From:

Dr Martins Paparinskis
Reader in Public International Law
University College London, Faculty of Laws

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Re: **APPOINTING AUTHORITIES AND THE SELECTION OF ARBITRATORS IN INVESTOR-STATE DISPUTE SETTLEMENT: AN OVERVIEW**

Dear David,

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

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

(1) How does the practice of appointing authorities in investor-State dispute settlement compare with international dispute settlement more generally?

(2) What is the function of appointing authorities in international dispute settlement?

(3) Is the current practice of appointing authorities desirable, in light of their function? In particular, is the limited extent of disclosure and explicit guidance regarding relevant criteria for selection of arbitrators desirable?

The key point of my submission is that States and other stakeholders should reflect upon whether current practice of appointing authorities in investor-State dispute settlement fits within modern international dispute settlement at all; or fits only for some (particularly constituted) appointing authorities; or, finally, perhaps the limited disclosure and the delegation of hard policy calls to appointing authorities is the best possible solution, accurately reflecting the lack of underlying political consensus among the stakeholders.

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

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

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

4. The approach of Presidents of the International Court of Justice ('**ICJ**') and the International Tribunal for Law of the Sea ('**ITLOS**') to appointments of arbitrators illustrates this proposition. In the ICJ, 'it is clear that many of [appointments] have occurred in very important and very difficult cases that proved important for both law-application and law-making'.[1] The ICJ Statute does not address appointments itself, but the *Yearbook of the International Court of Justice* notes, in a section on 'Occasional Functions Entrusted to the President of the Court', that '[t]here are many international instruments which provide that in certain eventualities the President of the Court may be requested by the contracting parties to appoint arbitrators, umpires, members of conciliation commissions, etc.'.[2] The extent of disclosure of appointments appears to have changed over the years: up to 1982, *Yearbooks* noted appointments made in the particular year[3] (without further describing relevant considerations or procedural steps[4]). More

[1] M Reisman, 'The Supervisory Jurisdiction of the International Court of Justice: International Arbitration and International Adjudication' (1996) 258 Hague Recueil 9, 91.
[2] *Yearbook of the International Court of Justice 2014-2015* (Registry of the ICJ) 69.
[3] *Yearbook of the International Court of Justice 1982-1983* (Registry of the ICJ) 127.

recently, appointments are not noted in *Yearbooks*, even when they are made.[5] Overall, as Shabtai Rosenne put it, 'official publications ... are reticent about describing the manner in which these functions have been performed in individual cases'.[6] In ITLOS, appointments of arbitrators by the President are addressed in Article 3(e) of Annex VII of UNCLOS.[7] In practice, these appointments are very important. For example, China did not participate in *The South China Sea Arbitration,* therefore the President of ITLOS had to make the necessary appointment of four out of five arbitrators.[8] Similarly to appointments by the ICJ President, relevant considerations and procedural steps are not further described (although it has been suggested that in practice the necessary appointments take the form of a meeting of the parties with the President[9]).

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

2. THE FUNCTION OF APPOINTING AUTHORITIES IN INTERNATIONAL DISPUTE SETTLEMENT

6. The benchmark for evaluating the desirability of current practice is how satisfactorily it fulfils the function that appointing authorities have in international dispute settlement. It seems to me that the function of appointing authorities is best considered alongside other institutions and procedures for selecting adjudicators in international courts and tribunals (other than a choice by a single disputing party). Plainly, there are significant differences between procedures

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

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

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

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

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

[9] See comments at https://www.ejiltalk.org/self-appointment-in-international-arbitration/.

for selection of international adjudicators in various international courts and tribunals,[10] but the usual common denominator is a political choice by the relevant community, however constituted; sometimes exclusively so (for example, election of Judges of the International Court of Justice[11]), and sometimes in combination with further criteria and technocratic review procedures (for example, election of Judges of the International Criminal Court[12]). The key point is that these are hard choices, implicating hard questions of principle and power – possibly the hardest in international dispute settlement -- and are mostly resolved through explicit engagement and resolution in a public forum, increasingly by reference to explicit criteria set out by the relevant community. In the next section, I will consider whether it is desirable for appointing authorities in investor-State dispute settlement to follow a different approach, as they apparently do in current practice, dealing in turn with the disclosure of information (Section 3.A) and criteria for appointment of arbitrators (Section 3.B).

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

A. DISCLOSURE OF INFORMATION

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

8. *First*, there is no good reason. The limited disclosure of appointing authorities is an unreflective adoption of archaic and outdated practices. Judge Muhammad Zafrulla Khan, a former President of the ICJ, found historical antecedents for appointing authorities in the 19th century practice of naming as arbitrators sovereigns or governments -- that would then in their own turn, first in practice and then formally, nominate further individual(s) to act as arbitrators.[13] (The *Beagle Channel* case is a recent example of this practice, where Her Majesty's Government was the arbitrator, and for the purpose of fulfilling their duties appointed a Court of Arbitration

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

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

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

[13] MZ Khan, 'The Appointment of Arbitrators by the President of the International Court of Justice' 14 (1975) 14 Communicazioni e Studi 1021, 1022-3.

consisting of five Judges of the International Court of Justice.[14]) If this reading is right, then the understatement with which appointing institutions operate fits perfectly within the classic practices of unreasoned decisions and nominations by the great and good of the 19th century-world, but much less so in the 21st century international dispute settlement.

9. *Secondly,* a distinction has to be drawn between different appointing authorities. Some appointing authorities are themselves selected through a public and contested procedure, perhaps obviating the necessity for further disclosure. For example, some investment protection treaties provide for the President of the International Court of Justice as the appointing authority, who would necessarily have been elected both in the United Nations as well as by their judicial peers.[15] The Research Paper describes the selection process of the World Bank president (the ICSID appointing authority) ([69]-[77]) and the PCA Secretary-General (the PCA appointing authority ([94]-[96]), and perhaps the contestation by the respective political communities is deemed to be rigorous enough to obviate further disclosure. Conversely, it is less obvious that the method of constitution of other appointment authorities is one that involves relevant actors in a manner that would justify limited disclosure (e.g. essentially commercial arbitration appointing institutions with no State involvement).

10. *Thirdly,* the current practice is entirely proper. It accurately reflects the thinness of institutions and the lack of underlying political community in investor-State dispute settlement -- unlike, say, United Nations, the World Trade Organization, or the International Criminal Court. States have (so far) not created either judicial or political institutions in the field of international investment law that could contain public engagement with selection of adjudicators; there is reasonable disagreement whether and how such institutions should be created; and agreement on appointing institutions, without more, is an accurate reflection of the furthest reach of current consensus. Disagreement reduced to an institution, as it were.[16]

11. The Research Paper notes, rightly in my view, policy trade-offs involved in transparency ([21]). But to the extent that greater transparency is desirable – either because it is 'valuable in itself or useful as in instrument to achieve other goals' ([21]) – what information should be disclosed? One possible benchmark would be the function exercised by appointing authorities, which was suggested above to be analogous to institutions and procedures for selecting adjudicators in international courts and tribunals. At a rather high degree of abstraction, it would be plausible to expect information about (1) who has been selected, (2) by what procedure they have been selected (and, depending on the character of the procedure, by reference to what

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[14] *Dispute between Argentina and Chile Concerning the Beagle Channel* (1977) 21 RIAA 53, 63-4.
[15] E.g.1994 UK-India BIT http://investmentpolicyhub.unctad.org/Download/TreatyFile/1613 art 9(3)(c)(ii).
[16] Cf. P Allot, 'The Concept of International Law' (1999) 10 EJIL 31, 43.

criteria), and, possibly, (3) who else has been considered for selection (whether individually or by identifying relevant characteristics)[17]. Of course, demands for transparency will depend on the (perception of the) function exercised by authorities and by investor-State dispute settlement more generally, and information could be provided in various ways. But this a plausible starting point for discussing expectations of disclosure in modern international dispute settlement.

B. SELECTION OF ARBITRATORS

12. ICSID Newsletter published in January 2018 provides a note on designations to the ICSID Panels of Arbitrators and Conciliators. A section on 'qualifications' lists certain attributes as 'highly desirable for designees given the mandate of Panel members' (hinting, one imagines, at considerations that ICSID takes into account when it exercises its function of the appointing authority) as well as a section on 'expanding diversity'.[18] The points made are sensible and it is not my intention to criticise them. But it is worth emphasising that criteria for the selection of international adjudicators do not reflect natural and inescapable technocratic consensus. These are hard political choices made by States and other relevant stakeholders, possibly the hardest choices in dispute settlement ([6]) (for example, a permanent international court was not created at the 1907 Hague Peace Conference because of lack of agreement on the choice of judges).[19]

13. Choices of criteria for selection of adjudicators have been made differently for different international courts (and indeed differently for the same courts at different points in time). For example, Judges of the ICJ are elected by the General Assembly and the Security Council of the UN, reflecting an 'understanding' both as to the regional distribution and as to the (sometime) tradition of electing those candidates who come from the P5 countries.[20] Judges of the International Criminal Court are elected by the Assembly of States Parties, reflecting equitable geographical representation, fair representation of female and male judges, and expertise (List A judges have established competence in criminal law, while List B judges have competence in relevant areas of international law, such as international humanitarian law as well as human rights law), and great weight is attributed to recommendations of the Advisory Committee on Nomination of Judges.[21] The European Court of Human Rights and the Court of Justice of the

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[17] Cf. Research Paper [246].

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

[19] http://www.icj-cij.org/en/history.

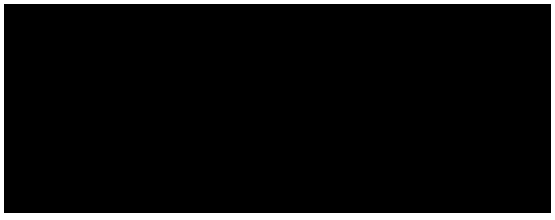
[20] R Higgins and ors, *Oppenheim's International Law: United Nations* (Volume II, OUP 2017) 1139-41.

[21] https://asp.icc-cpi.int/en_menus/asp/press%20releases/Pages/PR1338.aspx. See further S Barriga, 'Election Rules for ICC Judges: A Balanced Bench Through Quasi-Quotas', https://www.ejiltalk.org/election-rules-for-icc-judges-a-balanced-bench-through-quasi-quotas/, and 'Informal guide and commentary to the procedure for the

European Union provide further examples of the mixture of varied criteria, significantly changing alongside perceptions of judicial legitimacy, that may be taken into account in the appointment process.[22]

14. Decisions on selection of arbitrators in investor-State dispute settlement call for an engagement with these policy questions, if not explicitly then by necessary implication.[23] What expertise is required or desirable for an adjudicator, and how can it be demonstrated? Is there a need for a regional representation of adjudicators; what is the definition of and weight given to regions (and does it vary in differently constituted appointing authorities); and is the number of disputes involving States from a particular region a relevant consideration for appointment of arbitrators of a particular region? Is gender diversity a relevant, desirable, or compulsory consideration; is it evaluated by reference to candidates considered or candidates appointed; and what is the benchmark for achieving it? These are only some of the hard policy questions that appointing authorities have to necessarily form an opinion on to exercise their functions, and they can be – and have been – answered in legitimately different ways by different regimes of international dispute settlement.

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



nomination and election of judges to the International Criminal Court' ICC-ASP/16/INF.2 (5 May 2017) https://asp.icc-cpi.int/iccdocs/asp_docs/ASP16/ICC-ASP-16-INF2-ENG.pdf.

[22] M Bobek, *Selecting Europe's Judges* (OUP 2015).

[23] Cf. Kaufmann-Kohler and Potestà (n 10) III.B.