

The Quadrilemma: Appointing Adjudicators in Future Investor-State Dispute Settlement

Malcolm Langford

Daniel Behn

Maria Chiara Malaguti

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The Quadrilemma: Appointing Adjudicators in Future Investor-State Dispute Settlement

Malcolm Langford, Daniel Behn and Maria Chiara Malaguti

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1. Introduction

Concern with the selection and appointment of arbitrators has been central in the ‘legitimacy crisis’ surrounding investor-state dispute settlement (ISDS). The regime has been slated and criticised for the outsized role of litigating parties in appointment,¹ the absence of transparency in the appointment procedure,² the potential for conflicts of interests,³ and the lack of gendered and geographic diversity in selection with few demands for qualifications in public international law.⁴ To be sure, the current model has its defenders. Some scholars argue that party-controlled appointment enhances trust in the process and outcomes while the flexible approach to qualifications may attract the necessary experience from commercial arbitration.⁵

Nonetheless, the current model of *ad hoc* party-dominated model of selection and appointment remains a concern, and it is the subject of different reform processes. The International Centre for Settlement of Investment Disputes (ICSID) has sought to prioritise women and developing country nationals in its institutional appointments,⁶ with some but limited success.⁷ More

¹ Sergio Puig, ‘Blinding International Justice,’ 56(3) *Virginia Journal of International Law* (2017).

² See e.g., Chiara Giorgetti, ‘Who Decides Who in International Investment Arbitration,’ 35(2) *University of Pennsylvania Journal of International Law* 431 (2014);

³ See e.g., Phillippe Sands, ‘Conflict and Conflicts in Investment Treaty Arbitration: Ethical Standards for Counsel,’ in Arthur Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (New York: Brill, 2012), at 28-49; Malcolm Langford, Daniel Behn, and Runar Lie, ‘The Revolving Door in International Investment Arbitration’ (2017) 20(2) *Journal of International Economic Law* 301.

⁴ See e.g., Lucy Greenwood & C. Mark Baker, ‘Getting a Better Balance on International Arbitration Tribunals,’ 28 *Arbitration International* 653 (2012); Susan Franck *et al.*, ‘The Diversity Challenge: Exploring the “Invisible College” of International Arbitration,’ 53 *Columbia Journal of Transnational Law* 429 (2015).

⁵ James Crawford, ‘The Ideal Arbitrator: Does One Size Fit All?,’ (2018) 32(5) *American University International Law Review*, 1003.

⁶ Meg Kinnear, ‘Advancing diversity in international dispute settlement,’ [World Bank Blogs](#), 8 March 2019.

⁷ See the statistical assessment in: Taylor St. John, Daniel Behn, Malcolm Langford, and Runar Lie, ‘Glass Ceilings and Arbitral Dealings: Gender and Investment Arbitration,’ *Pluricourts Working Paper*, January 2018; M. Langford, D. Behn and M. Usynin, Does Nationality Matter? Arbitrator Background and Arbitral Outcomes, in Daniel Behn, Ole Kristian Fauchald and Malcolm Langford (eds.), *The Legitimacy of Investment Arbitration: Empirical Perspectives* (Cambridge University Press, forthcoming 2020).

boldly, an investment court system was established in recent EU-Canada and EU-Vietnam free trade agreements, whereby fifteen permanent judges are appointed to a first instance tribunal together with a fixed number for an appellate tribunal.⁸

The theme is also central in ISDS reform process in UNCITRAL Working Group III. Shortcomings in selection and appointment of arbitrators was identified as one explanation for the six identified concerns with the existing system. These are excessive costs, lengthy duration of proceedings, inconsistency of decisions, incorrectness of awards, absence of arbitral diversity, and lacking arbitral independence. In April 2019, selection and appointment was named as one of five initial topics for concrete reform discussions.⁹ The UNCITRAL secretariat was asked to compile, summarize and analyse relevant information on the topic¹⁰ in cooperation with the Academic Forum.¹¹

This Academic Forum paper is the third in a triad on selection and appointment of adjudicators in future ISDS. The first paper analysed the political science literature on the effects of selection and appointment mechanisms for international courts;¹² and the second paper provided an overview of the different structural options and their respective advantage and disadvantages.¹³ In light of this analysis, the Academic Forum's previous [concept papers](#) regarding the six concerns, and other scholarship,¹⁴ this paper examines which models of selection and appointment would best address the concerns of states in UNCITRAL WGIII.

⁸ A. Bjorklund, John Gaffney, Fabien Gelinas and Herfried Wöss, 'TDM CETA Special - Introduction', (2016) *Transnational Dispute Management (TDM) CETA Special 1*; Shilpa Singh, 'Analyzing Features of Investment Court System under CETA and EUVIPA: Discussing Improvement in the System and Clarity to Clauses', *Kluwer Arbitration Blog*, 8 February 2019.

⁹ UN doc. [A/CN.9/970](#).

¹⁰ See summary of the session in Malcolm Langford and Anthea Roberts, 'UNCITRAL and ISDS Reforms: Hastening Slowly', *EJIL:Talk!*, 29 April 2019.

¹¹ UN doc. [A/CN.9/970](#), para. 84

¹² Olof Larsson, Theresa Squatrito, Øyvind Stiansen, and Taylor St John, 'Selection and Appointment in International Adjudication: Insights from Political Science' *Academic Forum on ISDS Concept Paper 2019/10*.

¹³ Andrea K. Bjorklund, Marc Bungenberg, Manjiao Chi, and Catharine Titi, 'Selection and Appointment of International Adjudicators: Structural Options for ISDS Reform' *Academic Forum on ISDS Concept Paper 2019/11*.

¹⁴ This includes Gabrielle Kaufmann-Kohler and Michele Potestà, 'The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards', *CIDS Supplemental Report*, 15 November 2017.

Thus, we seek to evaluate and partly predict the effects of proposed solutions on the key issues at stake for Working Group III. In doing so, we find that there is unlikely to be an ideal solution. Instead, we identify trade-offs as part of what we have called a quadrilemma – balancing values of independence, accountability, diversity and procedural fairness.¹⁵ For example, increasing the number of adjudicators as such may increase diversity but might complicate attempts to achieve case-based consistency, important for procedural fairness. Or appointment for fixed single terms may significantly increase independence but make the system potentially less accountable – possibly lessening the pressure for ‘correct’ decisions.

To be sure, some solutions are more likely than others to address state’s concerns, and we do not hesitate to identify this. Yet, such evaluative findings must be treated with some caution. Each finding should be interpreted in the context of the broader institutional solution to which each mode of appointment is attached and accompanying reforms. In this paper, we only examine the discrete effects for appointment and selection. For example, the creation of a standing body with permanent adjudicators will reduce *ipso facto* costs for litigating parties (there will be no tribunal fees) and shorten proceedings (there is no need to constitute a tribunal and no space for arbitrator challenges). However, states could seek to reduce overall costs and length of proceedings with policy interventions.

The paper begins by setting out six stylised *models* of institutional reform and the corresponding selection and appointment choices (section 2). It then analyses the implications for each model for the concerns of states with ISDS (section 3) and concludes by identifying the overall advantages and disadvantages of each model with a focus on the underlying *trade-offs* (section 4).

2. Stylised Models for Selection and Appointment

There are six basic types of institutional reform scenarios in which adjudicators could be selected and appointed. As displayed in the following table, these options are distributed along a spectrum of centralisation, from rosters for party appointment to a standing tribunal and appellate body, and ends with the paradigmatic reform option of ‘No ISDS’. The rest of the table display the *key choices* for states concerning selection and appointment in relation to each of these institutional forms, namely who nominates, who appoints, the renewability and length

¹⁵ This is set out in section 4 after a discussion of Dunoff and Pollack’s judicial trilemma.

of tenure, and the number of adjudicators. The current system is also included at the beginning as a comparator.

Table 1. Idealised Reform Models

Institutional form	Nominator	Appointor	Type of tenure	Adjudicators
1. ISDS with no reform	Parties, Institution	Parties, Institution	Ad hoc	Many
2. Roster(s) for party-appointment	Parties, Institution	Parties, Institution	Ad hoc; but roster would have terms	Few, many
3. Institutional appointment of arbitrators	Institution	Institution	Ad hoc; but roster would have terms	Few, many
4. Standing tribunal, no appellate body	States	Institution	Fixed terms that could be renewable	Few, many
5. Appellate body with first instance ISDS	States	Institution	Fixed terms that could be renewable	Few, many
6. Standing tribunal and appellate body	States	Institution	Fixed terms that could be renewable	Few, many
7. No ISDS	N/A	N/A	N/A	N/A

However, the possible structures for a tribunal/court that we discuss in this paper are not meant to be exhaustive. They only serve the purpose of illustrating the possible contexts within which selection and appointment of adjudicators would or could be made. To the same end, we are uncertain as to whether the alternatives we discuss are the only ones conceivable.

2.1 ISDS with No Reform

The current practice for the selection and appointment of arbitrators in ISDS cases as they are currently practiced is dictated by the conditions provided in the specific dispute settlement provisions in the applicable international investment agreement (IIA). Typically, these so-called ISDS clauses will place pre-dispute conditions on the Parties before a dispute can be brought. Following these conditions, a typical ISDS clause will state the means by which a Claimant-investor can initiate an arbitration once the pre-dispute conditions are met. For the vast majority of ISDS clauses, a list of options will be provided. The contents of these options varies widely from IIA to IIA, but will frequently permit the Parties to bring a claim: (1) administered by ICSID (using the ICSID Arbitration Rules or Additional Facility Rules), (2) administered by an international commercial arbitration centre (primarily the ICC or SCC and occasionally the LCIA), or (3) through an ad hoc procedure using the UNCITRAL Arbitration Rules (current practice increasingly uses the PCA to administer this type of arbitration).

The language of the specific ISDS clause that the Claimant-investor invokes will invariably affect the manner in which the arbitrators for the case are selected.

2.1.1 ICSID Arbitration

Many ISDS clauses include reference to ICSID arbitration as one of the choices that Claimant-investors can select as an option. Selecting an ICSID arbitration provides two distinct institutional aspects: (1) ICSID as the institution administering the arbitration, and (2) ICSID as the institution providing its ICSID Arbitration Rules as the set of procedural rules applicable to the dispute. When ICSID is chosen as the administering institution, the default practice is also a choice of the ICSID Arbitration Rules as applicable (but this is only the default: there are a number of ICSID administered cases applying the UNCITRAL rules, for instance).

The default procedure for the selection of arbitrators at ICSID is the following: Step (1), the Claimant-investor selects an arbitrator of their choice and notifies the appointment of that arbitrator to the ICSID Secretariat; Step (2), the Respondent-state selects an arbitrator of their choice and notifies the appointment of that arbitrator to the ICSID Secretariat; and Step (3), the Parties or co-arbitrators (or through a process including input from both the Parties and the co-arbitrators) select a chairperson arbitrator to preside over the proceedings. This default procedure does not require that any of the arbitrators be selected from any type of roster or list even though ICSID does keep such a roster. For the majority of ICSID cases, the default procedure is used and the Parties are able to select and appoint a tribunal of arbitrators without any use of a roster or institutional assistance.

There are no known ICSID administered cases where the ICSID Secretariat has appointed the entire tribunal. In the vast majority of cases, the two Parties are able to appoint their respective party-appointed arbitrators without any institutional assistance. Practice does show that occasionally the Respondent-state refuses to appoint an arbitrator, and in those cases the ICSID Secretariat can step in and make an appointment of the Respondent-state party appointed arbitrator. Most frequently, institutional appointments at ICISD occur when the Parties or co-arbitrators are unable to select and appoint a chairperson for the tribunal. In these instances, the ICSID Secretariat will make an appointment. The process by which the ICSID Secretariat appoints the chairperson is typically from a list of potential candidates that is circulated to the Parties. The list is narrowed down to a few candidates (or just one) and the ICSID Secretariat makes the choice (if no candidates are acceptable from the list, the ICSID Secretariat can always circulate a second list or just select a chairperson without any further input from the

Parties). The ICSID Secretariat, in making their selection, are not required to draw candidates off any of the rosters or lists that ICSID keeps.

The one restraint that is unique for ICSID administered arbitrations is that the party-appointed arbitrators cannot have citizenship that is the same as the citizenship of the party making the appointment, unless the other party agrees.

2.1.2 SCC or ICC or LCIA Arbitration

Another option found in ISDS clauses is reference to the selection of an international commercial arbitration centre to administer the arbitration. In these cases, which is currently a distinct minority of the overall ISDS caseload, the selection of arbitrators follows the same default procedure as that of ICSID. None of these international commercial arbitrations mandates that any party-appointed arbitrators or institutional appointments must be selected from a roster or list of potential candidates. The major difference between these institutions and ICSID is that the Parties are able to appoint an arbitrator with the same citizenship as that of the Party making the appointment.

2.1.3 UNCITRAL Arbitration

In a majority of ISDS clauses, the Claimant-investor is given the choice to initiate an ad hoc arbitration that is subject to the UNCITRAL Arbitration Rules. The default arrangement, if this option is taken, is that the arbitration will not have any institutional administration. The selection of arbitrators in these cases is derived from the selection rules in the UNCITRAL Arbitration Rules. Selection of arbitrators typically follows the same three step process as used for ICSID administered cases. If one of the Parties (typically only the Respondent-state in ISDS cases) refuses to make an appointment or if the Parties or co-arbitrators are not capable of agreeing on a chairperson, the UNCITRAL Arbitration Rules require that an appointing authority be used. Under the UNCITRAL Arbitration Rules, the Parties can propose an appointing authority, which can include the Secretary-General of the PCA. The Secretary-General of the PCA can act as the appointing authority or they can nominate another individual or institution to act as the appointing authority in a particular case. The appointing authority then must circulate a list of potential candidates (not required to be drawn from a list or roster) to each of the Parties and the appointing authority will make an appointment based on a candidate or candidate that have not been struck from each Parties' respective lists.

2.2 Roster(s) for Party-Appointment

The use of a roster to allow Parties to select arbitrators for ISDS cases is one possible reform option.¹⁶ The use of a roster for party-appointment of arbitrators may or may not modify the status quo depending on how the roster is designed. Undoubtedly, there will be a number of structural and institutional considerations in order to make a party-appointed roster system work. The first requirement is that there must be an institution to keep, update and make available a list of arbitrators. This means that any future reform initiative that suggests the use of a roster system for selection of arbitrators will require that there is a mechanism that trumps the current default rules available to parties when selecting arbitrators under current ISDS clauses. With that said, there are a number of ways that a roster or rosters could be used.

2.2.1 Types of Rosters

Any reform of ISDS that would be based on the use of a roster for making party-appointments will require that a choice is made about what types of rosters will be used, what the conditions for nomination to a particular list will be, what institution will host the list, and how the parties will select from these lists.

Multiple Rosters

One possibility is to keep the current lists or rosters that are maintained by the various institutions already administering ISDS cases. ICSID, the PCA, the ICC and the LCIA all keep some form of roster or list. ICSID has a roster of 10 Members of the Panel of Arbitrators. In addition to this list of 10 individuals, there is also a List of Designations by the Contracting States to the ICSID Convention. A Contracting State may nominate up to 8 individuals, and these individuals do not need to have the same citizenship as the State appointing them. For both the Panel of Arbitrators and the List of Designations, the term is 5 years, renewable.

The PCA also maintains a roster called the Members of the Permanent Court of Arbitration. This list or roster includes designations by Member States of the PCA of up to 4 individuals. These individuals do not need to have the same citizenship as the State that appoints them. The ICC also has a number of Members (currently, there are 176 Members of the Court of

¹⁶ For a full overview of current approaches to rosters, see Bjorklund, Bungenberg, Chi, and Titi, 'Selection and Appointment of International Adjudicators' (n. 13).

Arbitration of the ICC). The LCIA similarly keeps a list of Members. The SCC does not have a roster or list that is publicly available.

All of these rosters or lists currently do not require any Parties or relevant institutions to select arbitrators from them. In fact, many of the individuals on these lists (the ICSID and PCA lists) have not sat on any ISDS arbitral tribunal to date. However, one reform option could be to permit Parties (and institutions when they are required to appoint) to use the lists that are currently already available. This could either allow a Party (or institution) to voluntarily select off a particular roster or any roster (there could be a list of eligible rosters determined). It could likewise require a Party (or institution) to mandatorily select off a particular roster or any roster.

A Single Roster

Another possibility for a party-appointment based system is to establish a new single roster that can be used by the institution established through the reform process. There are a number of ways that this roster could be established; and likewise, a number of ways that arbitrators could be selected from such a list or roster. As stated, at ICSID, there are currently two ways that arbitrators can be put on the ICSID roster. The first is institutional nomination. The ICSID Secretary-General nominates and selects 10 individuals to be on its Panel of Arbitrators. Currently, this list contains 5 women and 5 men. All individuals on the Panel have sat as an arbitrator in an ISDS case. The second is State-based nomination. Here, the Contracting States to ICSID nominate up to 8 individuals to be on the list or roster. Not all Contracting States have made nominations and not all Contracting States have nominated the maximum number of individuals.

A new single roster could be created for use by Parties either on a mandatory or voluntary basis. There are also a number of ways that arbitrators could be placed on the list or roster. The institution established to administer post-reform ISDS cases could exclusively nominate candidates; or the roster could be exclusively composed of nominations from Contracting States to the new institution; or the roster could follow the precedent of the ICSID list and have a combination of the two modes. The next choice will be to determine the number of candidates that can be nominated. The ICC Court of Arbitration has 176 Members. If only institutional nominations are permitted, it is likely that more than 10 individuals will need to be appointed to the list. Likewise, if only Contracting States are able to nominate, then (depending on the number of Contracting States that sign up to the new institution) more than 8 individuals will likely need to be nominated by each eligible State.

For a single roster based on the retention of a party-appointment system for selection of arbitrators would likely need between 150 and 200 individuals.

2.2.1 Use of Roster(s)

Once the determination on what type or types of roster is made, the next issue that will arise is how the roster or list is used by the Parties to a particular ISDS dispute.

Mandatory Selection from Roster(s)

One reform possibility for use of a roster or list of arbitrators that can be selected by the Parties to an ISDS dispute is to make selection off the list mandatory. This would mean that the Parties – ie, both the Claimant-investor and the Respondent-state – would be required to select from a particular roster. Likewise, the selection of the chairperson would be required to be selected from the roster as well.

Another way to do this is a hybrid mechanism whereby the two party-appointed arbitrators can select any individual they want regardless of whether that person is on the relevant list or roster, but that the chairperson must be selected off the list (whether the appointment is made by the Parties or co-arbitrators or an institution).

If Parties are required to select off a single roster or from the rosters already in use, it will be critical that these lists provide a good distribution of arbitrators that the Parties will want to select. It should be a geographically diverse group, with an appropriate number of women and all candidates should have the requisite expertise that the Parties require. Currently, it is doubtful that the rosters in place at the various institutions administering ISDS cases would meet the criteria required by the Parties when making selections.

Voluntary Selection from Roster(s)

Another possibility in regards to the use of rosters or lists is to maintain the current status quo and use rosters only voluntarily by the Parties to a particular ISDS dispute. This would not foreclose the possibility that a new post-reform institution could be established and create its own list or roster, however. The list or roster could be used on a voluntary basis by the Parties in selecting arbitrators. If a voluntary roster is used, then it is less important that those on the roster have the relevant expertise or experience that Parties would demand. However, such a roster or list would not be frequently used by the Parties or by the new institution in selecting

arbitrators; much in the same way as the current lists or rosters kept by the PCA or ICSID are infrequently used.¹⁷

2.3 Institutional Appointment of Arbitrators

Many of the design considerations addressed in the previous section on the use of rosters or lists for the maintenance of a party-appointment system of arbitrators will apply to the use of a roster or rosters by arbitral institutions in the selection of arbitrators. This reform option keeps ISDS in place but replaces the process for the appointment and selection of arbitrators from the Parties to an institution. There are a variety of ways in which an institution could select arbitrators. One possibility, which is mentioned in the previous section is to have a hybrid selection process whereby Parties to an ISDS dispute each select and appoint an arbitrator of their choosing (either from a roster or not) and then the relevant institution selects and appoints the chairperson (either from a roster or not). Another possibility is to have all appointments made by an institution. This would require that the institution appoint two co-arbitrators and a chairperson. In the following sub-sections, the manner in which appointments made by an institution could be structured.

2.2.1 Institutional Appointment of Tribunal

There are a number of considerations when speaking of converting the method of selection of arbitrators from the Parties to an institution. The first consideration is to determine who makes the appointments. The second consideration is to determine if a roster is to be used, and if so, whether the use of a roster is mandatory or voluntary.

Who Selects and How?

On the question of who decides, there are a number of options. One manner in which arbitrators could be selected is to vest authority in the Secretary-General of the arbitral institution established as part of the reform process. This would mean that the decision to appoint tribunal members in all ISDS cases would be vested with a single individual. A second option would be to have a Standing Committee within the institution that would be responsible for making all appointments. Organization of this Standing Committee would need to consider the following: (1) how would arbitrators be selected (eg, through a majority voting process or an

¹⁷ Ibid.

internal list process); (2) how large or small the committee would be; and (3) how long the terms on the committee would be.

The next question would require thought on the question of how arbitrators could be selected. Here there are also a number of possibilities. One option would be for the institution to make all appointments with no input from the Parties. This would permit the institution to select (through an internal process of selection) two co-arbitrators and a chairperson. Another option would permit input from the Parties to the dispute with the ultimate decision of selection falling to the institution. For example, the institution could circulate different list of potential co-arbitrators to each of the Parties and the Parties could then rank their preferences off of the list. Then a second identical list of potential chairpersons could be circulated to the Parties and both Parties would individually rank their preferences for a chairperson from that list.

Mandatory or Voluntary Selection from Roster(s)

Once it is determined who in the institution will make the appointments and how they will make those appointments, the next question is whether a list or roster will be used by the institution in making appointments. The composition of such a roster would follow the same considerations that would need to be made for a party-appointment-based roster discussed in the previous section. Once the rules and parameters are set for establishing a roster that an institution could use in the selection of arbitrators for a tribunal, the next consideration is whether the institution must select from the roster or whether it is only used as guidance, with the institution not being required to select from the roster.

One additional possibility is to create different rules for the use of the roster for the selection of the co-arbitrators and for the chairperson. For example, there could be a rule that for the selection of the co-arbitrators, use of the roster by the institution would be voluntary; but for the selection of the chairperson, the use of the roster would be mandatory.

One versus Three Member Tribunals

A final aspect in regard to the institutional appointment of arbitrators for ISDS cases would be to consider whether a mandatory threshold rule could be established for the use of a sole arbitrator or a three member tribunal. One way that such a rule could be established is to require that all disputes claiming a value less than a certain monetary amount (eg, 5 million USD or 10 million USD) would automatically appoint a sole arbitrator. All ISDS disputes above the threshold would automatically appoint a three member tribunal. For the appointment of the

sole arbitrator, the institution could use the same mechanism chosen for the selection of the chairperson in a three member tribunal.

2.4 Standing Tribunal with No Appellate Body

One possible option for reform of the dispute settlement system for resolving investor-state disputes is to move away from ad hoc selection and appointment of arbitrators (whether institution or party-based) to that of a standing investment tribunal mandated with the resolution of all investor-state disputes. The organization of such a standing tribunal or court could take many forms, but in regard to the composition of the tribunal or court, the selection and appointment of judges would be significantly different than the current ISDS system.

Under this reform option, a standing tribunal or court would be established, but no second level review through an appellate mechanism would be created. Presumably, the awards or judgements rendered by such a standing tribunal or court would then be subject to similar rules currently used for the enforcement and recognition of arbitral awards according to the New York Convention.

In regard to the selection and appointment of judges to a standing tribunal or court would require a number of considerations, including: criteria, selection, size, and terms.

2.4.1 Criteria

The first consideration is to determine the criteria to be used for those eligible for nomination to the court. These criteria would be established most likely in the instrument creating the standing tribunal or court. This would primarily be a State-based nomination process, but processes could be established to have nomination procedures that include input from non-State entities as well. All potential nominees would have to have a relevant expertise, standing, and experience to sit as a judge on an international tribunal.

Further considerations for criteria are to determine whether gender balance would be mandated and whether each State would be required to only nominate its own citizens or whether the State could also nominate candidates with citizenship from third States. There may also be a need to consider whether a system for ad hoc judges to eligible for appointment to specific cases involving particular states.

2.4.2 Selection

The next consideration would be to establish the rules required for how nominations are made to the standing court or tribunal. One option would be for each Contracting State to the new institution created as part of the reform process to nominate a set number of candidates to be selected by the institution, of which one would be appointed to the standing court. Another option would be for all of the nominated candidates to be put into a single large pool and the institution then selects the judges from that pool.

A related issue in regard to nomination and selection is to determine whether each Contracting State would have at least one judge on the court or whether there would be a system established for the selection of judges based on geographical regions: see discussion on full versus selective representation in section 3.5.

2.4.3 Size

Another consideration in designing a standing tribunal or court is to determine its size, structure and type. A simple conventional structure would be to have a set number of judges with a president and vice-president. The number of judges appointed could reflect the number of Contracting States to the institution, or could be a set number in multiples of three so that chambers could be established to hear individual cases (eg, a 15, 18, or 21 member court).

Another option would be to create a roster or list of court members that could be used by the institution in selecting panels of three judges for specific cases. This would permit the possibility of a much larger pool of judges to draw from. The same criteria and nomination procedures for a traditional standing court could be used to select judges on the list or roster. In terms of selecting judges for specific cases, the process could be random or it could fall to the Secretary-General of the institution or there could be a single full-time president of the court that is tasked with appointing judges to specific cases.

2.4.4 Terms

A final consideration in selecting and appointing judges to sit on a standing tribunal or court is determining term lengths and limits. There are a number of international courts that set terms for judges that could be used as models for a standing tribunal or court. For example, judges could be appointed to terms that are 3, 6, or 9 years; and these terms could be once or twice renewable. The appointments could also be staggered at 3 year intervals so that the turnover of new judges on the court would be gradual.

2.5 First Instance ISDS with Appellate Body

The next potential option for the reform of investor-state disputes would be to maintain a system that retains some form of ISDS, either as it is currently practiced or as it might be reformed through the use of rosters or institutional appointments. Under this option, ISDS in the first instance could be designed to fit one of the first three models described above (status quo, roster(s) for party-appointment, or institutional appointment of arbitrators).

However, under this reform option, an appellate body would be established to review all first instance ISDS judgements or awards. The scope of this appellate body would have some effect on the selection and appointment of judges to sit on the appellate body. If the scope of review is *de novo*, then appellate body cases will take much longer than if the review is restricted. An additional consideration is whether review of first instance ISDS cases by the appellate body would be mandatory and automatic; or whether it would fall to the choice of the Party or Parties to request review of the first instance ISDS judgement or award.

The establishment of the appellate body and how it selects judges could follow the same design options as articulated in the previous section on the selection and appointment of judges for a standing first instance tribunal or court.

One specific consideration for an appellate body that may have an effect on the manner in which judges are appointed and selected, is if an option for an *en banc* or grand chamber review is established for exceptional cases. This would require that the size of the appellate body be set, even if judges are drawn off a list or roster for typical three member cases.

2.5 Standing Tribunal with Appellate Body

The next major reform option could be the establishment of a standing first instance and appellate body. The selection and appointment of judges to both would follow the same set of considerations described in the two previous sub-sections (standing tribunal with no appellate body, first instance ISDS with appellate body).

The one additional consideration for this option in regard to the selection and appointment of judges, is whether the standing first instance court and the appellate body remain separate institutions with their own rules and procedures for selecting and appointing judges, or if the rules would be the same. It is notable that in CETA the nature of the appointment of judges in the appellate body was left unresolved. A related option would be to integrate the judges sitting

on the first instance standing tribunal and at the appellate body. For example, one president could be appointed to the standing tribunal and another to the appellate body, and each of these two judges would be responsible for selecting three member chambers for each specific case that emerges. The judges selected to sit on first instance cases and appellate body cases could be drawn from the same pool of judges (if a list or roster is used).

7. No ISDS

The last model that can be considered would be the removal of all formal adjudication from international investment agreements. Under such an option, selection and appointment of judges or arbitrators would not be an issue. The relevant domestic appointment systems would be domestic, whether permanent national courts or alternative dispute resolution (ADR). For example, one submission to UNCITRAL notes the role of the Korean Office of the Foreign Investment Ombudsman (OFIO) in providing “investment aftercare to support investors who face grievances”; and the Brazilian CFIA model of an investment ombudsmen and a joint committee of representatives from the home and host state to help both prevent and resolve conflicts between investors and governments.¹⁸ Thus, questions of selection and appointment would relate to these distinct and often tailored solutions.

ADR may also be international, whether through mediation or expert/administrative review panels. In a submission by one state, it is noted that

ADR can involve either conciliation or mediation, but it may also concentrate on a fact-finding exercise that makes it possible to narrow down the actual extent of the dispute. The process aims at resolving disputes. The advantage of these alternative approaches is to provide for a faster and less costly settlement, the more so when the problem is tackled at an early stage and with the specific goal of avoiding escalation.¹⁹

The state also noted the role of arbitration in this process:

Arbitration institutions also have a role to play in making the resort to alternative means more commonplace within the international investment law community.

¹⁸ *Possible reform of investor-State dispute settlement (ISDS) Submission from the Government of Brazil*, A/CN.9/WG.III/WP.171, 11 July 2019.

¹⁹ *Possible reform of Investor-State dispute settlement (ISDS) Submission from the Government of South Africa*, UN doc. A/CN.9/WG.III/WP.176, 17 July 2019, paras. 40-41.

- Arbitration institutions could propose simplified rules for ADR or provide for more flexibility in rules on conciliation, mediation and fact-finding, so as to make them more attractive to those wishing to use them in legal proceedings on investment matters;
- Arbitration institutions could also facilitate the access to ADR procedures by developing capacity or encouraging the inclusion of experts on ADR techniques in their lists;
- Arbitration institutions could also further develop their support to parties wishing to go for an ADR procedure - such support could be logistical, secretarial, etcetera.²⁰

If such alternative mechanisms are adopted and there is a need for the selection and appointment of individuals to mediate disputes or sit on informal review panels, the various options provided in the above section could be used to select and appoint such individuals.

3. ISDS concerns and stylised models

We now turn to analyse, evaluate and partly predict the effect of these six institutional models of selection and appointment

3.1 Costs

There is a significant potential for several of the selection and appointment reform options to reduce costs, although the extent varies. The costs of investment treaty arbitrations can be substantial. These costs are divided between (1) *legal costs*: counsel costs and experts costs; and (2) *tribunal fees*: arbitrator fees, and tribunal, arbitral institution and hearing venue.²¹

Table 2.1 shows recent studies on *legal costs*, which are the largest cost component of any investment treaty arbitration (besides an eventual damages award which is excluded from the analysis and UNCITRAL's current understanding of costs).²² The most recent data (using PITAD²³ up to 1 February 2019) shows that for all known investment arbitration cases where cost data is available, claimant's legal costs in 169 cases were 6.1 million USD, while

²⁰ Ibid. para. 49.

²¹ See overview of literature in Malcolm Langford, Daniel Behn and Laura Létourneau-Tremblay, 'Empirical Perspectives on Investment Arbitration: What do we know? Does it Matter?', *ISDS Academic Forum Working Paper 7/2019*, section 2.

²² With data up to 2011, Franck reports that combined costs (claimant and respondent costs) average 10 to 11 million USD (a median of around 6 million USD). See also Susan D. Franck, *Arbitration Costs: Myths and Realities in Investment Treaty Arbitration* (OUP 2019).

²³ Daniel Behn, Malcolm Langford, Ole Kristian Fauchald, Runar Lie, Maxim Usynin, Taylor St John, Laura Letourneau-Tremblay, Tarald Berge and Tori Loven Kirkebø, *PITAD Investment Law and Arbitration Database: Version 1.0*, Pluricourts Centre of Excellence, University of Oslo (31 January 2019).

respondent's legal costs in 177 cases were 5.2 million USD.²⁴ As for the fees associated with *tribunals*, it was estimated in 2010 that 18% of the overall amount of any given investment treaty arbitration was the cost of the tribunal, but that ratio has now fallen below 10%, as Table 2.2 indicates.²⁵ Average tribunal costs are now in the vicinity of 1 million USD.

Table 2.1: Legal costs (USD)

Study	Period	Arbitral rules	Sample (no. Awards)	Average claimant costs	Sample (no. Awards)	Average respondent costs	Inflation-adjusted year
<i>Commission and Moloo (2018)</i> ²⁶	2011-2017	ICSID	90	6,043,915	88	5,217,247	2017
<i>Commission and Moloo (2018)</i>	2010-2017	UNCITRAL	36	6,077,585	41	4,596,807	2017
<i>Behn and Daza (2019)</i>	1987-2019	ICISD and UNCITRAL	169	6,067,184	177	5,223,974	2018

Table 2.2 Tribunal fees (USD)

				Average tribunal fees	Median tribunal fees	Inflation-adjusted year
<i>Franck (2007)</i> ²⁷	1987-2007	ICSID and UNCITRAL	17	581,333	501,370	non-adjusted
<i>Commission and Moloo (2018)</i>	2011-2017 (FY)	ICSID	68	922,087	876,816	2017
<i>Commission and Moloo (2018)</i>	2010-2017 (FY)	UNCITRAL	48	960,641	730,104	2017
<i>Behn and Daza (2019)</i>	1987-2019	ICISD and UNCITRAL	193	947,622	746,708	2018

The question is then which of the reform scenarios for selection and appointment is likely to reduce tribunal and legal costs. Without any doubt, the three models that embrace permanent adjudicators (4, 5 and 6) will reduce the *direct* tribunal costs for parties. Both the investor and the respondent state will be able to take advantage of the standing mechanisms for free or a relatively low filing and procedural fees. In options 2 and 3, the tribunal costs will remain.

²⁴ Daniel Behn and Ana Maria Daza, 'The Defense Burden in Investment Arbitration?' (2019) PluriCourts Working Paper.

²⁵ For the ratio up to 2010, see David Gaukrodger and Kathryn Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community* (OECD Publishing 2012), 19. On the most recent ratio, see Behn and Daza, *supra*.

²⁶ Jeffrey Commission and Rahim Moloo, *Procedural Issues in International Investment Arbitration* (OUP 2018).

²⁷ Susan D. Franck, 'Empirically Evaluating Claims about Investment Treaty Arbitration' (2007) 86(1) NC L Rev 1.

However, there are three important caveats in reaching this obvious finding. First, the state principals to the new institutional regime will need to pay for the judges/standing members. Thus, there will be *indirect* costs with a standing mechanism, although it is likely that developed states would bear more of this burden, thus reducing overall tribunal costs (including indirect costs) in a substantial way at least for developing countries, as well as developed countries which are the subject of many claims.

Second, the reduction in the overall cost burden is not necessarily large, even if it is significant. This is because the bulk of costs in ISDS relate to legal costs, as Table 2 makes clear. Nonetheless, it might be possible to argue that legal costs could be reduced in a more centralized system. For example, a standing court may be empowered to institute case management principles that focus proceedings on key issues.²⁸ Indeed, there are real economic incentives for members of standing tribunals and appellate bodies to institute case management principles. *If* they are paid a fixed salary, the absence of such principles will increase workload. Permitting parties to ventilate many issues in a case, does not result in greater judicial compensation; it demands more time.²⁹ However, a permanent tribunal is neither a necessary or sufficient condition for reduction of legal costs. States may need to signal or require the need for case management approaches that could also help reduce legal costs.

Third, the conclusion that permanent bodies are more likely to reduce tribunal costs and possibly legal costs (as discussed in the paragraph above) is partly conditional on cases proceeding at a relatively prompt manner. If a standing mechanism was inundated with cases – as occurred with the European Court of Human Rights from the late 1970s – then costs *may* increase for parties. There may be slightly higher legal costs in delayed proceedings and opportunity costs for both parties in terms of time used in the litigation. While it is unlikely that such permanent mechanisms will be overburdened in their first decade or so, given that states would possibly only gradually adopt the new system, some mechanism to adapt to increased volume of litigation should be considered. For example, one could envisage a requirement that the number of adjudicators be easily expanded – with mandatory funding – if an independent body conclude that the cause of delay is linked to workload.

²⁸ *Possible reform of investor-State dispute settlement (ISDS) Submission from the European Union and its Member States*, UN doc. A/CN.9/WG.III/WP.159/Add.1, para. 54.

²⁹ Judges like others presumably seek to maximise leisure time: see L. Epstein and J. Knight, ‘Reconsidering Judicial Preferences’ (2013) 16 *Annual Review of Political Science* 11.

3.2 Duration

From the time of registration of a dispute, the current average length of ISDS proceedings for an arbitration is 3.73 years.³⁰ Whether this period can be considered ‘excessive’ is contingent. It is partly a normative and legal question and empirically depends on the choice of comparators (some international and domestic courts are faster in processing; others slower).³¹ In any case, many of the proposed reforms involving appointment could have a significant impact on the duration of proceedings. A sizeable portion of each *ad hoc* arbitration is devoted to the selection and appointment of arbitrators, including challenges to arbitrators and replacement. Yet, as we shall see, the magnitude of the average decrease in time for each institutional option is highly dependent on accompanying reforms. It cannot be understood fully in isolation.

Two of the principal causes of lengthier proceedings relate to the initial selection process and challenges to arbitration. First, the time taken to constitute an *ad hoc* tribunal is significant. A survey of the arbitral proceedings conducted by ICSID showed that the average duration of the surveyed tribunal constitutions was of 258 days.³² While Behn, Berge and Langford find that non-ICSID tribunals are constituted slightly more quickly, they also find that selection processes can take between 3 to 12 months.³³ Thus, the institutional reforms which involve a permanent body (4, 5 and 6) will clearly see a reduction of time devoted to this aspect of the case. The situation is less clear for the other options.

Could the use of a roster also decrease the time taken to constitute a tribunal, as the options are limited? This is a possibility, but depends on the appointment process. If parties retain the ability to choose the arbitrator or select from a shortlist (option 2), there is unlikely to be any reduction in the length of the proceeding. If an institution chooses the arbitrator from a roster (option 3), then this procedure could lead to almost the same reduction in the length of the selection and appointment of an arbitrator as with a standing body. The abolition of ISDS would mean that cases would be in the hands of permanently appointed domestic courts or

³⁰ Daniel Behn, Tarald Berge and Malcolm Langford, ‘Why the Delay? Explaining the Duration of International Investment Arbitration Proceedings’, *Law and Practice of International Courts*, forthcoming 2020.

³¹ Hestermeyer et. al, ‘Duration of proceedings’, *ISDS Academic Forum Concept Paper 2019/2*.

³² ICSID Secretariat, *Proposals for Amendment of the ICSID Rules – Working Paper (Volume 3)*, 2 August 2018, p 902.

³³ Behn, Berge and Langford, ‘Why the Delay?’ (n. 29 above).

domestic arbitration where relevant. However, whether this would be an improvement on duration of cases would be highly country-dependent.³⁴

Second, a statistical regression analysis of the key causes of *delay* identified four statistical significant determinants: bifurcation, arbitrator challenges, arbitrator replacement and dissenting opinion.³⁵ A move to permanent bodies would affect directly two of these four factors. First, arbitrator replacement processes (due to illness, death, resignation, or successful challenge) would not be relevant, given the existence of other available judges. Second, challenges to adjudicators would be much less frequent and highly case significant. Interestingly, the factor that had the largest effect on delay was arbitrator challenges. The use of a roster with institutional appointments could also lessen delays from arbitrator challenges and replacements, although the process may be slightly elongated. A roster with party appointments is unlikely to have any effect on these two delay-causing factors.

It is important though to consider separately options 5 and 6, which involve appellate review. While the appointments would be speedier and challenges/replacements less of a problem, appellate review in and of itself may lengthen proceedings. The key question here is whether the average time taken to select arbitrators for existing ‘appellate’ processes (ad hoc ICSID annulment committee hearings, currently 1.91 years) is longer than the average time for future appellate review. On one hand, appellate review would most likely cover a wider range of grounds for challenge and thus could potentially involve longer proceedings. On the other hand, there would be no time lost in establishing a tribunal. Moreover, an appellate review body could be entrusted with the power to retain the case and render a new arbitral award.³⁶ This option is not possible under the existing ICSID annulment system or other domestic court proceedings for annulment.

3.3 Consistency

In UNCITRAL WGIII, states have been concerned that the lack of consistency could negatively affect the reliability, effectiveness and predictability of the ISDS regime and its credibility.³⁷ This would undermine ideas of the rule of law, general legitimacy in the system,

³⁴ Hestermeyer et. al, *supra* note.

³⁵ Behn, Berge and Langford, *supra* note.

³⁶ Hestermeyer et. al, *supra* note.

³⁷ A/CN.9/WG.III/WP.150, par. 5.

confidence in the stability of the investment environment. However, consistency has different meanings as it relates to both outcomes and interpretation.³⁸ First, we may be concerned with *outcome-based consistency*: in the application of the law, adjudicators should treat like cases alike. There have been cases of claims based on similar facts, arising out of a single governmental measure, and brought under the same substantive and procedural rules, which have been decided differently by different tribunals. Second, there is concern with *jurisprudential consistency*, ensuring doctrinal uniformity across arbitral decisions. Finally, there is *inter-system consistency*, in which some states and scholars have expressed concern that investment arbitration has failed to ensure consistent interpretive approaches to interpretation and outcomes across different regimes in public international law, e.g. trade, human rights, environment.³⁹

This perceived lack of consistency has, at least in part, been attributed to the *ad hoc* nature of ISDS arbitration. Each tribunal is typically composed to decide one particular dispute, rather than multiple disputes, and there is no formal doctrine of precedent (*stare decisis*) in public international law. *Ad hoc* tribunals are thus not bound to follow the decisions and awards of other *ad hoc* tribunals. New methods of selecting and appointing adjudicators may help enhancing at least the first two types of consistency. To that end, Academic Forum Paper No 3, *Lack of Consistency and Coherence in the Interpretation of Legal Issues* illustrates how different reform options may assist: ‘a “top-down” solution through a permanent investment court or appellate body ... can achieve, relatively quickly, a high level of consistency, coherence and predictability beneficial for both public authorities and business.’⁴⁰ However, as they note, the extent to which each reform model will contribute varies, and there are drawbacks with a strong focus on consistency.⁴¹

It is clear that greater institutionalisation will ensure greater outcome and jurisprudential consistency. That is one of the prime functions of an *appellate body*, which is found in options

³⁸ UNCITRAL, Report April 2018, paras. 20-21; Wolfgang Alschner, *Ensuring correctness or promoting consistency? Tracking policy priorities in investment arbitration through large-scale citation analysis*, in Daniel Behn, Ole Kristian Fauchald and Malcolm Langford, *Legitimacy of Investment Arbitration: Empirical Perspectives* (Cambridge University Press, 2020).

³⁹ Margaret Young (ed.), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press, 2012);

⁴⁰ *Lack of Consistency and Coherence in the Interpretation of Legal Issues*, Working Group No 3, March 2019 version, para. 10.

⁴¹ *Ibid.* para. 9. See also Lise Johnsen and Lisa Sachs, *Inconsistency's Many Forms in Investor-State Dispute Settlement and Implications for Reform*, CCSI Briefing Note, November 2018; and discussion below.

5 and 6: “rogue” or “outlier” decisions could be appealed, although depending on the scope of the appellate body’s jurisdiction.⁴² The presence of an appellate body would reinforce consistency also in the model of a first instance ISDS with Appellate Body, as arbitrators or judges would be concerned above overrule. However, outcome consistency in treaty interpretation would be highly dependent on a secretariat assisting the body.

Moreover, the creation of a *standing first instance* body (option 4) could also contribute to greater outcome and jurisprudential consistency. As specifically for selection and appointment of adjudicators, a standing tribunal would be formed by a stable group of members, possibly of a limited number. This would likely favour consistency by the very fact that adjudicators would be a limited number and judge on an extended number of cases. Moreover, if standards for selection would also include relevant expertise on international law, issues rising out of the coexistence of different treaties and their interpretation according to the cases would improve. Moreover, the existence of a single secretariat in assisting tribunal members would also ensure greater consistency.

It is also possible that such institutionalisation in options 4-6 would lead to greater coherence with other branches of international law: inter-system consistency. However, such a scenario is only likely with clear instructions or a change in substantive law. The WTO Appellate body, upon which many model a future investment appellate body, has largely sought to keep itself insulated from the rest of international law, including international investment law.⁴³ As Johansen and Sachs note:

Indeed, a powerful court and/or appellate body established specifically to hear concerns of investors, unable to hear complaints by other citizens or entities (except to the extent they may be represented by their states’ positions), and structurally isolated from other areas of domestic and international law and policy and relevant expertise, exacerbates concerns that any law developed by a new court or appellate body will be unduly ignorant of or unconcerned with non-investor rights and interests.⁴⁴

⁴² *Lack of Consistency and Coherence in the Interpretation of Legal Issues*, *ibid.*

⁴³ Niccolo Ridi, ‘Approaches to External Precedent: The Invocation of International Jurisprudence in Investment Arbitration and WTO Dispute Settlement’, in S. Gáspár Szilágyi, D. Behn and M. Langford, *Adjudicating Trade and Investment Disputes: Convergence or Divergence?* (Cambridge University Press, 2020).

⁴⁴ Johansen and Sachs, p. 8.

The other selection and appointment options are less likely to increase consistency and may potentially decrease it over time. The ISDS Academic Forum working group on consistency concluded that so-called improved ISDS ‘may lead to qualitative improvements in the ISDS system, and may have indirect benefits, but it would not directly lead to improvements in the consistency or coherence of decision-making.’ Thus, the greater introduction of rosters with party or institutional appointments may decrease the number of arbitrators but consistency may only be achieved to the extent that such a reduction occurs. Moreover, they conclude that our option 7, No ISDS, would be unlikely to lead to ‘benefits from the perspective of unjustifiable inconsistencies as different national courts, which would not be bound to have regard to the others’ decisions, would be ruling on the correct interpretation of IIA provisions.’⁴⁵

However, an excessive or one-sided focus on consistency can come at a price. The Academic Forum authors note that: ‘the current system may be said to allow for experimentation, correct solutions tend to bubble to the top over time, and higher quality reasoning is generated in the long term’.⁴⁶ As Wolfgang Alschner has pointed out, states have imposed a clear hierarchy between the two objectives in their UNCITRAL deliberations,⁴⁷ stressing that “consistency should not be to the detriment of the correctness of decisions.”⁴⁸ In other words, states are more concerned about consistently incorrect arbitral decisions than inconsistent but correct ones. Interestingly, in a recent study it is concluded that arbitral tribunals today tend to prioritize consistency over one measure of correctness: appropriate use of citations. The author finds that three out of four citations, based on a dataset of more than 4500 references, connect to highly dissimilar IIAs. Johnsen and Sachs also point to different mechanisms that might ameliorate the negative effects of a consistency focus, such as greater space for and encouragement of submissions by states, third parties, and non-governmental organisations and affected citizens.

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⁴⁵ *Lack of Consistency and Coherence in the Interpretation of Legal Issues*, above, para.

⁴⁶ *Ibid.* para. 9. See also Johnsen and Sachs:

⁴⁷ Alschner, *Ensuring correctness or promoting consistency?* (n. 37 above).

⁴⁸ *Ibid.*, para. 26.

⁴⁹ Johnsen and Sachs, sections 5-6.

3.4 Correctness

While consistency is a systemic notion, correctness is a decision-specific one, i.e., about the substantive quality of a specific decision. As in the case of consistency, in the investment law reform discourse, the term has acquired a particular meaning. While consistency may be a sign of correctness, it can equally be an indicator of incorrectness. Thus, correctness in the current debate has become related to the question when different treaties (or factual circumstances) warrant different interpretations. Here there may be trade-offs between a correct decision and the systemic consistency of jurisprudence.⁵⁰

Correctness is also more broadly related to the concern with *accountability* in the design of international dispute resolution. How to ensure that adjudicators are appropriately constrained in the process and substance of decision-making such that they arrive at a legally correct decision.

Whereas institutional options have a lesser impact when dealing specifically with correctness, since this concerns individual decisions, and thus the real element of help would be the establishment of an appellate body rather than necessarily the establishment of a stable tribunal, when the two issues of consistency and correctness are linked together and tried to be solved jointly, then institutional options as a whole re-emerge as the solution that would apparently better ensure to achieve the expected goals.

Two core characteristics are often associated with incorrect ISDS decision-making: misidentification and misapplication of applicable law: tenure, representativity, institutionalisation and legal qualifications.⁵¹ First, the establishment of renewable terms, although potentially reducing independence (see above) would function as an incentive to correctly apply applicable law. As Larsson et al note:

Renewable terms can improve what we refer to as judicial accountability as states can base reappointment decisions on the past performance of the judges. However, such accountability may come at the expense of judicial independence as judges wishing to be reappointed face incentives to satisfy the actors in control of reappointment decisions.⁵²

⁵⁰ See Wolfgang Alschner, *supra*.

⁵¹ Anna De Luca, Mark Feldman, Martins Paporinskis, and Catharine Titi, *Responding to Incorrect ISDS Decision-Making: Policy Options*, Academic Forum Concept Paper 2019/4.

⁵² Olof Larsson, Theresa Squatrito, Øyvind Stiansen, and Taylor St John, *Selection and Appointment in International Adjudication: Insights from Political Science*, Academic Forum Concept Paper 2019/10, p. 3.

Thus, models of appointment which rely on small rosters and long fixed judicial terms, are unlikely to increase accountability and correctness. In this respect, the decision is not so much between an arbitral or judicial system, but the nature of those systems. Thus, the current system of open appointments may include more incentives for accountability than a small roster where arbitrators feel confident of reappointment. The same intra-category divisions also appear in the situation of No ISDS. Some courts have renewable terms, others do not.

However, in this context a distinction should be drawn between legal and political correctness, the latter responding to state preferences as to interpretation, procedure or outcomes. Views on the importance of tribunals maintaining sociological legitimacy varies in the academy but also amongst states in UNCITRAL WGIII. In any case, reform models that make bodies more accountable may produce decisions that are more legally correct and politically acceptable. But this is far from a given. Courts and arbitration panels are often engaged in trade-offs between a correct legal result and placation of parties.

Second, Larsson, Squatrito, Stiansen and St. John show that representative approaches to appointment can, paradoxically, enhance accountability:

On full representation courts where each state controls the appointment of one judge, judges may be expected to primarily seek to maintain support from “their own” state. By contrast, if judges are elected through majority voting, they will need to maintain the support of a larger coalition of states.⁵³

Adjudicators are thus answerable to *many* in both selection and renewal. Thus, models in which the numbers are constrained – especially an international court with many state members or appellate panel – may be more likely to be correct, politically and possibly legally.

Third, greater institutionalisation may increase assessment. A robust secretariat, more regular contact between and with adjudicators, and greater engagement of third parties and *amicus curiae*, may produce more correct or higher quality decisions. There is an increase in concentrated expertise and more available information. Indeed, one study finds that the greater centralisation of the WTO system partly explains why it has been more responsive

⁵³ Ibid. p. 21.

(accountable) to state concerns than investment arbitration.⁵⁴ However, while centralisation may increase consistency and political accountability, it is only features that increase expertise and information flows that will most likely increase legal correctness. Thus, the options 4 and 5 of a first instance court are those that would most likely meet these aims. An appellate review body may assist – by increasing dialogue –, but pressures for consistency may sometimes be at the cost of legal correctness. Yet, the role of national courts and state-to-state dispute resolution should not be discarded in relation to correctness. For instance, national courts will struggle with expertise about international law but they may have more expertise in relation to the facts, relevant domestic law and the overall context. Thus, they may be stronger on factual correctness, although this strength would vary from court to court, country to country.

Finally, reform models of any kind that put greater emphasis on qualifications may improve the quality of correct reasoning. However, different types of qualification may relate to different types of correctness. International law qualifications with treaty interpretation; commercial law qualifications with the substance of the case.

3.5 Diversity

Obtaining a consistent and appropriate amount of diversity among those selected to sit in ISDS cases under the current system, according to empirical research, will be a challenge under the status quo. When speaking about adjudicative diversity in ISDS, the discourse tends to focus on only two (but a fundamental important two) aspects: (1) insufficient numbers of appointments to women; and (2) insufficient appointments going to arbitrators that are not nationals of Western states.⁵⁵ Assessing the amount of diversity among a pool of adjudicators can certainly be measured beyond these two socio-demographic data points. Other potentially important diversity variables among international adjudicators include: experience, legal and professional background, age, education, religious and cultural background, among others

⁵⁴ Malcom Langford, Cossette Creamer and Daniel Behn, 'Regime Responsiveness' in Szilárd Gáspár-Szilágyi, Daniel Behn, Malcolm Langford (eds), *Adjudicating Trade and Investment Disputes: Convergence or Divergence?* (Cambridge University Press 2019), ch. 10.

⁵⁵ The use of a Western versus non-Western state division in addressing issues of representative geographic diversity is typical. There are of course many additional ways of dividing states into groups for assessing representativeness, but we will use the Western and non-Western binary here. This is based on the main UN groupings. The Western group is comprised of the following states: Andorra, Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Israel, Italy, Liechtenstein, Luxembourg, Malta, Monaco, Netherlands, New Zealand, Norway, Portugal, San Marino, Spain, Sweden, Switzerland, United Kingdom and the United States of America. All other states are classified as non-Western.

(importantly the less tangible variations or diversity in the decision-making process itself, i.e. the values, ideological preferences, worldviews, etc. of decision-makers).

While the diversity discourse typically focuses on gender and nationality, a moniker of system frequently accuses it of being “pale, male, and stale.” Interestingly, the staleness (diversity or a reasonable balance among new entrants and those that have sat on many cases) variable is not one that is normally considered in the debates on diversity in ISDS. Currently, the party-driven appointment process in ISDS curtails the seriousness with which diversity of experience is desired. Those appointing arbitrators in ISDS cases consider what we have referred to elsewhere as the “prior experience norm” as an important determinant in making appointments.⁵⁶ In other words, the current system does not desire diversity of experience (new entrants are not desired and therefore it is unlikely that this would improve absent reforms to appointment processes). The prior experience norm creates the status quo system of appointments in ISDS cases as one that is very misaligned on the side of previous experience in ISDS cases, resulting in repeat appointments that have implications not only for experience diversity (staleness) but also for the number of women and geographical diverse arbitrators will enter the system in the coming year.

With that said, it is clear that a diversity among adjudicators in a given international system can and does have implications in regard to the robustness, quality and rigor of the decision-making process, but is also equally important as an issue of the perceived legitimacy that a system of adjudication achieves when the decision-makers are roughly representative of its users. In terms of gender and geographic diversity, ISDS has never achieved anywhere close to a representative number of women arbitrator (roughly 10% of overall appointments in ISDS cases up to 2019) and is perhaps getting closer to representativeness in terms of non-Western arbitrators (roughly 26% of appointments in ISDS cases up to 2019).⁵⁷

Initiatives aimed at improving gender and geographic diversity among ISDS arbitrators under the current system have been pursued for a number of years through a number of different

⁵⁶ Taylor St. John, Daniel Behn, Malcolm Langford, and Runar Lie, ‘Glass Ceilings and Arbitral Dealings: Gender and Investment Arbitration,’ *Pluricourts Working Paper*, January 2018

⁵⁷ M. Langford, D. Behn and M. Usynin, Does Nationality Matter? Arbitrator Background and Arbitral Outcomes, in Daniel Behn, Ole Kristian Fauchald and Malcolm Langford (eds.), *The Legitimacy of Investment Arbitration: Empirical Perspectives* (Cambridge University Press, *forthcoming* 2020).

initiatives.⁵⁸ While the discussion whether there are sufficient numbers of women and non-Western arbitrators in the eligible pool of potential arbitrators that could be selected in a given ISDS cases is beyond the scope of this section. However, it is sufficient for our purposes to state that gender and geographic diversity is improving year on year in ISDS appointments but is structurally incapable of achieving gender and nationality representativeness due to the importance given to an adjudicators previous experience when making appointments (this reduces new entrants, which also structurally limits the number of women and geographical diverse arbitrators that could enter the system in a given year), which is compounded by the decentralized and diverse actors making appointment choices (these include the parties to the dispute and in some cases an institutional appointment will be required). Combined, an ISDS with no reform is unlikely to achieve desired diversity under the status quo.

Given this background on the diversity of adjudicators in ISDS, there is likely to be significant gains in diversity (at least in terms of gender and nationality) if the various reform options are considered. There are three key aspects as to why appointment of adjudicators under an ISDS with no reform is unlikely to achieve a representatively diverse body of adjudicators: it is ad hoc, decentralized and largely non-institutional. The various reforms all remove a completely unrestricted system of party-appointed arbitrators, and thus would be very likely to improve diversity so long as the institutions created for selecting arbitrators is sufficiently supportive of such an initiative. The one significant trade-off or limitation in the various reform options and their effect of adjudicator diversity is when options for a standing court and/or an appellate mechanism are discussed. These would require state-based, tenured appointments of an extremely limited number, which could reduce the representativeness of these institutions either on the basis that appointments to the bench will be driven by non-diversity based criteria and/or the small size of any such course would make it incapable of being geographically representative (but it still could be gender representative).

Moving through the various reform options, we begin with options 2 and 3. In terms of appointment and tenure, these 2 options move ISDS away from an unrestricted system of party-appointment to one that institutionally appoints (option 3) or institutionally suggests (option

⁵⁸ Susan Franck et al., 'International Arbitration: Demographics, Precision and Justice' ICCA Congress Series No. 18: Legitimacy: Myths, Realities, Challenges 33 (2015); Susan Franck et al., 'International Arbitration: Demographics, Precision and Justice' ICCA Congress Series No. 18: Legitimacy: Myths, Realities, Challenges 33 (2015); Lucy Greenwood and C. Mark Baker, 'Is the Balance Getting Better? An Update on the Issue of Gender Diversity in International Arbitration' 31 *Arb. Int'l* 413, 418 (2015).

2). Here the nature of the appointments remains ad hoc and based on what could be a relatively large pool of candidates eligible for appointment. In terms of improving diversity, it is likely that option 3 could have the most dramatic impact on diversity. So long as the institution making appointments is under a mandate to select arbitrators for each case that meet a diversity criterion, the likelihood that diversity will be improved is very high. There is already evidence that institutional appointment of arbitrators will improve diversity so long as the institution also requires that diversity among adjudicators be taken seriously. Under the current system and in the instances where institutions are asked to make appointments (usually they are asked to select the chair), there is more diversity than compared with those arbitrators selected completely by the parties to the dispute. The most clear-cut example of this is the appointments that ICSID makes in annulment proceedings, which is combined with a policy that aims at increasing gender and geographic diversity among appointments the institution is tasked with making. This is currently the only process in ISDS that would operate like option 3 in practice (all tribunals appointed exclusively by an institution); and it is clear that overall, ICSID annulment committees to date has appointed approximately 50% non-Western committee members and 20% women committee members.⁵⁹

Option 2 is a reform option that would require the selection of arbitrators from a roster. The starting point would be to require that whatever the selection process for putting arbitrators on the roster requires, that it also include a requirement of gender and geographic diversity among those arbitrators placed on the roster. This would allow for a roster to be created that looks very diverse. However, it may not result in any improvement in diversity depending on how it is used. If the roster is merely indicative, then it is unlikely there would be any improvement in diversity because for all intents and purposes, an indicative roster that parties may choose from does not change anything from an unrestricted system of party-appointed arbitrators used in the current system. However, if the roster that is created is required to be diverse and then that roster goes from being indicative to mandatory, then parties will still be making appointments but from a more restricted (and more diverse) pool of arbitrators. The caveat with all of this is that there is absolutely nothing that can be done to ensure that the arbitrators that parties select off a mandatory roster result in diverse tribunals of adjudicators. Unless there is some type of

⁵⁹ M. Langford, D. Behn and M. Usynin, Does Nationality Matter? Arbitrator Background and Arbitral Outcomes, in Daniel Behn, Ole Kristian Fauchald and Malcolm Langford (eds.), *The Legitimacy of Investment Arbitration: Empirical Perspectives* (Cambridge University Press, forthcoming 2020).

complicated rule requiring that a certain type of arbitrator (say either a woman or from a non-Western state) is required to be appointed if the other party selects a different type of arbitrator (say a man or from a Western state), there would be zero guarantee that even a mandatory roster would per se improve diversity.

Moving to options 4, 5, and 6 which mostly require the establishment of permanent and institutionally centralized system of adjudication. The one caveat to that is the option where a status quo ISDS is kept in the first instance but an appellate mechanism is established above it. In regards to the court-like institutions (a standing first instance court and/or an appellate court), there could be gains in diversity but there is the equally likely scenario that diversity would decrease. To start, and only speaking in regard to the staleness issue, it is obvious that a standing court or appellate court would be unlikely to have a maximum of 12 to 15 members. There have been over 750 different arbitrators appointed in ISDS cases to date. Even if the reality is that a small minority of these arbitrators (approximately 50) take most of the appointments, a court with 12 to 15 members is incapable of having the high number of unique individuals (which can be viewed as diversity in its own right) that the ISDS system currently enjoys. Turning to diversity as referring primarily to gender and geographic diversity, a standing court or appellate court can achieve some diversity only if it required to do so. If there are no diversity rules that states must consider when putting forward candidates for the court(s), then it is statistically unlikely that gender and geographic diversity would result (male arbitrators from the West still provide the largest sub-set of current ISDS arbitrators that might be considered for appointment to the court(s)). Therefore, a diversity rule would have to be established in order to produce a gender and geographically representative court. This would likely have to be done at the stage of the nomination process by states. Otherwise, the selection to the court based on nominations may not allow for a selection of representative judges.

While the centralized institutionalized process envisioned for any standing court or appellate court option will make rules on selection of a diverse court more likely than the current party-driven process (with only voluntary initiatives on diversity), the small size of the court(s) may make geographic diversity impossible to meet. However, this could be solved with some sort of regional approach to appointments. This would not be the case for creating a gender representative court, unless there is some scenario where states refuse to put forward women nominees on the basis that there are not enough qualified women in the pool (this reasoning has been used in the nomination process at other international courts by states).

Overall, the issue of creating a system of adjudication that is at least gender and geographically diverse is challenging. Under the current system of ISDS, achieving diversity is limited by the way in which parties are allowed to select their arbitrators and that certain structural features will make achievement of sufficiently diverse tribunals difficult. The other reform options may provide more opportunity to improve diversity, but each reform option has its own set of limitations that may reduce improvements in diversity. All reforms that would use rosters cannot ensure that parties will select a diverse tribunal even if the roster (either indicative or mandatory) is diverse. ***A reform option that would shift to a system of ISDS with all institutional appointments is most likely to achieve desired diversity.*** And finally, the reform options that include various combinations of first instance courts and some type of appellate mechanism, are likely to limit the diversity of these courts by the mere fact that membership on the court will be so restricted. This will surely impact geographic diversity – it is impossible to ensure most configurations of a multilateral global geographically court that would be geographically diverse (12 to 15 members to represent a large number of states in the world).

3.6 Independence

A key driver behind the UNCITRAL reform process has been the perceived lack of independence of arbitrators. The perceived threat to independence may be from *external* influences – the classical definition of independence: “the freedom of judges to decide disputes free of improper outside influences.”⁶⁰ In the case of investment arbitration, concern has been expressed for indirect influence through party appointment,⁶¹ direct influence through interference by parties,⁶² or the combined effect produced when arbitrators also act as legal counsel in other cases, through the practice of ‘double hatting’.⁶³ The concern may also be for *internal* influences that threaten the impartiality of adjudicators. Accordingly, arbitrators ‘must be relied upon to carry out their public duties independent of venal or ideological

⁶⁰ Helen Keller and Severin Meier, ‘Independence and Impartiality in the Judicial Trilemma’, 111 *American Journal of International Law (AJIL) – Unbound* (2017), 344-348, 345.

⁶¹ Sergio Puig, ‘Blinding International Justice’ 56(3) *VJIL* 647; Sergio Puig and Anton Strezhnev, ‘The David Effect and ISDS’ (2017) 28(3) *EJIL* 731.

⁶² Phillippe Sands, ‘Developments in Geopolitics: The End(s) of Judicialization?’ 2015 *ESIL Conference Closing Speech*, 12 September 2015. Reprinted in *EJILTalk!*

⁶³ Malcolm Langford, Daniel Behn and Runar Lie, ‘The Ethics and Empirics of Double Hatting,’ 7(6) *ESIL Reflection* (2018).

considerations'.⁶⁴ Empirical research indicates that normative views and geography may affect outcomes.⁶⁵

A number of the reform options address directly external and/or internal independence and impartiality, although there are various trade-offs to consider. First, the international reform options under models 2 to 6, will all reduce the degree of party influence on adjudication. Roster systems in option 2 will potentially have the least effect, as it only limits the pool of arbitrators, and arbitrators will know which party appointed them. Institutional appointment of arbitrators (model 3) and judicial appointment (4-6) will clearly distance adjudicators from the *litigating* parties. Model 7 (No ISDS) would have the same effect in relation to use of domestic and international courts with two exceptions.⁶⁶ State-to-state based arbitration would maintain a model of party appointment and, possibly in some cases, a government may be able to appoint judges favourable to its position before an investor's case is heard. Second, the movement to judicial forms of adjudication (models 4-6) will decrease the likelihood of double hatting and increase transparency in appointment processes. This can have the effect of enhancing the appointment of members which are free from non-legal influences.

However, while the influence of parties may decrease, whether the investors or state, the overall influence of states (in the plural) will increase. This is partly the point of the reform. As was discussed in section 3.4, greater state involvement in selection potentially ensures greater correctness (legal or political) in awards by enhancing the degree of accountability to the system's principals.

This tension between the two goals is often unavoidable: 'independence and accountability are features that are in conflict with each other: the more independent judges are the less accountable they will be, and vice versa.'⁶⁷ For example, renewable terms may decrease

⁶⁴ John Ferejohn, 'Independent Judges, Dependent Judiciary: Explaining Judicial Independence', 72 *Southern Californian Law Review* (1999), 353, 35, cited in Keller and Meier, 345.

⁶⁵ See Gus Van Harten, 'Leaders in the Expansive and Restrictive Interpretation of Investment Treaties: A Descriptive Study of ISDS Awards to 2010', 29(2) *European Journal of International Law*, 507-549; Michael Waibel and Yanhui Wu, 'Are Arbitrators Political? Evidence from International Investment Arbitration' (2017) Working Paper; and M. Langford, D. Behn and M. Usynin, Does Nationality Matter? Arbitrator Background and Arbitral Outcomes, in Daniel Behn, Ole Kristian Fauchald and Malcolm Langford (eds.), *The Legitimacy of Investment Arbitration: Empirical Perspectives* (Cambridge University Press, *forthcoming* 2020). Note that in an earlier study that Susan D. Franck, 'Development and Outcomes of Investment Treaty Arbitration' (2009) 50(2) *Harvard Intl L J* 435 did not find a geographic effects on outcomes.

⁶⁶ The exception is where states are able to appoint judges to domestic courts

⁶⁷ Larsson, Squatrito, Stiansen and St. John, 5.

independence even if it enhances accountability and correctness. Notably, this tension also arises with all types of judicial alternatives, whether international (models 4-6) or through the No ISDS approach of accepting the greater involvement of domestic courts (model 7). Thus, there are some clear policy implications for independence and correctness in the choice of the models.

However, it is arguably possible to develop mechanisms of selection and appointment or ameliorating measures that would seek to optimise the attainment of both, independence and accountability. For example, Larsson, Squatrito, Stiansen and St. John point to the use of screening committees for appointments to various international courts, noting for example on the CJEU:

While causal effects of the panel on judicial independence and performance have not been subject to much empirical scrutiny, it is worth noting that the Panel's reports have led to the rejection of several candidates and some observers posit that it has strengthened domestic appointment procedures in member states.⁶⁸

Thus, any move to stronger judicialisation could or should be accompanied by greater attention to the types of influences states may have in the selection and appointment process. In addition, there may be compensating mechanisms, such as providing adjudicators with greater financial autonomy in the operation of the institution, higher standards for removal or suspensions of judges, and less ability of states to interfere with interpretation post-decision.⁶⁹

4. Trade-Offs and Concluding Analysis

In their analytical framework concerning selection and appointment of adjudicators, Dunoff and Pollack invoke an underlying judicial trilemma:

[T]he states that design, and the judges that serve on, international courts face an interlocking series of tradeoffs among three core values: (1) judicial *independence*, the freedom of judges to decide cases on the facts and the law; (2) judicial *accountability*, structural checks on judicial authority found most prominently in international courts in reappointment and reelection processes; and (3) judicial *transparency*, mechanisms that

⁶⁸ Ibid. 23.

⁶⁹ Ibid.26-31.

permit the identification of individual judicial positions (such as through individual opinions and dissents).⁷⁰

In their view, this creates an optimisation challenge. It is only possible to ‘maximize’ at most two of these three vectors due to the inherent trade-offs.⁷¹ Thus, an international court can ‘exhibit high levels of judicial independence and judicial transparency’, such as through open voting and/or individual opinions, but only if individual judicial accountability is low, for example with non-renewable judicial terms so that judges feel confident about identifying their view publicly.⁷²

The heuristic of the judicial trilemma has been praised for its analytical and ‘thought-provoking’⁷³ clarity but also criticised on three counts. First, all of these criteria might not be relevant for the design of all international courts. De Burca comments that ‘Judicial accountability would not be high on any list I would draw up of the values to be pursued or the features to build into the design of an international tribunal’ and ‘transparency, while a reasonably relevant feature, would not necessarily be an indispensable one.’ Secondly, authors have criticised the exclusion of other important values from the list, such as ‘judicial competence and experience, fairness of decision-making procedures, quality and thoroughness of judicial reasoning, and efficiency and timeliness of judgment’.⁷⁴ Thirdly, the construction of each category has been critiqued. Some scholars argue that the definition of independence is too broad and demanding⁷⁵ others that the definition of transparency is too narrow.⁷⁶ Hilman

⁷⁰ Jeff Dunoff and Mark Pollack, ‘The Judicial Trilemma’, 111(2) *American Journal of International Law*, 225-276, 225.

⁷¹ Ibid.

⁷² Ibid. 226.

⁷³ Gráinne de Búrca, ‘Introduction to the Symposium on Jeffrey Dunoff and Mark Pollack: “The Judicial Trilemma”’, *American Journal of International Law (AJIL) - Unbound*, 341-343, 343.

⁷⁴ Ibid. See also Jennifer Hilman, ‘Independence at the Top of the Triangle: Best Resolution of the Judicial Trilemma?’, *American Journal of International Law (AJIL) - Unbound*, 364-368.

⁷⁵ ‘In our view, this understanding of independence is too broad. A narrower and more precise definition of independence would be: “the freedom of judges to decide disputes free of improper outside influences.” Judicial independence cannot guarantee that judges decide disputes only upon the facts and the law, without any ideological considerations.’ Helen Keller and Severin Meier, ‘Independence and Impartiality in the Judicial Trilemma’, 111 *American Journal of International Law (AJIL) – Unbound* (2017), 344-348.

⁷⁶ ‘With respect to transparency, the authors are focused on the narrow issue of whether a judge’s position or vote on a particular issue before the court can be readily discerned as the test for whether a court is transparent. Their measure yfocuses on the existence (or not) of dissenting or separate opinions. While recognizing the normative debate surrounding judicial transparency, Dunoff and Pollack do not take on the issue of why it matters who authored a given dissent or separate opinion. In theory, so long as a court permits judges to issue separate or dissenting views, those views ought to stand for themselves, regardless of who drafted them. In my view, a court that regularly issues dissenting views on an anonymous basis ought to be viewed as a transparent court, but the

notes that the framework is too state-centric and focused on courts with state-to-state dispute resolution: ‘Individuals are less likely to be able to hold judges accountable to them than states are. Moreover, it is easier for judges to be entirely independent of individuals than to be totally independent of states.’⁷⁷

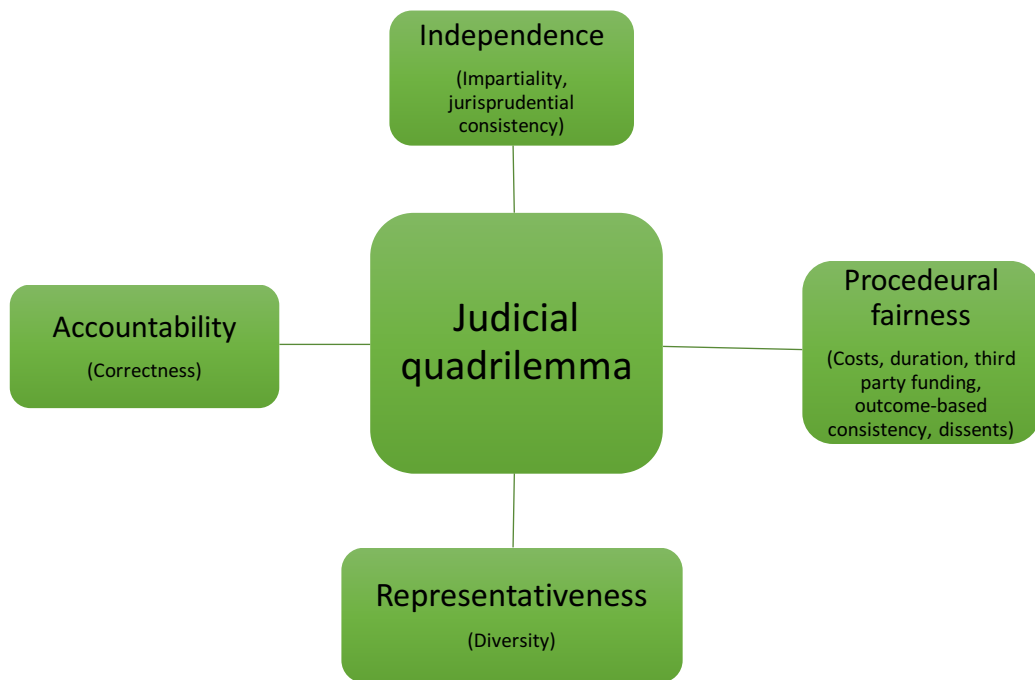
In our view, the framework provides a useful departure point for considering the inherent trade-offs in designing selection and appointment procedures. Moreover, some of these criticisms would not be accepted by states and many other actors in the ISDS reform process. Accountability is a major concern and the lack of dissenting opinions in ISDS has led many to speculate that awards are a function of compromise rather than independent legal reasoning. However, the critics are right to point out the narrow selection of values and the applicability to adjudicative systems outside the WTO, the departure point for Dunoff and Pollack.

In our view, these weaknesses with the framework in the context of ISDS reform can be addressed by re-constituting the trilemma as a quadrilemma. The first step is to recognise that a key value in reform debates concerning international dispute resolution is *representativity*, often expressed as concerns around geographic and gender-based diversity. As discussed in section 3.5, enhancing representativeness may increase the sociological legitimacy of the ISDS regime or improve the quality of outcomes through enhanced cognitive diversity. The second step is recognising that transparency is one of many values concerning *procedural fairness*. It is one thing to know ‘who’ in the arbitral or judicial panel was in disagreement, and ‘why’; but parties are likely to have a myriad of other concerns with procedural fairness, many of them central to the UNCITRAL WG III process: duration of proceedings (efficiency), tribunal and legal costs (resources) and consistency (ensuring predictability) as well as other issues of transparency such as third-party funding. We have thus proposed a quadrilemma that can be used to assess the different trade-offs for selection and appointment in ISDS.

Figure 1. The Judicial Quadrilemma

Trilemma analysis would reach the opposite conclusion.’ Jennifer Hilman, ‘Independence at the Top of the Triangle: Best Resolution of the Judicial Trilemma?’, *American Journal of International Law (AJIL) - Unbound*, 364-368, 365.

⁷⁷ Ibid. 356.



This quadrilemma provides an opportunity to identify in conclusion some of the key trade-offs for the UNCITRAL process and the need for potential compensatory mechanisms. For example:

- ***Procedural fairness vs Independence:*** Selection and appointment in more institutionalised and centralised dispute resolution models will most likely reduce costs and duration of proceedings. However, the desire for greater independence in the form of jurisprudential consistency to ensure consistency will naturally point to appellate review. This may mean the length of proceedings and some costs could reflect current levels. Thus, case management reforms would be essential to any process but to the extent they do not compromise other aspects of procedural fairness.
- ***Independence versus Accountability.*** A move to less party control over appointment will enhance the independence and impartiality of ISDS adjudicators. The result may be, though, that adjudicators may be less answerable to litigating parties and states for their decision-making. Mechanisms to make adjudicators more answerable, for example through renewable terms, may decrease the likelihood of legally correct decisions, although may make them more politically correct. This tension is difficult to resolve but approaches that combine non-renewable terms with possibility for state

influence in other areas or renewable terms with high degrees of financial and interpretive autonomy may be one way to crack the nut.

- ***Representativeness versus Procedural Fairness and Independence.*** The need to ensure greater geographic, gender diversity and professional background would speak for a large number of adjudicators, whether on a pool or court. However, this may reduce the efficiency of the system and jurisprudential consistency, through both the possibility for diverse outcomes and an over-emphasis on the role of individual states being represented in the adjudicative system. Some scholars have argued that if the result is less representation of those with a commercial law background there is a risk of inefficient proceedings and incorrect outcomes. There may be also a tension with accountability but it is less clear: less accountable to individual states but more accountable to all states. Thus, the solution may be ensuring representative-enough models of selection and appointment, e.g. through minimum gender quotas, regional representation and broad definitions of diversity. Moreover, the trade-offs can be problematized. Enhancing diversity may increase independence through cognitive diversity.