



Comments submitted by Switzerland on two UNCITRAL Draft Working Papers

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I. APPELLATE MECHANISM AND ENFORCEMENT ISSUES

A. General considerations

1. The Working Paper (“WP”) on the appeals mechanism (“AM”) provides a good overview of the main issues that States will need to consider if they decide to set up such a mechanism.
2. The creation of an AM primarily seeks to address two concerns voiced by States in the UNCITRAL WGIII discussions, i.e. (i) correctness in individual disputes, and (ii) consistency and coherence of case law. If appropriately designed, an AM, whether conceived as a stand-alone body or as part of a two-tier standing permanent institution (“MIC”), can positively contribute to both the correctness and consistency of ISDS decisions. The WP, however, rightly stresses the need to find “an appropriate balance between the possible benefits of an appellate mechanism and any potential costs” (WP, para. 3). In particular, this means providing for certain safeguards to avoid that an appeal becomes a full rehearing on each and every aspect of the case (e.g., full rehearing on the facts and evidence) and to discourage frivolous appeals (by introducing provisions on the dismissal of unmeritorious appeals, security of costs, etc. (see WP, para. 37).

B. Scope and standard of review

3. With respect to the questions on the grounds of appeal and their relationship with annulment grounds raised in WP, sect. II.A.1.(a), we are of the view that, if an AM is created, it should *replace* and *absorb* the existing annulment or set aside mechanisms. This is in part because grounds for appeal are normally broader than (and thus already include) the usual grounds for annulment. Furthermore, providing for a separate annulment on top of the appeal phase would *de facto* create a three-tier dispute



settlement system, which would go against the objective of efficiency in terms of time and costs, as the WP itself acknowledges at para. 8.

4. More specifically, while annulment solely centers on the review of the *integrity* of the proceedings and the award (i.e. lack of severe procedural defects), appeal focuses on both the *integrity* and the *substantive correctness*. This means that appeal grounds in a prospective AM should include both the typical annulment grounds, i.e. (1) lack of jurisdiction, (2) lack of independence and impartiality of the tribunal, and (3) due process violations, as well as typical appeal grounds, i.e. (4) error of law and, (5) to the extent UNCITRAL WGIII consider it necessary, (manifest) error of fact. Hence, any provision on grounds of appeal (see the options proposed at WP, para. 59 nos. 1-3), should, in our view, comprise of the foregoing four or five grounds.
5. With respect to ground of appeal no. (5) above, i.e. appeal on errors of *fact*, it would seem preferable to exclude such ground altogether, which would avoid fully rehearing cases. Instead, the appeal could be limited to errors of law, which would be sufficient to fix the concerns that are supposed to be remedied, i.e. lack of consistency of the case law and correctness of legal interpretations. It would also avoid the major drawback of appeals, i.e. longer duration and higher costs, about which there is consensus that they are a major concern.
6. Opening the doors to appeals on errors of fact, albeit manifest, entails the risk that every losing party will file an appeal hoping to convince the appeals tribunal that the error is manifest. That in and of itself will require briefing and a determination. In other words, there is a risk that the appeal becomes an opportunity to fully re-hear the entire case, including the oral evidence, rather than an opportunity of error correction of the first-instance decision.
7. We do recall, however, that in the preliminary discussions on appeals at one of the previous UNCITRAL WGIII sessions, many States spoke in favor of extending the appellate review to errors of fact. If such position were to be confirmed in the forthcoming discussions, our view is that at least a “manifest” threshold should be maintained, which would to some extent mitigate the shortcomings of a broad appellate review (see also below para. 10 on the standard of review).
8. Still in respect of the formulation of the grounds of appeal, we see no need to limit an error of law to certain substantive standards, as envisaged in some of the options in WP, para. 59, no. 1(a). “Errors in the application or interpretation of the law” would seem a preferable formulation. Furthermore, the suggestion at WP, para. 59, nos. 1(c) that an appeal may also lie in an “error in the application of the law to the facts of a case” appears confusing as it blurs the line between errors of fact and law. Similarly, the option provided at para. 59, no. 3, whereby the appellate tribunal “may also undertake a review of errors of law or fact in exceptional circumstances, to the extent they are not covered under paragraph (1) (a) and (b) above” appears unclear and unnecessary.
9. With regard to the relationship with annulment remedies, it bears noting that the introduction of an AM may significantly affect the role of domestic courts in controlling the arbitration – a question that is flagged by the WP at paras. 9 and 24. These

aspects will need to be carefully examined if an AM for investor-State arbitral awards is established. The legal issues to be considered in this context are significant and require taking into account the distinctions between ICSID and non-ICSID arbitrations, which are subject to different legal regimes¹.

10. With regard to the standard of review, and assuming the scope will also extend to errors of fact, as mentioned above, we agree that it appears wise to limit errors of fact to “manifest” or “egregious” errors. This would entail that the appellate tribunal when examining the facts will be bound to grant the first instance tribunal at least some degree of deference in respect of fact-finding (see also the considerations made at WP, para. 13). In other words, the appellate tribunal will not be able to reverse the decision simply if it disagrees with a factual finding, but only where such factual finding is, for instance, untenable. Of course, that untenable fact would also need to be relevant and material to the outcome of the dispute to justify a reversal.

C. Appealable decisions

11. We have the following comments in connection with the questions asked in the WP as to which decisions should be subject to appeal (paras. 18-22):
 - We see no need to provide for an appeal over decisions on challenge of ISDS tribunal members, as such step may overburden the AM, and challenges are the main delaying factor (together with bifurcation);² moreover, the decisions on challenges of tribunal members could be attacked together with the final award if the latter was rendered by one or more arbitrators whose independence and impartiality was affirmed in challenge proceedings but which remain disputed;
 - Interim measures granted by the first-instance tribunal should not be appealable before the AM, as they are by definition not final and can be revised at any time by the tribunal who has issued them depending on the circumstances;
 - With regard to decisions on jurisdiction, there are both benefits and drawbacks in allowing for an immediate appeal as opposed to postponing the appeal until the final decision on the merits is rendered. To make a parallel with the annulment framework, in Switzerland, for instance, decisions on jurisdictions (named preliminary awards on jurisdiction) must be appealed immediately (Art. 190(3) of the Federal Law on Private International Law); in the ICSID Convention framework, by contrast, only a final award is subject to annulment; hence, a party dissatisfied with a decision on jurisdiction rendered in an ICSID bifurcated procedure must wait until the end of the proceeding to challenge the tribunal’s jurisdictional findings. The first system has the benefit of achieving immediate clarity over an important question, although it opens the path for potentially more than one challenge

¹ See Gabrielle Kaufmann-Kohler and Michele Potestà (2020), *The Path to Reform of ISDS: What Role for National Courts?*, in: *Investor-State Dispute Settlement and National Courts*, European Yearbook of International Economic Law, Springer, chap. 4.3 (which contains a more detailed discussion of these issues).

² See D. Behn, M. Langford, *et al*, *Empirical Perspectives on Investment Arbitration: What Do We Know? Does It Matter?*, Academic Forum Paper, available at https://brill.com/view/journals/jwit/21/2-3/article-p188_2.xml, sect. 2.3.2 (discussing studies which find that “[t]he most significant delay factors concern procedural events that occur during an arbitration, namely bifurcation, arbitrator challenges and arbitrator replacement”).

proceedings (e.g. one on the decision on jurisdiction and another one subsequently on the final award on the merits). It also risks causing a stay of the first instance proceedings until the annulment is decided, which is a delay factor. The second system seeks to avoid that the challenge proceedings slow down the overall process and concentrates all challenges to the award into one proceeding. The drawback is that if a final award is annulled on jurisdictional grounds, the merits phase will have been carried out for nothing. This being said, we have no strong views on whether one system should be preferred over the other. This may also depend on the final overall design of the AM. In any event, if UNCITRAL WGIII was to opt for an immediate appeal of jurisdictional decisions, it should consider enacting safeguards to prevent an automatic suspension of the first instance proceedings pending the appeal (see also WP, para. 26), unless the appeal tribunal decides otherwise. This would help to protect against dilatory appeals.

D. Effect of appeal

12. As the WP correctly notes (para. 27), the appeal tribunal should be able to affirm, reverse or modify the decision of the first-tier tribunal and render a final decision that replaces the first instance decision. It should, however, also be able to *annul* the decision, if certain annulment grounds are found to exist. For instance, if an appeal succeeds on the ground of lack of independence/impartiality of a tribunal member, the consequence may be that the decision is annulled and the case resubmitted to a fresh tribunal.
13. If the record before the appeals tribunal allows it, the latter should have the power to render a final decision putting an end to the dispute. If this is not possible, it may remand the matter to the first-tier tribunal (WP, paras. 28-30). It is thus important to provide for remand authority, especially but not only if an appeal is allowed only for errors of law, to avoid that the appellate tribunal is unable to complete the analysis because it has insufficient information on the facts. The language suggested at para. 59, no. 9, thus appears appropriate.
14. One aspect that does not appear to be considered in the WP is whether the first-instance tribunal on remand should be bound by the legal findings made by the appellate tribunal. It would seem that an affirmative answer should be given to that question.
15. Finally, if an appeal succeeds based on the ground of lack of independence of one or more of the tribunal members, it is obviously not possible to remand the case to the same first-instance tribunal. In that situation, the case should be submitted to a new tribunal (similar to what presently happens in the ICSID context in case of annulment).

E. Enforcement

16. The enforceability of the decisions of ISDS mechanisms is of key importance for the overall effectiveness of the system. One of the advantages of the existing ISDS system is the possibility for parties to enforce the award under international treaties, in particular the New York Convention (“NYC”) and the ICSID Convention. Hence, every effort

should be made to create an enforcement regime which ensures a comparable level of effectiveness.

17. In Switzerland's view, the question of enforcement of decisions subject to appeal presents different issues depending on whether the appeal level is built on the "traditional" investor-state arbitration model (1) or whether it is built on a new permanent first-tier level (i.e. the envisaged MIC) (2).

1. Appeal to arbitration

18. Starting from an appeal to arbitration, the addition of an AM does not change the nature of the process as arbitration. As the WP mentions at para. 42, there are already a number of arbitration rules that provide for internal appellate mechanisms. Hence, for non-ICSID awards the addition of an appellate layer does not, in our view, affect the enforceability of an award under the NYC.
19. By contrast, for ICSID awards that would be made subject to an appeal, there are two main questions to consider. First: whether an *inter se* modification under Article 41 VCLT³ is permissible given the fact that under the ICSID Convention, ICSID awards are not subject to appeal. Although the issue is not uncontroverted, a number of studies carried out recently have examined this treaty law question and have come to the conclusion that such an *inter se* modification would in principle be permissible. We refer to the First CIDS Report for further explanations on this question, in particular on whether the conditions under Article 41 VCLT would be met (WP, paras. 53 ff.).⁴ We also look forward to reviewing the forthcoming "more detailed paper" which ICSID is preparing on this issue and which is mentioned at WP, para. 56.
20. The second question is whether in *third countries* that do not consent to the new AM ICSID awards that would be subject to appeal could benefit from the enforcement regime under Article 54 of the ICSID Convention. We are of the view that non-parties to the *inter se* modification would not be bound by the special enforcement regime that were to be established along the lines of Article 54 of the ICSID Convention. Rather, they would be in a situation similar to that of non-ICSID Contracting Parties in respect of an ICSID award. In other words, those States would have to enforce the ICSID award in accordance with the NYC.⁵

³ By contrast, an "amendment" of the ICSID Convention under Article 66 of the ICSID Convention does not appear to be feasible in practice as it would require the agreement and ratification by all Contracting States (currently more than 160).

⁴ See Gabrielle Kaufmann-Kohler and Michele Potestà (2016), *First CIDS Report*, Section VII.B.2. See also Brian McGarry and Josef Ostfanský (2017), *Is the Law of Treaties an Obstacle or a conduit for the reform of investor-state dispute settlement?*, *Emory International Law Review*, Vol. 32, pp. 1001-1013. For a different view, see Nicolas Jansen Calamita (2017), *The (In)Compatibility of Appellate Mechanisms with Existing Instruments of the Investment Treaty Regime*, *Journal of World Investment and Trade*, Vol. 18, Issue 4, pp. 585-627

⁵ See Gabrielle Kaufmann-Kohler and Michele Potestà (2016), *First CIDS Report*, paras. 200, 245.

2. Appeal in a MIC scenario

21. With regard to enforcement of decisions issued by a *permanent court* (composed by a standing first instance body and a standing appellate tribunal), the issues that arise are more complex. In this context, one must especially distinguish between enforcement in Contracting States to the new court and in third states. Enforcement in Contracting States to the potential MIC would pose no major problems, because Contracting Parties would be able to agree an enforcement regime between themselves when creating or adhering to the MIC.
22. The actual challenge relates to enforcement *in third states*, as courts of third states would ultimately have the last word when it comes to enforcement of a MIC decision in their territories. A number of papers and reports have carried out an in-depth examination of this issue. The First CIDS report, among others, has reviewed the extent to which MIC decisions subject to an appeal could be viewed to fall within the scope of the NYC, and in particular the extent to which those decisions could be deemed products of a “permanent arbitral body” under Article 1(2) NYC.⁶ Considering the MIC as a “permanent arbitral body” would allow decisions rendered by the first instance permanent body and/or the appeal tribunal to benefit from the enforcement regime provided under the Convention.
23. In that connection, we note that the WP suggests a number of options to address the possible uncertainty linked to the enforceability of appellate decisions rendered by a MIC (para. 43). In our view, the most effective option would be to prepare a recommendation on the interpretation of Article 1(2) of the NYC, which would provide that the Convention applies to decisions rendered by the MIC.⁷ As the WP recalls, UNCITRAL has adopted similar recommendations on the interpretation of the NYC in the past.

F. Remedies against the appeal decision

24. WP, para. 59, no. 10, proposes that “[t]he appellate [body][court][tribunal] may correct any errors in computation, any clerical or typographical errors or any errors of similar nature on its own initiative within [thirty] days of the date of the decision it rendered”. In addition to correction, which is the remedy envisaged in the proposed provision, consideration should also be given to other post-award remedies which are normally provided in connection with judgments and awards, in particular interpretation and revision.

G. The role of treaty parties

25. WP, para. 62, briefly discusses joint interpretations by treaty parties and their possible effect on appeal proceedings. As also discussed at the 39th session of UNCITRAL

⁶ See First CIDS Report, sections V.E and VI.E. See also Michele Potestà, *Challenges And Prospects For The Establishment Of A Multilateral Investment Court: Quo Vadis Enforcement?* in: Ch. Klausegger, P. Klein et al. (Eds), *Austrian Yearbook on International Arbitration 2018*, Vienna 2018, pp. 157 – 178.

⁷ See also First CIDS Report, para. 155.

WGIII, the effect of a binding interpretation by treaty parties on *ongoing* ISDS proceedings should be carefully considered. Indeed, once the proceedings are pending, the disputing State should not have the power to influence the outcome by agreeing on an interpretation that would bind the tribunal. It is - and it should remain - the task of tribunals, including a potential appellate tribunal, to interpret and apply investment treaties in order to decide individual disputes. Hence, consistent with due process and the rule of law, joint treaty interpretation by state parties should in principle not apply to ongoing ISDS proceedings, whether first-instance or appellate.

26. Furthermore, WP, para. 62, briefly flags the question “whether a decision by an appellate tribunal should be subject to confirmation or some review by the States parties to the relevant investment treaty”. This appears wholly inappropriate as it would give the power to review a decision to one of the parties subject to that decision. It would further run contrary to one of the main purposes of investor-state dispute settlement, which is to de-politicize investment disputes.

H. Possible models of appellate mechanisms

27. Finally, the WP discusses, at paras. 63-69, possible models of AMs. In our view, and keeping in mind that one of the principal, if not *the* principal, reason for introducing an AM would be to foster consistency in case law, only a multilateral standing AM (whether built on the existing system or as part of a MIC) would be able to ensure such consistency. By contrast, multiple *ad hoc* or treaty-by treaty AMs (see WP, para. 63) would be unlikely to make any significant contribution to the overall consistency of the jurisprudence. At best they would strengthen the internal consistency in respect of the particular IIA under which they are created; at worst, they would further increase the fragmentation of the system.

II. SELECTION AND APPOINTMENT OF ISDS TRIBUNAL MEMBERS

28. Selection and appointment of ISDS adjudicators is a key issue in the ISDS reform discussions.

A. Individual qualifications and other requirements

29. We note that in respect of qualifications and other related aspects, the Secretariat's WP sometimes refers to the Draft Code of Conduct prepared jointly by ICSID and UNCITRAL. The present comments are limited to the WP itself and do not cover the Draft Code of Conduct, on which comments will be provided separately.

30. With regard to qualifications, it is obviously important that ISDS adjudicators be well qualified to hear the specific types of disputes that arise under investment treaties. As a general observation, we agree with the WP's remark that those qualifications should not be "too many or too strict, so as to avoid impacting negatively the pool of qualified individuals, which would run against the aim of achieving diversity" (WP, para. 8).

31. In our view, it appears essential that an ISDS adjudicator have expertise and experience in international law or international investment law and familiarity with international dispute settlement – i.e. be competent in the subject-matter at issue in ISDS disputes and in the techniques of dispute resolution. Among the options considered at WP, para. 9, we see no need for the following qualifications:

- Expertise in "international trade" is not strictly necessary: ISDS disputes deal with investment law, not trade law in the strict sense.
- Similarly, there appears to be no need that an ISDS adjudicator "have an understanding ... of issues of sustainable development", as such requirement is vague and undefined.
- The requirement that an ISDS adjudicator "have an understanding ... of how governments operate" is similarly unclear. It may have the effect of restricting the pool to (former) government officials. In this respect, when formulating individual qualification requirements, the emphasis should be placed on the candidates' competence rather than on a specific prior professional activity. Expertise and experience in international law and international investment law and familiarity with international dispute settlement are skills that may be acquired in a variety of ways, including through the practice of law as a judge or practitioner, teaching and research as an academic, service as government officials (e.g., State officials active in the defense of investment claims or in the negotiation of IIAs), and work in international organizations active in dispute settlement. Diversity in professional backgrounds may well be beneficial to the tribunal. However, it should not form part of the mandatory qualification requirements.
- Finally, requiring that ISDS adjudicators possess "specific knowledge relevant to the dispute at hand, for example, industry-specific knowledge, knowledge of the relevant domestic legal system and calculation of damages" does not appear strictly necessary. First, as already noted, the key knowledge required in ISDS disputes relates to international investment law. Industry-specific knowledge, e.g. mining, oil and gas, construction, while useful, is less important in ISDS

disputes than in other settings (e.g., commercial arbitration). It thus need not be spelled out specifically. Second, “knowledge of the relevant domestic legal system” cannot be a prerequisite, as this would favour arbitrators of the nationality of the host State (as those that are more likely to be familiar with the domestic legal system at issue), which would limit the pool and may impact impartiality. Again, ISDS primarily involves making decisions based on *international* rather than domestic law and, where issues of national law come up, reasonably educated jurists can decide matters in a law in which they are not trained if briefed by the parties. Finally, while an understanding on the “calculation of damages” is often useful and not always sufficiently present nowadays, it may be difficult to verify that such requirement is met in practice. We thus see practical hurdles in making it a mandatory qualification requirement.

32. With regard to diversity (in particular gender and geographic) (WP, paras. 14 ff.), we agree that it is an important concern for the long-term legitimacy of the system (WP, para. 14). In a system in which the appointments are primarily made by the disputing parties (as in the current ISDS system), it is difficult to make significant progress in this regard. This is, *inter alia*, because (i) the typical appointment process inevitably leads to reliance on known arbitrators who have a proven track record (which tends to perpetuate the existing non-diverse pool and exclude newcomers from underrepresented groups), and (ii) the disputing parties are neither tasked with nor interested in broadening the adjudicator pool, which is a systemic concern rather than their immediate concern. Hence, in our view, in the existing system, diversity can only be realistically advanced if a greater role in the appointment process is given to arbitral institutions who can implement diversity-driven policies more forcefully. Currently, the statistics confirm that institutional appointments are more diverse than party appointments, but they are also much less frequent. To encourage this trend further, States should give institutions the mandate to actively pursue diverse appointments (see below para. 34). There is in our view more scope to achieve greater diversity if one moves to a semi-permanent (roster) or permanent (MIC) system, as diversity considerations/requirements can be built into the selection requirements to compose the roster or bench as a whole (see below para. 43).

B. Methods of selection and appointment

33. In connection with the possible improvement to the selection and appointment processes, the WP distinguishes essentially between three main scenarios, i.e. (1) incremental improvements to the current system; (2) roster-based options; and (3) establishment of a permanent or standing mechanism.

1. Improvements to the current *ad hoc* system

34. The WP raises the following questions:
- “*Whether the selection and appointment [should] be made fully or partially by the appointing authority and by whom within the appointing authority*” (WP, para. 26)
- In our view, there would be several advantages in entrusting appointments to the appointment authorities, i.e. essentially the arbitral institutions, first and

foremost in terms of independence and impartiality (as the co-arbitrators would feel no “loyalty” vis-à-vis the appointing party and would not be selected for their pre-existing views (i.e. “pro-investor”/ “pro-State” arbitrators)). It would also be easier to ensure the desired diversity on the panel, provided the institutions receive a mandate by States to make diverse appointments. Of course, shifting the appointment power from the disputing parties to the arbitral institutions would not *per se* resolve the legitimacy issues. Rather, it would shift them to the institutions. There may in particular be risks that too much power is concentrated in very few people or groups of people who will *de facto* determine the composition of most investment tribunals. For that reason, transparency in the internal institutional selection process and mechanisms will be key to ensure the institutions’ accountability (see also the concerns flagged at WP, para. 31).

- “*Whether the selection and appointment by the appointing authority would be made through a roster*” (WP, para. 29)

We refer to our comments on the roster below.

- “*Whether more than one institution would serve as appointing authority*” (WP, para. 30)

What matters is that the appointments be entrusted to institutions who deal with investment disputes and, as a result, have actual insight in arbitrators’ profiles and performance. The two main ones are obviously ICSID and the PCA. This said, it may happen that an institution lacks independence in respect of a dispute or party. In such a case, that institution should have the possibility – and the obligation – to refer the appointment to another pre-identified institution.

- “*How to ensure transparency and accountability*” (WP, para. 31)

As mentioned above, if institutions are to assume an enhanced role in the appointment process, this needs to be accompanied by greater transparency and mechanisms to ensure their effective accountability, to pre-empt the rise of new legitimacy concerns. Practically, it would mean that the institution must have rules about who makes the appointment and how, these rules must be published, there is an oversight mechanism, etc.

2. Roster

35. As the WP notes, the use of a roster, i.e. a pre-established list of individuals, could be envisaged in several scenarios. The two main ones⁸ are the following (i) disputing parties select the tribunal members from the roster; or (ii) the appointing authorities select them from the roster. Creating a roster would have both advantages and drawbacks in each of these scenarios, as discussed below.

⁸ Further combinations can of course be conceived, e.g. arbitral institutions pick from the roster in consultations with the disputing parties; or disputing parties can pick the co-arbitrators (whether from the roster or not) and the arbitral institutions pick the chair from the roster; etc. For simplicity, we only discuss the two main scenarios referred to in the text.

i. Disputing parties select from the roster

36. Under this option, disputing parties would be allowed to select tribunal members among a restricted pool (or closed list), based on past performance, specific expertise, skills and background. This option may encounter the favor of those disputing parties who value the ability to appoint “their” adjudicator and to influence the choice of the chair (if the chair is to be appointed by the party appointees).
37. While the roster system is an interesting attempt to bridge the gap between proponents and opponents of party-appointment, it will not address all the concerns expressed against party-appointment which is regarded by many as one of the most critical features of the current system. The roster system would not do away with adjudicator bias in favor of the appointing disputing party nor with the resulting excessive power placed in the hands of the chair of the tribunal. Furthermore, one can anticipate that in a roster model, individuals on the roster may be tempted to profile themselves as either pro-investor or pro-State in order to secure appointments, with an ensuing risk of polarization.
38. Hence, in our view, it is doubtful that a roster model from which disputing parties can select the adjudicators would adequately address all the current concerns and would not rather replicate at least part of the existing problems. At the same time, it cannot be ruled out that at a certain stage of the reform efforts, States might reach to it as a compromise solution. If this were to occur, one would have to assess in light of all the viable options whether the remedy is worse than the evil or whether it does provide some improvement.

ii. Arbitral institutions select from the roster

39. If the choice from the roster is left to the appointing authority, i.e. the arbitral institutions, the drawbacks just mentioned would be alleviated, as one could expect that the institution would select the “best” individuals without regard to their inclination to the disputing parties’ views.
40. This being said, whoever picks the individuals to sit in the actual tribunal that must resolve the dispute (whether the disputing parties or the appointing authority), the key question is how individuals are selected to the roster. In other words, if the selection process whereby States (or other actors) select the individual on the roster is flawed, then the end result might be worse than the current system as the disputing parties/arbitral institutions would be restricted to a pool of “bad” candidates. Indeed, currently disputing parties are not limited in their choice and the adjudicators who are part of what could be called the informal roster are selected by market forces based on their performance. To avoid ending up with a pool of “bad” candidates, States would need to consider issues similar to those that arise in the design of selection procedures of a permanent body (on which see next section). In short, for the establishment of a roster, as for a permanent body, it is key that selection of the adjudicators is carried out through a procedure that is multi-layered, transparent, and open to stakeholders. It is crucial that mechanism are put in place aimed at minimizing risks of political

considerations in the appointment and at ensuring that the choice of the adjudicators can be made from among a large number of highly qualified candidates.

3. Permanent or standing body (MIC)

41. The composition of a potential MIC will be instrumental in determining the success and legitimacy of such an institution, as States, investors and other stakeholders will evaluate whether the composition of the MIC affords sufficient guarantees that it will perform its functions fairly, impartially, and in accordance with the mandate conferred upon it. In connection with the selection procedures of adjudicators in a potential MIC (WP, paras. 45 ff.), from Switzerland's viewpoint, two aspects merit particular consideration and are addressed below: (a) the definition of the qualifications for each *individual* adjudicator as well as for the MIC *as a whole* and (b) the design of the selection process. In this respect, due consideration should be given to the CIDS Supplemental Report⁹, which provides further details and analysis on these and other points in connection with the composition of a potential MIC.

a. Individual qualifications and requirements for the MIC as a whole

42. As a preliminary matter, it will be crucial to define the *individual* requirements for adjudicators as well as the criteria for the composition of the MIC *as a whole*. In respect of individual requirements, we have already addressed the relevant qualities and qualifications above *sub A*.
43. Setting *individual* qualifications will, however, not be sufficient, as a potential MIC needs to abide by certain requirements for its composition *as a whole*. This aspect concerns in particular diversity and representativeness of the court, which will be essential to enhance its legitimacy, provided the composition is a reflection of those for whom the adjudicatory body renders justice. In this respect, the selection process will need to guarantee sufficient *geographic* and *gender* representation. Recent reforms to permanent courts such as the International Criminal Court (ICC) or the ECtHR show how diversity criteria can be effectively factored into the selection process.¹⁰
44. Finally, the MIC must be endowed with strong guarantees of *independence* both structurally and for the concrete exercise of the members' adjudicatory functions. Several mechanisms would need to be put in place to shield the institution collectively and the judges individually from external influences, some of which are also discussed in the WP (see esp. paras. 66 ff.). The most important ones are security of tenure, terms of office (longer, non-renewable terms are likely to strengthen independence), financial security, adequate resources, rules on incompatibilities, privileges and immunities, and case assignment rules¹¹.

⁹ See Gabrielle Kaufmann-Kohler and Michele Potestà (2017), *CIDS Supplemental Report*.

¹⁰ See further CIDS Supplemental Report, sect. III.B.3.

¹¹ See more extensively CIDS Supplemental Report, sect. III.4.b.

b. Selection process

45. With regard to the selection process, it is important to note as a general matter that the method for selecting adjudicators, be it at the national or international level, is crucial for purposes of structural independence. This will be no different for the potential MIC. In this context, independence will have to be guaranteed mostly (though not only) by and vis-à-vis the treaty parties, i.e. the contracting States to the MIC Statute, since States will be in control of the selection process as a result of the shift from an *ad hoc* to a permanent dispute resolution framework. Designing a selection process that, *inter alia*, ensures that adjudicators are independent from the constituent States appears more critical here than in the present ISDS setting, as for the MIC only one type of disputing parties controls the selection process (the States).
46. As the practice at existing permanent international courts and tribunals shows, the involvement of States (and, within the State apparatus, in particular of State *governments*) may lead to risks of politicization of the selection process. This is true in both full representation and selective representation courts (a distinction made also by the WP at paras. 48 ff.). Appointment on the basis of political considerations rather than competence and merit may undermine the quality of the decisions and, ultimately, the adjudicatory body's independence, credibility and legitimacy.
47. While a completely de-politicized selection process may perhaps not be conceivable, the process should provide incentives for States to appoint the most suitable candidates in terms of competence and merit and impose checks and balances on the States' choices. A process that guarantees selection on the basis of expertise and integrity, rather than of mere political considerations, will best ensure that elected judges will serve "in their individual capacity",¹² and not as representatives of a given country or of certain views and interests.
48. On the basis of recent experiences with international courts and tribunals, the objectives of ensuring that adjudicators are appointed on the basis of expertise and integrity are more likely to be fulfilled if the selection process is (i) multi-layered; (ii) open to stakeholders; and (iii) transparent (see also WP, paras. 61-63).
49. First, the selection of the "best" candidates is more likely to be ensured by a *multi-layered* process, where a number of phases constrain the potentially wide discretion which States enjoy in selecting the adjudicators. Indeed, individual criteria established by the constitutive instruments, such as "high moral character" or eligibility to a high judicial office, leave broad discretion in the choice of the candidates. Procedures that provide checks and balances make certain that such discretion is not misused. For instance, in a number of courts and tribunals, an expert advisory panel has been created to screen the qualifications of candidates put forward by the treaty parties. The presence of such a screening panel creates an incentive for States to propose and ultimately elect the most qualified candidates. The WP, para. 62, rightly refers to some of the relevant examples, which in Switzerland's view could serve as useful models in this context.

¹² See, e.g., ECHR, Art. 21(2) ("The judges shall sit on the Court in their individual capacity").

50. In alternative to nominations put forward by treaty parties, it might be useful to envisage an “open call for candidatures”, to allow any interested individual with the necessary qualification requirements to put forward his or her own candidature. A call for candidatures would open up the pool of candidates beyond those individuals that are already under their governments’ radar and give States more opportunities of choice. Designing selection procedures that effectively allow candidates to be chosen from a wide pool appears particularly important given the criticism voiced against politicized and non-transparent selection methods in certain international courts.
51. Second, the process should be *open* to the consideration of views of multiple stakeholders. One step in the process should thus make sure that the views of stakeholders other than States are heard in respect of the selection of candidates. This applies in particular to investors. Hence, the selection process should include a “consultations” step, in which relevant stakeholders are heard.
52. Third, the process should be *transparent*. Subjecting procedures to scrutiny from the public is likely to reduce the selection of candidates based on improper motives. It can also serve the purpose of widening the potential pool of candidates and, like the consultations referred to above, will improve the legitimacy of the institution. Recent reforms in other frameworks¹³ show that several means can increase transparency in the selection process, including the advertisement of openings; consultation with stakeholders; publication of CVs of candidates (preferably in a standard form so as to allow easier comparability of their qualifications);¹⁴ and public hearings of candidates.

¹³ Reforms carried out over the last 10-15 years in the context of the Council of Europe and the ECtHR have greatly enhanced transparency in the selection process. See in particular PACE (2009), *Nomination of candidates and election of judges to the European Court of Human Rights*, 27 January 2009, Resolution 1646 (2009), esp. para. 4; Council of Europe (2012a), *Guidelines of the Committee of Ministers on the Selection of Candidates for the post of Judge at the European Court of Human Rights*, Committee of Ministers, 29 March 2012, CM (2012) 40-final, as amended by Council of Europe (2012b), *Guidelines of the Committee of Ministers on the Selection of Candidates for the post of Judge at the European Court of Human Rights*, Committee of Ministers, 29 March 2012, CM(2012)40-add.

¹⁴ As is required now at the ICC (see ICC (2013a), *Report of the Advisory Committee on Nominations of Judges on the work of its second meeting*, Assembly of States Parties, 12th Session, ICC-ASP/12/47 (29 October 2013), Annex III); and at the ECtHR (see PACE (1996), *Procedure for examining candidatures for the election of judges to the European Court of Human Rights*, 22 April 1996, Resolution 1082 (1996), para. 4 and Appendix).