



City Research Online

City, University of London Institutional Repository

Citation: Zulker Nayeem, M. S. ORCID: 0000-0001-5242-8728 (2021). Composition of ad hoc Committee for annulling ICSID arbitral award: Appraising the participation of Parties and Contracting States (City Law School Research Paper 2021/12). London: City Law School, City, University of London.

This is the published version of the paper.

This version of the publication may differ from the final published version.

Permanent repository link: <https://openaccess.city.ac.uk/id/eprint/27237/>

Link to published version: City Law School Research Paper 2021/12

Copyright: City Research Online aims to make research outputs of City, University of London available to a wider audience. Copyright and Moral Rights remain with the author(s) and/or copyright holders. URLs from City Research Online may be freely distributed and linked to.

Reuse: Copies of full items can be used for personal research or study, educational, or not-for-profit purposes without prior permission or charge. Provided that the authors, title and full bibliographic details are credited, a hyperlink and/or URL is given for the original metadata page and the content is not changed in any way.

City Research Online:

<http://openaccess.city.ac.uk/>

publications@city.ac.uk



THE CITY
LAW SCHOOL
CITY, UNIVERSITY OF LONDON
— EST 1894 —

Academic excellence for business and the
professions



City Law School Research Paper 2021/12

Composition of *ad hoc* Committee for annulling ICSID arbitral award: Appraising the participation of Parties and Contracting States

Name: Sekander Zulker Nayeem

Date: December 2021

Sekander Zulker Nayeem
The City Law School

This text may be downloaded for personal research purposes only. Any additional reproduction for other purposes, whether in hard copy or electronically, requires the consent of the author(s). If cited or quoted, reference should be made to the name(s) of the author(s), the title, the number, and the working paper series

All rights reserved.

© 2021

The City Law School Working Paper Series are published by The City Law School, City University
London, Northampton Square, London, EC1V 0HB.

An index to the working papers in The City Law School Working Paper Series is located at:
www.city.ac.uk/law/research/working-papers

Composition of *ad hoc* Committee for annulling ICSID arbitral award: Appraising the participation of Parties and Contracting States

Published in Rajshahi University Law Review (2021) Vol. XI, p. 131-145

Sekander Zulker Nayeen*

Abstract

The International Centre for Settlement of Investment Dispute (ICSID) provides a delocalized system for reviewing an arbitral award passed by its original tribunal. In this system, review against any arbitral decision is heard and decided by an '*ad hoc* Committee' composed by the Chairman of the Administrative Council of ICSID. Some commentators criticize that the present Committee-composition system confines the party-autonomy and effective participation of ICSID Contracting States in the process. Consequently, some stipulations regarding the qualifications of the arbitrators are not being fully sustained, and the parties are not getting their disputes resolved by the arbitrators they desire. The present study approaches to the ways of ensuring party-autonomy, the participation of the parties and Contracting States in the composition of the *ad hoc* Committee. In doing so, the compositions of World Trade Organization (WTO) Appellate Body and the International Court of Justice (ICJ) have been discussed to entice an analogy with that of ICSID *ad hoc* Committee.

Keywords: Composition of *ad hoc* Committee, Discretion of the Chairman, Party autonomy, Qualification and experience of arbitrators, WTO Appellate Body.

* PhD Student at the City, University of London under the auspices of City Law School Doctoral Scholarship; he is an Additional District and Sessions Judge, Bangladesh Judiciary, and the UK Government's Chevening Scholar. This article is a modified version of a chapter of his LLM dissertation that was submitted to the City, University of London. The author acknowledges the cordial assistance of his supervisor Professor David Collins in accomplishing this research.

I. Introduction

The *ad hoc* Committee¹ (annulment Committee) is a superior authority in ICSID system established to review an award passed by ICSID tribunal. The composition of this Committee is considerably different from other arbitral regimes and even largely different from the composition of arbitral tribunal under the ICSID Convention itself.² It is composed of three members selected by the Chairman of the Administrative Council of ICSID (hereinafter as the Chairman) on receipt of request from the Secretary General upon registration of an application for annulment.³ This procedure of constituting *ad hoc* Committee broaches some debates, such as, it gives unhindered discretion to the Chairman in composing the Committee which affects the principle of party autonomy especially the parties' participation in selecting and constituting the Committee; it only leaves limited or indirect scope of participation for Contracting States to form the Committee. Given the situations, part-II of this study analyzes- how the composition of *ad hoc* Committee undermines party-autonomy to the extent of appointment of arbitrators. Part-III analyzes- how the greater participation of the parties and Contracting States could minimize the problems arose in part-II. The scope of this paper is strictly confined within some narrower, but significant arbitration principles- such as, party-autonomy and party-participation in the composition of the ICSID arbitral review forum. In theorizing these principles into the ICSID review regime a qualitative research has been carried out throughout the paper.

II. Party autonomy and the composition of *ad hoc* Committee

The procedure for composing *ad hoc* Committee seems contrary to the principle of party autonomy. Generally, party autonomy in its absolute sense means that the parties will have control in all aspects of the proceedings including the composition of the arbitral tribunal and the rules governing the proceedings.⁴ The party autonomy especially parties' participation in appointing arbitrators⁵ is historically recognized in investment arbitration.⁶ Under this principle, investment arbitration provides the parties some privileges of constituting the tribunal and choosing suitable laws. ICSID system also recognizes party

¹ In this study, it would, sometimes, be called as 'annulment Committee' or simply 'Committee'.

² Generally, the primary arbitral tribunal under ICSID Convention consists of an uneven number of arbitrators. Each party appoints one arbitrator, and the arbitrators attempt to agree on the third arbitrator, the President of the Tribunal. If the party-appointed arbitrators fail to agree, the Secretary-General (or the Chairman of the Administrative Council) of ICSID appoints the President. In appointing their arbitrators the parties enjoy unhindered party-autonomy because they are not bound to select them from the Panel of Arbitrators of ICSID. The system is almost same in case of other arbitral regimes.

³ ICSID Convention art 52(3) and Arbitration Rules rule 52

⁴ Anoosha Boralessa, 'Limitations of Party Autonomy in ICSIS Arbitration' (2004) 15 *The American Review of International Arbitration* 253, 266

⁵ Julian D. M. Lew, Loukas A. Mistelis, et al., *Comparative International Commercial Arbitration*, (© Kluwer Law International; Kluwer Law International 2003) para 10-4

⁶ Joseph M. Matthews, 'Difficult Transitions Do Not Always Require Major Adjustment- It's Not Time to Abandon Party-Nominated Arbitrators in Investment Arbitration' (2010) 25 *ICSID Rev. Foreign Investment Law Journal* 356, 359.

autonomy in constituting the original arbitral tribunal.⁷ Party autonomy in ICSID is so wide that it does not limit the party to appoint an arbitrator even out of the panel of ICSID-arbitrators.⁸ However, the scenario is radically reverse for the composition of annulment Committee. It deprives the parties from a fundamental privilege of choosing international arbitration i.e. the party-appointment.⁹ The first deprivation starts with the restriction upon selecting members of *ad hoc* Committee from the ICSID's panel of arbitrators only. It ultimately restricts the parties' expectation to get the dispute resolved by a qualified arbitrator of their choice. The second deprivation starts with the parties' non-participation and the Chairman's discretion in constituting the Committee. These two matters will be discussed elaborately in the following paragraphs.

A. The question of qualifications of the panel members

Since there is no party-appointment, the annulment Committee is supposed to be composed of renowned experts in the field of investment arbitration with a view to satisfying the parties about the standard of the decision. Some commentators claimed that the members of the *ad hoc* Committees are usually experts in investment arbitration.¹⁰ But how a party would be assured about the expertise of such a member? It may be argued that the parties' satisfaction on ICSID-arbitrator's qualifications should be assessed following the terms and conditions ICSID sets for selecting the arbitrators. At the moment of agreeing to arbitrate before ICSID tribunal, the parties give up their right to get preferred arbitrators during annulment because, they believe, ICSID provisions ensure the appointment of experts in annulment Committee. Therefore, the ICSID provisions requiring the qualifications of the arbitrators can be considered as a substitution to the arbitrators' qualifications. Hence, it is necessary to see at first how ICSID prepares the panel of qualified arbitrators.

In preparing this panel of arbitrators, ICSID invites each Contracting States to designate four qualified persons to this panel.¹¹ The Chairman may, additionally, designate up to ten persons to this panel.¹² This provision invokes the Contracting State to forward only 'qualified persons'. The Convention stipulates three main qualifications for designating persons to the panel- such as they must be (i) persons of high moral character, (ii) recognized for competence in the fields of law, commerce, industry or finance, (iii) competent to exercise independent judgment.¹³ In addition, the designated person's

⁷ Boralessa (n 4) 253

⁸ Juan Fernández-Armesto, 'Different Systems for the Annulment of Investment Awards' (2011) 26(1) *ICSID Review* 128, 134

⁹ Chiara Giorgetti, 'Who Decides Who Decides in International Investment Arbitration' (2013) 35(2) *University of Pennsylvania Journal of Law* 431, 437

¹⁰ Kateryna Bondar, 'Annulment of ICSID and Non-ICSID Investment Awards: Differences in the Extent of Review' (2015) 32(6) *Journal of International Arbitration* 621, 633

¹¹ ICSID Convention, art 13(1)

¹² ICSID Convention, art 13(2)

¹³ ICSID Convention, art 14(1)

competence in the field of law shall be of particular importance.¹⁴ Apart from the qualification 'high moral character', the Convention requires arbitrators' expertise in four major fields e.g. law, commerce, industry, finance. The ICSID system divided these major fields in 11 'economic sectors'¹⁵ and 12 specific 'subject of dispute'.¹⁶ The basic qualifications, economic sectors and subject of dispute represent the diversity of ICSID arbitral regime. This diversity demands the panel members' expertise and experience in diversified areas of investment. Some other attributes such as- knowledge of and experience with international investment law, public international law and international arbitration are also necessary for being the panel member.¹⁷ In short, these stipulations forward three major demands before designating an arbitrator to the panel- one, the arbitrators must have expertise in any one or more of the major fields or economic sectors specified in the Convention; two, they must be capable of independent judgment; three, they must have prior experience of conducting arbitration. If we theoretically consider the stipulated qualifications mentioned above, we must admit that the panel of arbitrators are rich enough to deal the review regime. But, there have been complaints in the past that not all members of the panel had the necessary qualifications.¹⁸ In the following paragraphs, some recent data will be analyzed to search the substance of such allegation.

In 2015, the Chairman constituted 13 annulment Committees¹⁹ wherein 25²⁰ persons were appointed from the panel of arbitrators. By perusing their Curriculum Vitae (CV),²¹ it appears that everyone possesses a range of expertise in international arbitration and participated in different arbitrations under ICSID, International Chamber of Commerce (ICC), United Nations Commission on International Trade Law (UNCITRAL) Model Law and others. However, the range of their professions does not give the impression that the panel of arbitrators covers the diversified areas of investment knowledge. All the 25 arbitrators are

¹⁴ ICSID Convention, art 14(1)

¹⁵International Centre for Settlement of Investment Dispute,

<<https://icsid.worldbank.org/apps/icsidweb/cases/pages/advancedsearch.aspx>> accessed 27 July 2016 [The 'economic sectors are: (i) agriculture, fishing & forestry, (ii) construction, (iii) electric power & other energy, (iv) finance, (v) information & communication, (vi) oil, gas & mining, (vii) other industry, (viii) services & trade, (ix) tourism, (x) transportation and (xi) water, sanitation and flood protection.]

¹⁶ *Ibid* [The 'subject of dispute' are: (i) banking enterprise, (ii) cement production enterprise, (iii) debt instruments, (iv) food products enterprise, (v) hydrocarbon concession, (vi) mining concession, (vii) renewable energy generation enterprise, (viii) telecommunication enterprise, (ix) waste disposal enterprise, (x) waste management services, (xi) water and sewer services concession agreement, (xii) water services concession]

¹⁷ International Centre for Settlement of Investment Dispute,

<<https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/Qualifications-for-the-Panels.aspx>> accessed 29 July 2016.

¹⁸ Georges Delaume, Le Centre International pour le reglement des Differends relatifs aux Investissements (CIRDI), (1982) 109 *J. DROIT INT'L (CLUNET)* 775, 820-1

¹⁹<<https://icsid.worldbank.org/apps/icsidweb/cases/pages/advancedsearch.aspx?qE=s&trbFdt=01%2F01%2F2015&trbTdt=12%2F31%2F2015&apprl=CD20.CD18&typ=CD12>> accessed 30 July 2016, 12 *ad hoc* Committees were constituted and one was reconstituted.

²⁰ *Ibid*. Some of the panel members were appointed for more than one *ad hoc* Committee.

²¹ ICSID, 'Arbitrators, Conciliators and Ad Hoc Committee Members'

<<https://icsid.worldbank.org/apps/ICSIDWEB/arbitrators/Pages/CVSearch.aspx>> CVs are available on ICSID official website.

from legal discipline e.g. professors in law, legal practitioners, and judges. Only two arbitrators have the experiences of working in banking sector. The professional backgrounds of these arbitrators appointed in the annulment Committees do not express the true representation of all the major fields in the panel of arbitrators. There are some risks of not appointing arbitrators from other technical fields. Consequently, other professionals, for example, engineers, bankers, government high officials, agriculturist etc should be included in the panel since the ICSID deals economic sectors concerned with them.

Again, the arbitrators are required to be capable of delivering independent judgment. But ICSID does not have any mechanism to assess the independent judgment-delivering quality of a designee. For example, there is no formal body or mechanism in the ICSID that can call for and assess the designees' prior relevant work records or track records to evaluate their capability of delivering independent judgment. The designation of individuals is mostly within the discretion of States that may not select the designees through a competition. Furthermore, their designation is not subject to any challenge or scrutiny.²² Consequently, a person having limited quality of delivering independent judgment can likely be designated. This is not a problem during selecting arbitrators for original tribunal because, before appointing the arbitrators, the parties scrutinize the qualifications of arbitrators whereby they could avoid appointing anyone who does not satisfy the parties' desired qualifications.²³ Problem occurs when the Chairman appoints the members for annulment Committee as the parties do not have any opportunity to forward a choice. However, it is expected that the Chairman will appoint such member who has prior experience of conducting ICSID tribunal because, firstly, working within the ICSID system enables the Chairman to assess individual-arbitrator's competence of delivering independent judgment and, secondly, it equips the arbitrator with the ICSID arbitration experience. It has been observed that the Chairman constituted 13 annulments Committee in 2015 appointing 25 persons from the panel.²⁴ Some members served in more than one Committee.²⁵ At least seven Committee members out of them did not have any prior experience of conducting ICSID original arbitration.²⁶ Some of them had only conducted one annulment proceedings ever and one member, despite having no experience in ICSID original arbitration conducted seven annulment proceedings.²⁷ The fact forwards a question that how the Chairman assessed the competence and experience of the Committee members regarding their capability of delivering independent judgment. Therefore, the above analyses posed three

²² Boralessa (n 4) 288

²³ Carlos Alberto Matheus López, 'Practical Criteria for Selecting International Arbitrators' (2014) 31(6) *Journal of International Arbitration* 795 - 806

²⁴ ICSID (n 19)

²⁵ Ibid

²⁶ ICSID, 'Arbitrators, Conciliators and Ad Hoc Committee Members' (n 21)

²⁷ Ibid

major problems regarding the qualifications of annulment Committee members- one, failure to ensure the representation from other major disciplines; two, non-availability of the mechanism to assess the independent judgment quality of the designees; three, limited scope to appoint experienced arbitrators. The Chairman's wide discretion of constituting the Committee is one of the contributing factors for these problems.

B. The question of party-participation and the Chairman's discretion

During the selection of an arbitrator, usually, the parties and their counsels spend substantial time and resources for searching efficient arbitrator.²⁸ In ICSID, the parties do not have any freedom to appoint or even select a member of annulment Committee because the Chairman appoints three persons from the panel of arbitrators.²⁹ As mentioned earlier, this panel would be constituted with the persons designated by both the Chairman and Contracting States. During such designation the Chairman, in addition, pays due regard to the importance of assuring representation from the principal legal systems of the world and the main forms of economic activity.³⁰

However, in principle, the Chairman's discretion regarding the Committee-composition is subjected to two nominal restrictions: one, the member must be taken from the panel of arbitrators; and two, those members must not be connected with any of the parties through nationality or any prior arbitration, conciliation etc.³¹ These rules indicate the formation of such an annulment Committee independent from the parties' control. This may be for gaining more trust and confident on the unbiased constitution of the Committee. But this system diverts the whole process to unhindered discretion of the Chairman prioritizing his discretion over the parties' expectation and, even, minimizing the ICSID Member States' participation in constituting the Committee. David Collins termed this discretion of the Chairman, who is also the President of World Bank, as autocratic.³² The unhindered discretion of the Chairman has driven three major debates in the process of composing annulment Committee. *First*, since the Chairman has wide discretion of designating persons to the panel of arbitrators, does he ensure representation from the principal legal system and main forms of economic activity? *Second*, in absence of party-appointment, does he show any bias appointing his own designees in the annulment Committee? *Third*, do the Contracting States have any role in the appointment of annulment Committee?

First, the Chairman has an obligation to designate persons to the panel of arbitrators ensuring representation from all of the principal legal systems and main forms of economic activity. The phrase 'principal legal systems' is similar to the practice of International Court of

²⁸ Giorgetti (n 9) 445

²⁹ ICSID Convention, art 52(3)

³⁰ ICSID Convention, art 14(2)

³¹ ICSID Convention art 52(3)

³² David Collins, ICSID Annulment Committee Appointments: Too Much Discretions for the Chairman (2013) 30 (4) *Journal of International Arbitration* 333, 339

Justice (ICJ) and refers to the various groups of the prevailing legal systems.³³ Since the concept 'principal legal systems' has been borrowed from the ICJ practice, an alike representation can be brought into ICSID system. Today this distribution in ICJ is as follows: Africa 3, Latin America and the Caribbean 2, Asia 3, Western Europe and other States 5, Eastern Europe 2.³⁴ Rules may be framed providing a proportionate and reasonable distribution so that representation from all major legal systems can be ensured. Now, what is the meaning of the second phrase 'main forms of economic activity'? During the adoption of ICSID Convention it was said that 'the expression the main forms of economic activity in Section 15(2) covered such sectors of the economy as banking, industry, agriculture and the like'.³⁵ The ICSID system clarifies these major fields specifying 11 'economic sectors' in dispute which can be described as the major technical sectors in investment area. However, after examining the biographies³⁶ of the present designees, it is evident that they do not represent professionals from some main economic forms such as – agriculture, business, banking etc. All of the designees except one³⁷ are legal experts especially professors in law and arbitration practitioners. Professor David Collins posed confusion that there is no indication as to the criteria of designating these members by the Chairman.³⁸ This question has some substance because any document published from ICSID does not disclose any information regarding such designation. Such designation should be regulated by a set of rule ensuring the representation from major legal systems and economic sectors.

Second, the Chairman is designating persons to the panel of arbitrators and again selecting members of annulment Committee from the same panel. Since there is no rule as to how the Committee members would be selected, it seems absolute discretion of the Chairman. In this backdrop, the Chairman is likely to exercise his wide discretion to appoint his designees to the Committee. Practically, there may have some other presumptions behind this exercise of power. One, as the designees from the Contracting States usually enters into the panel without any scrutiny; the Chairman might not find enough qualified arbitrators among them. Two, the Chairman, being the President of the World Bank, could not provide enough attention for searching qualified arbitrators from the long panel. Third, the Chairman knows well the qualifications of his designees which prompted their nominations to annulment Committees. These all are the consequences of non-participation

³³ ICSID Secretariat, *History of the ICSID Convention Vol-II-2*, 728

³⁴ International Court of Justice, Members of the Court <www.icj-cij.org/court/?p1=1&p2=2> accessed 3 August 2016

³⁵ ICSID Secretariat, *History of the ICSID Convention Vol – II-1*, 487

³⁶ https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/Biographical%20Notes_Arbitrators_FINAL accessed 1 August 2016.

³⁷ One designee is engineer having a Law degree.

³⁸ Collins (n 32) 337

of the parties and wide discretion of the Chairman in appointing the annulment Committee members. So, a mechanism for fair and unbiased procedure of appointment in the Committee is necessary.

Third, the Chairman's discretion in constituting the annulment Committee turned into absolute arrangement excluding the participation of Contracting States. It can be claimed that the Contracting States have indirect participation in composing the Committee as they designate the members of panel. So, they exercise a limited and indirect influence on the composition of Committees due to the fact that appointments are made from the panel of arbitrators.³⁹ But it is the ultimate discretion of the Chairman whether any members designated by the Contracting States would be appointed for annulment Committee. Since the State parties' designation does not undergo any scrutiny, there have been complaints that not all members of the panels had the necessary qualifications or were available for appointments.⁴⁰ In this backdrop, the Chairman may prefer to rely upon his personally acquainted panel members or his designees for annulment Committees. This is because there is no democratic mechanism whereby Contracting States may participate in selecting the Committee members.

The discussion in this part puts forward some debates regarding the composition of *ad hoc* Committee members. Such as- (i) ICSID system affects party autonomy especially party appointment; (ii) it cannot always appoint the members with desired qualifications and experiences in investment-arbitration; (iii) it cannot prepare a panel of arbitrators representing the major economic sectors; (iv) it cannot ensure the equal selection of the States' designated arbitrators to the Committees in comparison with the Chairman's designees ; (v) it does not provide a mechanism ensuring the Contracting States' participation in the composition of *ad hoc* Committees.

III. Reformation to ensure party-appointment and Contracting States' participation

A limited modification into the ICSID annulment system may solve the problem of party-appointment. ICSID may maintain two panels of arbitrators- one for the original arbitration and another for annulment wherefrom parties to the dispute may nominate their arbitrators in each proceeding. Some commentators urged for enlarging the pool of arbitrators as a better solutions.⁴¹ It does not seem better because it still suggests selection of arbitrators from the common pool where each arbitrator is professionally connected with

³⁹ Christoph H. Schreuer, With Loretta Malintoppi, August Reinisch, Anthony Sinclair, *The ICSID Convention: A Commentary* (2nd edn, Cambridge University Press 2009) 1029.

⁴⁰ Paulsson, J., ICSID's Achievements and Prospects, 6 ICSID Review – FILJ 380, 394 (1991); ICSID Twelfth Annual Report 4 (1977/78) cited in Schreuer (n 39) 50

⁴¹ Giorgetti (n 9) 437

others. It, rather, would create professional conflict among them. Question may arise, would a separate panel of arbitrators solve the debates as exposed in earlier part.

First, both the States and Chairman would ensure the qualifications of their designees to the panel. It is interesting that the rules of quality-designation are provided in the existing regulations of ICSID. Regulation 21(2) of the Administrative and Financial Regulations stipulates that the Contracting State must indicate the name, address and nationality of the designee, and include a statement of his qualifications, with particular reference to his competence in the fields of law, commerce, industry and finance. This obligation seems not respected properly by the Contracting States because, on a search into the ICSID data,⁴² it is found that most of their designees' profiles do not contain the stipulated descriptions. Such a panel of arbitrators would lead the Chairman to appoint Committee members from a narrow list of his acquainted persons. Therefore, the designation, be it either by the Contracting States or Chairman, must include a detail description specifying the designee's area of expertise and experience in arbitration. During the designation they must forward some other professionals, not only legal experts, to be included in their lists. The Chairman has two additional duties at the time of designation, such as ensuring the representation from- principal legal systems and main economic activity. The Chairman should designate more members from technical fields, e.g., engineering, agriculture etc.

Second, the present system has centered all powers of constituting *ad hoc* Committee into the functions of Chairman denying greater participation of the Contracting States. But such participation is necessary for the development of the ICSID annulment mechanism. As Professor David Collins commented-

'[S]ubstantive improvements to the annulment procedure's mandate, keeping within the bounds of its discretion to assess the correctness of the procedure adopted by tribunals in rendering an award, could be achieved by ensuring greater ICSID member participation in the appointment of the annulment committees'.⁴³

For ensuring such participation, he referred the composition of the WTO's Appellate Body.⁴⁴ This Appellate Body is a standing body of seven persons that hears appeals from

⁴² <<https://icsid.worldbank.org/apps/ICSIDWEB/arbitrators/Pages/CVSearch.aspx?qE=pnltype&pnltype=ARB>> accessed 01 August 2016.

⁴³ Collins (n 32) 339

⁴⁴ Ibid 340

reports issued by panels deciding the disputes brought by WTO Members.⁴⁵ Unlike the ICSID, the appointment of particular individuals to this Body are made by a committee within the WTO's Dispute Settlement Body (DSB) which itself represents the Member States of the WTO.⁴⁶ The decision of WTO Appellate Body member-appointment is taken on the recommendation of a Selection Committee, composed of various representatives from WTO committees, as well as the WTO Director General.⁴⁷ This process is addressed as more transparent and participatory than that of the ICSID annulment committee appointment.⁴⁸ David Collins supported a separate panel of arbitrators for annulment Committees following WTO model.⁴⁹ He urged to complement the role of the Chairman in annulment Committee appointment with the Administrative Council of ICSID (hereinafter as Administrative Council) since it is comprised of one representative of each of the Member States of ICSID, with each member having one vote.⁵⁰ He further suggested that the Administrative Council or a Committee under it should have some vetting power on the appointment of annulment Committee members by the Chairman.⁵¹ These suggestions stressed on the democratic participation of Contracting States and curbing unhindered discretion of the Chairman. But he did not suggest the way of ensuring party-appointment from this separate panel.

For party-appointment, the panel of arbitrators for annulment Committee can be prepared following the steps discussed hereafter. Like the existing regulation,⁵² the Secretary-General, at first step, will convene the Contracting States and then the Chairman to designate persons to the panel of arbitrators specifying their expertise in particular economic sector and experiences in conducting arbitration. However, a format of arbitrators' CV should be designed by ICSID to this effect. Upon receiving the designations, either the Administrative Council or a small Committee under it will scrutinize the competence of the designated persons in conducting arbitration. Interestingly, Mr. Kpognon, an expert to the Consultative Meeting of ICSID Convention, during drafting the Convention, also proposed such a screening test by the ICSID⁵³ though his proposal was not succeeded in vote.⁵⁴ However, the Administrative Council or a Committee will finalize the panel of arbitrators with those designated persons whom they will find qualified. If they find any designee disqualified for the panel, they will drop him from the list and may convene the concerned State to

⁴⁵ www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm accessed 02 August 2016.

⁴⁶ Collins (n 32) 340

⁴⁷ Ibid 341; See also Understanding on Rules and Procedures Governing the Settlement of Disputes, art 2.4 [Where the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus]

⁴⁸ Ibid

⁴⁹ Ibid

⁵⁰ Ibid

⁵¹ Ibid

⁵² ICSID Administrative and Financial Regulations, reg 21(1)

⁵³ History Vol-II-1 (n 33) 253

⁵⁴ Schreuer (n 39) 49

forward another name. Like the selection of members for WTO Appellate Body, they along with the Chairman will prepare, at the same time, a panel of arbitrators for annulment Committee with those designees whom they will find experienced in investment arbitration. ICSID has records of making several appointments in annulment Committees from a small pool of highly experienced arbitrators.⁵⁵ This attempt reflects the ICSID's realization to preparing separate panel of arbitrators for annulment. In doing so, they must apply their mind in incorporating into both panels the experts from diversified professional backgrounds. This system of paneling will ensure the quality and responsible selection of the arbitrators into ICSID system in one hand. On the other hand, it will ensure the greater participation of Contracting States in the whole selection process. At the last step, like the appointment of members in original ICSID arbitration, the parties will be given autonomy to appoint their arbitrators from the annulment panel when they proceed for annulment of any arbitral decision. In case of their failure, the Chairman will exercise his power of appointing the members of annulment Committee. Such system would address the concerns regarding party-appointment and arbitrator's experience.

However, as against the concept of party-appointment in ICSID annulment, some commentators⁵⁶ argued that the Convention curtailed party-appointment because it wants to establish ultimate objectivity through an unbiased forum of annulment. Since party appoints its arbitrator after having some communications- like interview, the arbitrator may show biasness to his appointing parties.⁵⁷ To address this apprehension, party-appointment can be curtailed to 'party-consultation' or 'party preference'. There are some examples of consulting with the parties in appointing members of annulment Committees.⁵⁸ Under the 'party-preference' system, the parties may send a confidential letter of preference mentioning three arbitrators from the separate panel of arbitrators for annulment to the Chairman who may appoint any one out of the three. It will satisfy the parties regarding the qualifications and experiences of the arbitrators. In addition, it will help ICSID to constitute an *ad hoc* Committee with some unbiased arbitrators who would have no correspondences with the parties to the dispute.

⁵⁵ Lucy Reed, Jan Paulsson, et al., *Guide to ICSID Arbitration*, (Kluwer Law International 2010) 174

⁵⁶ Fernández-Armesto (n 8) 128; Schreuer (n 39) 1029

⁵⁷ Doak Bishop, Lucy Reed, 'Practical Guidelines For Interviewing, Selecting And Challenging Party-Appointed Arbitrators In International Commercial Arbitration' (1998) 14(4) *Arbitration International* 395

⁵⁸ For example, in *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A v. the Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Annulment, 5 September 2007, para. 24 it is mentioned that, 'after consultation with the parties, ICSID appointed Sir Franklin Berman, Justice Hans Danelius and Professor Andrea Giardina to serve on the Ad hoc Committee set up for the annulment proceedings'.

The City Law School
City, University of London
Northampton Square
London EC1V 0HB

T: +44(0)20 7040 3309
E: law@city.ac.uk



Email enquiries:
law@city.ac.uk



Telephone enquiries Find out more, visit
+44 (0) 44 02 7040 5787 www.city.ac.uk/law

