

Politicization of a Future International Investment Tribunal's Appointment and How to Avoid It

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Abstract: In 1965, the World Bank promoted the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) with the aim of filtering any political and diplomatic influence out of international investment disputes. This aim was achieved by lending several features from commercial arbitration. Today, after a successful launch phase of the Convention's mechanism, the benefit of the current investor-state dispute settlement system is debated. Lack of legitimacy, interference with the states' right to regulate in the public interest and doubts about the arbitrator's impartiality are some examples of the most frequently voiced concerns. Several different solutions, reaching from an investment court under the CETA for the EU-Canadian disputes to a truly multilateral court available to an open number of states, have been put forward. Most of the suggested roads leading out of the ISDS crisis provide for the establishment of a standing court. Scholars primarily argue that those models bear the risk of re-politicizing the controversies. This essay assesses, based on a comparative approach, whether the concern of re-politicization is justified. For such purpose, it focuses on the areas that are particularly threatened by a possible interference of the states' political powers: the appointment of the judges and their independence and impartiality requirements. The outcome of the analysis does not promise well for the future investment court. The experience of other standing courts and tribunals show that a certain degree of political influence cannot be excluded. It would rather seem that the states do not even wish to create a completely depoliticized system. In addition, as this study shows, an investment court could also widen the room for judges to introduce their political beliefs into the decision-making process.

Keywords: Investor-state dispute settlement; investment arbitration appeal mechanism; permanent investment court; composition and election; independence and impartiality.

Summary: 1. Background. – 2. Does the Proposed Model of a Permanent Investment Tribunal Risk (Re-)Politicization? – 2.1. Composition and Election of the Permanent Investment Tribunal. – 2.2. Independence Requirement. – 2.3. Impartiality Requirement. – 3. Conclusion.

1. *Background*

Back in time, during the 19th and the first half of the 20th century, disputes between host states and foreign investors were highly politicized. Such disputes had thus often led to the exercise of diplomatic protection or, in the extreme case, to the use of force (so-called gunboat diplomacy) as there were no other peaceful remedies available. The stakeholders of foreign investments were at that time simply ill-equipped to handle conflicts concerning foreign investments¹.

Subsequently, in the 1960s, following several serious threats to world peace² and at the height of the decolonization phase, the World Bank promoted one of the most ambitious international instruments to settle investor-state disputes: the 1965 Washington Convention³ which instituted the International Centre for Settlement of

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1. For a general historical overview see Taylor St John, *The Rise of Investor-State Arbitration: Politics, Law, and Unintended Consequences* (Oxford University Press 2018).

2. Consider, for instance, the armed conflict between the United Kingdom and Egypt following the nationalization of the Suez Canal Company in 1956 or the dispute between France and Tunisia arising out of the Tunisian National Assembly's authorization to expropriate all foreign-owned land (approximately 300,000 hectares) in 1964.

3. The official name of the treaty is Convention on the Settlement of Investment Disputes between States and Nationals of Other States. It entered into force on October 14, 1966 and has been ratified by 154 contracting states.

Investment Disputes (ICSID). The Convention created a self-contained jurisdictional mechanism for the settlement of investor-state disputes based on international arbitration in the context of which an investor has *locus standi* to bring claims against the host state without the support or intervention of its home state⁴. The private party was thus granted with a direct access to an international dispute resolution mechanism with the possibility to participate on a procedurally equal footing against a state⁵. Ever since the Convention's purpose was to "insulate such disputes [between the state and the foreign investor] from the realm of politics and diplomacy"⁶.

Boosted by the developed countries' wish to have their investors protected and the developing countries' need to attract private capital flows, ICSID soon became an essential institution for the resolution of disputes arising out of foreign investments. Indeed, hundreds of investment arbitrations were conducted under the auspices of the ICSID⁷ and it is considered a powerful tool to depoliticize investment disputes, prohibiting contracting states from invoking diplomatic protection or bringing international claims⁸. According to the prevailing scholarly opinion, the major contribution of ICSID to investment arbitration – in terms of depoliticization – is preventing the powerful capital-exporting states from participating side by side with their

4. See Jeswald W. Salacuse, *The Law of Investment Treaties* 421 (Oxford University Press 2nd ed. 2015). See generally Piero Bernardini, *Investimento straniero e arbitrato*, 27 *Rivista dell'arbitrato* 673 (2017).

5. See generally Charity L. Goodman, *Uncharted Waters: Financial Crisis and Enforcement of ICSID Awards in Argentina*, 28 *University of Pennsylvania Journal of International Law* 449, 457 (2007).

6. ICSID, II-1 *History of the ICSID Convention* 242 (1968).

7. As of June 30, 2018, ICSID had registered 676 cases under the ICSID Convention and Additional Facility Rules. See ICSID, *The ICSID Caseload – Statistics (Issue 2018-2)* (2018), available at <https://icsid.worldbank.org/en/Pages/resources/ICSID-Caseload-Statistics.aspx> (last visited March 25, 2019).

8. See David A. Soley, *ICSID Implementation: An Effective Alternative to International Conflict*, 19 *The International Lawyer* 521, 543 (1985). See also Ibrahim F.I. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, 1 *ICSID Review* 1, 5–13 (1986); Piero Bernardini, *Investment Arbitration under the ICSID Convention and BITs*, in Gerald Aksen et al. (eds.), *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner* (ICC 2005).

citizens in the proceedings against host states⁹. In addition, it has been suggested that another depoliticizing effect of the ICSID proceedings is the separation of the law from its "socio-economic, cultural and political origins and ramifications"¹⁰. The response offered by ICSID was thus a modern approach to address the realities and requirements of the last several decades.

At present, despite the positive development of ICSID, investor-state dispute settlement (ISDS) is facing tough times¹¹: there is a common consent that the current investment arbitration mechanism based upon the 1965 Washington Convention lacks arbitral neutrality, accountability and transparency¹². In addition, arbitration investment awards ordering governments the payment of substantial compensation to foreign investors led to a controversial public debate on the legitimacy of the actual ISDS model. Major newspapers also labelled ISDS as obscure or secret trade courts and declared them a threat to national interest from the rich and powerful¹³. It has further been

9. See Ibrionke T. Odumosu, *The Law and Politics of Engaging Resistance in Investment Dispute Settlement*, 26 Penn State International Law Review 251, 271 (2007).

10. *Id.*

11. See Cesare Trecroci and Rossella Sabia, *Ascesa e declino dell'Investor-State Arbitration, fra contrasto alla corruzione internazionale, regolazione dei mercati e "Free Trade Agreements" multilaterali*, 26 Rivista dell'arbitrato 165 (2016); Bernardini, *Investimento straniero e arbitrato* at 682–683 (cited in note 4).

12. See Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 Fordham Law Review 1521 (2005). For a detailed analysis of the backlash against the current ISDS system see Gabrielle Kaufmann-Kohler and Michele Potestà, *Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism?*, CIDS report 10–15 (2016), available at <https://www.cids.ch/conferences-research/projects/isds-project> (last visited March 25, 2019); UNCTAD, *Reform of Investor-State Dispute Settlement: In Search of a Roadmap 2–4* (2013), available at <https://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=551> (last visited March 25, 2019).

13. See George Monbiot, *This Transatlantic Trade Deal Is a Full-Frontal Assault on Democracy* (The Guardian, November 4, 2013), available at <https://www.theguardian.com/commentisfree/2013/nov/04/us-trade-deal-full-frontal-assault-on-democracy> (last visited March 25, 2019); Claire Provost and Matt Kennard, *The Obscure Legal System That Lets Corporations Sue Countries* (The Guardian, June 10, 2015), available at <https://www.theguardian.com/business/2015/jun/10/obscure-legal-system-lets-corporations-sue-states-ttip-icsid> (last visited March 25, 2019); Kavaljit Singh, *ISDS Is Unsited to Meet Today's Global Challenges* (Financial Times,

argued that an arbitral tribunal composed of private arbitrators and not elected or appointed by the community whose rights are affected by the decisions is not an appropriate setting: consent of the government is not the same as consent of the governed¹⁴. Most importantly, however, commentators have voiced for a number of years now unease about the current ISDS mechanism acting in conflict with the states' right to regulate in the public interest, including public health, public policy, safety, and the environment¹⁵. These difficulties of the current framework have been described as the first "growing pains" of a dispute resolution mechanism that is still in its infancy¹⁶.

Many countries and NGOs thus emphasize the need for an in-depth reform in order to rebalance the shortcomings of the actual ISDS system. In this context, a division appeared evident between some states – the loyalists – that seem presently favouring incremental, bilateral reforms (for example Japan¹⁷) and other countries – the reformists – that openly advocate for a systemic and fundamental reform, for

May 8, 2017), available at <https://www.ft.com/content/ed08cd0c-2fea-11e7-9555-23ef563ecf9a> (last visited March 25, 2019).

14. See Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41 *Vanderbilt Journal of Transnational Law* 775, 782 (2008). But see David D. Caron, *Investor State Arbitration: Strategic and Tactical Perspectives on Legitimacy*, 32 *Suffolk Transnational Law Journal* 513, 520 (2008).

15. See OECD, "*Indirect Expropriation*" and the "*Right to Regulate*" in *International Investment Law*, OECD Working Paper on International Investment, 2 (2004), available at https://www.oecd.org/daf/inv/investment-policy/WP-2004_4.pdf (last visited March 25, 2019); Caroline Henckels, *Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration*, 15 *Journal of International Economic Law* 223, 243 (2012); Catharine Titi, *The Right to Regulate in International Investment Law* 58 (Dike Verlag 2014); Vera Korzun, *The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-Outs*, 50 *Vanderbilt Journal of Transnational Law* 355, 358 (2017).

16. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration* at 1523 (cited in note 12).

17. The United States were also originally labelled as loyalists. However, the latest declarations of U.S. Federal Government representatives document rather a general opposition to ISDS: see, for instance, Robert Lighthizer (United States Trade Representative), statements before the United States House Committee on Ways and Means (March 21, 2018), available at <https://worldtradelaw.typepad.com/ielpblog/2018/03/brady-lighthizer-isds-exchange.html> (last visited March 25, 2019).

instance with the creation of an international investment court and/or an appellate body (for example the European Union and Canada)¹⁸.

The debate on the reform, however, has not been confined to a theoretical level. The European Union (EU) and Canada, for instance, adopted in the Comprehensive Economic and Trade Agreement (CETA) a bilateral investment court with a built-in appellate mechanism instead of the traditional ICSID mechanism. Most recently, the Secretariat of the United Nations Commission on International Trade Law (UNCITRAL) referred to the CETA investment court as an option to ensure a coherent and consistent ISDS regime: "A reform option could include, as envisaged by certain recent investment treaties, the creation of a court, established as a permanent international institution"¹⁹.

However, the EU and Canada are already planning an upgrade of their CETA tribunal in the form of an investment forum open to a plurality of signing states. The two CETA parties already expressed their common will to "work expeditiously towards the creation of the Multilateral Investment Court"²⁰. In September 2017, the European Commission also formulated a recommendation for a Council decision to open negotiations for a convention creating a multilateral tribunal for the settlement of investment disputes²¹. Many other models of international investment courts developed by reformist states are

18. See Anthea Roberts, *The Shifting Landscape of Investor-State Arbitration: Loyalists, Reformists, Revolutionaries and Undecideds* (EJIL:Talk!, June 15, 2017), available at <https://www.ejiltalk.org/the-shifting-landscape-of-investor-state-arbitration-loyalists-reformists-revolutionaries-and-undecideds/> (last visited March 25, 2019); Anthea Roberts, *UNCITRAL and ISDS Reform: Pluralism and the Plurilateral Investment Court* (EJIL:Talk!, December 12, 2017), available at <https://www.ejiltalk.org/uncitral-and-isds-reform-pluralism-and-the-plurilateral-investment-court/> (last visited March 25, 2019).

19. Possible reform of investor-State dispute settlement (ISDS), Note by the Secretariat of the United Nations Commission on International Trade Law, 36th session (October 29–November 2, 2018), UN Doc. A/CN.9/WG.III/WP.149, para. 44.

20. *Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States*, available at <http://data.consilium.europa.eu/doc/document/ST-13541-2016-INIT/en/pdf> (last visited March 25, 2019).

21. See European Commission, *Recommendation for a Council Decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes*, COM/2017/493 final.

sculptured on the basis of a permanent adjudicatory body, similar to other already existing international tribunals²².

In the same vein, the Geneva Center for International Dispute Settlement (CIDS) recently published a research paper, from the pen of Prof. Gabrielle Kaufmann-Kohler and Michele Potestà, that promotes "a truly multilateral dispute settlement system" with a single permanent investment tribunal "potentially competent to resolve investment disputes concerning as many states as would opt into it"²³ and an additional single appeal mechanism. According to the proposal, the new ISDS mechanism should be incorporated into existing investment treaties through a multilateral opt-in convention. The CIDS report was presented at UNCITRAL's annual session held in New York in July 2016 and considered in an official note by the UNCITRAL Secretariat²⁴.

The advanced-level discussion leads to the question whether the creation of a standing tribunal deciding the investment cases on an international level brings back, through the back door, a problem which is believed to have been eliminated: the politicization of investor-state disputes. Remarkably, already the past UNCITRAL discussions on the ISDS reform have been described as highly political by renowned scholars²⁵. Therefore, one may legitimately fear that a future dispute resolution body will be further influenced either through the contracting states' inappropriate interference in the functioning of the tribunal or through a partisan behaviour of the judges.

22. See Nicolette Butler and Surya Subedi, *The Future of International Investment Regulation: Towards a World Investment Organisation?*, 64 *Netherlands International Law Review* 43, 62 (2017); Catharine Titi, *The European Union's Proposal for an International Investment Court: Significance, Innovations and Challenges Ahead*, *Transnational Dispute Management* (January 2017), available at <https://www.transnational-dispute-management.com/article.asp?key=2427> (last visited March 25, 2019).

23. Kaufmann-Kohler and Potestà, *Can the Mauritius Convention serve as a model* at 4 (cited in note 12).

24. *Settlement of commercial disputes: presentation of a research paper on the Mauritius Convention on Transparency in Treaty-based Investor-State Arbitration as a possible model for further reforms of investor-State dispute settlement*, Note by the Secretariat of the United Nations Commission on International Trade Law, 49th session (June 27–July 15, 2016), UN Doc. A/CN.9/890.

25. See Anthea Roberts, *UNCITRAL and ISDS Reform: Not Business as Usual* (EJIL:Talk!, December 11, 2017), available at <https://www.ejiltalk.org/uncitral-and-ids-reform-not-business-as-usual/> (last visited March 25, 2019).

This essay examines thus the question whether such fear of re-politicization of ISDS is justified, with a particular focus on the judges' appointment procedure (2.1) as well as their independence (2.2) and impartiality (2.3) requirements. In order to provide a useful analysis and to point out feasible remedies, a comparative approach will be adopted together with a closer look at the *modus operandi* of already existing international or regional jurisdictional bodies.

2. Does the Proposed Model of a Permanent Investment Tribunal Risk (Re-)Politicization?

The underlying assumption of this study is that the future international investment tribunal will have the features of a standing adjudicative body, as opposed to an *ad hoc* body appointed as necessary on a case-by-case basis. The members of standing courts are pre-elected and filed cases are assigned to all or some of them. It seems thus legitimate to assume that the states cannot intervene directly in the decision-making process of the court. More likely, they would rather try to gain influence through the appointment of judges that would likely take into account the appointing states' policies when it comes to decide in one or the other way.

2.1. Composition and Election of the Permanent Investment Tribunal

The first instance tribunal provided under CETA (identical to the EU-Vietnam Free Trade Agreement) combines elements of traditional investor-state arbitration with judicial features²⁶: there is a roster composed of fifteen members (five EU citizens, five Canadian citizens and five nationals of third countries)²⁷ who will hear cases on a rotation and random allocation basis²⁸. The members, however, are

26. See generally August Reinisch, *Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards?: The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration*, 19 *Journal of International Economic Law* 761 (2016).

27. See CETA art. 8.27.

28. See Piero Bernardini, *Reforming Investor-State Dispute Settlement: The Need to Balance Both Parties' Interests*, 32 *ICSID Review* 38, 41–44 (2017).

nominated by the CETA Joint Committee comprising representatives of the EU and Canada²⁹. Contrary to the present ISDS system where the investors have a voice in the appointment of the arbitral tribunal, the nomination of the roster will be completely decided by the states.

In the first place, the CETA appointment mechanism offers itself to being misused by the contracting states to nominate panellists who are sensitive to government priorities. In particular, one feature of CETA's first-instance tribunal catches the eye: the parties can no longer chose their own judges³⁰. This change stands in opposition to the traditional arbitration-based approach according to which the parties should be at liberty to choose their own arbitral tribunal so that the controversy may be decided by "judges of their own choice"³¹. Moreover, the political dimension of the bargains and negotiations between the EU Member States as to the appointment of the judges could relegate to second place more important issues, such as competence and qualifications. Similar critiques were voiced with reference to the abandoned TTIP proposal that provided for an approach similar to the CETA's³².

As an alternative to the bilateral CETA tribunal, the CIDS report argues that the appointment of the multilateral investment tribunal's roster should be decided by a body that is representative of the whole international community, such as the UN General Assembly. An additional consultation of business organizations would, claims the CIDS report, avoid a system of pure parte appointed arbitrators and mitigate the risk of shifting from the current commercial arbitration

29. See CETA art. 8.27 and 26.1.

30. See Bernardini, *Reforming Investor-State Dispute Settlement* at 47–48 (cited in note 28).

31. Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* 216 (Sweet & Maxwell 2004).

32. See Eduardo Zuleta, *The Challenges of Creating a Standing International Investment Court*, *Transnational Dispute Management* (January 2014), available at <https://www.transnational-dispute-management.com/article.asp?key=2065> (last visited March 25, 2019); Emma Rose Bienvenu, *The EC's Proposal for a Permanent Investment Court System: Politics, Pitfalls, and Perils*, paper for the 2017 Penn JIL Online Symposium: International Investment Law (2017), available at <http://pennjil.com/the-ecs-proposal-for-a-permanent-investment-court-system-politics-pitfalls-and-perils/> (last visited March 25, 2019).

inspired mechanism to an inter-state paradigm³³. In an earlier position paper, the authors of the CIDS report suggested, in addition to a consultation with investors, the establishment of a roster of decision-makers. Moreover, the selection of the roster should be carried out by an advisory panel with the task of screening candidates in order to ensure the quality of the persons and the transparency of the process³⁴.

Overall, the scholars generally accept that the institution of a permanent multilateral investment tribunal would require the international community to enter into a multilateral agreement³⁵. In order to preserve the functionality and the workability of the institution, it would however not be possible that every party to such treaty has its own representative sitting in the adjudicating panel. It would thus be necessary to find a selection mechanism that is acceptable to a majority of States and representative of their interests.

In this context, the first red flags from a politicization standpoint begin to turn up. It seems reasonable to suppose that capital-exporting countries have an interest in how a treaty is applied to the investors. This interest must however be considered in the light of the state's general foreign policy, which means that the investor's home state will not always support its own citizens³⁶. It is thus not far-fetched to maintain that the governments would make their choices for the

33. See Kaufmann-Kohler and Potestà, *Can the Mauritius Convention serve as a model* at 61 (cited in note 12).

34. See Gabrielle Kaufmann-Kohler and Michele Potestà, *Challenges on the Road toward a Multilateral Investment Court*, 201 Columbia FDI Perspectives 2 (2017), available at <https://academiccommons.columbia.edu/doi/10.7916/D8NV9VQQ> (last visited March 25, 2019).

35. See Gus Van Harten, *A Case for an International Investment Court*, paper for the Inaugural Conference of the Society of International Economic Law (Geneva, July 15–17, 2008), available at https://works.bepress.com/gus_vanharten/96/ (last visited March 25, 2019); Zuleta, *The Challenges of Creating a Standing International Investment Court* (cited in note 32); European Commission, *Investment in TTIP and beyond – the path for reform: Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court*, concept paper (2015), available at http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF (last visited March 25, 2019); Kaufmann-Kohler and Potestà, *Can the Mauritius Convention serve as a model* at 10–15 (cited in note 12); Butler and Subedi, *The Future of International Investment Regulation* at 57 (cited in note 22).

36. See Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 American Journal of International Law 179, 207 (2010).

judges sitting on the investment tribunal, taking into account the possibility to be a respondent in future proceedings³⁷. The traditional capital-exporting countries Spain and Italy, for instance, have lately found themselves facing investment disputes following changes in regulatory structures for energy investment.

An extensive study, examining all the decisions rendered by the European Court of Human Rights (ECHR) between 1960 and 2006, concluded that contracting states to the European Convention on Human Rights regularly appoint judges that match their political views and meet the desired level of activism, rather than selecting judges for professional reasons³⁸. The same finding holds true for the appointment of the World Trade Organization (WTO) Appellate Body's members: it has been reported that possible candidates regularly undergo extensive interviews with United States and EU officials for the assessment of their tendency to expansive judicial law-making³⁹.

Since international law remains blind to policy issues – due to the acceptance of sovereign equality of the states – it would be difficult, if not impossible, to apply an empirical test to the states' possible voting behaviour. However, the sole perception of a lack of impartiality could undermine the authority of the investment tribunal and investors could be reluctant to defer their disputes to the tribunal⁴⁰. In fact, *BusinessEurope*, the biggest European business lobby group, has already expressed its disagreement to a purely state-appointed body⁴¹.

37. See European Federation for Investment Law and Arbitration, *Task force paper regarding the proposed International Court System (ICS)* (February 1, 2016 draft), available at https://efila.org/wp-content/uploads/2016/02/EFILA_TASK_FORCE_on_ICS_proposal_1-2-2016.pdf (last visited March 25, 2019).

38. See generally Erik Voeten, *The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights*, 61 *International Organization* 669 (2007).

39. See Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 *American Journal of International Law* 247, 264 (2004).

40. *Id.*

41. See BusinessEurope, *Assessment of the European Commission's proposal on a new Investment Court System 5* (October 23, 2015), available at https://www.busesseurope.eu/sites/buseur/files/media/position_papers/rex/2015-10-23_assessment_of_commission_proposal_on_a_new_investment_court_system.pdf (last visited March 25, 2019).

However, the alternative method suggested in the CIDS report – *i.e.* the appointment of the investment tribunal's judges by an assembly representing the states adhering to the new investment tribunal, similar to the International Court of Justice (ICJ)⁴², the International Criminal Court⁴³, or the WTO Appellate Body – does not solve the politicization issue by looking closer. In fact, the election processes of standing international courts are subject to growing criticism, particularly for the so-called horse trading, that is, agreements and arrangements among states to support one another's candidates. Recently, the selection of international judges has been acknowledged as "complex and long processes involving campaigning, lobbying for candidates, and meetings between candidates and diplomatic representatives in order to secure or facilitate an election"⁴⁴.

As a remedy to such behaviour, the appointment procedure of the ECHR tried to deprive the governments of the complete control over the appointment of judges. Each contracting state has the right to submit a list of three candidates to the Parliamentary Assembly of the Council of Europe, which then elects one of the proposed judges⁴⁵. Nevertheless, the Assembly usually votes the candidate preferred by the government⁴⁶. As another example, the states establishing the International Criminal Court tried to find a remedy against election agreements, but it proved impossible to prohibit states from agreeing on appointments⁴⁷. It is thus questionable if the states' bargaining could be effectively prevented in a process which is, like other elections, to a high level political.

42. See Kaufmann-Kohler and Potestà, *Can the Mauritius Convention serve as a model* at 60 (cited in note 12).

43. See Zuleta, *The Challenges of Creating a Standing International Investment Court* at 9 (cited in note 32).

44. Gabrielle Kaufmann-Kohler and Michele Potestà, *The Composition of a Multi-lateral Investment Court and of an Appeal Mechanism for Investment Awards*, CIDS Supplemental Report 89 (2017), available at http://www.uncitral.org/pdf/english/workinggroups/wg_3/CIDS_Supplemental_Report.pdf (last visited March 25, 2019).

45. ECHR art. 22.

46. See generally Voeten, *The Politics of International Judicial Appointments* (cited in note 38).

47. See Brandeis University - International Center for Ethics, Justice and Public Life, *Toward an International Rule of Law*, 2010 Brandeis Institute for International

The designation of an independent appointing authority could be another approach to avoid political inference in the election phase. Noted scholars have recently launched the idea to create an election system similar to that of the Caribbean Court of Justice, whose members are appointed by a commission composed of non-governmental representatives, such as presidents of supranational authorities, law professors, deans of law schools, and law or bar associations⁴⁸. However, the creation of such a new body might be burdensome. Indeed, one may legitimately ask who could assume the appointing function among the already existing authorities. Although there are several options, none seems really appealing: the Chairman of the ICSID Administrative Council, an *ex officio* position of the President of the World Bank Group, is traditionally nominated by the United States as the largest shareholder of the Group. The Secretary General of ICSID is elected by the World Bank's Board of Directors, in which over 60 percent of the votes are exercised by directors from eleven major capital-exporting countries. The Secretary General of the Permanent Court of Arbitration is traditionally a Dutch diplomat. The International Chamber of Commerce describes itself as the "world business organization".⁴⁹ All in all, none of those duly international organizations has – *prima facie* – the independency characteristics one would associate with the function of appointing authority of a future investment court.

A possible solution to overcome the above highlighted shortfalls of the proposed appointment procedures could be the approach adopted under the COMESA Investment Agreement for state-state disputes⁵⁰ or the North American Free Trade Agreement (NAFTA)⁵¹. These treaties provide for a definition of minimum requirements for the election of a roster which is comprised by judges appointed *ex ante*

Judges report, 37 (2010), available at <https://www.brandeis.edu/ethics/pdfs/internationaljustice/biij/BIIJ2010.pdf> (last visited March 25, 2019).

48. See Kaufmann-Kohler and Potestà, *The Composition of a Multilateral Investment Court* at 89 (cited in note 44).

49. See Van Harten, *A Case for an International Investment Court* at 19 (cited in note 35).

50. See Investment Agreement for the COMESA Common Investment Area art. 30.

51. See NAFTA art. 2009.

by the treaty parties. Whereas under NAFTA it is still the parties' duty to select the panelists, the COMESA Investment Agreement goes one step further in stripping the contracting parties' autonomy away and provides that arbitrators are selected by the COMESA Secretariat, rather than by the disputing parties⁵². As an alternative, in order to avoid an over-empowerment of the Secretariat, one may consider a solution where the judges are assigned randomly to the dispute panels. The main drawback of a roster system is undeniably – assuming that the judges are not employed full-time – the necessity to provide for restrictions on the judges' professional activities when they are not sitting on a panel.

As to the duration of the office, it has been argued that judges with a life appointment or without the possibility to be re-elected may be more willing to adopt controversial decisions⁵³. A life-time career, however, may not be helpful for the development of the international law and the investment tribunal⁵⁴. A shorter term with the possibility of re-election would give the States the possibility to confirm only the judges with a satisfying record⁵⁵.

An equal risk of politicization could derive from a possible re-election of the investment tribunal's judges. Even honourable and experienced judges feel a pressure when it comes to re-election and that they may tend to avoid controversial decisions⁵⁶.

A relatively long-term appointment without re-election could be a feasible solution to allow the adoption of progressive decisions, on one side, and to guarantee a rotation of the judges, on the other side. This approach is currently followed by the ECHR⁵⁷ and has been

52. See Investment Agreement for the COMESA Common Investment Area, annex A, art. 6.

53. See Zuleta, *The Challenges of Creating a Standing International Investment Court* at 8 (cited in note 32); Kaufmann-Kohler and Potestà, *Can the Mauritius Convention serve as a model* at 62 (cited in note 12).

54. See Brandeis University - International Center for Ethics, Justice and Public Life, *Toward an International Rule of Law* 38 n. 19 (cited in note 47).

55. See Kaufmann-Kohler and Potestà, *Can the Mauritius Convention serve as a model* 89 n. 5 (cited in note 12).

56. See Brandeis University - International Center for Ethics, Justice and Public Life, *Toward an International Rule of Law* at 37–38 (cited in note 47).

57. ECHR art. 23.

suggested by Institute of International law at its Rhodes session⁵⁸. In recent years, however, (western) states seem to prefer a system based on a re-election mechanism: both the CETA⁵⁹ and the draft TTIP⁶⁰ provide for renewable appointments.

2.2. Independence Requirement

According to the prevailing scholarly opinion, a standing investment tribunal could provide appropriate responses to the criticism relating to the current ISDS system in terms of independence, conflict of interests and ethical standards⁶¹.

The CETA, for instance, provides that the investment tribunal's judges shall be independent and "not ... affiliated with any government"⁶². At the same time, however, an explanatory note clarifies that "the fact that a person receives remuneration from a government does not in itself make that person ineligible"⁶³. Doubts are justified as to whether government-appointed employees, officials or consultants can assume unbiased positions if the appointing state's interests are at stake⁶⁴. To avoid the perception of lack of independence and apprehension of bias, it would thus be necessary to set high standards. The WTO Appellate Body, for instance, requires its judges to be "unaffiliated with any government"⁶⁵.

58. Institute of International Law, *The Position of the International Judge*, resolution of the 2011 Rhodes session (September 9, 2011), art. 2(1), available at http://www.idi-iil.org/app/uploads/2017/06/2011_rhodes_06_en.pdf (last visited March 25, 2019).

59. CETA art. 8.27(2).

60. European Commission, Transatlantic Trade and Investment Partnership proposal (November 12, 2015), ch. II, sec. 3, art. 9(5), available at http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf (last visited March 25, 2019).

61. Zuleta, *The Challenges of Creating a Standing International Investment Court* at 9 (cited in note 32).

62. CETA art. 8.30(1). The TTIP draft of November 2015 (cited in note 60), for instance, required the members of the tribunal to be "independent beyond any doubt": ch. II, sec. 3, art. 9(5).

63. CETA art. 8.30(1) n. 12.

64. See generally Bienvenu (cited in note 32).

65. Agreement Establishing the World Trade Organization, annex II, art. 17(3).

Some well-known scholars claim that the judges very likely want to return home after their appointment expires⁶⁶. This sheds light on another possible dilemma: will the judges support their home state's position at the end of the career in order to increase their chances for a future employment by their home states? Some scholars recommended, as a solution, to appoint only experienced judges at the end of their career for a non-renewable term⁶⁷.

Overall, there are many possible connections with the appointing state that may lead to (unconscious) bias and may (re-)introduce political considerations in the tribunal's mechanism. It is, however, questionable if the states really want to have completely independent judges deciding on the future investment cases.

2.3. Impartiality Requirement

Perhaps one of the harshest critics of the current ISDS mechanism is that arbitrators are biased in favour of their appointing party, either to increase the likelihood of future appointments or to gain a reputation as "reliable" arbitrator or because of their personal policy preferences⁶⁸.

On the other hand, it has also been suggested several times that judges of international tribunals vote in the interest of the electing state, rather than applying and enforcing the law in an unbiased manner⁶⁹. In order to verify whether the criticism is justified, it may be appropriate to examine some empirical studies that have been conducted with reference to the voting behaviour of elected judges.

66. See Brandeis University - International Center for Ethics, Justice and Public Life, *Toward an International Rule of Law* at 39 (cited in note 47); Cesare P.R. Romano, Karen J. Alter, and Yuval Shany (eds.), *The Oxford Handbook of International Adjudication* 625 (Oxford University Press 2014); William A. Schabas and Shannonbrooke Murphy, *Research Handbook on International Courts and Tribunals* 381 (Edward Elgar Publishing 2017).

67. See Brandeis University - International Center for Ethics, Justice and Public Life, *Toward an International Rule of Law* at 39 (cited in note 47).

68. See generally Catherine A. Rogers, *The Politics of International Investment Arbitration*, 12 Santa Clara Journal of International Law 223 (2013).

69. See generally Eric A. Posner and Miguel F.P. de Figueiredo, *Is the International Court of Justice Biased?*, 34 The Journal of Legal Studies 599 (2005); Voeten, *The Politics of International Judicial Appointments* (cited in note 38).

From an analysis of the ICJ's decisions emerged, quite unsurprisingly, that judges are clearly partisan when their home state appears as a party. The judges vote in favour of their home states in approximately 90 percent of the cases, whereas they agree with the proposed decision in 50 percent of the cases if they have no relationship with the disputing parties⁷⁰.

Although this finding does not allow any statement related to the judges' voting behaviour when their home State is not involved in the dispute – and has thus limited importance – it emphasizes nevertheless an important aspect: it would be advisable to include in the statute of the investment tribunal a provision that allows rebalancing such a situation of bias. The statute could, for instance, provide that a judge of one of the parties' nationality shall not decide in the case⁷¹ or that the parties should be given the possibility to choose an additional judge to be added to the bench in such a case⁷².

Most importantly, the said study concludes that ICJ decisions are influenced by national bias even if the judges' home states are not involved: the judges assume a position in favour of countries that are similar – in terms of wealth, culture and political regime – to their home states or that are strategic partners of their home states⁷³.

Another analysis examined 4,488 decisions of the United States Courts of Appeals on politically sensitive issues like abortion, capital punishment, contracts clause, discrimination, campaign finance and the possibility to pierce the corporate veil⁷⁴. The study confirms, first of all, that the judge's vote can be predicted by its party affiliation; secondly, that the judge's ideological position will be amplified if the other two members of the panel are related to another political party; and, thirdly, that the judge's ideological position will be dampened if there is no judge related to another political party sitting on the panel.

70. See generally Posner and de Figueiredo, *Is the International Court of Justice Biased?* (cited in note 69).

71. See Statute of the International Court of Justice art. 31(1); Statute of the International Tribunal for the Law of the Sea art. 17(1).

72. See Statute of the International Court of Justice art. 31(2); Statute of the International Tribunal for the Law of the Sea art. 17(2).

73. See generally Posner and de Figueiredo, *Is the International Court of Justice Biased?* (cited in note 69).

74. Notably, the three-judge panels of the United States Courts of Appeals are appointed by the governing President of the United States.

This suggests that the panel composition has an important impact on the likely outcome of the appeal, which is a serious threat to the rule of law principle⁷⁵.

Although it has been highlighted that international investment arbitrators' decisions are also influenced by their policy views, educational background and professional experience⁷⁶, the above-cited research shows that the establishment of an investment tribunal would most likely not lead to an elimination of politically biased decisions.

3. Conclusion

On the basis of this research, it is very likely that a future investment tribunal would increase the level of politicization in investment disputes. All the above-outlined analysis dealing with the functioning and decision-making of already existing courts, as well as the proposed models for an investment tribunal, show that there is probably no remedy or solution to completely avoid depoliticization of the tribunal. States would have the possibility to exert a certain influence in the mechanism of a future investment court – the question is only whether they want to refrain from actually making use of such power. There would be various options to do so.

On the other hand, it has been recently suggested that a certain degree of politicization of ISDS is even desirable, for instance to better understand the background of the dispute⁷⁷. Indeed, as Sir Hersch Lauterpacht held, "every international dispute is political"⁷⁸.

75. See generally Cass R. Sunstein, David Schkade, and Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 *Virginia Law Review* 301 (2004).

76. See Charles H. Brower II, *Obstacles and Pathways to Consideration of the Public Interest in Investment Treaty Disputes*, in Karl P. Sauvant (ed.), *Yearbook on International Investment Law & Policy 2008-2009* 347 (Oxford University Press 2009). See also, generally, Michael Waibel and Yanhui Wu, *Are Arbitrators Political? Evidence from International Investment Arbitration*, working paper (2011), available at https://www.researchgate.net/publication/256023521_Are_Arbitrators_Political (last visited March 25, 2019).

77. See Daniel Kelemen, *Selection, Appointment, and Legitimacy: A Political Perspective*, in Michal Bobek (ed.), *Selecting Europe's Judges: A Critical Review of the Appointment Procedure to the European Courts* 245 (Oxford University Press 2015).

78. See Hersch Lauterpacht, *The Function of Law in the International Community* 161 (Oxford University Press 2011).