Overcoming the Legitimacy Crisis in Investment Treaty Arbitration

Merit of the EU Reform Proposal
vis-à-vis the Standard of Judicial Independence and Impartiality

Inaugural-Dissertation zur Erlangung der Doktorwürde (Dr. iur.)
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Abbreviations

1782 US-France FCN	Treaty of Amity and Commerce, United-States - France
1782 US-Netherlands FCN	Treaty of Amity and Commerce, United-States - Netherlands
1786 US-Morocco FCN	Treaty of Peace and Friendship, United States - Morocco
1795 US-Spain FCN	Treaty of Friendship, Limits and Navigation, United States - Spain
1867 US-Nicaragua FCN	Treaty of Friendship, Commerce, and Navigation, United States - Nicaragua
1881 US-Yugoslavia FCN	Treaty of Commerce, United States - Yugoslavia
1891 US-Congo FCN	Treaty of Amity, Commerce, and Navigation, United States - Congo
1899 Hague Convention	Hague Convention for the Pacific Settlement of International Disputes (1898-1899)
1907 Hague Convention	Hague Convention for the Pacific Settlement of International Disputes (1907)
1951 US-Greece BIT	Treaty of Friendship, Commerce and Navigation, United States - Greece
1953 US-Japan FCN	Treaty of Friendship, Commerce and Navigation, United States - Japan
1959 Germany-Pakistan BIT	Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments
1959 New York Convention	Convention of the Recognition of Foreign Arbitral Awards
1968 Indonesia-Netherlands BIT	Agreement on Economic Cooperation between the Government of the Kingdom of the Netherlands and the Government of the Republic of Indonesia
1970 BLEU-Indonesia BIT	Agreement between the Kingdom of Belgium and the Republic of Indonesia on the Encouragement and Reciprocal Protection of Investments

2016 CETA	Comprehensive Economic and Trade Agreement (Agreed text as of 29 February 2016)
AANZFTA	ASEAN Australia New Zealand Free Trade Agreement
Abs-Shawcross Draft Convention	Draft Convention on Investments Abroad
ACHPR	African Court of Human and Peoples' Rights
Additional Facility Rules	Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes
Adelaide L Rev	Adelaide Law Review
AfJ	Allegiance for Justice
AJWH	Asian Journal of WTO & Internationall Health Law & Policy
Am J Comp L	American Journal of Comparative Law
Am J Int'l L	American Journal of International Law
Arb	Arbitration
Arb Int'l	Arbitration International
ASP	Assembly of States Parties
AUSFTA	Australia-US Free Trade Agreement
Berkeley J Int'l L	Berkeley Journal of International Law
BIT	Bilateral Investment Treaty
Brit YB Int'l L	British Year Book of International Law
CAFTA-DR	Dominican Republic-Central America Free Trade Agreement
Cal L Rev	California Law Review
Can Bus L Int'l	Canadian Business Law Journal Canada
Cardozo J Conflict Resol	Cardozo Journal of Conflict Resolution
CETA	Comprehensive Economic and Trade Agreement
ChAFTA	China-Australia Free Trade Agreement
Chi J Int'l L	Chicago Journal of International Law
Claims Settlement Declaration	Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the

	United States of America and the Government of the Islamic Republic of Iran
Clara J Int'l L	Santa Clara Journal of International Law
CLFTA	United States-Chile Free Trade Agreement
Cornell L Q	Cornell Law Quarterly
Duke L J	Duke Law Journal
ECHR	European Convention on Human Rights
ECOSOC	United Nations Economic and Social Council
ECT	European Energy Charter Treaty
ECtHR	European Court of Human Rights
Et seq	Et Sequens
Et seqq	Et Sequentes, et Sequentia
EU	European Union
Eur J Int'l L	European Journal of International Law
EUVFTA	EU-Vietnam Free Trade Agreement
FCN	Friendship, Commerce and Navigation
Fordham L Rev	Fordham Law Review
Fn.	Footnote
FTA	Free Trade Agreements
GA J Int'l & Comp L	Georgia Journal of International & Comparative Law
GATT 1948	General Agreement on Tariffs and Trade
Global Bus & Dev L J	Global Business & Development Law Journal
Harv L Rev	Harvard Law Review
IACoHR	Inter-American Court of Human Rights
IACoHR Statute	Statute of the Inter-American Court of Human Rights
IBA	International Bar Association
ICC	International Chamber of Commerce
ICC Arbitration Rules	ICC Rules of Arbitration
ICC Code	International Code of Fair Treatment for Foreign Investment
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICJ Statute	Statute of the International Court of Justice

ICS	Investment Court System
ICSID	International Centre for Settlement of Investment Disputes
ICSID AF	ICSID Additional Facility
ICSID AF 2006	ICSID Arbitration (Additional Facility) Rules (2006)
ICSID AF Arbitration Rules	ICISD Arbitration (Additional Facility) Rules (1978)
ICSID Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of other States
ICSID Rev	ICSID Review - Foreign Investment Law Journal
ICTY	International Criminal Tribunal for the former Yugoslavia
IIA	International Investment Agreement
ILA Statute	International Law Association Draft Statutes of the Arbitral Tribunal for Foreign Investment and the Foreign Investment Court
ILC	International Law Commission
Int'l Legal Mat	International Legal Materials
Irish J Eur L	Irish Journal of European Law
Isr YBHR	Israeli Yearbook of Human Rights
ISDS	Investor-state Dispute Settlement Mechanism
ITLOS	International Tribunal of the Law of the Sea
ITLOS Statute	Statute of the International Tribunal of the Sea
IUSCT	Iran-United States Claims Tribunal
J App Prac & Process	Journal of Appellate Practice and Process
J Contemp Legal Issues	Journal of Contemporary Legal Issues
Leiden J Int'l L	Leiden Journal of International Law
Loy LA Int'l & Comp L Rev	Loyola of Los Angeles International and Comparative Law Review
MAT	Permanent Multilateral Appeal Tribunal
Mex L J	United States-Mexico Law Journal
MIC	Multilateral Investment Court
Mich L Rev	Michigan Law Review

NAFTA	North American Free Trade Agreement
NGO	Non-governmental Organisation
Nw J Int'l L & Bus	Northwestern Journal of International Law & Business
NYU Envtl L J	New York University Environmental Law Journal
NYU J Int'l L & Pol	New York University Journal of International Law and Politics
NYU J L & Bus	New York University Journal of Law and Business
OAU	Organization of African Unity
OECD	Organisation for Economic Co-operation and Development
PACE	Parliamentary Assembly of the Council of Europe
PCA	Permanent Court of Arbitration
PCA Arbitration Rules	Permanent Court of Arbitration Rules 2012
Proceedings of the Annual Meeting (ASIL)	Proceedings of the Annual Meeting of the American Society of International Law
Protocol ACHPR	Protocol to the African Charter on the Establishment of the African Court on Human and People's Rights
Rome Statute	Rome Statute of the International Criminal Court
SCC	Stockholm Chamber of Commerce
SCC Arbitration Rules	Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce
SPLOS	States Parties to the Law of the Sea Convention
Temple L Rev	Temple Law Review
The Geo Wash Int'l L Rev	The George Washington International Law Review
TFI	Tribunal of First Instance
TPP	Trans-Pacific Partnership Agreement
Trade L & Dev	Trade, Law and Development
Transnat'l Disp Mgmt	Transnational Dispute Management Journal
TTIP	Transatlantic Trade and Investment Partnership Agreement

TTIP Proposal	Transatlantic Trade and Investment Partnership (EU Proposal for Investment Protection and Resolution of Investment Disputes as published on 12 November 2015)
UC Davis J Int'l L & Pol'y	UC Davis Journal of International Law and Policy
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UN Charter	Charter of the United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Arbitration Rules	UNCITRAL Arbitration Rules (as adopted in 2013)
UNCITRAL 1976 Arbitration Rules	UNCITRAL Arbitration Rules (as adopted in 1976)
UNCLOS	United Nations Convention on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
UNGA	UN General Assembly
UNHRC	UN Human Rights Committee
UNRG	UN Regional Groups
UNSC	UN Security Council
US	United States
Va J Int'l L	Virginia Journal of International Law
Vand J Transnat'l L	Vanderbilt Journal of Transnational Law
VCLT	Vienna Convention on the Law of Treaties
WIF	World Investment Forum
WTO	World Trade Organization
WTO AB	WTO Appellate Body
WTO Agreement	Agreement Establishing the World Trade Organization
WTO DSB	WTO Dispute Settlement Body
WTO DSU	WTO Understanding on Rules and Procedures Governing the Settlement of Disputes
Yale L J	Yale Law Journal

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Introduction

The recent negotiations on far-reaching free trade agreements ("FTAs") such as the *Trans-Pacific Partnership Agreement*[1] ("TPP Agreement" or "TPP") and the *Transatlantic Trade and Investment Partnership Agreement*[2] ("TTIP Agreement" or "TTIP") as well as the *Comprehensive Economic and Trade Agreement*[3] ("CETA") have put investment treaty arbitration in the focus of the public debate – and critique. Opponents of investment treaty arbitration regard it as 'a top-secret operation led by a small group of white old men' not suitable for disputes that deal with laws and regulations of states. The public pressure that has resulted from a broad media campaign questioning the merit of investment treaty arbitration – mostly without providing an accurate representation of the facts and the system – appears to act as a catalyst to reform and propel states to take action.

This Introduction is intended to provide a brief overview of investment treaty arbitration (see A.) as well as the public criticism of investment treaty arbitration that seems to have resulted in the current legitimacy crisis (see B.) and the reform proposals of the European Union ("EU") that are the subject of this thesis (see C.).

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[1] Trans-Pacific Partnership Agreement (signed on 4 February 2016) <http://www.tpp.mfat.govt.nz/text> accessed 7 December 2017, TPP.

[2] The negotiations on the Transatlantic Trade and Investment Partnership Agreement (TTIP) between the European Union (EU) and the United States of America (US) began in 2013 and are currently on hold following the change in the US administration. See German Federal Ministry for Economic Affairs and Energy, 'Transatlantic Trade and Investment Partnership (TTIP)' <https://www.bmwi.de/Redaktion/EN/Dossier/ttip.html> accessed 7 December 2017.

[3] Comprehensive Economic and Trade Agreement (Agreed text as of 29 February 2016, provisionally in force since 21. September 2017) <http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf> accessed 7 December 2017, 2016 CETA, chapter 8 section F.

A. Investment Treaty Arbitration in a Nutshell

Investment treaty arbitration is a mechanism to settle disputes arising between a foreign national ("investor") and a sovereign state ("host state") *vis-à-vis* an investment the investor has made on the territory of the host state.[4] Investment arbitration is usually not the only remedy available to the investor to settle an investment dispute. It generally forms part of a broader dispute settlement regime often including forms of alternative dispute resolution ("ADR") such as conciliation and mediation to prevent the escalation of the investment dispute from the outset.[5]

Investment arbitration tribunals are created on an individual basis for an individual case subject to the consent of the disputing parties. States usually accept the obligation to settle investment disputes by investment arbitration in private contracts concluded between the investor and the host state ("investor-state contracts"), in international investment agreements in the investment chapter of treaties concluded between two or more states ("IIAs") or in investment laws. The term 'investment treaty arbitration' only refers to the latter two alternatives.

I. The General Concept of IIAs

In this thesis, the term IIA refers to bilateral investment treaties ("BITs") that are concluded between two states as well as regional investment treaties that are concluded between more than two states. The term 'multilateral' is used to describe investment treaties that are open to or intended for signature by any state. In contrast, private investment contracts concluded between an investor and the host state to regulate an individual investment are not considered IIAs.

BITs and regional investment treaties may appear in the form of FTAs that form part of a broader free trade regime between two or more States. Well-known examples of FTAs concluded at a regional level include *inter alia* the *North*

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[4] Timothy G. Nelson, '"History Ain't Changed": Why Investor-State Arbitration Will Survive the "New Revolution"' in Michael Waibel and Asha Kaushal (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Wolters Kluwer Law & Business 2010) 556.

[5] Morris Besch, 'Typical Questions Arising within Negotiations' in Marc Bungenberg and others (eds), *International Investment Law* (C.H. BECK; Hart; Nomos 2015) 146 para 178.

American Free Trade Agreement[6] ("NAFTA") or the *European Energy Charter*[7] ("ECT"). FTAs are also concluded at the bilateral level.

Although from a historical perspective, the so-called *Friendship, Commerce and Navigation*[8] ("FCN") treaties can be considered predecessors of the current IIA regime, today's dense network of IIAs mainly emerged after the conclusion of the first BIT between Germany and Pakistan in 1959 ("1959 Germany-Pakistan BIT"). According to the United Nations Conference on Trade and Development ("UNCTAD"), the IIA regime currently consists of 2960 BITs and 368 other IIAs.[9]

II. Dispute Settlement Regimes of IIAs

IIAs generally contain a dispute settlement regime which is two-fold. On one hand, the States parties are provided with the option of submitting disputes between each other. On the other hand, they contain an investor protection regime that allows the investor to submit disputes against the host state arising from a conduct violating the standards which have been incorporated in the treaty to protect the investor ("treaty claims"). Such standards may for instance be the obligation of fair and equitable treatment or the prohibition of expropriation.

It is noteworthy that in treaty-based arbitration proceedings, the investor is generally barred from submitting claims based on contractual obligations ("contract claims"). To bridge this gap, modern IIAs sometimes contain 'umbrella clauses'

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[6] North American Free Trade Agreement (signed on 17 December 1992, entered into force on 1 January 1994) <https://www.nafta-sec-alena.org/Home/Legal-Texts/North-American-Free-Trade-Agreement> accessed 7 December 2017, NAFTA.

[7] Energy Charter Treaty (concluded on 17 December 1994, entered into force on 16 April 1998) 2080 UNTS 95, ECT.

[8] The term FCN treaty is a generic one and although most often these treaties were indeed called *Friendship, Commerce and Navigation* treaties, other terms were also used containing the expressions "peace" or "amity" for instance. See Kenneth J. Vandevelde, *Bilateral Investment Treaties: History, Policy, and Interpretation* (Oxford University Press 2010); Kenneth J. Vandevelde, 'A Brief History of International Investment Agreements' (2005) 12 UC Davis J Int'l L & Pol'y 157, 158.

[9] Not all of these IIAs are in force, see UNCTAD, 'Database of Investor-State Dispute Settlement (ISDS)' <http://unctad.org/en/Pages/DIAE/ISDS.aspx> accessed 7 December 2017.

obliging the host state to respect its contractual commitments *vis-à-vis* the investor. However, these clauses have been criticized by some arbitrators as "destructive of the distinction between national legal orders and the international legal orders".[10]

Whether the investor bases his claim on the investor-state contract or on an IIA notably affects the applicable law and scope of the investment dispute since investor-state contracts, in contrast to IIAs, are generally subject to the national laws of the host states. In this respect, the Permanent Court of International Justice found in the *Serbian Loans case* that "[a]ny contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country".[11]

The practice of arbitral tribunals has somewhat diluted this clear-cut approach by acknowledging that general principles of international law can be applied to the interpretation and application of investor-state contracts.[12] Yet at the same

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[10] *SGS Société Générale de Surveillance SA v Pakistan* (Decision on Jurisdiction, 6 August 2003), [2003] 18 ICSID Rev-FILJ 307, 363 para 167; *El Paso Energy International Company v Argentina* (Decision on Jurisdiction, 27 April 2006) ICSID Case No. ARB/03/15, <http://www.italaw.com/sites/default/files/case-documents/ita0268_0.pdf> accessed 7 December 2017, 28 para 82.

[11] *Serbian Loans case (France v Serb-Croate-Slovene State)* [1929] PCIJ Ser A, No. 20, 41.

[12] *Lena Goldfields, Ltd v USSR* (Award, September 1930), [1930] 5 Ann Dig 3 reprinted in: Arthur Nussbaum, 'Arbitration Between the Lena Goldfields Ltd. and the Soviet Government' (1950) 36(1) Cornell L Q 31, 42 et seqq, 50; see also *Abu Dhabi Arbitration (Petroleum Development Ltd v Sheikh of Abu Dhabi)* (Award, September 1951), [1951] 18 Int'l L Rep 144 and *Ruler of Qatar v International Marine Oil Company* (Award, June 1953), [1953] 20 Int'l L Rep 534, relevant excerpts reprinted in: R. D. Bishop, James Crawford and W. M. Reisman, Foreign Investment Disputes: Cases, Materials, and Commentary (2005) 662 et seq and 667 et seq. In the *Aramco Arbitration (Saudi Arabia v Arabian American Oil Company)* (Award, 23 August 1958), [1963] 27 Int'l L Rep 117, 169, the tribunal held that although the national laws of Saudi Arabia were applicable to the concessions contract that this law had to be "interpreted or supplemented by the general principles of law, by the custom and practice of the oil business and by pure jurisprudence, in particular whenever certain private rights […] would not be secured […] by the law in force in Saudi Arabia". See also *Saphire International Petroleums Ltd v National Iranian Oil Company* (Award, 15 March 1963), [1967] 35 Int'l L Rep 136, 171 et seqq; *BP Exploration Company (Libya) Ltd v Libya* (Awards, 10 October 1973 and 1 August 1974), [1979] 53 Int'l L Rep 297, 298; *Texaco Overseas Petroleum Company & California Asiatic Oil Company (Topco-Calasiatic) v Libya* (Awards, 27 November 1975 and 19 January 1977), [1979] 17 Int'l Legal Mat 1, 28; *Aminoil Arbitration (Government of Kuwait v American Independent Oil Company)* (Award, 24 March 1982), [1982] 21 Int'l Legal Mat 976, 1020 et seqq; *ELF*

time, tribunals have emphasized that the role of international law is limited to the correction of, or supplementation to the host states' national laws when they are found to be lacking adequate protection.[13] In most cases, arbitral tribunals justified the application of international law by referring to specific clauses in the investor-state contracts, such as choice of law clauses or clauses dealing with the interpretation and application of the contract.[14] The existence of a contractual clause submitting disputes to international arbitration has also been found to factor into the decision on the recourse to international law.[15]

III. Use of Arbitral Institutions and Arbitration Rules

Arbitration clauses in treaties generally refer to an arbitral institution that provides services in connection with investment treaty arbitration proceedings and has its own arbitration rules, e.g. International Centre for Settlement of Investment Disputes ("ICSID"), the Permanent Court of Arbitration ("PCA"), the Stockholm Chamber of Commerce ("SCC") or the International Court of Arbitration of the International Chamber of Commerce ("ICC").

Aquitaine Iran (France) v National Iranian Oil Company (Preliminary Award, 14 January 1982), [1994] 96 Int'l L Rep 251, 253.

[13] For instance, the arbitrator in the Topco-Calasiatic arbitration stressed that the application of general principles of international law "is to be explained not only by the lack of adequate legislation in the State concerned […]. It is also justified by the need for the private contracting party to be protected against unilateral and abrupt modifications of the legislation in the contracting State; it plays, therefore, an important role in the contractual equilibrium intended by the parties." *Texaco Overseas Petroleum Company & California Asiatic Oil Company (Topco-Calasiatic) v Libya* (Awards, 27 November 1975 and 19 January 1977), [1979] 17 Int'l Legal Mat 1, 28.

[14] André v Walter, 'State Contracts and the Relevance of Investment Contract Arbitration' in Marc Bungenberg and others (eds), *International Investment Law* (C.H. BECK; Hart; Nomos 2015) 88 para 16; see also Uwe Kischel, *State Contracts: Völker-, Schieds- und Internationalprivatrechtliche Aspekte des Anwendbaren Rechts* (Marburger Schriften zum Öffentlichen Recht vol 6, Boorberg 1992) 385 et seqq, 417.

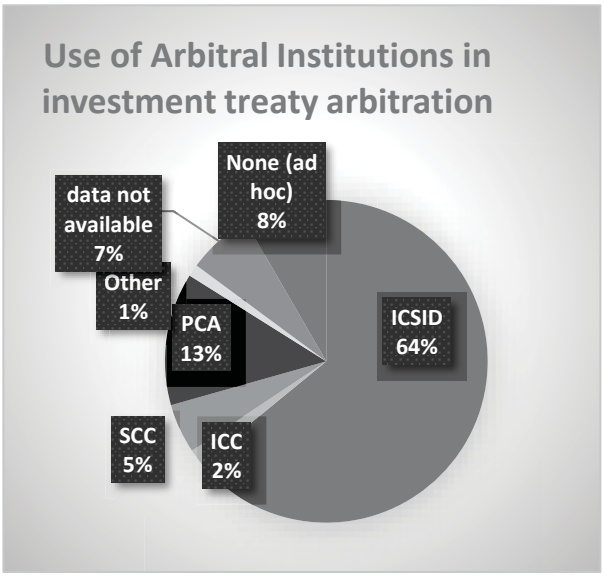
[15] See for instance, *Texaco Overseas Petroleum Company & California Asiatic Oil Company (Topco-Calasiatic) v Libya* (Awards, 27 November 1975 and 19 January 1977), [1979] 17 Int'l Legal Mat 1, 28 et seq; *Saphire International Petroleums Ltd v National Iranian Oil Company* (Award, 15 March 1963), [1967] 35 Int'l L Rep 136, 172.

The administration of investment treaty arbitrations involves *inter alia*

i. transmission and filing of oral and written communications;
ii. arrangements concerning the arbitrators' fees and advance deposits as well as disbursement of tribunal fees and expenses;
iii. assistance with establishing the date, time and place of hearings and party notification;
iv. further support services in connection with hearings, etc.[16]

As an alternative to institutional arbitration, many treaties also provide the option of *ad hoc* arbitration under the UNCITRAL Arbitration Rules[17] or other arbitration rules. In *ad hoc* arbitration, no institutional administration is involved.[18]

To date, ICSID administered approx. 64 percent of investment treaty arbitrations and is thus the most used arbitral institution.[19] The PCA administered approx. 13 percent, the SCC approx. 5 percent and the ICC approx. 1 percent of the investment treaty arbitrations according to the data available to UNCTAD. Approx. 8 percent of investment treaty arbitrations are conducted *ad hoc* without involvement of an arbitral institution.



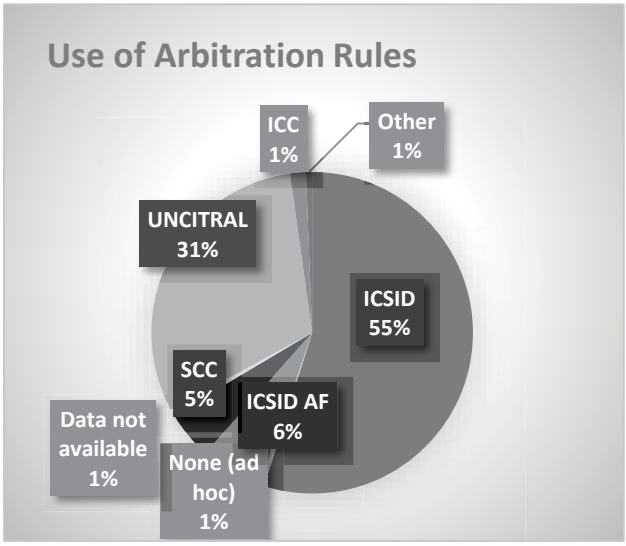
[16] See for instance Permanent Court of Arbitration <https://pca-cpa.org/en/services/arbitration-services/case-administration/> accessed 7 December 2017.

[17] UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013 UNGA Res 68/109) <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf> accessed 7 December 2017, UNCITRAL Arbitration Rules.

[18] Johan Billiet, *International Investment Arbitration: A Practical Handbook* (Maklu 2016) 33.

[19] UNCTAD, 'Investment Policy Hub: Investment Dispute Settlement Navigator' <http://investmentpolicyhub.unctad.org/ISDS/FilterByRulesAndInstitution> accessed 7 December 2017.

More than 60 percent of the investment treaty arbitrations to date have been conducted under the arbitration rules of ICSID and the ICSID Additional Facility ("ICSID AF").[20] The UNCITRAL Arbitration Rules are used in approx. 31 percent of the investment treaty arbitrations. Significantly less used are the arbitration rules of the SCC (approx. 5 percent) and the ICC (approx. 1 percent).



B. The Legitimacy Crisis in Investment Treaty Arbitration as a Catalyst for Reform

The so-called legitimacy crisis of investment treaty arbitration as investor-state dispute settlement mechanism ("ISDS") seems to be propelled by a growing scepticism of some states (see I.) as well as the intense public media debates surrounding the negotiation of several high-profile treaties such as TTIP and CETA (see II.). The Background of the legitimacy crisis is manifold but seems to be at least partially rooted in the public international law element of ISDS (see III.).

I. States' Mounting Scepticism towards Investment Treaty Arbitration

It seems that investment treaty arbitration has become the subject of mounting criticism by several states. The scepticism towards investment treaty arbitration is probably most pronounced among the Latin American states which has driven

[20] ibid.

Bolivia, Venezuela and Ecuador to withdraw from the *Convention on the Settlement of Investment Disputes between States and Nationals of other States*[21] ("ICSID Convention") in recent years.[22] Ecuador completely split from ISDS by disengaging from all BITs.[23] Brazil, on the other hand, has never even ratified any of the investment treaties it negotiated and has no intention to change this practice in the future.[24]

Yet the trend towards the termination of BITs is not solely a Latin American phenomenon; it seems to materialize when states grow disenchanted with the regime due to what they perceive as unsatisfactory decisions or unfounded claims by foreign investors or after being threatened with a multitude of investor claims. The latter seems to have prompted India and Indonesia to terminate some of its investment treaties,[25] while South Africa has begun to terminate its treaties and develop a domestic investment protection regime instead.[26]

Reservations to the current regime are not confined solely to developing states which may feel the threat of high-profile investment claims more keenly than developed states. Norway and Poland, for instance, have refrained from entering into any BIT during the past 15 years or more while Australia's approach to ISDS provisions in IIAs has been erratic in recent years.[27] In the Australia-US

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[21] Convention on the Settlement of Investment Disputes between States and Nationals of other States (adopted on 18 March 1965, entered into force on 14 October 1966) 575 UNTS 159, ICSID Convention. The original text is reprinted in Rosemary G. Rayfuse and Elihu Lauterpacht, *ICSID Reports: Reports of Cases Decided on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965* (vol 1, Cambridge University Press 1993) 3 et seqq.

[22] Andrés A. Mezgravis, 'The Arbitration Review of the Americas 2014: Venezuela' (17 October 2013) Global Arbitration Review <http://globalarbitrationreview.com/insight/the-arbitration-review-of-the-americas-2014/1036795/venezuela> accessed 7 December 2017; Rodrigo Jijón-Letort and Juan M. Marchán, 'The Arbitration Review of the Americas 2018: Ecuador' (29 August 2017) Global Arbitration Review <http://globalarbitrationreview.com/insight/the-arbitration-review-of-the-americas-2018/1146884/ecuador> accessed 11 December 2017.

[23] ibid.

[24] Kathryn Gordon and Joachim Pohl, 'Investment Treaties over Time - Treaty Practice and Interpretation in a Changing World' (2015) OECD Working Papers on International Investment 2015/02 <http://dx.doi.org/10.1787/5js7rhd8sq7h-en> accessed 7 December 2017, 6.

[25] ibid.

[26] ibid.

[27] ibid, 7.

Free Trade Agreement[28] ("AUSFTA") which entered into force in 2005, the parties refrained from including ISDS provisions which was motivated by the parties' mutual confidence in their respective legal systems.[29] In that vein, the labor-led Gillard government declared in 2011 that it would pass on the inclusion of ISDS provisions in future IIAs after Australia had been confronted with the tobacco-plain packaging arbitration initiated by Philip Morris.[30] Yet after the liberal-led Abbot government came into office two years later, Australia backpedalled on this strict ISDS policy.[31] Australia is now committed to include ISDS provisions on a case-by-case basis in future IIAs and has done so *inter alia* in the recently negotiated TPP or in the *China-Australia Free Trade Agreement*[32] ("ChAFTA").[33] In contrast, the public criticism towards ISDS within the EU as

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[28] Australia-United States Free Trade Agreement (signed on 18 May 2004, entered into force on 1 January 2005) <http://dfat.gov.au/trade/agreements/ausfta/official-documents/Pages/official-documents.aspx> accessed 11 December 2017, ASEAN Australia New Zealand FTA.

[29] ibid, chapter 21 section B; see also Australian Government Department of Foreign Affairs and Trade, 'Australia – United States Free Trade Agreement: Guide to the Agreement' (March 2004) <http://dfat.gov.au/about-us/publications/trade-investment/australia-united-states-free-trade-agreement-guide-to-the-agreement/Documents/ausfta_guide.pdf> accessed 7 December 2017, 59 ("In recognition of the Parties' open economic environments and shared legal traditions, and the confidence of investors in the fairness and integrity of their respective legal systems, the Investment Chapter does not establish an investor-state dispute settlement mechanism.").

[30] Australian Government Department of Foreign Affairs and Trade, 'Gillard Government Trade Policy Statement: Trading our way to more jobs and prosperity' (April 2011) <http://blogs.usyd.edu.au/japaneselaw/2011_Gillard%20Govt%20Trade%20Policy%20Statement.pdf> accessed 7 December 2017, 14 ("In the past, Australian Governments have sought the inclusion of investor-state dispute resolution procedures in trade agreements with developing countries at the behest of Australian businesses. The Gillard Government will discontinue this practice. If Australian businesses are concerned about sovereign risk in Australian trading partner countries, they will need to make their own assessments about whether they want to commit to investing in those countries.").

[31] Jurgen Kurtz and Luke Nottage, 'Investment Treaty Arbitration 'Down Under': Policy and Politics in Australia' (February 2015), Legal Studies Research Paper 15/06 <http://ssrn.com/abstract=2561147> accessed 7 December 2017, 4.

[32] China-Australia Free Trade Agreement (signed on 17 June 2015, entered into force on 20 December 2015) <http://dfat.gov.au/trade/agreements/chafta/official-documents/Pages/official-documents.aspx> accessed 7 December 2017, ChAFTA.

[33] Trans-Pacific Partnership Agreement (signed on 4 February 2016) <http://www.tpp.mfat.govt.nz/text> accessed 7 December 2017, TPP, chapter 9 section B; China-Australia Free Trade Agreement (signed on 17 June 2015, entered into force on 20 December 2015) <http://dfat.gov.au/trade/agreements/chafta/official-documents/Pages/official-documents.aspx> accessed 7 December 2017, ChAFTA, chapter 9 section B; Australian Government Department of Foreign Affairs and Trade, 'Investor-State Dispute Settlement' <http://dfat.gov.au/trade/topics/Documents/isds-faqs.pdf> accessed 7 December 2017.

well as the change in US administration after the presidential election in November 2016 have stalled the negotiations on TTIP.[34] The negotiations are yet to be resumed although the US Secretary of Commerce Wilbur Ross signalled in May 2017 that he would be open to resuming negotiations with the EU.[35]

Considered in isolation, the opposition against ISDS seems strong; however, if put in context, the public criticism does not detract from the general necessity of ISDS. Considering that 130 countries have been affected by investment treaty arbitration, either as home state of the claimant or respondent, or both, the actions of a few select states as described above cannot be regarded as being representative for a global trend in investment treaty arbitration.

A recent study concluded that over 90 percent of the BITs in force have operated without a single investor claim of a treaty breach.[36] Further, the increased use of investor-state arbitration over the past 20 years seems proportional to the overall number of more than 3300 concluded IIAs. Considering the 817 known cases at present, less than 25 percent of the concluded IIAs gave rise to investment arbitration.[37]

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[34] German Federal Ministry for Economic Affairs and Energy, 'Transatlantic Trade and Investment Partnership (TTIP)' <https://www.bmwi.de/Redaktion/EN/Dossier/ttip.html> accessed 7 December 2017; European Commission, 'European Commission Services' Position Paper on the Sustainability Impact Assessment in Support of Negotiations of the Transatlantic Trade & Investment Partnership between the European Union and the United States of America' (31 March 2017) <http://trade.ec.europa.eu/doclib/docs/2017/march/tradoc_155462.pdf> accessed 7 December 2017, 1; Tim Wallace, 'EU's TTIP Trade Deal With the US Has Collapsed, Says Germany' *The Telegraph* (28 August 2016) <http://www.telegraph.co.uk/business/2016/08/28/eus-ttip-trade-deal-with-the-us-has-collapsed-says-germany/> accessed 7 December 2017; Philip Blenkinsop, 'Trump Victory Could Spell Defeat for EU-U.S. Trade Deal' *Reuters* (9 November 2016) <https://www.reuters.com/article/us-usa-election-trade-eu/trump-victory-could-spell-defeat-for-eu-u-s-trade-deal-idUSKBN1342TF> accessed 7 December 2017.

[35] Lori A LaRocco, 'Wilbur Ross Says He's 'Open to Resuming' Talks on Mega-Trade Deal with Europe' *CNBC* (31 May 2017) <https://www.cnbc.com/2017/05/30/exclusive-wilbur-ross-says-hes-open-to-resuming-ttip-negotiations.html> accessed 7 December 2017.

[36] Gregory N. Hicks and Scott Miller, 'Investor-State Dispute Settlement - A Reality Check: A Report of the CSIS Scholl Chair in International Business' (January 2015) <csis.org/files/publication/150116_Miller_InvestorStateDispute_Web.pdf> accessed 7 December 2017, 1.

[37] See below, chapter 1, sec. B. IV, p. 40 et seqq for details.

II. The Shaping of the Discussions by Public Media

Until the mid-1990s when several investors initiated high-profile cases under Chapter 11 of the NAFTA, investment treaty arbitration had received little acclaim in the public media. Yet this changed drastically with the initiation of investment arbitration proceedings against Argentina following the Argentine financial crisis.[38] More recently, the nuclear phase-out related Vattenfall arbitrations[39] and the tobacco-plain packaging related arbitrations initiated by Philip Morris[40] have prompted a vigorous debate on the drawbacks of investment treaty arbitration.

In the course of the TTIP negotiations, the debate on investment treaty arbitration became more heated. An open letter of the organization Allegiance for Justice ("AfJ") dated March 2015 – which was supported by more than a hundred law professors and addressed to the leaders of the US Congress and the US Trade Representative – aptly expresses the critique. The professors opposed the inclusion of investor-state dispute settlement ("ISDS") provisions in the TPP as well as in the TTIP Agreement in order "to protect the rule of law and [the] nation's sovereignty".[41]

The following excerpt of the open letter is illustrative and representative of the ratio underlying the backlash investment treaty arbitration seems to experience in recent years:

> "ISDS grants foreign corporations a special legal privilege, the right to initiate dispute settlement proceedings against a government for actions that allegedly cause a loss of profit for the corporation. Essentially, cor-

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[38] See generally William W. Burke-White, 'The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System' (2008) 3 AJWH 199.

[39] *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v Federal Republic of Germany* (Award, 21 March 2011) ICSID Case No. ARB/09/6, <http://www.italaw.com/sites/default/files/case-documents/ita0890.pdf> accessed 7 December 2017; *Vattenfall AB and others v Federal Republic of Germany* (Pending) ICSID Case No. ARB/12/12, <http://www.italaw.com/cases/1654> accessed 11 December 2017.

[40] *Philip Morris Asia Limited (Hong Kong) v The Commonwealth of Australia* (Pending) PCA Case No. 2012-12, <http://www.pcacases.com/web/view/5> accessed 7 December 2017.

[41] 'Open Letter to Congressional Leaders and the U.S. Trade Representative by 100 Law Professors' (11 March 2015) <http://www.afj.org/wp-content/uploads/2015/03/ISDS-Letter-3.11.pdf> accessed 7 December 2017.

> porations use ISDS to challenge government policies, actions, or decisions that they allege reduce the value of their investments. These challenges are not heard in a normal court but instead before a tribunal of private lawyers.
>
> This practice threatens domestic sovereignty and weakens the rule of law by giving corporations special legal rights, allowing them to ignore domestic courts, and subjecting the United States to extrajudicial private arbitration. Corporations are able to re-litigate cases they have already lost in domestic courts. Further, they are able to do so in a private system lacking procedural protections. As more multi-national corporations are based outside of the US, more such challenges will be brought against the US.
>
> ISDS proceedings lack many of the basic protections and procedures of the justice system normally available in a court of law. There is no appeals process. There is no oversight or accountability of the private lawyers who serve as arbitrators, many of whom rotate between being arbitrators and bringing cases for corporations against governments. The system is also a one-way ratchet because corporations can sue, forcing governments to spend significant resources, while governments impacted by foreign corporations cannot bring any claims."[42]

A similar initiative was launched by 101 professors of law from 24 European countries against TTIP and CETA.[43] These are not the first such initiatives. In 2010, more than 70 internationally based scholars,[44] not necessarily of law released an open statement circulated by Osgoode Hall Law School. Therein they

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[42] ibid.

[43] 'Legal statement on investment protection in TTIP and CETA' (17 October 2016) <https://www.tni.org/en/article/legal-statement-on-investment-protection-in-ttip-and-ceta> accessed 7 December 2017.

[44] *inter alia* Gus Van Harten, Muthucumaraswamy Sornarajah, Peter Muchlinski, Sol Picciotto, Markus Krajewski and Stephen Gill; Gus van Harten and others, 'Public Statement on the International Investment Regime' (31 August 2010) <http://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/> accessed 7 December 2017 ("We have a shared concern for the harm done to the public welfare by the international investment regime, as currently structured, especially its hampering of the ability of governments to act for their people in response to the concerns of human development and environmental sustainability. […] Awards issued by international arbitrators against states have in numerous cases incorporated overly expansive interpretations of language in investment treaties. These interpretations have prioritized the protection of the property and economic interests of transnational corporations over the right to regulate of states and the right to self-determination of peoples. This is especially evident in the approach adopted by many arbitration tribunals to investment treaty concepts of corporate nationality, expropriation, most-favoured-nation treatment, non-discrimination, and fair and equitable treatment, all of which have been given unduly pro-investor interpretations at the expense of states, their governments, and those on whose behalf they act. This has constituted a major reorientation of the balance between investor protection and public regulation in international law. The award of damages as a remedy of first resort in investment arbitration poses a serious threat to democratic choice and the capacity of govern-

ultimately recommended the disengagement from the current investment treaty regime. In May 2015, Roosevelt Institute Chief Economist and Nobel laureate Joseph Stiglitz addressed another letter to the US Congress raising concerns about the inclusion of ISDS in BITs in general and specifically in the TPP and TTIP Agreements. He noted that scholars "from left and right" agreed on that policy and he summarized his position by stating that

> "ISDS is about rewriting the rules of how our economy works, tipping the balance of power in favor of big businesses at the expense of workers and the public here and in partner countries."[45]

While the critical assessment of investment treaty arbitration as a system that is 'ruled by lawyers and not the law' seems to have gained strong support in the public opinion, its merit is debatable. As it is, more than 40 law professors and scholars of international law, arbitration, and dispute settlement were part of a counter-initiative addressing the issues of the AfJ letter in another open letter circulated by the Yves Fortier Chair at McGill University.[46] The McGill letter addressed the criticism invoked by the AfJ letter and cautioned "that the discussion should be based on facts and balanced representations, rather than on errors or skewed information."[47] In a fast-moving world where the public opinion is largely steered by the media, in particular *via* the internet and social media which unfold an ever increasing influence, it seems difficult to conduct an informed debate. This has become a major issue during the reforms discussion.[48]

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ments to act in the public interest by way of innovative policy-making in response to changing social, economic, and environmental conditions. […] Investment treaty arbitration as currently constituted is not a fair, independent, and balanced method for the resolution of investment disputes and therefore should not be relied on for this purpose.").

[45] Joseph E. Stiglitz, 'Where Progressives and Conservatives Agree on Trade: Current Investor-State Dispute Settlement model is bad for the United States: Letter to the U.S. Congress' (18 May 2015) <https://www8.gsb.columbia.edu/faculty/jstiglitz/sites/jstiglitz/files/2015%20Letter%20to%20Congress%20on%20Trade%20Deal.pdf> accessed 11 December 2017.

[46] Susan D. Franck and others, 'An Open Letter About Investor-State Dispute Settlement by More than 40 Law Professors' (7 April 2015) <https://www.mcgill.ca/fortier-chair/isds-open-letter> accessed 7 December 2017. Among the signatories were, inter alia, the renowned international law professors Susan D. Franck; José E. Alvarez; Andrea Bjorklund; Charles H. Brower II; David A. Gantz; Jan Paulsson; Michael W. Reisman; Jeswald W. Salacuse; Debra P. Steger and Kenneth J. Vandevelde.

[47] ibid.

[48] Jörg Risse, 'Wehrt Euch endlich! Wider das Arbitration-Bashing' [2014] SchiedsVZ 265, 265 et seqq.

III. Background of the Legitimacy Crisis

The issues that lie at the core of the current legitimacy debate are manifold. They *inter alia* include the aspects of ensuring consistency and predictability of the awards regarding investment protection standards, of the independence and impartiality of the arbitrators (hereinafter also "arbitral independence and impartiality"), of the possibility to appeal an award as well as of transparency.[49]
The legitimacy of the standard of arbitral independence and impartiality, in particular, has been questioned on the grounds that investment disputes should be subject to the rule of law and not the rule of lawyers.[50] This argument is based on the premise that investment arbitrators lack judicial independence and thus may be biased. This conclusion is mostly based on the fact that the control mechanisms to ensure arbitral independence and impartiality deviate from those employed within international courts and tribunals and are more in line with commercial arbitration.

The criticism of investment treaty arbitration seems to at least partially be a result of the controversial nature of investment disputes and the fact that investment disputes often deal with complex and sensitive subject-matter involving regulatory measures of the host state and touching upon the host state's right to regulate. The public international law element results from the fact that the investment regime is comprised of international treaties that are governed by public international law.[51] A resemblance to (domestic) public law – to a certain extent – further results from the investment relationship between a foreign investor and a host state in as much as a relationship between an individual and a state is concerned.[52] The public (international) law element of the investment

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[49] European Commission, 'A Multilateral Investment Court: A New System for resolving Disputes Between Foreign Investors and States in a Fair and Efficient Way' (13 September 2017) <http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156042.pdf> accessed 7 December 2017, 3.

[50] See e.g. the blog post of EU Trade Commissioner Malmström, Cecilia Malmström, 'Investments in TTIP and beyond - towards an International Investment Court' (5 May 2015) Blog Post <http://ec.europa.eu/commission/2014-2019/malmstrom/blog/investments-ttip-and-beyond-towards-international-investment-court_en> accessed 7 December 2017 ("My assessment of the traditional ISDS system has been clear – it is not fit for purpose in the 21st century. I want the rule of law, not the rule of lawyers.").

[51] See above in this chapter, sec. A. I. and II., p. 2 et seqq.

[52] European Commission, 'The Identification and Consideration of Concerns as Regards Investor to State Dispute Settlement' (20 November 2017) Working Paper for UNCITRAL

regime sets it apart from commercial arbitration which is why several stakeholders demand a reform of the current system which adequately reflects the specific character of investment disputes.

C. The EU Response to the Legitimacy Crisis

Against this backdrop, the EU – encountering strong public opposition during the negotiations of the TTIP Agreement with the United States of America ("US") – in 2015 launched its proposal to substitute investment treaty arbitration as a dispute resolution mechanism with a two-tiered investment court system ("ICS") in the investment chapters of all FTAs completed in the future. In this context, the European Parliament *inter alia* recommended to the EU Commission in July 2015

> "to ensure that foreign investors are treated in a non-discriminatory fashion, while benefiting from no greater rights than domestic investors, and to replace the ISDS system with a new system for resolving disputes between investors and states which is subject to democratic principles and scrutiny, where potential cases are treated in a transparent manner by publicly appointed, independent professional judges in public hearings and which includes an appellate mechanism, where consistency of judicial decisions is ensured, the jurisdiction of courts of the EU and of the Member States is respected, and where private interests cannot undermine public policy objectives".[53]

Two months later, the EU Commission published the *Commission Draft Text TTIP - Investment*[54], an internal document providing for the establishment of an investment court system with permanent tribunals for the first and appellate instance.[55] In November 2015, the EU then published its formal TTIP proposal

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WG III <http://trade.ec.europa.eu/doclib/docs/2017/november/tradoc_156402.pdf> accessed 7 December 2017, 1 et seq.

[53] European Parliament Resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP) (2014/2228(INI)) P8_TA-PROV(2015)0252, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2015-0252+0+DOC+PDF+V0//EN> accessed 7 December 2017, art. 2.(d)(xv).

[54] European Commission, 'Commission Draft Text TTIP - Investment' (16 September 2015) <http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf> accessed 7 December 2017.

[55] ibid, art. 9 et seqq; see also European Commission, 'Draft text on Investment Protection and Investment Court System in the Transatlantic Trade and Investment Partnership (TTIP): European Commission - Fact Sheet' (16 September 2015) <http://europa.eu/rapid/press-release_MEMO-15-5652_en.htm> accessed 7 December 2017.

regarding *Investment Protection and Resolution of Investment Disputes* under TTIP[56] ("TTIP Proposal").

The TTIP Proposal was preceded by an *Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)* [57] with the intention to receive feedback from the stakeholders regarding possible improvements to the current system.[58] From the 150,000 replies received, the EU Commission concluded that there were four issues where further improvements should be explored: the protection of the government's right to regulate; the establishment and functioning of arbitral tribunals; the relationship between the domestic judiciary and ISDS and the possibility of establishing an appellate mechanism.[59]

The EU implemented the ICS in the recently signed *EU-Vietnam Free Trade Agreement*[60] ("EUVFTA") and CETA. Yet this bilateral solution is not the ultimate reform goal of the EU. CETA and EUVFTA both include provisions that foresee the transition from the ICS to a permanent multilateral investment court system ("MIC") committing Canada and Vietnam to work with the EU to create such a court.[61] The creation of a MIC had previously been defined as the ultimate

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[56] Transatlantic Trade and Investment Partnership (EU Proposal for Investment Protection and Resolution of Investment Disputes, published on 12 November 2015) <http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf> accessed 7 December 2017, TTIP Proposal.

[57] European Commission, 'Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP): Report' (13 January 2015) Commission Staff Working Document SWD(2015) 3 final <http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf> accessed 7 December 2017.

[58] ibid, 8.

[59] ibid, 4.

[60] EU-Vietnam Free Trade Agreement (Agreed text as of January 2016) <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437> accessed 7 December 2017, EUVFTA, chapter 8 section 3.

[61] European Commission, 'A Future Multilateral Investment Court' (13 December 2016) MEMO/16/4350 <http://europa.eu/rapid/press-release_MEMO-16-4350_en.htm> accessed 7 December 2017.

goal of long-term reform in a concept paper published by EU Trade Commissioner Malmström in May 2015.[62] The EU Commission currently evaluates potential features of such a MIC to replace the bilateral tribunals in the future.[63] The United Nations Commission on International Trade Law ("UNCITRAL") joined the reform discussions in July 2017.[64]

To substantiate the need for such a MIC, EU Trade Commissioner Cecilia Malmström reiterated in a speech on 27 February 2017 several (mis-)conceptions of investment treaty arbitration, *inter alia,* contending that

> "[y]ou expect judges to be qualified, free of any perception of conflict of interest; free of any interest in the outcome of the case. This does not happen with ISDS."[65]

She also emphasized that any reformed system must be built on the principles of the EU trade policy and thus should be transparent, effective and value-based.[66] Against this background, the EU Commission released a recommendation for a Council decision on 13 September 2017 whose adoption would allow the EU to participate in negotiations for a MIC.[67]

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[62] Cecilia Malmström, 'Concept Paper: Investment in TTIP and beyond – the path for reform: Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court' (5 May 2015) <http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF> accessed 7 December 2017, 11.

[63] European Commission, 'A Multilateral Investment Court: A New System for resolving Disputes Between Foreign Investors and States in a Fair and Efficient Way' (13 September 2017) <http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156042.pdf> accessed 7 December 2017, 2.

[64] ibid, 2; European Commission, 'The Identification and Consideration of Concerns as Regards Investor to State Dispute Settlement' (20 November 2017) Working Paper for UNCITRAL WG III <http://trade.ec.europa.eu/doclib/docs/2017/november/tradoc_156402.pdf> accessed 7 December 2017, 1 et seqq.

[65] Cecilia Malmström, 'Reforming investment dispute settlement' (Speech, Brussels, 27 February 2017) <http://trade.ec.europa.eu/doclib/docs/2017/february/tradoc_155393.pdf> accessed 12 December 2017, 5.

[66] ibid, 4.

[67] European Commission, 'Recommendation for a Council Decision Authorising the Opening of Negotiations for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes' (13 September 2017) COM(2017) 493 final <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1505306108510&uri=COM:2017:493:FIN> accessed 7 December 2017, 1 et seqq.

Based on the premise of these recent developments, this thesis sets out to assess whether the currently proposed reforms are necessary and/or desirable to ensure or enhance the legitimacy of investment treaty arbitration. In this respect, particular attention is paid to a comparison between the standard of arbitral independence and impartiality and that of judicial independence and impartiality at the international and supranational level to assess whether the control mechanisms are indeed insufficient to legitimize investment treaty arbitration.

1

BIT by BIT: The Proliferation of Investment Treaty Arbitration

The historical context from which the current regime of investment treaty arbitration has emerged represents an important aspect in the current reforms discussion as it elucidates the political intricacies that accompanied the emergence of the system and the (failed) attempts of procedural reform. The recurrent failure of concluding a multilateral investment agreement during the past century has induced the emergence of the currently fragmented investment landscape while simultaneously acting as a deterrent to any attempt of reforming the investment treaty arbitration regime.

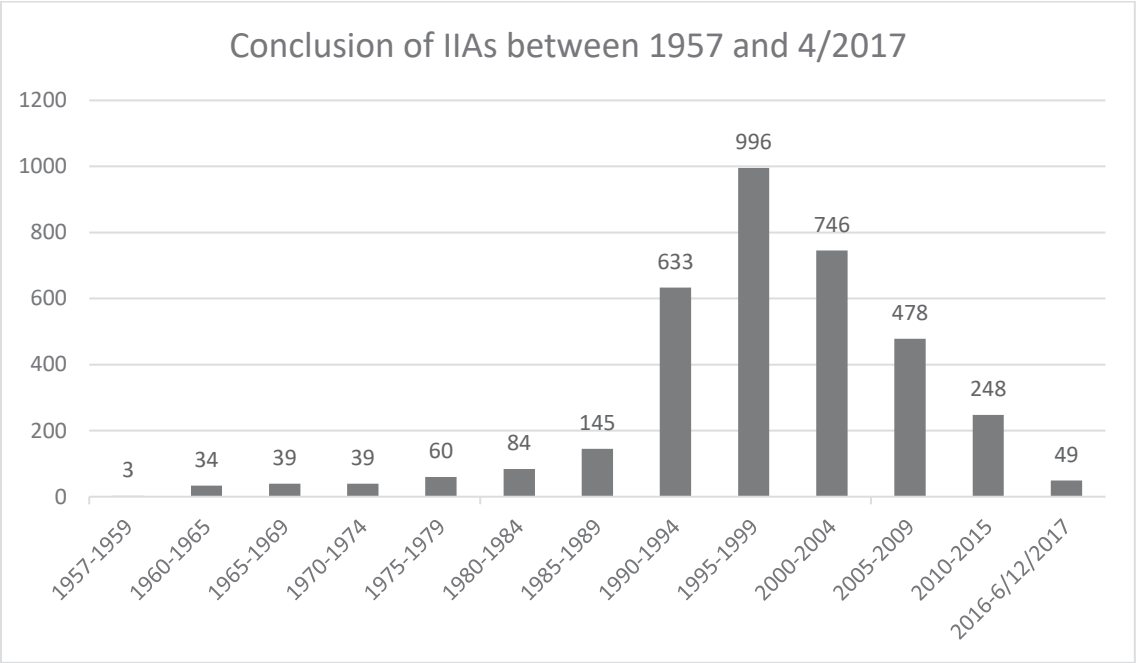
A. The Evolution of IIAs

The vast majority of the current IIA network consists of BITs with only about a tenth being other IIAs such as regional treaties.[68] Although BITs have generally been concluded since 1959 – when Germany and Pakistan concluded the first modern BIT – they were few and far between in the earlier years. It was not until the 1990s, that an increasing proliferation of BITs occurred.

I. The IIA 'Boom' and its Manifold Causes

The first half of the 1990s witnessed a veritable boom *vis-à-vis* the conclusion of IIAs as their number more than quadrupled compared to the previous five years. During the next five years that number grew even more exponentially as the following figure illustrates:

[68] See above, Introduction, sec. A. I., p. 2 et seq.



Source: UNCTAD, Investment Policy Hub[69], *status:* 6 December 2017.

Among the several factors that may have contributed to the exponential proliferation of IIAs seems to be the emergence of the *Washington Consensus*[70] in 1989, a set of ten policy reforms that were considered beneficial for the development of Latin American countries.[71] The policy reforms were promoted by the International Monetary Fund ("IMF"), the World Bank and the US Treasury

[69] UNCTAD, 'Investment Policy Hub: International Investment Agreements Navigator' <http://investmentpolicyhub.unctad.org/IIA/MostRecentTreaties#iiaInnerMenu> accessed 7 December 2017.

[70] The term 'Washington Consensus' was coined by economist John Williamson. See for a summary of the history of the Washington Consensus: John Williamson, 'A Short History of the Washington Consensus' in Narcís Serra and Joseph E Stiglitz (eds), *The Washington Consensus Reconsidered: Towards a New Global Governance* (Oxford University Press 2008) 14 et seqq; See also John Williamson, 'What Washington Means by Policy Reform' in John Williamson (ed), *Latin American Adjustment: How Much Has Happened?* (Institute for International Economics 1990) 7 et seqq.

[71] John Williamson, 'A Short History of the Washington Consensus' in Narcís Serra and Joseph E. Stiglitz (eds), *The Washington Consensus Reconsidered: Towards a New Global Governance* (Oxford University Press 2008) 14 et seqq. The Washington Consensus became a controversial issue during the following years as its opponents called it a "set of neoliberal policies […] imposed on hapless countries by the Washington-based international financial institutions", see John Williamson, 'Did the Washington Consensus Fail?: Outline of speech at the Center for Strategic and International Studies' (6 November 2002) <http://www.iie.com/publications/papers/print.cfm?ResearchId=488&doc=pub> accessed 7 December 2017.

which led to their implementation in the following years.[72] The *Washington Consensus* reinforced *inter alia* that fiscal discipline, privatization of state enterprises and market liberalization were main pillars in facilitating economic development and stabilization within developing states.[73] The consensus included the promotion of Foreign Direct Investment[74] ("FDI"), acknowledging that the conclusion of IIAs was crucial to the development of developing states.[75] Another factor responsible for triggering the rapid increase in IIAs may have been the lack of alternatives for developing states. The Third World Debt crisis and the economic recession in developed states both led to a decrease of international lending and aid for the benefit of developing states.[76] Hence, the importance of FDI flows increased significantly and states sought to attract more FDI by creating an investment-friendly environment through the conclusion of IIAs.[77] The

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[72] Narcís Serra, Shari Spiegel and Joseph E. Stiglitz, 'Introduction: From the Washington Consensus Towards a New Global Governance' in Narcís Serra and Joseph E. Stiglitz (eds), *The Washington Consensus Reconsidered: Towards a New Global Governance* (Oxford University Press 2008) 3.

[73] Narcís Serra and Joseph E. Stiglitz (eds), *The Washington Consensus Reconsidered: Towards a New Global Governance* (Oxford University Press 2008) 3.

[74] UNCTAD defines FDI as follows: "Foreign direct investment (FDI) is a category of investment that reflects the objective by a resident enterprise in one economy (direct investor) of establishing a lasting interest in an enterprise (direct investment enterprise) that is resident in an economy other than that of the direct investor. Lasting interest implies the existence of a long-term relationship between the direct investor and the direct investment enterprise, and a significant degree of influence on the management of that enterprise. Direct or indirect ownership of 10 percent or more of the voting power of an enterprise resident in one economy by an investor resident in another economy is considered to be evidence of such a relationship." UNCTAD, *UNCTAD Training Manual on Statistics for FDI and the Operations of TNCs: FDI Flows and Stocks* (vol 1, United Nations 2009) 38.

[75] John Williamson, 'What Washington Means by Policy Reform' in John Williamson (ed), *Latin American Adjustment: How Much Has Happened?* (Institute for International Economics 1990) 7 et seqq; Andrew P. Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009) 48.

[76] Gus van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press 2007) 38 et seqq; Kenneth J. Vandevelde, 'A Brief History of International Investment Agreements' (2005) 12 UC Davis J Int'l L & Pol'y 157, 177 et seqq.

[77] Karl P. Sauvant, 'The Rise of International Investment, Investment Agreements and Investment Disputes' in Karl P Sauvant (ed), *Appeals Mechanism in International Investment Disputes* (Oxford University Press 2008) 9.

development was further propelled by the collapse and fragmentation of the Soviet Union which led to the emergence of new market economies in Central and Eastern Europe.[78]

Initially, the offer of an effective investment protection regime was seen as a tool to attract more FDI by minimizing the risk of the investor.[79] To this end, developing states that lacked confidence in their domestic regulatory authorities offered the adherence to international minimum standards in an attempt to bridge the gap to the existing regulatory standards in developed states.[80] ISDS was also considered to have a depoliticising effect with regard to the international relations between states,[81] since ISDS enables foreign investors and host states to resolve disputes without the involvement of the investor's home state.[82] This is promoted by advocates of ISDS as a significant advantage to state to state dispute settlement.[83]

Today, the linkage between the conclusion of IIAs with a strong investment protection regime in place and FDI is controversial. Many studies on this field concluded that IIAs did not contribute to the attraction of FDI.[84] The relationship between ISDS and FDI thus remains ambiguous.[85] In addition, the depoliticising

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[78] Chester Brown, 'The Evolution of the Regime of International Investment Agreements' in Marc Bungenberg and others (eds), *International Investment Law* (C.H. BECK; Hart; Nomos 2015) 181 para 70.

[79] Christoph H. Schreuer, 'Do We Need Investment Arbitration?' (2014) 11 Transnat'l Disp Mgmt 1 et seqq.

[80] Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press 2009) 1.

[81] Christoph Schreuer, 'Investment Protection and International Relations' in August Reinisch and Ursula Kriebaum (eds), *The Law of International Relations: Liber amicorum Hanspeter Neuhold* (Eleven International Pub 2007) 357.

[82] OECD, *OECD Business and Finance Outlook 2016* (OECD 2016) 227.

[83] ibid.

[84] Gus van Harten, 'Five Justifications for Investment Treaties: A Critical Discussion' (2010) 2 Trade L & Dev 1, 7 et seqq; Susan D. Franck, 'Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law' (2007) 19 Global Bus & Dev L J 337, 373 ("As there is mixed empirical and anecdotal evidence about the impact investment treaties have on FDI, it is not surprising that the evidence with regard to the specific effect of investment treaty arbitration is also unclear.").

[85] Australian Government Productivity Commission, 'Bilateral and Regional Trade Agreements - Research Report' (November 2010) <http://www.pc.gov.au/projects/study/trade-agreements/report> accessed 11 December 2017, 269 ("There is also evidence that committing to ISDS provisions does not influence foreign investment flows into a

effect is to some extent overshadowed by the fact that ISDS has become a subject of current political controversies and a mayor point of contention in several jurisdictions.[86]

II. FCN Treaties: The Forerunners of the Current IIAs

The conclusion of the 1959 Germany-Pakistan BIT marks the starting-point for the development of the current regime of IIAs.[87] Yet the substantive provisions contained in modern IIAs have a longer tradition that roots in the FCN treaties as forerunners of modern IIAs.

Originally, FCN treaties were concluded to regulate trade matters by the US during the colonial era in the 18th century.[88] Yet the FCN treaties did not directly deal with investments. They contained, however, provisions on the protection of property that later on gave rise to the debate on an international minimum standard of treatment of aliens.[89] The US FCN treaties for instance required the payment of compensation in the event of expropriation[90] and granted the nationals

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country"); Axel Berger and others, 'Attracting FDI through BITs and RTAs: Does treaty content matter?' (30 July 2012) Columbia FDI Perspectives 75 <http://ccsi.columbia.edu/files/2014/01/FDI_75.pdf> accessed 7 December 2017, 2.

[86] OECD, *OECD Business and Finance Outlook 2016* (OECD 2016) 227; see also above Introduction, sec. B. I., p. 10 et seqq.

[87] Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments (signed on 25 November 1959, entered into force on 28 April 1962) 457 UNTS 23, 1959 Germany-Pakistan BIT; Karl P. Sauvant, 'The Rise of International Investment, Investment Agreements and Investment Disputes' in Karl P. Sauvant (ed), *Appeals Mechanism in International Investment Disputes* (Oxford University Press 2008) 9; UNCTAD, 'Bilateral Investment Treaties 1959-1999' (New York and Geneva 2000) <http://unctad.org/en/docs/poiteiiad2.en.pdf> accessed 7 December 2017, 1.

[88] The first of these treaties was concluded in 1782 between the US and France, the Treaty of Amity and Commerce, United States - France (signed on 16 July 1782) 8 STAT 12, 1782 US-France FCN. Other early FCN treaties were the Treaty of Amity and Commerce, United States - Netherlands (signed on 8 October 1782) 8 STAT 32, 1782 US-Netherlands FCN; Treaty of Peace and Friendship, United States - Morocco (signed on 23 June 1786) 8 STAT 100, 1786 US-Morocco FCN; Treaty of Friendship, Limits and Navigation, United States - Spain (signed on 27 October 1795) 8 STAT 138, 1795 US-Spain FCN.

[89] Kenneth J. Vandevelde, 'A Brief History of International Investment Agreements' (2005) 12 UC Davis J Int'l L & Pol'y 157, 158 et seq.

[90] See for instance the General Treaty of Amity, Commerce, and Consular Privileges, US - El Salvador (6 December 1870) 18 STAT 725; Treaty of Amity, Commerce, and Navigation, United States - Congo (signed on 24 January 1891) 27 STAT 926, 1891 US-Congo

of one state party most favoured nation ("MFN") and national treatment regarding the right to engage in business dealings on the territory of the other state party.[91] Yet the FCN treaties were not only limited by scope and protection, they also failed to provide any means of enforcement.[92]

Thus, up until the Second World War ("WWII"), investment disputes were most commonly solved by diplomacy or military force.[93] In the aftermath of the First World War ("WWI"), the FCN treaty regime gradually evolved and incorporated more and more provisions on investment protection.[94]

The end of WWII saw a new wave of FCN treaties triggered by the need to regulate the reconstruction process and to provide investment protection.[95] In addition to the provisions on property protection, the FCN treaties concluded in the post-WWII era guaranteed 'equitable treatment' with respect to not only property but also persons and enterprises of the respective other state party.[96] The presence of these investment protection provisions became more dominant in the post-WWII FCN treaties as the conclusion of more bilateral trade agreements became less important after the *General Agreement on Tariffs and Trade*[97] ("GATT") was established in 1947.[98]

FCN; Treaty of Friendship, Commerce, and Navigation, United States - Nicaragua (signed on 21 June 1867) 15 STAT 549, 1867 US-Nicaragua FCN, art. IX.

[91] See for instance the Treaty of Commerce, United States - Yugoslavia (signed on 14 October 1881) 22 STAT 963, 1881 US-Yugoslavia FCN, art. I.

[92] Kenneth J. Vandevelde, 'A Brief History of International Investment Agreements' (2005) 12 UC Davis J Int'l L & Pol'y 157, 161.

[93] ibid.

[94] Alexandra Diehl, *The Core Standard of International Investment Protection: Fair and Equitable Treatment* (International arbitration law library vol 26, Kluwer Law International 2012) 38.

[95] Herman Walker, JR, 'Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice' (1956) 5 Am J Comp L 229, 244 et seq.

[96] See exemplary Treaty of Friendship, Commerce and Navigation, United States - Greece (signed on 3 August 1951) 5 UST 1829, 1951 US-Greece BIT, art. I ("Each Party shall at all times accord equitable treatment to the persons, property, enterprises and other interests of nationals and companies of the other Party.") [Emphasis added].

[97] General Agreement on Tariffs and Trade (signed on 30 October 1947, provisionally applied from 1 January 1948 pursuant to the Protocol of Provisional Application) 55 UNTS 814, GATT 1948.

[98] Kenneth J. Vandevelde, 'A Brief History of International Investment Agreements' (2005) 12 UC Davis J Int'l L & Pol'y 157, 161.

The investment treatment standards reflected in the post-WWII FCN treaties influenced the codification efforts of a multilateral investment treaty and were incorporated in the *Draft Convention on Investments Abroad*[99] ("Abs-Shawcross Draft Convention").[100] The post-WWII FCN treaties also contained provisions on dispute resolution where the parties consented to the jurisdiction of the then newly established International Court of Justice ("ICJ") regarding disputes over the interpretation or application of the respective treaty.[101] Yet these provisions did not release the investor from the obligation to meet the conditions of diplomatic protection by exhausting all local remedies and persuading his home state to espouse his claim.[102]

III. The Conclusion of BITs at the Initiative of Developed States

In 1959, a new era began with the conclusion of the Germany-Pakistan BIT.[103] Other Western European countries quickly followed Germany's lead.[104] Although FCN treaties were still concluded in the aftermath of the first BIT, they became few and far between. The US for instance concluded their last FCN

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[99] Draft Convention on Investments Abroad (1960) 9 JPL 116; reprinted in: UNCTAD, International Investment Instruments: A Compendium, Vol. 5 (United Nations, 1996) 395, Abs-Shawcross Draft Convention.

[100] Cf. 1951 US-Greece BIT, art. I and art. VII(1) ("Property of nationals and companies of either Party shall receive the most constant protection and security within the territories of the other Party.") and Abs-Shawcross Draft Convention, art. 1 ("Each Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties. Such property shall be accorded the most constant protection and security within the territories shall not in any way be impaired by unreasonable or discriminatory measures.").

[101] See for instance the Treaty of Friendship, Commerce and Navigation, United States - Japan (signed on 2 April 1953) 4 UST 2063, 1953 US-Japan FCN, art. XXIV(2) ("Any dispute between the Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the Parties agree to settlement by some other pacific means.").

[102] Kenneth J. Vandevelde, 'A Brief History of International Investment Agreements' (2005) 12 UC Davis J Int'l L & Pol'y 157, 165.

[103] See Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments (signed on 25 November 1959, entered into force on 28 April 1962) 457 UNTS 23, 1959 Germany-Pakistan BIT.

[104] France concluded its first BIT in 1960, Switzerland in 1961, the Netherlands in 1963, Italy and the Belgium-Luxembourg Union in 1964, Sweden in 1965, Norway in 1966 and Denmark in 1968. See for more details UNCTAD, 'Bilateral Investment Treaties 1959-1999' (New York and Geneva 2000) <http://unctad.org/en/docs/poiteiiad2.en.pdf> accessed 7 December 2017, 53.

treaty in 1966.[105] The first wave of BITs up until 1990 were almost exclusively concluded between developing and developed states, usually at the initiative of the developed states.[106]

The BIT practice is best explained by looking at the different economic interests. Developed states were typically capital-exporting states while developing states were typically capital-importing states.[107]

The capital-exporting states sought to enter into BITs to obtain additional and higher standards of legal protection for their investors than those usually offered under the national laws of the capital-importing states.[108] This became even more significant after all codification efforts regarding a minimum standard of treatment failed. Developing states continued to reject the idea of such a standard while maintaining their position that foreign investors should only be able to raise the same treatment that the developing states accorded their own nationals.

Keeping in mind that capital-importing states were mostly developing states, their incentive to conclude the BITs with capital-exporting states stems from the creation of a favourable environment that would attract foreign investors.[109]

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[105] Kenneth J. Vandevelde, 'A Brief History of International Investment Agreements' (2005) 12 UC Davis J Int'l L & Pol'y 157, 162.

[106] Between 1960 and 1970, a total number of 65 BITs was concluded between developing and developed states while only 3 were concluded among developing states. Between 1970 and 1980, the numbers were similar: 69 BITs were concluded between developing and developed states and between developing states and Central and Eastern European countries while only 6 were concluded among developing states. Between 1980 and 1990 there was a small increase in BITs concluded between developing and developed/Eastern European countries: 125 BITs were concluded between developing and developed states and 19 between developing and Eastern European countries, while 31 were concluded among developing states. See UNCTAD, 'Bilateral Investment Treaties 1959-1999' (New York and Geneva 2000) <http://unctad.org/en/docs/poiteiiad2.en.pdf> accessed 7 December 2017, 5.

[107] ibid, 1.

[108] ibid.

[109] ibid. See also Catherine M. Amirfar, 'Treaty Arbitration: Is the Playing Field Level and Who Decides Whether It Is Anyway?' in Van den Berg, Albert Jan (ed), *Legitimacy: Myths, Realities, Challenges* (ICCA Congress Series No. 18, Legitimacy: Myths, Realities, Challenges. Wolters Kluwer Law & Business 2015) 757 et seqq; Francisco Orrego Vicuña, 'Carlos Calvo, Honorary NAFTA Citizen' (2002) 11 NYU Envtl L J 19, 30.

B. The Emergence of Investment Treaty Arbitration

Historically, investors had no avenue to directly assert their claims vis-à-vis a foreign state; they were instead dependent on their home state's cooperation to exercise diplomatic protection on their behalf (see I.). This procedural obstacle was resolved by granting investors direct access to arbitration *via* investment treaty arbitration (see II.). The inception of investment treaty arbitration eliminated the need for diplomatic protection to settle investment disputes (see III.). Since the mid-1990s, the use of investment treaty arbitration increased significantly with a veritable 'boom' since the year 2000 (see IV.).

I. International Arbitration between States as the Traditional Method of Dispute Settlement under FCN Treaties

A survey undertaken by Stuyt demonstrates the significance of international inter-state arbitration as a method for settling international disputes arising from FCN treaties. According to the data compiled by Stuyt and a table drawn by James Crawford, between 1794 and the First Hague Conference in 1899, an estimated total number of 6117 interstate arbitral awards was rendered. Between the First Hague Conference and the creation of the Permanent Court of International Justice ("PCIJ") in 1922, a total number of 226 and from 1924 until 1989, a total number of 309[110] interstate arbitral awards can be accounted for.[111] During the latter time-period, there were also 76 arbitral awards rendered between states and other entities.[112]

After the end of WWII, the use of international inter-state arbitration increased significantly.[113] This was partly because disputes arising from the earlier FCN treaties could only be brought before an arbitral tribunal or mixed commission

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[110] This does not include the many awards that are unaccounted for, including the awards rendered by the Iran-US Claims Tribunal (IUSCT).

[111] James Crawford, 'Continuity and Discontinuity' in Christina Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Scheuer* (Oxford University Press 2009) 808; Alexander M. Stuyt, *Survey of International Arbitrations: 1794-1989* (3rd edn, Martinus Nijhoff Publishers 1990) 1 et seqq.

[112] ibid.

[113] Andrew P. Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009) 24.

if the states gave their express consent after the dispute had already arisen.[114] In contrast, the post-WWII FCN treaties as well as the early BITs contained explicit and binding dispute resolution clauses that regulated the access to arbitration and other dispute resolution options.[115] To mitigate the risks arising from possible bias, corruption and inefficiency in the national courts of the host state, investors also began to incorporate contractual arbitration clauses to settle investment disputes.[116] A side-effect of the increased use of international arbitration – also in the commercial context between companies – was the growing question of enforcement of the awards rendered by the tribunals. This led to the conclusion and widespread ratification of the *Convention on the Recognition of Foreign Arbitral Awards*[117] ("New York Convention") in 1958, which limits the grounds on which national courts may refuse to recognize or enforce a foreign arbitral award.[118]

II. The Rise of Investment Treaty Arbitration through the Establishment of ICSID

The rise of investment treaty arbitration can directly be linked to the adoption of the ICSID Convention under the auspices of the World Bank which led to the creation of ICSID. The ICSID Convention has been ratified by 153 States Parties and signed by another eight.[119] ICSID provides the parties with a neutral forum to directly settle disputes arising between foreign investors and the host states

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[114] See e.g. the Jaffa-Jerusalem Railway Arbitration of 1922, reproduced in: Shabtai Rosenne, 'The Jaffa-Jerusalem Railway Arbitration (1922)' (1998) 28 Isr YBHR 239. Regarding the concession cases arising from concession agreements concluded during the 1920s between Western companies and the Soviet Union, see Stephen M Schwebel, *Justice in International Law* (Cambridge University Press 1994) 436. See also generally Van V. Veeder, 'Lloyd George, Lenin and Cannibals: The Harriman Arbitration' (2000) 16 Arb Int'l 115; V. V Veeder, 'The 1921–1923 North Sakhalin Concession Agreement: The 1925 Court Decisions Between the US Company Sinclair Exploration and the Soviet Government' (2002) 18 Arb Int'l 185.

[115] See e.g. the 1953 US-Japan FCN, art. XXIV(2).

[116] M. Sornarajah, *The International Law on Foreign Investment* (2nd ed. Cambridge University Press 2004) 404 et seq.

[117] Convention on the Recognition of Foreign Arbitral Awards (signed on 10 June 1958, entered into force on 7 June 1959) 330 UNTS 38, 1959 New York Convention.

[118] ibid, art. III et seqq.

[119] ICSID, 'Database of ICSID Member States' <https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx> accessed 7 December 2017.

given the parties' prior consent.[120] To this end, it offers facilities for conciliation and arbitration of investment disputes between States Parties and nationals of other States Parties.[121] Yet the ICSID Convention does not establish a permanent arbitral tribunal; it merely provides the legal framework and governs the conduct of arbitration as well as the enforcement of awards.[122]

The concept of investment treaty arbitration developed against the backdrop of the so-called 'first United Nations ("UN") development decade' which was launched by the UN General Assembly in December 1961 and spanned the 1960's when it became clear that the desired economic growth of the developing countries could not be achieved solely by depending on the resources of investor states but would also depend on additional investments from the private sector.[123] To facilitate and promote such private investments, international organizations devised several suggestions and models intended to remove some of the road-blocks hindering the flow of foreign investment.[124]

In this setting, the General Counsel of the World Bank Aron Broches transmitted a note to the Executive Directors on 28 August 1961 concerning the *Settlement of Disputes between Governments and Private Parties* in which he addressed the difficulties an investor encounters when its investment abroad is harmed by measures attributable to the host state.[125] He underscored that neither the turn to

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[120] ICSID Convention, art. 1 ("The purpose of the Centre shall be to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention.") and art. 25(1) ("The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.").

[121] ibid, art. 1(2).

[122] ibid, art. 37 et seqq.

[123] ICSID, *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States - Analysis of Documents* (vol I, International Centre for Settlement of Investment Disputes 1970) 2.

[124] ibid.

[125] Excerpt of the note reprinted in ICSID, *The History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States - Documents in English* (vol II-1, International Centre for Settlement of Investment Disputes) 1.

the domestic courts of the host state nor diplomatic protection by the home state provide sufficient security for the investor. With regard to the latter, he emphasized that the political implications of diplomatic protection may deter the investor's home state from espousing his claim as this could create tensions with the host state and that alternatives were needed.[126] A month later, the President of the World Bank, Eugene R. Black, declared his intention to explore with other institutions and member governments the possibility of developing a machinery to settle disputes between governments and private investors,[127] which culminated in the adoption of the ICSID Convention in 1965.

During the negotiations on the ICSID Convention, states recognized that the consent to investor-state arbitration in a treaty or in a foreign investment code or law would be considered an offer to arbitrate that the investor may accept by submitting his claim to arbitration.[128] This marked a turning point for the BIT practice and facilitated the resort to investor-state arbitration.

The first BIT explicitly referring to investor-state arbitration was the BIT concluded between the Netherlands and Indonesia in 1968[129] although its wording does not make clear whether consent is already given by the BIT or if it merely contains an obligation to grant consent in the future.[130] After the ICSID published

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[126] ibid ("The necessity of espousal of [the investor's] case by his national Government before an international claim can be lodged, introduces a political element. An investor may well find that his national Government refuses to espouse a meritorious case because it fears that to do so would be regarded as an unfriendly act by the host Government. And this consideration is even more likely to cause the national Government to refrain from acting if the merits of the investor's case are not wholly clear in its view, thus withholding from the investor an opportunity to have his case judged by an impartial tribunal.").

[127] See the excerpt from address by President Eugene R. Black to the Annual Meeting of the Board of Governors on 19 September 1961; ibid, 3.

[128] Christoph H. Schreuer (ed), *The ICSID Convention: A Commentary* (Cambridge University Press 2001) art. 25 para 257 et seq.

[129] Agreement on Economic Cooperation between the Government of the Kingdom of the Netherlands and the Government of the Republic of Indonesia (signed on 7 July 1968, entered into force on 17 July 1971, terminated on 1 July 1995) 14 UNTS 1971, 1968 Indonesia-Netherlands BIT.

[130] ibid, art. 11 ("The Contracting Party in the territory of which a national of the other Contracting Party makes or intends to make an investment, shall assent to any demand on the part of such national and any such national shall comply with any request of the former Contracting Party, to submit, for conciliation or arbitration, to the Centre established by the Convention of Washington of 18 Mar. 1965, any dispute that may arise in connection with the investment".) [Emphasis added].

model arbitration clauses,[131] the wording of the clauses entailing the states' consent to investor-state-arbitration became more clear in future BITs, explicitly referring to the irrevocably and anticipatory consent of the states.[132]

In 1978, ICSID created an Additional Facility ("ICSID AF") to deal with arbitration proceedings in cases where one of the parties has not ratified the ICSID Convention or is not a national of the contracting state[133], the two requirements for the jurisdiction of ICSID according to Article 25(1) of the ICSID Convention.[134] In contrast to arbitrations under the ICSID Convention, the *Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes*[135] ("1978 Additional Facility Rules") provide that the enforcement of awards is not governed by the ICSID Convention.[136] To safeguard the enforcement of

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[131] See ICSID, 'Model Clauses Relating to the Convention on the Settlement of Investment Disputes Designed for Use in Bilateral Investment Agreements' (1969) 8 Int'l Legal Mat 1341.

[132] See for example the BIT between the Belgium-Luxembourg Economic Union (BLEU) and Indonesia; Agreement between the Kingdom of Belgium and the Republic of Indonesia on the Encouragement and Reciprocal Protection of Investments (signed on 15 January 1970, entered into force on 17 June 1972) 20 UNTS 1972, 1970 BLEU-Indonesia BIT, art. X ("Each Contracting Party hereby irrevocably and anticipatory gives its consent to submit to conciliation and arbitration any dispute relating to a measure contrary to this Agreement, pursuant to the Convention of Washington of 18 March 1965, at the initiative of a national or legal person of the other Contracting Party, who considers himself to have been affected by such a measure. This consent implies renunciation of the requirement that the internal administrative or judicial resorts should be exhausted.") [Emphasis added].

[133] The term "National of another Contracting State" is legally defined in article 25(2) ICSID Convention which was considered a major innovation as it solved the problem that had often arisen when the national laws of the host state provided that foreign investors had to set up locally incorporated companies to make their investment which were then considered to be nationals of the host state. The consequence was that the state of nationality could not espouse the claim of the locally incorporated company. Under article 25(2) ICSID Convention, locally incorporated companies that are controlled by a foreign investor can start the ICSID proceedings.

[134] ICSID Convention, art. 25(1).

[135] The original text of the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes (1978) <http://icsidfiles.worldbank.org/icsid/icsid/staticfiles/facility-archive/3.htm> accessed 11 December 2017, 1978 Additional Facility Rules, is reproduced in Rosemary G. Rayfuse and Elihu Lauterpacht, *ICSID Reports: Reports of Cases Decided on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965* (vol 1, Cambridge University Press 1993) 217 et seqq.

[136] Cf. Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes (1978) <http://icsidfiles.worldbank.org/icsid/icsid/staticfiles/facility-archive/3.htm> accessed 11

awards, the *Arbitration (Additional Facility) Rules*[137] set out a limitation of the choice of forum by providing that arbitral proceedings can only be held in states that are party to the New York Convention.[138]

III. The Concept of Diplomatic Protection and its Waning Role in Settling Investment Disputes

Prior to the adoption of the ICSID Convention, an investor had mainly two possibilities for exercising his rights *vis-à-vis* the host state: (1) An investor would either settle investment claims by turning to the domestic courts of the host state or (2) by applying for diplomatic protection to his home state in which case it is in the discretion of the latter to espouse the investor's claim.[139]

The ICJ has acknowledged the discretionary nature of the concept of diplomatic protection as well as its status as customary law (see 1.). By granting the investor direct access to an investment dispute settlement mechanism, the role of diplomatic protection has drastically decreased as investors do no longer depend on the espousal of their claims by the home state (see 2.). Under the ICSID Convention, the exercise of diplomatic protection is generally suspended during investment treaty arbitration proceedings (see 2.). The waning role of diplomatic protection in resolving investment disputes may be based on the mistrust towards its discretionary nature that was further propelled by the ICJ's decision in the *Barcelona Traction Case* (see 3.).

December 2017, 1978 Additional Facility Rules, art. 3 ("Since the proceedings envisaged by Article 2 are outside the jurisdiction of the Centre, none of the provisions of the Convention shall be applicable to them or to recommendations, awards, or reports which may be rendered therein.").

[137] The original text of the ICSID Arbitration (Additional Facility) Rules (1978) <http://icsidfiles.worldbank.org/icsid/icsid/staticfiles/facility-archive/facility-en.htm> accessed 5 December 2017, ICSID AF Arbitration Rules, is reproduced in Rosemary G. Rayfuse and Elihu Lauterpacht, *ICSID Reports: Reports of Cases Decided on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965* (vol 1, Cambridge University Press 1993) at 249 et seqq.

[138] ICSID AF Arbitration Rules art. 19 ("Arbitration proceedings shall be held only in States that are parties to the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards.").

[139] Christoph Schreuer, 'Investment Protection and International Relations' in August Reinisch and Ursula Kriebaum (eds), *The Law of International Relations: Liber amicorum Hanspeter Neuhold* (Eleven International Pub 2007) 345.

1. The Concept of Diplomatic Protection

Diplomatic protection stems from the international law principle that a state is responsible for any injury to an alien due to the state's wrongful act or omission.[140] It describes the procedure employed by the home state of the injured alien to seek compensation and reparation for the internationally wrongful act inflicted.[141] In essence, diplomatic protection allows a state to make a claim on behalf of its injured national *vis-à-vis* the culpable state.[142]

It has repeatedly been held that by exercising diplomatic protection over a national, the rights the home state asserts in respect to its national are its own rights.[143] The PCIJ found in this regard that

> "it is an elementary principle of international law that a state is entitled to protect its subjects, when injured by acts contrary to international law committed by another state, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law."[144]

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[140] Cf. ILC, 'Draft Articles on Diplomatic Protection with commentaries' (2006) <http://www.refworld.org/docid/525e7929d.html> accessed 8 December 2017, 24.

[141] See the jurisprudence of the PCIJ and its successor, the ICJ on diplomatic protection: *The Mavrommatis Palestine Concessions* [1924] PCIJ Ser. A, No. 2, 12; *Case concerning the Barcelona Traction Light and Power Company Limited (Belgium v Spain), Second Phase* (Judgment) [1970] ICJ Rep 4, 44; *Nottebohm case (Liechtenstein v Guatamala), Second Phase* (Judgment) [1955] ICJ Rep 4, 24; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* (Preliminary Objections, Judgment), [2007] ICJ Rep 582, 614 para 86 et seqq; see also ILC, 'Draft Articles on Diplomatic Protection' (2006, Official Records of the General Assembly, Sixty-first Session, Supplement No 10, UN Doc A/61/10), art. 1 ("diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility").

[142] ibid.

[143] See for instance *The Mavrommatis Palestine Concessions* [1924] PCIJ Ser. A, No. 2, 12; *Case concerning the Barcelona Traction Light and Power Company Limited (Belgium v Spain), Second Phase* (Judgment) [1970] ICJ Rep 4 44 ; see also Andrew P. Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009) 5.

[144] *The Mavrommatis Palestine Concessions* [1924] PCIJ Ser. A, No. 2, 12.

This traditional approach can be traced back to the 18th century. In this vein, the swiss jurist Emmerich de Vattel stated in 1758 that

> "Whoever ill-treats a citizen indirectly injures the State, which must protect that citizen. The sovereign of the injured citizen must avenge the deed and, if possible, force the aggressor to give full satisfaction or punish him, since otherwise the citizen will not obtain the chief end of civil society, which is protection". [145]

According to Borchard, the principle of diplomatic protection has developed on the premise that

> "under the reciprocal obligations of allegiance and protection, the state has a definite interest in seeing that its citizen is not harmed by another state; that, when the state espouses the claim of its citizen, it has become a national public claim; that the state has full control over it; that it may settle it or drop it on any terms it chooses; and that the citizen has no right to control the prosecution."[146]

Borchard questioned the *Vattel theory* on the "ground of its essential unreality" regarding the "alleged organic unity between the state and its citizens abroad".[147] The contention by the *Vattel theory* – that a wrongful act inflicted upon the national of a state by another state simultaneously constitutes a wrongful act *vis-à-vis* the home state – has undergone multiple scrutinies over the years.[148] The International Law Commission ("ILC") has rejected the *Vattel theory* as "fictious" with the rationale that the home state does not only assert its own right by 'espousing' the national's claim, it also asserts the right of the national who in his own right benefits from a broad protection regime on the international level.[149]

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[145] Emmerich d Vattel, Charles G. Fenwick and Albert G. d Lapradelle, *The Law of Nations or The Principles of Natural Law. Translation of the Edition of 1758. By Charles G. Fenwick* (Classics of International Law, [s.n.] 1916) 136.

[146] See for further references Edwin Borchard, 'Protection of Citizens Abroad and Change of Original Nationality' (1934) 43 Yale L J 359, 363.

[147] ibid, 362.

[148] James L. Brierly and Claud H. M. Waldock, *The Law of Nations: An Introduction to the International Law of Peace, Sixth edition edited by Sir Humphrey Waldock* (6th edn, Clarendon Press 1963) 276 et seq; Edwin Borchard, 'Protection of Citizens Abroad and Change of Original Nationality' (1934) 43 Yale L J 359, 362; ILC, 'Draft Articles on Diplomatic Protection with commentaries' (2006) <http://www.refworld.org/docid/525e7929d.html> accessed 8 December 2017, 25.

[149] ibid, 25; see also James L. Brierly and Claud H. M. Waldock, *The Law of Nations: An Introduction to the International Law of Peace, Sixth edition edited by Sir Humphrey Waldock* (6th edn, Clarendon Press 1963) 276 et seq.

Although states have exercised diplomatic protection since the 18th century, it was only in 1924 that the PCIJ acknowledged the concept in the *Mavrommatis Palestine Concessions* case as an "elementary principle of international law".[150] It has since become a rule of customary international law.[151] The ICJ confirmed the customary nature of the diplomatic protection principle and clarified its conditions by making the state's right to invoke diplomatic protection dependent upon two requirements:[152] the nationality of the claimant, determined by each State according to its domestic law,[153] and the exhaustion of all available local remedies.[154] The ICJ also held that it is subject to the state's discretion whether it invokes its right of diplomatic protection or not.[155]

2. The Relationship between Investment Treaty Arbitration and Diplomatic Protection

Prior to the adoption of the ICSID Convention, the General Counsel of the World Bank explored the relationship between diplomatic protection and investment arbitration in a working paper containing an early draft of the ICSID Convention for further discussion. He submitted that a state's right to exercise diplomatic protection would generally be suspended if the investor submits his

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[150] Andrew P. Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009) 4; *The Mavrommatis Palestine Concessions* [1924] PCIJ Ser. A, No. 2, 12 ("[I]t is an elementary principle of international law that a state is entitled to protect its subjects, when injured by acts contrary to international law committed by another state, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law.").

[151] *Republic of Guinea v Democratic Republic of the Congo* (Preliminary Objections, Judgment) [2007] ICJ Rep 582, 599 para 39.

[152] See for instance *Interhandel (Switzerland v United States of America)* (Preliminary Objections), [1959] ICJ Rep 6, 27; *Elettronica Sicula S.p.A. (ELSI) (United States of America v Italy)* [1989] ICJ Rep 15, 43 et seq para 53.

[153] ILC, 'Draft Articles on Diplomatic Protection' (2006, Official Records of the General Assembly, Sixty-first Session, Supplement No 10, UN Doc A/61/10) art 4.

[154] ibid, art 14.

[155] *Case concerning the Barcelona Traction Light and Power Company Limited (Belgium v Spain), Second Phase* (Judgment) [1970] ICJ Rep 4, para 79.

claim to international arbitration. The right to diplomatic protection would however resurface in the event that the host state does not fulfill its obligations under the convention:

> "The Convention recognizes the right of a private party, within the limits laid down in the Convention, to proceed against a foreign State before an international arbitral tribunal in its own name, rather than seek the diplomatic protection of its national State or have that State bring an international claim. It would seem to be a natural concomitant of the recognition of the private party's right of direct access to an international jurisdiction, to exclude action by its national State in cases in which such access is available under the Convention; and the same would seem to be true in cases in which the private party is a defendant rather than a plaintiff. Since the exclusion of the national State rests on the premise that the other Contracting State will abide by the provisions of the Convention, the rule of exclusion is subject to an exception in the event that premise falls away; in that event the right to give diplomatic protection and to bring an international claim remains unaffected." [156]

The ICSID Convention seems to have incorporated this understanding of the relationship between diplomatic protection and investment treaty arbitration. Article 27(1) of the ICSID Convention regulates the relationship of investment treaty arbitration and diplomatic protection to the effect that the exercise of diplomatic protection by the home state is generally suspended after the investor has submitted a dispute to arbitration.[157] Yet this does not preclude the home

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[156] See Working Paper in the form of a Draft Convention prepared by the General Counsel and transmitted to the Executive Director, comment to section 6 reprinted in ICSID, *The History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States - Documents in English* (vol II-1, International Centre for Settlement of Investment Disputes) 24.

[157] ICSID Convention, art. 27(1) ("No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute."). See also ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries 2001' (United Nations 2008) <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf> accessed 8 December 2017, 74 ("The extent to which investors can waive the rules of diplomatic protection by agreement in advance has long been controversial, but under the Convention on the Settlement of Investment Disputes between States and Nationals of other States (art. 27, para 1), consent by an investor to arbitration under the Convention has the effect of suspending the right of diplomatic protection by the investor's national State.").

state from "informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute".[158]

Since beyond the ICSID Convention no other investment protection instrument seems to make explicit reference to diplomatic protection, the general relationship between diplomatic protection and investment treaty arbitration has been subject to debate.[159] There does not seem to be a customary rule that would preclude or waive the exercise of diplomatic protection during investment arbitration proceedings.[160]

Article 17 of the *Draft Articles on Diplomatic Protection* appears to suggest that the suspension of diplomatic protection during investment treaty arbitration is applicable beyond the mandate of the ICSID Convention. The article stipulates that the draft articles do not apply if they would be inconsistent with provisions of an IIA.[161] Diplomatic protection would thus not apply if it would be contradictory to the investment protection regime provided for in the IIA.[162]

This subsumption corresponds to the suspension of diplomatic protection as decreed by the ICSID Convention. It further highlights the nature of the protection regimes contained in IIAs. They are merely a procedure provided by states whereby a non-state entity can invoke the responsibility of another state *vis-à-vis* a primary obligation owed to it by this state, on its own account and without the intermediation of any other state.[163] Without this procedure, the obligation

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[158] ICSID Convention, art. 27(2).

[159] Martins Paparinskis, 'Investment Arbitration and the Law of Countermeasures' (2008) 79 Brit YB Int'l L 264, 280.

[160] ibid, 281 et seqq.

[161] ILC, 'Draft Articles on Diplomatic Protection' (2006, Official Records of the General Assembly, Sixty-first Session, Supplement No 10, UN Doc A/61/10) art. 17 ("The present draft articles do not apply to the extent that they are inconsistent with special rules of international law, such as treaty provisions for the protection of investments.").

[162] ILC, 'Draft Articles on Diplomatic Protection with commentaries' (2006) <http://www.refworld.org/docid/525e7929d.html> accessed 8 December 2017, 89.

[163] ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries 2001' (United Nations 2008) <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf> accessed 8 December 2017, 95.

of reparation would exist towards the state that espoused the individual's claim although the latter would be the ultimate beneficiary.[164]

3. Mistrust towards Diplomatic Protection following the ICJ's decision in the *Barcelona Traction Case*

There is a certain amount of mistrust towards diplomatic protection that is essentially based on its discretionary nature. There is a risk that states may be reluctant to exercise diplomatic protection if a 'genuine connection' to the investor is missing or if this would be reverse to their own interests, political or otherwise.[165]

The mistrust deepened with the ICJ's decision in the *Barcelona Traction* case.[166] The ICJ held that the right of diplomatic protection in respect of an injury to a company belongs solely to the state under the laws of which the company is incorporated and in whose territory it has its registered office.[167] In the case before it, the ICJ thus rejected Belgium's right to diplomatic protection on behalf of the (Belgian) shareholders of Barcelona Traction Light and Power Company Limited ("Barcelona Traction") as the company was incorporated and had its registered office in Canada.[168] The ICJ stressed that the rejection of Belgium's right to exercise diplomatic protection against the backdrop of the cessation of the Canadian government of the diplomatic protection of Barcelona Traction would not create a vacuum because there "is no obligation upon the possessors

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[164] ibid.

[165] John Dugard, 'Fourth report on diplomatic protection, by Mr. John Dugard, Special Rapporteur' (13 March and 6 June 2003) UN Doc A/CN.4/530 and Add.1 <http://legal.un.org/ilc/documentation/english/a_cn4_530.pdf> accessed 8 December 2017, 8 ("In practice States will not exercise diplomatic protection merely on the basis of incorporation, that is, in the absence of some genuine connection arising from substantial national shareholding in the corporation. It is unrealistic to expect a State to expend time, energy, money and political influence on a corporation injured abroad when it has no material connection with the corporation.").

[166] Juliane Kokott, 'Interim Report on "The Role of Diplomatic Protection in the Field of the Protection of Foreign Investment"' in ILA, 'New Delhi Conference (2002) Committee on Diplomatic Protection of Persons and Property: Second Report' <https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=1098&StorageFileGuid=63d9d704-5de7-4f32-8a86-3d5fccd427b5> accessed 11 December 2017, 31.

[167] *Case concerning the Barcelona Traction Light and Power Company Limited (Belgium v Spain), Second Phase* (Judgment) [1970] ICJ Rep 4, 42 para 70 et seqq.

[168] ibid.

of rights to exercise them" and a right could not be equated with an obligation.[169] The ICJ acknowledged two exceptions to this principle, being the demise of the company,[170] or when considerations of equity call for it. The ICJ thus contemplated a right of diplomatic protection of the home state of the shareholders in the event that the state whose responsibility is invoked is coincidentally the national state of the company.[171]

The ICJ's finding in the *Barcelona Traction* case was quite controversial which is evidenced by the dissenting opinion of judge *ad-hoc* Riphagen and the eight separate opinions of which five more judges were in favour of the right of the shareholder's state to exercise diplomatic protection.[172] The *Barcelona Traction* decision has earned widespread criticism and is seen as a catalyst for the promotion of alternative dispute resolution mechanisms such as investor-state arbitration.[173] Dugard accurately sums up the criticism in his *Fourth report on diplomatic protection:*

> "In practice States will not exercise diplomatic protection merely on the basis of incorporation, that is, in the absence of some genuine connection arising from substantial national shareholding in the corporation. It is unrealistic to expect a State to expend time, energy, money and political influence on a corporation injured abroad when it has no material connection with the corporation. Conversely, it is unrealistic to expect a respondent State to accept such a minor link as incorporation as constituting the "genuine link" necessary to confer standing to present an international claim."[174]

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[169] ibid, 45 para 80 et seq.

[170] ibid, 41 para 64 et seqq.

[171] ibid, 48 para 92 et seq.

[172] See for a detailed discussion: John Dugard, 'Fourth report on diplomatic protection, by Mr. John Dugard, Special Rapporteur' (13 March and 6 June 2003) UN Doc A/CN.4/530 and Add.1 <http://legal.un.org/ilc/documentation/english/a_cn4_530.pdf> accessed 8 December 2017, 7 para 11 et seqq.

[173] See e.g. Juliane Kokott, 'Interim Report on "The Role of Diplomatic Protection in the Field of the Protection of Foreign Investment"' in ILA, 'New Delhi Conference (2002) Committee on Diplomatic Protection of Persons and Property: Second Report' <https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=1098&StorageFileGuid=63d9d704-5de7-4f32-8a86-3d5fccd427b5> accessed 11 December 2017, 31.

[174] John Dugard, 'Fourth report on diplomatic protection, by Mr. John Dugard, Special Rapporteur' (13 March and 6 June 2003) UN Doc A/CN.4/530 and Add.1 <http://legal.un.org/ilc/documentation/english/a_cn4_530.pdf> accessed 8 December 2017, 8 para 16.

The dichotomy between developing states and developed states also contributed to the mistrust towards diplomatic protection.[175] This concern is even more pronounced regarding investors from weaker economies. They might not be able to rely on diplomatic protection at all, as these states are more likely to cave to political or economic pressure exerted by a stronger host state.[176] For these reasons, the investor's direct access to international arbitration is considered to be more beneficial to the investor than the customary international law system of diplomatic protection, as it avoids "the political uncertainty inherent in the discretionary nature of diplomatic protection and dispense[s] with the conditions for the exercise of diplomatic protection".[177]

IV. The Increased Use of Investor-State Arbitration

With the proliferation of modern IIAs during the 1990s, the use of investor-state arbitration as a means to settle investment disputes has drastically increased. While there had been only 43 known cases initiated between 1987 and 2000 according to the data available on UNCTAD's ISDS Database, this number grew exponentially to 701 known initiated cases between 2000 and 2016 (see table below).[178]

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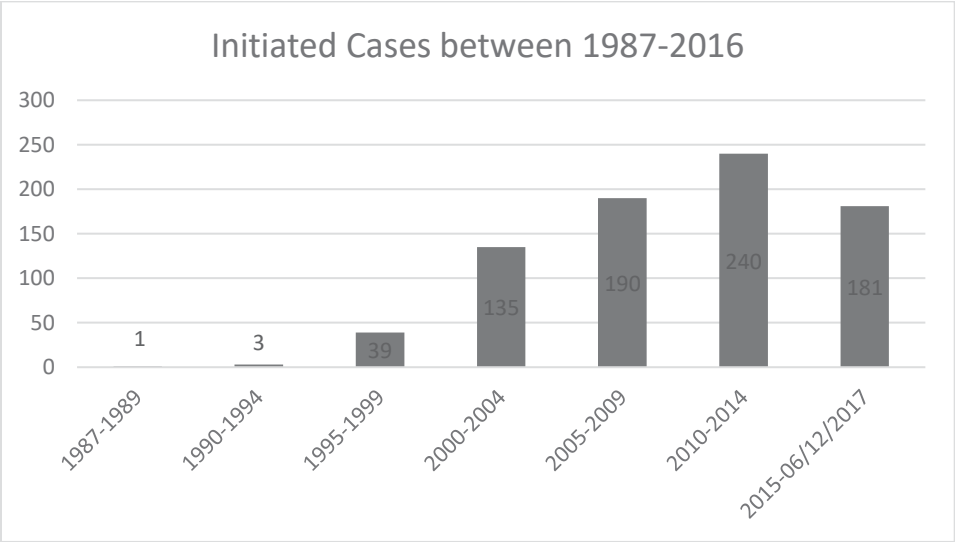
[175] *Case concerning the Barcelona Traction Light and Power Company Limited (Belgium v Spain), Second Phase (Separate Opinion Judge Padilla Nervo)* (Judgment), [1970] ICJ Rep 243, 249 ("It is not the shareholders in those huge corporations who are in need of diplomatic protection; it is rather the poorer or weaker States, where the investments take place, who need to be protected against encroachment by powerful financial groups, or against unwarranted diplomatic pressure from governments who appear to be always ready to back at any rate their national shareholders, even when they are legally obliged to share the risk of their corporation and follow its fate, or even in case of shareholders who are not or have never been under the limited jurisdiction of the State of residence accused of having violated in respect of them certain fundamental rights concerning the treatment of foreigners.").

[176] Juliane Kokott, 'Interim Report on "The Role of Diplomatic Protection in the Field of the Protection of Foreign Investment"' in ILA, 'New Delhi Conference (2002) Committee on Diplomatic Protection of Persons and Property: Second Report' <https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=1098&StorageFileGuid=63d9d704-5de7-4f32-8a86-3d5fccd427b5> accessed 11 December 2017, 26.

[177] ILC, 'Draft Articles on Diplomatic Protection with commentaries' (2006) <http://www.refworld.org/docid/525e7929d.html> accessed 8 December 2017, 90.

[178] See UNCTAD, 'Investment Policy Hub: Investment Dispute Settlement Navigator' <http://investmentpolicyhub.unctad.org/ISDS> accessed 6 December 2017.

Source: ISDS Database[179]



Between 2011 and 2016, more than 52 up to 77 arbitral proceedings were initiated in each year. However, this trend seems to decline as until 6 December 2017 only 35 arbitral proceedings were initiated.[180]

Overall, there currently exists a total number of 817 known cases,[181] which in turn implies that less than 25 percent of the concluded IIAs gave rise to investment arbitration proceedings while more than 75 percent operated without a single claim. This statistic is somewhat flawed since it does not count the multiple claims lodged under the same treaty, as some IIAs, for instance the NAFTA or the ECT, gave rise to more than one claim. The percentage of IIAs operating without a single claim would thus be even higher than 80 percent. In a recent study, it has been concluded that over 90 percent of the existing BITs have operated without a single claim.[182] Yet this fact does not diminish the relevance of investment treaty arbitration as the number of initiated ICSID cases is still on the rise: 52 new cases were registered in ICSID's fiscal 2015 (1 July 2014 to 30

[179] UNCTAD, 'Database of Investor-State Dispute Settlement (ISDS)' <http://unctad.org/en/Pages/DIAE/ISDS.aspx> accessed 7 December 2017.

[180] UNCTAD, 'Investment Policy Hub: Investment Dispute Settlement Navigator' <http://investmentpolicyhub.unctad.org/ISDS> accessed 6 December 2017.

[181] ibid.

[182] Gregory N. Hicks and Scott Miller, 'Investor-State Dispute Settlement - A Reality Check: A Report of the CSIS Scholl Chair in International Business' (January 2015) <csis.org/files/publication/150116_Miller_InvestorStateDispute_Web.pdf> accessed 7 December 2017, 1.

June 2015).[183] This represents an increase of 30 percent compared to the number of cases registered in the prior fiscal year and is the highest number of cases registered at ICSID in a single fiscal year.[184] In ICSID's fiscal year 2016, 45 new cases of which 44 were investment arbitration cases were registered with ICSID.[185] Fifteen of these cases involved States Parties from Western Europe with ten of these cases being initiated against Spain. Another ten cases were brought against Eastern European respondents.[186]

C. Implications of and Need for Legitimacy in Investment Treaty Arbitration

As indicated above,[187] several stakeholders have cast doubt onto the legitimacy of investment treaty arbitration. To assess whether the criticism of investment treaty arbitration is warranted, it is necessary to first evaluate the implications of and need for legitimacy in investment treaty arbitration.

Investment treaty arbitration is generally legitimated by the states' consent in the respective treaty (see I.) as well as a decision-making process that is perceived to be fair and adequate (see II.). There need to be sufficient procedural control mechanisms in place to ensure an independent and impartial decision-making process by the tribunal and to avoid any appearance of bias on behalf of the arbitrators (see III.).

I. Legitimacy through Consent by States

According to the traditional view, the legitimacy of public international law is generally based on the states' consent.[188] Since states have the ability to negotiate

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[183] ICSID, '2015 Annual Report' (4 September 2015) <https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID_AR15_ENG_CRA-highres.pdf> accessed 11 December 2017, 21.

[184] ibid, 21.

[185] ICSID, 'Annual Report 2016' (6 September 2016) <https://icsid.worldbank.org/en/Documents/resources/ICSID_AR16_English_CRA_bl2_spreads.pdf> accessed 8 December 2017, 31.

[186] ibid, 32.

[187] See above, Introduction, sec. B., p. 7 et seqq.

[188] Wolfrum Rüdiger, 'Legitimacy of International Law from a Legal Perspective: Some Introductory Considerations' in Rüdiger Wolfrum and Volker Röben (eds), *Legitimacy in*

and conclude international agreements, they voluntarily accept obligations *vis-à-vis* other states.[189] It thus can be inferred that an arbitral tribunal established in accordance with the dispute settlement provisions in the investment chapter of an IIA is legitimated by the consent of the parties to the treaty. If states withdraw their consent by disengaging from IIAs – as has happened in recent times[190] – they also withdraw the legitimization of investment treaty arbitration as a mechanism to settle investment disputes in this particular relationship. Yet this does not impede the legitimacy of the consent to investment treaty arbitration in other treaties with other states.

II. Legitimacy through Procedural Fairness and Distributive Justice

Procedural and institutional safeguards have a vital function in generating the general appreciation of a legitimate and fair decision-making process. It is on this perception that the states' compliance with the respective judicial body's decision rests. In this respect, legitimacy has two implications:

i. That a rule is made and applied by judges and officials in conformity with right process and thus promotes voluntary compliance by its addressees.[191]
ii. According to Thomas M. Franck, legitimacy can also be expressed in terms of procedural fairness and as such is one side of the concept of fairness with distributive justice as moral fairness being the other.[192]

International Law (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht. Springer 2008)

[189] ibid.

[190] See above, Introduction, sec. 7B., p. 7 et seqq.

[191] Thomas M. Franck, 'Democracy, Legitimacy and the Rule of Law: Linkages' (1999) NYU Law School, Public Law and Legal Theory Working Paper No. 2 <http://dx.doi.org/10.2139/ssrn.201054> accessed 8 December 2017, 1; Thomas M. Franck, *The Power of Legitimacy Among Nations* (Oxford University Press 1990) 41 et seqq; Charles N Brower and Stephan W. Schill, 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?' (2009) 9 Chi J Int'l L 471, 471; Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford University Press 1995) 26.

[192] ibid, 22.

The latter requirement of procedural fairness links "the legitimacy of a court to the processes it uses to render decisions".[193] The adherence to a fair and adequate decision-making process *inter alia* requires an independent and impartial decision-maker.[194] Other requirements have been discussed in this context but are beyond the scope of this work.[195]

The general requirement of an independent and impartial judiciary is also at the heart of the (international) rule of law that is commonly considered to accord "predictability and legitimacy to the actions of States".[196]

Yet while the broader concept of the (international) rule of law seems to be embedded in various legal instruments,[197] its exact meaning and status remain contested. Four basic requirements can be derived from the definition set out in the *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*[198] ("UN Rule of Law Declaration"): (1) the supremacy of international law, (2) the equality before the law, the need for (3) clear and predictable laws and (4) an independent and impartial judiciary. The relevant part of the UN Rule of Law Declaration reads that

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[193] Nienke Grossman, 'The Normative Legitimacy of International Courts' (2013) 86 Temple L Rev 61, 67.

[194] ibid.

[195] ibid, 81 et seqq.

[196] UNGA, 'Delivering justice: programme of action to strengthen the rule of law at the national and international levels: Report of the Secretary-General' (16 March 2012) UN Doc A/66/749 <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/66/749> accessed 8 December 2017, 2 para 3; Machiko Kanetake, 'The Interfaces between the National and International Rule of Law: A Framework Paper' (2014) <https://www.kcl.ac.uk/law/tli/events/methods-lab-pdf-kanetake.pdf> accessed 8 December 2017, 6.

[197] UN Charter of the United Nations (signed 26 June 1945, entered into force on 31 August 1965) 1 UNTS XVI, UN Charter, preamble, art. 1(1); Vienna Convention on the Law of Treaties (published on 23 May 1969, entered into force on 27 January 1980) 1155 UNTS 331, VCLT, preamble; Universal Declaration of Human Rights (adopted on 10 December 1948 by UNGA Res 217 A(III), UDHR, preamble; Understanding on Rules and Procedures Governing the Settlement of Disputes (1994) 33 Int'l Legal Mat 1226, DSU art. 3(3).

[198] UNGA, 'Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels: Resolution adopted by the General Assembly on 24 September 2012' (30 November 2012) UN Doc A/RES/67/1 <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/67/1> accessed 8 December 2017.

> "the rule of law applies to all States equally, and to international organizations, including the United Nations and its principal organs, and that respect for and promotion of the rule of law and justice should guide all of their activities and **accord predictability and legitimacy to their actions**. We also recognize that all persons, institutions and entities, public and private, including the State itself, are accountable to just, fair and equitable laws and are entitled without any discrimination to equal protection of the law".[199] […] [T]he **independence of the judicial system**, together with its **impartiality and integrity**, is an **essential prerequisite** for upholding the **rule of law** and ensuring that there is no discrimination in the administration of justice.[200]

According to this definition, an independent and impartial judiciary seems to be key to upholding the rule of law. This is also in line with scholarly definitions of the (international) rule of law that generally require an independent and impartial judiciary.[201]

Yet despite the strong support at UN level, it cannot reasonably be claimed that the (international) rule of law as a whole has gained the status of customary

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[199] ibid, 1 et seq para 2.

[200] ibid, 3 para 13 [emphasis added].

[201] Peter Tomka, 'The Rule of Law and the Role of the International Court of Justice in World Affairs' (Inaugural Hilding Eek Memorial Lecture by H.E. Judge Peter Tomka, President of the International Court of Justice, at the Stockholm Centre for International Law and Justice, 2 December 2013) <http://www.icj-cij.org/files/press-releases/9/17849.pdf> accessed 11 December 2017 ("For the concept of "rule of law" to be imbued with any kind of meaningful force on the international plane, independent and impartial courts, where disputes can be adjudicated and rights asserted, are absolutely vital."). See also Machiko Kanetake, 'The Interfaces between the National and International Rule of Law: A Framework Paper' (2014) <https://www.kcl.ac.uk/law/tli/events/methods-lab-pdf-kanetake.pdf> accessed 8 December 2017, 10; Mattias Kumm, 'International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model' (2003) 44 Va J Int'l L 19, 22; Kenneth J. Keith, 'John Dugard Lecture - 2015: The International Rule of Law' (2015) 28 Leiden J Int'l L 403, 408; Robert McCorquodale, 'Business, the International Rule of Law and Human Rights' in Robert McCorquodale (ed), *The Rule of Law in International and Comparative Context* (British Institute of International and Comparative Law 2010) 32; UNGA, 'Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels: Resolution adopted by the General Assembly on 24 September 2012' (30 November 2012) UN Doc A/RES/67/1 <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/67/1> accessed 8 December 2017, 3 para 13; UNGA, 'Delivering justice: programme of action to strengthen the rule of law at the national and international levels: Report of the Secretary-General' (16 March 2012) UN Doc A/66/749 <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/66/749> accessed 8 December 2017, 5 para 14 ("One of the central features of the rule of law at the international level is the ability of Member States to have recourse to international adjudicative mechanisms to settle their disputes peacefully, without the threat or use of force.").

international law. If anything, it has repeatedly been argued that the international rule of law is merely a political ideal to which all states should aspire.[202]

Going one step further, Crawford even alleged that the International Criminal Tribunal for the former Yugoslavia ("ICTY") found that rule of law standards do generally not apply beyond the domestic setting in the decision rendered against *Tadic*.[203] He links this assessment to the following passage where the tribunal held that

> "the principle that a tribunal must be established by law […] is a general principle of law imposing an international obligation which only applies to the administration of criminal justice in a municipal setting."[204]

Yet while this quote indeed suggests that the ICTY rejects an (international) rule of law, the tribunal goes on to state that

> "[t]his does not mean, however, that, by contrast, an international criminal court could be set up at the mere whim of a group of governments. Such a court ought to be rooted in the rule of law and offer all guarantees embodied in the relevant international instruments. Then the court may be said to be 'established by law.'"[205]

In this context, the tribunal further held that

> "[f]or a tribunal […] to be **established according to the rule of law**, it must be established in accordance with the proper international standards; it must provide all the **guarantees of fairness, justice and even-handedness**, in full conformity with internationally recognized human rights instruments. This interpretation of the guarantee that a tribunal be "established by law" is borne out by an analysis of the International Covenant on Civil and Political Rights.[…] The important consideration in determining whether a tribunal has been "established by law" is

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[202] Simon Chesterman, 'An International Rule of Law?' (April 2008) NYU Law School, Public Law and Legal Theory Working Paper No. 08-11 <http://ssrn.com/abstract=1081738> accessed 8 December 2017, 38 ("Recognizing the rule of law as a political ideal at the international level, rather than asserting it as a normative reality, properly locates the conduct of most of international affairs in the political rather than the strictly legal sphere.").

[203] James Crawford, 'The Rule of Law in International Law' (2003) 24 Adelaide L Rev 3, 9 ("I believe that we cannot accept what the ICTY seemed to say in Tadic, that international institutions including judicial institutions are in principle exempt from international standards. Such a position is indefensible in the long term, even if it were morally acceptable. In the long run national systems founded on the rule of law cannot tolerate review by international systems not so founded, especially as to otherwise internal matters.").

[204] *Prosecutor v Dusko Tadic a/k/a "Dule"* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995) IT-94-1, para 42.

[205] ibid.

> not whether it was pre-established or established for a specific purpose or situation; what is important is that it be **set up by a competent organ** in keeping with the relevant legal procedures, and should that it **observes the requirements of procedural fairness**."[206]

Thus, although the ICTY did not acknowledge the notion of an (international) rule of law, it can be inferred from this passage that for a tribunal to be legitimate certain requirements have to be fulfilled: (i) It has to be established by a competent organ in compliance with the relevant laws and (iii) must discharge its duties in compliance with the requirements of a fair procedure which – according to the definition above – requires an independent and impartial judiciary.

That the independence and impartiality of the judiciary is an essential feature of a legitimate and effective international judicial process can also be derived from the *Burgh House Principles On The Independence Of The International Judiciary*[207] ("Burgh House Principles") that have been endorsed by the International Law Association's Study Group on the Practice and Procedure of International Courts and Tribunals.[208]

III. Implications for Investment Treaty Arbitration

In investment treaty arbitration, legitimacy may thus depend on three aspects: (i) the states' consent in an IIA to submit disputes to investment treaty arbitration, (ii) the procedural fairness of the decision-making process and (iii) distributive justice, e.g. that like cases are treated alike. There need to be sufficient procedural control mechanisms ensuring the independence and impartiality of the decision-making process.

In the public discourse, the legitimacy of investment treaty arbitration has increasingly been questioned *inter alia* on grounds of the appearance of bias.[209]

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[206] ibid, para 45 [emphasis added].

[207] International Law Association Study Group on the Practice and Procedure of International Courts and Tribunals, 'The Burgh House Principles on the Independence of the International Judiciary' (June 2004) <http://www.pict-pcti.org/activities/Burgh%20House%20English.pdf> accessed 8 December 2017.

[208] ibid, preamble.

[209] Susan D. Franck, 'Challenges Facing Investment Disputes: Reconsidering Dispute Resolution in International Investment Agreements' in Karl P. Sauvant (ed), *Appeals Mechanism in International Investment Disputes* (Oxford University Press 2008) 187. See also e.g. Luis González García, 'Making impossible investor-state reform possible' in Anna

Crawford attributes the appearance of bias to the *ad hoc* character of arbitral tribunals:

> "[A] large proportion of international judicial or arbitral decisions are made by ad hoc panels, and this presents at least the image of selectivity and of arbitrariness."[210]

A legitimate decision-making process is generally incompatible with the appearance of bias. Thus, the internal and external sources from which bias may arise, need to be eliminated as far as possible; otherwise the legitimacy or procedural fairness of the system might be called into question.

In this context, the legitimacy of investment treaty arbitration may be called into question if the independence and impartiality of the arbitrators is not sufficiently

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Joubin-Bret and Jean E. Kalicki (eds), *Reform of Investor-State Dispute Settlement: Journeys for the 21st Century* (Brill Nijhoff 2015) 431; Kendall Grant, 'The ICSID Under Siege: UNASUR and the Rise of a Hybrid Regime for International Investment Arbitration' (2015) Osgoode Legal Studies Research Paper 26 <http://ssrn.com/abstract=2626498> accessed 8 December 2017, 5 et seqq; Stephan W. Schill, 'Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach' (2011) 52 Va J Int'l L 57, 67; Christian Tietje and Freya Baetens, 'The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership: Study' (24 June 2014) MINBUZA-2014.78850 <http://media.leidenuniv.nl/legacy/the-impact-of-investor-state-dispute-settlement-isds-in-the-ttip.pdf> accessed 8 December 2017, 68 para 136; Gus van Harten, 'A Case for an International Investment Court' [Geneva, 2008] Working Paper No 22/08 for the Society of International Economic Law Inaugural Conference <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1153424> accessed 8 December 2017, 2 et seqq; Sam Luttrell, 'Bias challenges in investor-State arbitration: Lessons from international commercial arbitration' in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press 2011) 445; Gus van Harten, 'Perceived Bias in Investment Treaty Arbitration' in Michael Waibel and Asha Kaushal (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Wolters Kluwer Law & Business 2010) 433; UNCTAD, 'Reform Of Investor-State Dispute Settlement: In Search Of A Roadmap, Updated for the launching of the World Investment Report (WIR)' <http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf> accessed 8 December 2017, 4; Cecilia Malmström, 'Concept Paper: Investment in TTIP and beyond – the path for reform: Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court' (5 May 2015) <http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF> accessed 7 December 2017, 6. Susan D. Franck, on the other hand, argues that "[t]here is little merit […] to the suggestion that arbitrators should not decide investment disputes because they are biased and unaccountable decision makers". She concludes her assessment by stating that "international arbitrators are legitimate decision makers who can promote justice through the proper application of law"; Susan D. Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through inconsistent Decisions' (2005) 73 Fordham L Rev 1521, 1596 et seq.

[210] James Crawford, 'The Rule of Law in International Law' (2003) 24 Adelaide L Rev 3, 10.

secured within the existing framework. Or more concretely: if it cannot sufficiently eliminate the internal and external sources from which bias may arise.

Another criticism invoked against the legitimacy of investment treaty arbitration is the potential for inconsistent awards.[211] Legal scholars as well as practitioners advocate the "need to legitimize the investor-state arbitration process by creating greater consistency, predictability and objectivity".[212] Indeed, the perception of legitimacy might suffer if sufficiently similar cases are treated differently. This may run contrary to the requirements of distributive justice and thus be perceived as unfair.

[211] James Crawford, 'The Case for an Appellate Panel and its Scope of Review' (2005) 2 Transnat'l Disp Mgmt 8, 8.

[212] Ian A. Laird and Rebecca Askew, 'Finality Versus Consistency: Does Investor-State Arbitration Need an Appellate System' (2005) 7 J App Prac & Process 285, 294.

2

The Notion of Arbitral Independence and Impartiality in Investment Treaty Arbitration

Before the criticism of the current system of investment treaty arbitration can be addressed, it is necessary to examine the current control mechanisms ensuring arbitral independence and impartiality in investment treaty arbitration (see A.). In a next step, a common core standard derived from the examination of various arbitration rules is determined (see B.) to set the scene for a comparison to the standard of judicial independence and impartiality employed in the international courts and tribunals (see chapter 3) and an assessment of the legitimacy of investment treaty arbitration in light of the criticism invoked in the public debate, namely that investment treaty arbitration is ruled by lawyers and not the rule of law (see chapter 4).

A. Control Mechanisms in Investment Treaty Arbitration

Investment treaty arbitration is usually strongly influenced by the parties. This particularly relates to the appointment process, where the parties may usually each appoint one arbitrator (hereinafter "party-appointed arbitrator"), while the presiding arbitrator is nominated by the two party-appointed arbitrators or an independent body. In this procedure, there are several structural safeguards in place to secure the parties' interest in arbitral independence and impartiality, in particular (i) nomination restrictions, (ii) mandatory disclosure by the prospective arbitrators and (iii) arbitrator challenge. In the following, these safeguards are examined *vis-à-vis* the arbitration rules of ICSID (see I.) and UNCITRAL (see II.). A comparison is then drawn also to other arbitration rules (see III.), namely the SCC, PCA and the Arbitration Rules of the ICC[213]. This is followed by a brief overview of informal safeguards for impartial decision-making in investment treaty arbitration (see IV.).

[213] ICC Rules of Arbitration (in force as of 1 March 2017) <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/> accessed 11 December 2017, ICC Arbitration Rules.

I. ICSID Arbitration Rules

Typically in investment treaty arbitration the constitution of the tribunal is generally at the parties' discretion.[214] The parties are free to choose the number of arbitrators constituting the tribunal as well as the method of their appointment. The parties may thus agree on a sole arbitrator or on any uneven number of arbitrators, e.g. three or five members.[215] The following restrictions apply:

i. The parties may generally not appoint a person who previously acted as a conciliator or arbitrator in the same matter.[216]

ii. Unless both parties agree, the majority of the arbitrators or the sole arbitrator shall not be of the same nationality or be a national of either party (hereinafter "national arbitrators").[217]

The arbitral proceedings as well as the prior appointment process are generally administered by ICSID's Secretary-General who is the legal representative and the principal officer of ICSID. His general responsibilities extend to the administration of ICSID and the function of registrar. [218]

1. Constitution of the Tribunal in Absence of Party Agreement

If the parties do not agree on a procedure for constituting the tribunal prior to or after notification of the request for arbitration, the following (default) procedure applies:

i. In this case, the tribunal consists of three arbitrators, one arbitrator appointed by each party (hereinafter "party-appointed arbitrator"). The

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[214] ICSID Arbitration Rules, rule 1 and 2 in conjunction with ICSID Convention, art. 37(2)(a).

[215] ICSID Convention, art. 37(1)(a).

[216] ICSID Arbitration Rules, rule 1(4).

[217] ibid, art. 39; ICSID Arbitration Rules, rule 1(3).

[218] ibid, art. 11.

third arbitrator who shall act as president of the tribunal (hereinafter "presiding arbitrator") is appointed by agreement of the parties.[219]

ii. Either party proposes one person as party-appointed arbitrator and one person as presiding arbitrator; the party-appointed arbitrator may not have the same nationality or be a national of either party.[220]

iii. The other party is then invited to propose its own party-appointed arbitrator and concur in the appointment of the presiding arbitrator or propose another person for this function and invite the initiating party to concur.[221]

iv. If the appointed persons accept the appointment, the tribunal is considered constituted and the proceeding commenced on the date the Secretary-General notifies the parties of this acceptance.[222]

If the tribunal is not established by this method within 90 days upon notification of the registration of the request for arbitration or within a time-limit previously agreed on by the parties, either party may request the Chairman of the Administrative Council[223] ("Chairman") to appoint the arbitrator or arbitrators not yet appointed and to designate the presiding arbitrator, if possible, within 30 days.[224]

2. Appointment by the Chairman of the Administrative Council

Arbitrators appointed by the Chairman shall not be nationals or have the same nationality of either party.[225] The Chairman consults both parties as far as possible before he appoints the arbitrators from the Panel of Arbitrators (hereinafter

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[219] ibid, art. 37(2)(b); ICSID Arbitration Rules, rules 3 et seqq.

[220] ibid, art. 37(2)(b); ICSID Arbitration Rules, rule 3(1)(a)(i).

[221] ibid, art. 37(2)(b); ICSID Arbitration Rules, rule 3(1)(a)(ii) and (b).

[222] ICSID Arbitration Rules, rule 6(1).

[223] The Administrative Council is one of the plenary organs of ICSID and composed of one representative of each contracting state to the ICSID Convention (art. 4(1) ICSID Convention). The Chairman is the president of the World Bank *ex officio* (art. 5 ICSID Convention).

[224] ibid, art. 37(2)(b), 38; ICSID Arbitration Rules, rule 4(1) and (4).

[225] ibid, art. 38.

"Panel") established in accordance with art. 12 to 16 of the ICSID Convention.[226] The members of the Panel serve for a period of six years; the Panel is established as follows:

i. Each contracting state elects four persons to the Panel who may have a different nationality than the contracting state.[227]

ii. The Chairman elects ten persons to the Panel each having a different nationality. The Chairman shall also assure that the principal legal systems of the world and of the main forms of economic activity are represented on the Panel.[228]

iii. A Panel member continues to serve in a tribunal even after his term has expired.[229]

3. Qualifications, Independence and Impartiality

All panel members as well as all other prospective arbitrators from outside the panel shall possess a high moral character and particularly recognized competence in the fields of law of commerce, industry or finance.[230] They shall be relied on to exercise independent judgment.[231] In this sense, ICSID tribunals have adopted the approach that arbitrators need to be both independent and impartial.[232] Impartiality in this sense is generally considered to imply "the absence of

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[226] ICSID Arbitration Rules, rule 4(4); ICSID Convention, art. 38 and 40(1).

[227] ibid, art. 13(1).

[228] ibid, art. 13(2) and 14(2).

[229] ibid, art. 56(2).

[230] ibid, art. 14(1); ICSID Arbitration Rules, rule 6(2).

[231] ICSID Convention, art. 14(1).

[232] *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v The Argentine Republic* (Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal, 22 October 2007) ICSID Case No. ARB/03/17, <http://www.italaw.com/sites/default/files/case-documents/ita0812.pdf> accessed 8 December 2017, 15 para 28; *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v Argentine Republic* (Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, 22 October 2007) ICSID Case No. ARB/03/19, <http://www.italaw.com/sites/default/files/case-documents/ita0824.pdf> accessed 8 December 2017, 13 para 29; *Tidewater Investment SRL and Tidewater Caribe, C.A. v Bolivarian Republic of Venezuela* (Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, 23 December 2010) ICSID Case No. ARB/10/5,

bias or predisposition towards a party" while independence requires "the absence of external control".[233] Tribunals have emphasized that the "requirements of independence and impartiality serve the purpose of protecting parties against arbitrators being influenced by factors other than those related to the merits of

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<http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C961/DC2031_En.pdf> accessed 11 December 2017, 13 para 37; *Repsol, S.A. and Repsol Butano, S.A. v Argentine Republic* (Decisión sobre la Propuesta de Recusación [Decision on the Proposal for Disqualification of Francisco Orrego Vicuña and Claus von Wobeser] 13 December 2013) ICSID Case No. ARB/12/38, <http://www.italaw.com/sites/default/files/case-documents/italaw3033.pdf> accessed 8 December 2017, 28 para 70; *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela* (Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, 12 November 2013) ICSID Case No. ARB 12/20, <http://www.italaw.com/sites/default/files/case-documents/italaw3009.pdf> accessed 8 December 2017, 28 para 58; *ConocoPhillips Petrozuata B.V. ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v Bolivarian Republic of Venezuela* (Decision on the Proposal to Disqualify a Majority of the Tribunal, 5 May 2014) ICSID Case No. ARB/07/30, <http://www.italaw.com/sites/default/files/case-documents/italaw3162.pdf.pdf> accessed 8 December 2017, 10 para 54; *İçkale İnşaat Limited Şirketi v Turkmenistan* (Decision on Claimant's Proposal to Disqualify Professor Philippe Sands, 11 July 2014) ICSID Case No. ARB/10/24, <http://www.italaw.com/sites/default/files/case-documents/italaw3260.pdf> accessed 8 December 2017, 26 para 115 ("[I]t is apparent that the term "independent judgment" in Article 14(1) has been used in a broad sense to cover both independence and impartiality. This is a generally accepted interpretation of the provision.").

[233] *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v The Argentine Republic* (Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal, 22 October 2007) ICSID Case No. ARB/03/17, <http://www.italaw.com/sites/default/files/case-documents/ita0812.pdf> accessed 8 December 2017, 15 para 28; *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v Argentine Republic* (Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, 22 October 2007) ICSID Case No. ARB/03/19, <http://www.italaw.com/sites/default/files/case-documents/ita0824.pdf> accessed 8 December 2017, 13 para 29; *Tidewater Investment SRL and Tidewater Caribe, C.A. v Bolivarian Republic of Venezuela* (Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, 23 December 2010) ICSID Case No. ARB/10/5, <http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C961/DC2031_En.pdf> accessed 11 December 2017, 13 para 37; *ConocoPhillips Petrozuata B.V. ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v Bolivarian Republic of Venezuela* (Decision on the Proposal to Disqualify L. Yves Fortier, Q.C. Arbitrator, 27 February 2012) ICSID Case No. ARB/07/30, <https://www.italaw.com/sites/default/files/case-documents/ita0223.pdf> accessed 11 December 2017, 17 para 54; *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela* (Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, 12 November 2013) ICSID Case No. ARB 12/20, <http://www.italaw.com/sites/default/files/case-documents/italaw3009.pdf> accessed 8 December 2017, 11 para 59; *Burlington Resources Inc. v Republic of Ecuador* (Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, 13 December 2013) ICSID Case No. ARB/08/5, <https://www.italaw.com/sites/default/files/case-documents/italaw3028.pdf> accessed 8 December 2017, 14 para 66; *Abaclat and Others v Argentine Republic* (Decision on the Proposal to Disqualify a Majority of the Tribunal, 4 February 2014) ICSID Case No. ARB/07/5, <http://www.italaw.com/sites/default/files/case-documents/italaw3057.pdf> accessed 8 December 2017, 18 para 75.

the case".[234] Arbitrators appointed from outside the Panel are required to possess the same qualities.[235]

4. Mandatory Disclosure

Before or after the first session of the tribunal, the appointed arbitrators have to declare and make statements on several circumstances. If the arbitrator fails to sign such a declaration by the end of the first session, he shall be deemed to have resigned. The arbitrator must *inter alia* confirm that he will judge fairly on the basis of the applicable law and will not accept any instruction or compensation for his services in the proceedings from any other source than ICSID.[236]

He must further make a statement on any past and present relationship with the parties, business, professional or otherwise, as well as any other circumstances that might put his independence into question.[237]

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[234] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic* (Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan, Arbitrator, 12 August 2010) ICSID Case No. ARB/07/26, <http://www.italaw.com/sites/default/files/case-documents/ita0887.pdf> accessed 8 December 2017, 14 para 43; see also *ConocoPhillips Petrozuata B.V. ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v Bolivarian Republic of Venezuela* (Decision on the Proposal to Disqualify L. Yves Fortier, Q.C. Arbitrator, 27 February 2012) ICSID Case No. ARB/07/30, <https://www.italaw.com/sites/default/files/case-documents/ita0223.pdf> accessed 11 December 2017, 17 para 55; *Universal Compression International Holdings, S.L.U. v Bolivarian Republic of Venezuela* (Decision on the Proposal for the Disqualification of two Members of the Arbitral Tribunal, 20 May 2011) ICSID Case No. ARB/10/9, <https://www.italaw.com/sites/default/files/case-documents/ita0886.pdf> accessed 11 December 2017, 23 para 70; *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela* (Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, 12 November 2013) ICSID Case No. ARB 12/20, <http://www.italaw.com/sites/default/files/case-documents/italaw3009.pdf> accessed 8 December 2017, 11 para 59; *Burlington Resources Inc. v Republic of Ecuador* (Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, 13 December 2013) ICSID Case No. ARB/08/5, <https://www.italaw.com/sites/default/files/case-documents/italaw3028.pdf> accessed 8 December 2017, 14 para 66; *Abaclat and Others v Argentine Republic* (Decision on the Proposal to Disqualify a Majority of the Tribunal, 4 February 2014) ICSID Case No. ARB/07/5, <http://www.italaw.com/sites/default/files/case-documents/italaw3057.pdf> accessed 8 December 2017, 18 para 75.

[235] ICSID Convention, art. 40(2) and 14(1).

[236] ICSID Arbitration Rules, rule 6(2).

[237] ibid, rule 6(2).

5. Arbitrator Disqualification

A formal control mechanism employed in ICSID arbitration is the option of proposing the disqualification of arbitrators which has been used more frequently in recent years, particularly with regard to bias challenge. Under article 57 of the ICSID Convention, the disqualification of an arbitrator requires the presentation of facts that indicate "a manifest lack" of the qualities required by article 14(1) of the ICSID Convention.[238] Neither the ICSID Convention nor the Arbitration Rules provide a specific time-limit within which the challenge has to be filed but that it has to be filed "promptly".[239] The timeliness of the proposal for disqualification of an arbitrator is thus determined on a case by case basis. ICSID tribunals have found that a proposal was timely when filed within seven or ten days after becoming aware of the underlying facts.[240] but that a delay of 53 days would lead to the waiver of the right to challenge the arbitrator.[241]

a) The Burden of Proof

To give effect to the protection against undue influence on the decision-making process, ICSID tribunals have found that already the appearance of bias might produce reasonable doubts about an arbitrator's independence and impartiality.[242] Hence, to demonstrate 'a manifest lack' of impartiality or independence in

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[238] ICSID Convention, art. 57.

[239] ICSID Arbitration Rules, art. 9(1).

[240] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic* (Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan, Arbitrator, 12 August 2010) ICSID Case No. ARB/07/26, <http://www.italaw.com/sites/default/files/case-documents/ita0887.pdf> accessed 8 December 2017, para 19; *BSG Resources Limited, BSG Resources (Guinea) Limited and BSG Resources (Guinea) SÀRL v Republic of Guinea* (Decision on the Proposal to Disqualify All Members of the Tribunal, 28 December 2016) ICSID Case No. ARB/14/22 <http://www.italaw.com/sites/default/files/case-documents/italaw8015.pdf> accessed 8 December 2017, para 62.

[241] *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v Argentine Republic* (Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, 22 October 2007) ICSID Case No. ARB/03/19, <http://www.italaw.com/sites/default/files/case-documents/ita0824.pdf> accessed 8 December 2017, para 26.

[242] *Perenco Ecuador Ltd v Republic of Ecuador and Petroecuador* (Decision on Challenge to Arbitrator, 8 December 2009) PCA Case No. IR-2009/1, <http://www.italaw.com/documents/PerencovEcuador-Challenge.pdf> accessed 8 December 2017, para 44; *Urbaser*

the sense of article 57 in conjunction with article 14(1) of the ICSID Convention, a party does not have to prove actual bias; rather, it is sufficient to demonstrate objectively "from a reasonable and informed third person's point of view" the appearance of bias.[243] The standard of the required burden of proof has been summarized as follows:

S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic (Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan, Arbitrator, 12 August 2010) ICSID Case No. ARB/07/26, <http://www.italaw.com/sites/default/files/case-documents/ita0887.pdf> accessed 8 December 2017, para 43; *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela* (Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, 12 November 2013) ICSID Case No. ARB 12/20, <http://www.italaw.com/sites/default/files/case-documents/italaw3009.pdf> accessed 8 December 2017, para 59; *Burlington Resources Inc. v Republic of Ecuador* (Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, 13 December 2013) ICSID Case No. ARB/08/5, <https://www.italaw.com/sites/default/files/case-documents/italaw3028.pdf> accessed 8 December 2017, para 66.

[243] *Perenco Ecuador Ltd v Republic of Ecuador and Petroecuador* (Decision on Challenge to Arbitrator, 8 December 2009) PCA Case No. IR-2009/1, <http://www.italaw.com/documents/PerencovEcuador-Challenge.pdf> accessed 8 December 2017, para 44; *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic* (Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan, Arbitrator, 12 August 2010) ICSID Case No. ARB/07/26, <http://www.italaw.com/sites/default/files/case-documents/ita0887.pdf> accessed 8 December 2017, 14 para 43; *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela* (Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, 12 November 2013) ICSID Case No. ARB 12/20, <http://www.italaw.com/sites/default/files/case-documents/italaw3009.pdf> accessed 8 December 2017, 11 para 59; *Burlington Resources Inc. v Republic of Ecuador* (Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, 13 December 2013) ICSID Case No. ARB/08/5, <https://www.italaw.com/sites/default/files/case-documents/italaw3028.pdf> accessed 8 December 2017, para 67 ("Articles 57 and 14(1) of the ICSID Convention do not require proof of actual dependence or bias; rather it is sufficient to establish the appearance of dependence or bias"); *Repsol, S.A. and Repsol Butano, S.A. v Argentine Republic* (Decisión sobre la Propuesta de Recusación [Decision on the Proposal for Disqualification of Francisco Orrego Vicuña and Claus von Wobeser] 13 December 2013) ICSID Case No. ARB/12/38, <http://www.italaw.com/sites/default/files/case-documents/italaw3033.pdf> accessed 8 December 2017, 16 et seq para 71; *Abaclat and Others v Argentine Republic* (Decision on the Proposal to Disqualify a Majority of the Tribunal, 4 February 2014) ICSID Case No. ARB/07/5, <http://www.italaw.com/sites/default/files/case-documents/italaw3057.pdf> accessed 8 December 2017, 18 para 76; *ConocoPhillips Petrozuata B.V. ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v Bolivarian Republic of Venezuela* (Decision on the Proposal to Disqualify a Majority of the Tribunal, 5 May 2014) ICSID Case No. ARB/07/30, <http://www.italaw.com/sites/default/files/case-documents/italaw3162.pdf.pdf> accessed 8 December 2017, para 52; *İçkale İnşaat Limited Şirketi v Turkmenistan* (Decision on Claimant's Proposal to Disqualify Professor Philippe Sands, 11 July 2014) ICSID Case No. ARB/10/24, <http://www.italaw.com/sites/default/files/case-documents/italaw3260.pdf> accessed 8 December 2017, 27 para 117; *RSM Production Corporation v Saint Lucia* (Decision on Claimant's Proposal for the Disqualification of Dr. Gavan Griffith, QC, 23 October 2014) ICSID Case No. ARB/12/10,

> "Under Article 57 of the ICSID Convention, the burden of proof is on the challenging party to establish, first, the **existence of the facts** from which it is said that a **manifest lack of the relevant qualities** can be inferred, and, secondly, to establish that such an inference can **reasonably be inferred in the circumstances**. The standard required by Article 57 is an **objective** one; it is **not based on the subjective perception** of the party proposing disqualification. It is not sufficient to posit an inference of lack of independence and impartiality which itself rests on another inference or mere speculation."[244]

"Manifest" in the sense of article 57 of the ICSID Convention means "evident" or "obvious" and relates to the ease with which the alleged lack of the required qualities, i.e. high moral character, competence, independence and impartiality of the arbitrator, can be perceived.[245] The inference must be "highly probable"

<http://www.italaw.com/sites/default/files/case-documents/italaw4062.pdf> accessed 8 December 2017, 13 et seq para 66; *Highbury International AVV, Compañía Minera de Bajo Caroní AVV, and Ramstein Trading Inc. v Bolivarian Republic of Venezuela* (Disqualification of Professor Brigitte Stern, 9 January 2015) ICSID Case No. ARB/14/10, <http://www.italaw.com/sites/default/files/case-documents/italaw4224.pdf> accessed 8 December 2017, para 10.

[244] *Abaclat and Others v Argentine Republic* (Recommendation Pursuant to the Request by ICSID on the Respondent's Proposal for the Disqualification of Arbitrator, 19 December 2011) ICSID Case No. ARB/07/5 <http://www.italaw.com/sites/default/files/case-documents/ita0240.pdf> accessed 8 December 2017, para 56 [emphasis added].

[245] *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v The Argentine Republic* (Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal, 22 October 2007) ICSID Case No. ARB/03/17, <http://www.italaw.com/sites/default/files/case-documents/ita0812.pdf> accessed 8 December 2017, para 34; *Universal Compression International Holdings, S.L.U. v Bolivarian Republic of Venezuela* (Decision on the Proposal for the Disqualification of two Members of the Arbitral Tribunal, 20 May 2011) ICSID Case No. ARB/10/9, <https://www.italaw.com/sites/default/files/case-documents/ita0886.pdf> accessed 11 December 2017, para 71; *Saint-Gobain Performance Plastics Europe v Bolivarian Republic of Venezuela* (Decision on Claimant's Proposal to Disqualify Mr. Gabriel Bottini from the Tribunal under Article 57 of the ICSID Convention, 27 February 2013) ICSID Case No. ARB/12/13 <http://www.italaw.com/sites/default/files/case-documents/italaw1311.pdf> accessed 8 December 2017, para 59; *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela* (Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, 12 November 2013) ICSID Case No. ARB 12/20, <http://www.italaw.com/sites/default/files/case-documents/italaw3009.pdf> accessed 8 December 2017, para 47; *Burlington Resources Inc. v Republic of Ecuador* (Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, 13 December 2013) ICSID Case No. ARB/08/5, <https://www.italaw.com/sites/default/files/case-documents/italaw3028.pdf> accessed 8 December 2017, para 68; *Abaclat and Others v Argentine Republic* (Decision on the Proposal to Disqualify a Majority of the Tribunal, 4 February 2014) ICSID Case No. ARB/07/5, <http://www.italaw.com/sites/default/files/case-documents/italaw3057.pdf> accessed 8 December 2017, para 71; *Repsol, S.A. and Repsol Butano, S.A. v Argentine Republic* (Decisión sobre la Propuesta de Recusación [Decision on the Proposal for Disqualification of Francisco Orrego Vicuña and Claus von Wobeser] 13 December 2013) ICSID Case No. ARB/12/38, <http://www.italaw.com/sites/default/files/case-documents/italaw3033.pdf> accessed 8

which imposes "a relatively heavy burden" on the party proposing the disqualification.[246] As the legal standard is an objective one,[247] it must be based on facts;[248] subjective perceptions of the party challenging the arbitrator are not sufficient to sustain a challenge under the ICSID Convention.[249] Although the standard for

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December 2017, para 73; *ConocoPhillips Petrozuata B.V. ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v Bolivarian Republic of Venezuela* (Decision on the Proposal to Disqualify a Majority of the Tribunal, 5 May 2014) ICSID Case No. ARB/07/30, <http://www.italaw.com/sites/default/files/case-documents/italaw3162.pdf. pdf> accessed 8 December 2017, para 47; *BSG Resources Limited, BSG Resources (Guinea) Limited and BSG Resources (Guinea) SÀRL v Republic of Guinea* (Decision on the Proposal to Disqualify All Members of the Tribunal, 28 December 2016) ICSID Case No. ARB/14/22 <http://www.italaw.com/sites/default/files/case-documents/italaw8015.pdf> accessed 8 December 2017, para 54.

[246] *ConocoPhillips Petrozuata B.V. ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v Bolivarian Republic of Venezuela* (Decision on the Proposal to Disqualify L. Yves Fortier, Q.C. Arbitrator, 27 February 2012) ICSID Case No. ARB/07/30, <https://www.italaw.com/sites/default/files/case-documents/ita0223.pdf> accessed 11 December 2017.

[247] *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v The Argentine Republic* (Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal, 22 October 2007) ICSID Case No. ARB/03/17, <http://www.italaw.com/sites/default/files/case-documents/ita0812.pdf> accessed 8 December 2017, para 39 et seq; *Abaclat and Others v Argentine Republic* (Decision on the Proposal to Disqualify a Majority of the Tribunal, 4 February 2014) ICSID Case No. ARB/07/5, <http://www.italaw.com/sites/default/files/case-documents/italaw3057.pdf> accessed 8 December 2017, para 77; *Burlington Resources Inc. v Republic of Ecuador* (Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, 13 December 2013) ICSID Case No. ARB/08/5, <https://www.italaw.com/sites/default/files/case-documents/italaw3028.pdf> accessed 8 December 2017, para 67; *ConocoPhillips Petrozuata B.V. ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v Bolivarian Republic of Venezuela* (Decision on the Proposal to Disqualify a Majority of the Tribunal, 5 May 2014) ICSID Case No. ARB/07/30, <http://www.italaw.com/sites/default/files/case-documents/italaw3162.pdf. pdf> accessed 8 December 2017, para 53; *BSG Resources Limited, BSG Resources (Guinea) Limited and BSG Resources (Guinea) SÀRL v Republic of Guinea* (Decision on the Proposal to Disqualify All Members of the Tribunal, 28 December 2016) ICSID Case No. ARB/14/22 <http://www.italaw.com/sites/default/files/case-documents/italaw8015.pdf> accessed 8 December 2017, para 58.

[248] *Saint-Gobain Performance Plastics Europe v Bolivarian Republic of Venezuela* (Decision on Claimant's Proposal to Disqualify Mr. Gabriel Bottini from the Tribunal under Article 57 of the ICSID Convention, 27 February 2013) ICSID Case No. ARB/12/13 <http://www.italaw.com/sites/default/files/case-documents/italaw1311.pdf> accessed 8 December 2017, para 53.

[249] *Abaclat and Others v Argentine Republic* (Decision on the Proposal to Disqualify a Majority of the Tribunal, 4 February 2014) ICSID Case No. ARB/07/5, <http://www.italaw.com/sites/default/files/case-documents/italaw3057.pdf> accessed 8 December 2017, para 77; *Burlington Resources Inc. v Republic of Ecuador* (Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, 13 December 2013) ICSID Case No. ARB/08/5, <https://www.italaw.com/sites/default/files/case-docu-

assessing the disqualification pursuant to article 57 of the ICSID Convention is generally strict,[250] the acceptance of the appearance of bias as employed in recent ICSID arbitrations lowers the burden of proof for the challenging party.[251]

b) Tendencies in ICSID Disqualification Decisions

In recent years, the number of applications for the disqualification of arbitrators has increased. Until 31 May 2014, ICSID for instance had received a total of 83 applications for the disqualification of arbitrators in 57 of the more than 470 registered cases. A total number of 44 of these challenges had been initiated between 2010 and 31 May 2014.[252] This makes approx. 53 percent of the overall applications.

However, the number may be proportional to the increase in the case count. Between January 2010 and 31 May 2014, approx. 196 cases of the overall 471 cases were filed.[253] This makes approx. 42 percent of the overall case count. Comparing the number of newly registered cases to the increase in applications

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ments/italaw3028.pdf> accessed 8 December 2017, para 67; *Repsol, S.A. and Repsol Butano, S.A. v Argentine Republic* (Decisión sobre la Propuesta de Recusación [Decision on the Proposal for Disqualification of Francisco Orrego Vicuña and Claus von Wobeser] 13 December 2013) ICSID Case No. ARB/12/38, <http://www.italaw.com/sites/default/files/case-documents/italaw3033.pdf> accessed 8 December 2017, para 72; *ConocoPhillips Petrozuata B.V. ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v Bolivarian Republic of Venezuela* (Decision on the Proposal to Disqualify a Majority of the Tribunal, 5 May 2014) ICSID Case No. ARB/07/30, <http://www.italaw.com/sites/default/files/case-documents/italaw3162.pdf.pdf> accessed 8 December 2017, para 53; *BSG Resources Limited, BSG Resources (Guinea) Limited and BSG Resources (Guinea) SÀRL v Republic of Guinea* (Decision on the Proposal to Disqualify All Members of the Tribunal, 28 December 2016) ICSID Case No. ARB/14/22 <http://www.italaw.com/sites/default/files/case-documents/italaw8015.pdf> accessed 8 December 2017, para 58.

[250] *Total S.A. v The Argentine Republic* (Decision on the Proposal to Disqualify Teresa Cheng, 26 August 2015) ICSID Case No. ARB/04/01, <http://www.italaw.com/sites/default/files/case-documents/italaw4367.pdf> accessed 8 December 2017, para 104.

[251] Peter Horn, 'A Matter of Appearances: Arbitrator Independence and Impartiality in ICSID Arbitration' (2014) 11(2) NYU J L & Bus 349, 393; Karel Daele, 'The Standard for Disqualifying Arbitrators Finally Settled and Lowered' (2014) 29 ICSID Rev 296, 305.

[252] Meg Kinnear, 'Challenge of Arbitrators at ICSID - An Overview' (2014) 108 Proceedings of the Annual Meeting (ASIL) 412; see also Meg Kinnear and Frauke Nitschke, 'Disqualification of Arbitrators under the ICSID Convention and Rules' in Chiara Giorgetti (ed), *Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals* (Brill Nijhoff 2015) 34 et seqq.

[253] ICSID, 'Cases Database' <https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx> accessed 6 December 2017.

for disqualification, the increase becomes less significant: Until 31 December 2009, the number of applications amounts to a quota of approx. 14 percent of the overall case count, while for the time period of 1 January 2010 to 31 May 2014, the quota is approx. 22 percent.[254]

A significant number of the applications seems to be resolved without a decision. An overview on ICSID's webpage shows that up to 1 April 2017, only 62 decisions on disqualification were issued, of which only four were upheld.[255] The overall case count was 656.[256] This suggests that decisions were only issued in approx. 9 percent of the cases.

(a) Sustained Proposals for Disqualification

Of the four sustained proposals for disqualifications, the following tendencies have emerged:

The chairman of ICSID's Administrative Council ("Chairman") upheld a proposal for disqualification on grounds that the challenged arbitrator furnished an explanation to the proposal for disqualification in which he alleged an unethical conduct of the party counsel that submitted the proposal. The Chairman found that "[s]uch comments do not serve any purpose in addressing the proposal for disqualification or explaining circumstances relevant to the allegations that the arbitrator manifestly lacks independence or impartiality."[257]

Another proposal for disqualification was upheld because the arbitrator was partner in the Madrid office of an international law firm whose New York and Caracas offices represented the claimant in a parallel proceeding against the respondent. Although the arbitrator was not involved as counsel in these proceedings, the overall structure of the international law firm and the facts that he (i)

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[254] ibid.

[255] ICSID, 'Decisions on Disqualification' <https://icsid.worldbank.org/en/Pages/Process/Decisions-on-Disqualification.aspx> accessed 6 December 2017.

[256] ICSID, 'Cases Database' <https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx> accessed 6 December 2017.

[257] *Burlington Resources Inc. v Republic of Ecuador* (Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, 13 December 2013) ICSID Case No. ARB/08/5, <https://www.italaw.com/sites/default/files/case-documents/italaw3028.pdf> accessed 8 December 2017, para 79 et seq.

was a member of the firm's International Arbitration Steering Committee and that (ii) his remuneration was not solely dependent on the proceeds of the Madrid office implied a degree of connection and overall coordination the different offices that would lead a reasonable third party to find an "evident or obvious appearance of lack of impartiality".[258]

Another proposal that was sustained relates to an arbitrator who was already involved in another arbitration in which the underlying facts were – to a minimal extent – similar, in particular vis-*à-vis* the alleged wrongful conduct of the respondent. This led the tribunal to conclude that a reasonable and informed third party observer would hold that the arbitrator, even unwittingly, may make a determination on the basis of external knowledge gained through the other arbitration which constitutes "an evident or obvious appearance of lack of impartiality".[259]

(b) Rejected Proposals for Disqualification

The vast majority of proposals for disqualification have, however, been rejected. Some examples are *inter alia*:

A proposal to disqualify Professor Stern on grounds that (i) she had already been appointed by the same party, Hungary, in the AES case, a parallel proceeding in which Hungary was represented by the same law firm and (ii) which arose out of similar factual circumstances and related to the same agreements and treaties,

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[258] *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela* (Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, 12 November 2013) ICSID Case No. ARB 12/20, <http://www.italaw.com/sites/default/files/case-documents/italaw3009.pdf> accessed 8 December 2017, para 66 et seqq.

[259] *Caratube International Oil Company LLP & Mr. Devincci Salah Hourani v Republic of Kazakhstan* (Decision on the Proposal for Disqualification of Mr. Bruno Boesch, 20 March 2014) ICSID Case No. ARB/13/13 <http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C2923/DC4716_En.pdf> accessed 8 December 2017, para 89.

was rejected by the tribunal.[260] The tribunal held that these factors are not sufficient to individually sustain the challenge and that a combination of the factors would not be considered under article 57 of the ICSID Convention.[261]

Similarly, a proposal to disqualify Professor Kaufmann-Kohler due to her participation in an arbitration in which she signed an award against the respondent, was rejected. The tribunal emphasized that "a difference of opinion over an interpretation of a set of facts is not in and of itself evidence of lack of independence or impartiality" and that a "judge or arbitrator may be wrong on a point of law or wrong on a finding of fact but still be independent and impartial."[262] This principle has been reiterated repeatedly.[263]

II. UNCITRAL Arbitration Rules

In UNCITRAL arbitrations, the tribunal generally consists of three arbitrators unless the parties have otherwise agreed or agree on another number within 30 days after the notice of arbitration.[264] If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the arbitral tribunal.[265]

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[260] *Electrabel S.A. v Republic of Hungary (*Decision on the Claimant's Proposal to Disqualify a Member of the Tribunal, 25 February 2008) ICSID Case No. ARB/07/19 <http://www.italaw.com/sites/default/files/case-documents/ITA%20LAW%207000.pdf> accessed 8 December 2017, para 37 et seqq.

[261] ibid, para 39.

[262] *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v The Argentine Republic* (Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal, 22 October 2007) ICSID Case No. ARB/03/17, <http://www.italaw.com/sites/default/files/case-documents/ita0812.pdf> accessed 8 December 2017, para 35.

[263] *Abaclat and Others v Argentine Republic* (Recommendation Pursuant to the Request by ICSID on the Respondent's Proposal for the Disqualification of Arbitrator, 19 December 2011) ICSID Case No. ARB/07/5 <http://www.italaw.com/sites/default/files/case-documents/ita0240.pdf> accessed 8 December 2017, para 156 et seqq; *İçkale İnşaat Limited Şirketi v Turkmenistan* (Decision on Claimant's Proposal to Disqualify Professor Philippe Sands, 11 July 2014) ICSID Case No. ARB/10/24, <http://www.italaw.com/sites/default/files/case-documents/italaw3260.pdf> accessed 8 December 2017, para 118 et seqq.

[264] UNCITRAL Arbitration Rules, art. 7(1).

[265] ibid, art. 9(1).

1. Appointment by the Appointing Authority

If within 30 days, one party fails to appoint an arbitrator or the two party-appointed arbitrators fail to appoint the presiding arbitrator, the presiding arbitrator is appointed by the appointing authority.[266] The appointing authority shall take into account any "such considerations as are likely to secure the appointment of an independent and impartial arbitrator and […] the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties".[267]

In the event that the appointing authority is called upon to appoint a sole arbitrator, a list-procedure generally applies.[268] Accordingly, the appointing authority sends a list with three names to each party from which the parties may each delete names and sort the remaining names according in order of preference.[269] If this list-procedure fails, the appointing authority may exercise discretion in appointing the sole arbitrator.[270]

The appointing authority is generally designated by the parties' agreement.[271] If the parties have not already agreed on the appointing authority prior to the notice of arbitration, a party may at any time propose one or more institutions or persons.[272] If the parties do not agree on the choice of an appointing authority within 30 days after such proposal, any party may request the Secretary-General of the PCA to designate the appointing authority.[273]

2. Mandatory Disclosures

The UNCITRAL Arbitration Rules require mandatory disclosures by the appointed arbitrator(s) *vis-à-vis* the parties as well as the other arbitrators before

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[266] ibid, art. 9(2) and (3).

[267] ibid, art. 6(7).

[268] ibid, art. 8(2).

[269] ibid, art. 8(2).

[270] ibid, art. 8(2).

[271] ibid, art. 6.

[272] ibid, art. 6(1).

[273] ibid, art. 6(2).

the respective appointment and for the duration of the whole arbitral proceedings. The disclosures relate to any circumstances likely to cast justifiable doubts on the independence and impartiality of the arbitrator(s).[274]

3. Arbitrator Challenge

In UNCITRAL arbitrations, the parties may challenge an arbitrator on grounds of circumstances that give rise to justifiable doubts as to the arbitrator's independence and impartiality.[275] The following restrictions apply:

i. the party that appointed the arbitrator may not raise a challenge on grounds that were already known at the time of appointment;[276]

ii. the other party may challenge an arbitrator only within 15 days after it has been notified of his appointment on such grounds that were already known;[277]

iii. both parties may at any time during the proceedings challenge an arbitrator within 15 days after becoming aware of grounds that give rise to justifiable doubts as to the arbitrator's independence and impartiality.[278]

If the challenged arbitrator does not voluntarily withdraw and failing an agreement between the parties on the challenge, the appointing authority decides the challenge.[279]

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[274] ibid, art. 11.

[275] ibid, art. 12(1).

[276] ibid, art 12(2).

[277] ibid, art. 13(1).

[278] ibid, art. 13(1).

[279] ibid, art. 13(3) and (4).

a) 'Reasonable Third Person Test'

To determine the grounds of the arbitrator challenge, an objective test applies.[280] The existence of circumstances giving rise to justifiable doubts as to the arbitrator's independence and impartiality is determined from the view of a "reasonable, fair-minded and informed third party" or a "fair minded, rational, objective observer".[281] Parties and tribunals often rely on the non-binding *IBA Guidelines on Conflicts of Interest in International Arbitration*[282] ("IBA Guidelines") for guidance on this matter. The IBA Guidelines "reflect international best practices and offer examples of situations that may give rise to objectively justifiable doubts as to an arbitrator's impartiality or independence".[283]

b) IBA Guidelines

Regarding the 'reasonable third person test', the IBA Guidelines state that

> "[d]oubts are justifiable if a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision."[284]

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[280] *National Grid PLC v the Republic of Argentina* (Decision on the Challenge to Mr Judd L. Kessler, 3 December 2007) LCIA Case No. UN 7949, <http://www.iisd.org/pdf/2008/itn_lcia_rulling_kessler_challenge.pdf> accessed 8 December 2017, para 80.

[281] ibid, para 80; *Vito G. Gallo v Government of Canada* (Decision on the Challenge to Mr. J. Christopher Thomas, QC, 14 October 2009) PCA Case No. 55798, <http://www.italaw.com/documents/Gallo-Canada-Thomas_Challenge-Decision.pdf> accessed 8 December 2017, para 19, 36; *Merck Sharp & Dohme (I.A.) Corporation v the Republic of Ecuador* (Decision on Challenge to Arbitrator Judge Stephen M. Schwebel. 12 April 2012) PCA Case No. AA442, <http://www.italaw.com/sites/default/files/case-documents/italaw7970.pdf> accessed 8 December 2017, para 52.

[282] IBA Guidelines on Conflicts of Interest in International Arbitration (adopted by resolution of the IBA Council on 23 October 2014) <http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx> accessed 8 December 2017.

[283] *ICS Inspection and Control Services Limited (United Kingdom v the Republic of Argentina* (Decision on Challenge to Arbitrator,17 December 2009) PCA Case No. 2010-9, <http://www.italaw.com/sites/default/files/case-documents/ita0415.pdf> accessed 8 December 2017, para 2.

[284] IBA Guidelines on Conflicts of Interest in International Arbitration (adopted by resolution of the IBA Council on 23 October 2014) <http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx> accessed 8 December 2017, General Standard 2(c).

The IBA Guidelines contain four lists categorizing potential conflict of interest situations: (i) The Non-Waivable Red List, (ii) the Waivable Red List, (iii) the Orange List and (iv) the Green List.

According to General Standard 2(d) of the IBA Guidelines, situations described in the Non-Waivable Red List mandatorily create justifiable doubts as to the arbitrator's impartiality or independence.[285] The Non-Waivable Red List *inter alia* refers to the following situations "deriving from the overriding principle that no person can be his or her own judge":[286]

i. The arbitrator is a party or a legal representative or employee of an entity that is a party;

ii. The arbitrator has a significant personal or financial interest in one of the parties, or the outcome of the case;

iii. The arbitrator is a manager, director or member of the supervisory board or has a controlling influence on an entity that has a direct economic interest in the outcome of the arbitration;

iv. The arbitrator or his firm regularly advises the party, or an affiliate thereof, and derives significant financial income therefrom.

The Waivable Red List covers conflicts of interest of all prospective arbitrators that may be waived if all parties, arbitrators and the arbitration institution expressly agree to the appointment while having full knowledge of the conflict of interest.[287] This requires a mandatory disclosure of all relevant circumstances by the prospective arbitrator.[288] To this end, the prospective arbitrator is required "to make reasonable enquiries to identify any conflict of interest, as well as any facts or circumstances that may reasonably give rise to doubts as to his or her

[285] ibid, General Standard 2(d).

[286] ibid, part II para 2.

[287] ibid, General Standard 4(c).

[288] ibid, General Standard 3(a).

impartiality or independence".[289] The Waivable Red List *inter alia* refers to the following situations:[290]

i. Arbitrator or arbitrator's law firm had a prior involvement in the dispute;

ii. Arbitrator has a direct or indirect interest in the dispute (e.g. holds shares in one of the parties or a close family member has a significant financial or personal interest in the outcome or in one of the parties);

iii. Arbitrator currently represents or advises one of the parties or is in the same law firm as the counsel to one of the parties;

iv. Arbitrator regularly advises one of the parties or an affiliate but neither he nor his law firm gain a significant income therefrom;

v. Arbitrator's law firm currently has a significant business relationship with one of the parties or an affiliate thereof.

The Orange List non-exhaustively lists situations that may – in the eyes of the parties – give rise to justifiable doubts as to the arbitrator's independence and as such have to be disclosed.[291] If the parties do not challenge the arbitrator within a certain time period after the disclosure, they are deemed to have accepted his appointment.[292] The Orange List covers a variety of specific situations that relate to

i. the current and previous services of the arbitrator for one of the parties and his other involvement in the case, e.g.

    a. within the last three years, arbitrator has served in another arbitration on a related issue involving one of the parties or
    b. has served as counsel for or against one of the parties or

[289] ibid, General Standard 7(d).

[290] ibid, Waivable Red List.

[291] ibid, part II para 3.

[292] ibid, part II para 3.

c. has been appointed on two or more occasions by one party or an affiliate thereof;
d. arbitrator's law firm currently advises one of the parties without gaining significant income therefrom.

ii. his relationship to the parties, the other arbitrators or the party counsels, e.g.

a. Arbitrator and another arbitrator or counsel are in the same law firm or members of the same barristers' chambers or was otherwise affiliated within the last three years;
b. A lawyer in the arbitrator's law firm is an arbitrator in another dispute involving one of the parties;
c. A close personal friendship or enmity exists between arbitrator and party counsel or a manager/director/member of the supervisory board of a party or an entity that has direct economic interest in the outcome of the dispute or an affiliate or witness or expert;
d. A family member of the arbitrator works with the same law firm as the party counsel but does not assist with the dispute.

iii. other circumstances, e.g. (arbitrator has publicly advocated a position on the case).

The Green List in contrast covers situations that are not subject to the arbitrator's duty of disclosure as they create no conflict of interest from a purely objective point of view. The IBA Guidelines state that in some situations, the objective test should prevail over the subjective test applied with regard to the Orange List.[293] Such situations include:

i. Legal opinions previously expressed by the arbitrator that relate to the case;

ii. Relationship of the arbitrator with another arbitrator or party counsel through membership in a professional association, or charitable or social organisation or social media network;

[293] ibid, part II para 7.

iii. Initial contact between arbitrator and a party (counsel) prior to appointment that did not address the merits or procedural aspects of the dispute other than to provide a basic understanding of the case.[294]

The IBA Guidelines offer a comprehensive list of best practice examples. The application is reflected in a number of arbitrator challenges in UNCITRAL arbitrations.

c) Examples in UNCITRAL Arbitrations

In contrast to the great number of challenge decisions in ICSID arbitrations that are publicly available, challenges under the UNCITRAL Arbitration Rules remain more confidential.[295] Nevertheless, some tendencies have emerged:

i. Sustained or successful challenges

a. In a challenge, the arbitrator was challenged because he and his law firm already represented another claimant in a pending investment treaty arbitration against the same respondent, thus acting adversely to one of the parties. Referring to the so-called Orange List, the appointing authority held that this creates a "situation of adversity" which should generally be avoided as it may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence.[296]

b. In another challenge, claimant *inter alia* challenged Ecuador's appointment of Professor Stern on grounds that she had (i) already prejudged key issues of the subject-matter of this dispute and (ii)

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[294] ibid.

[295] Charles B. Rosenberg, 'To Use a Cannon to Kill a Mosquito: Why the Increase in Arbitrator Challenges in Investment Arbitration Does Not Warrant a Complete Overhaul of the System' in Ian A Laird and others (eds), *Investment Treaty Arbitration and International Law* (Juris 2015) 4.

[296] *ICS Inspection and Control Services Limited (United Kingdom v the Republic of Argentina* (Decision on Challenge to Arbitrator,17 December 2009) PCA Case No. 2010-9, <http://www.italaw.com/sites/default/files/case-documents/ita0415.pdf> accessed 8 December 2017, para 2.

had a consistent record of appointments by respondent states.[297] At the time, Professor Stern served in two ICSID arbitrations and one UNCITRAL arbitrations in which Ecuador was the respondent state.[298] She found herself to be impartial and initially accepted the appointment.[299] In the rebuttal, claimant argued that

> "Ecuador's appointment of Professor Stern raises an unprecedented and intolerable situation in the world of investment arbitration. Ecuador proposes to appoint as an "independent and impartial" arbitrator a person who has already decided in Ecuador's favor (and against Murphy's position) on critical and potentially-dispositive issues in a closely-related arbitration involving the same contract terms, the same treaty, the same investment structure, the same law, the same measures, and virtually the same legal claims and defenses."[300]

Professor Stern then voluntarily accepted the challenge and resigned.[301]

c. The respondent, Ecuador, brought a similar challenge against the arbitrator appointed by the claimant, Mr. Tawil, which led to his resignation.[302] Ecuador mainly argued that there was an unusually close relationship between the claimant's counsel and Mr. Tawil

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[297] *Murphy Exploration & Production Company International v the Republic of Ecuador* (Claimant's Challenge to Professor Stern, 28 November 2011) PCA Case No. 2012-16 <http://www.italaw.com/sites/default/files/case-documents/ita0915.pdf> accessed 8 December 2017, 2.

[298] *Murphy Exploration & Production Company International v the Republic of Ecuador* (Letter from Professor Stern, 3 December 2011) PCA Case No. 2012-16 <http://www.italaw.com/sites/default/files/case-documents/ita0916.pdf> accessed 8 December 2017.

[299] ibid.

[300] *Murphy Exploration & Production Company International v Republic of Ecuador* (Claimant's Rebuttal on Challenge to Professor Stern, 25 January 2012) PCA case No. 2012-16 <http://www.italaw.com/sites/default/files/case-documents/ita0918.pdf> accessed 8 December 2017.

[301] *Murphy Exploration & Production Company International v Republic of Ecuador* (Letter from Professor Stern, 20 February 2012) PCA Case No. 2012-16 <http://www.italaw.com/sites/default/files/case-documents/ita0919.pdf> accessed 8 December 2017.

[302] *Murphy Exploration & Production Company International v Republic of Ecuador* (Letter from Mr. Tawil, 22 February 2012) PCA Case No. 2012-16 <http://www.italaw.com/sites/default/files/case-documents/ita0921.pdf> accessed 8 December 2017.

with whom he served as counsel in several ICSID arbitrations.[303] This combined with his unvarying representation of investors led Ecuador to conclude that from a reasonable and informed third party point of view, there is a likelihood that, as arbitrator, Mr. Tawil could be influenced by factors other than the merits of the case.[304]

ii. Rejected challenges

a. Respondent brought a challenge in NAFTA proceedings because the arbitrator had represented or assisted parties in procedures before the IACHR and before the UN Committee on the Elimination of Racial Discrimination (CERD). Both activities involve evaluating compliance by the respondent with its international commitments. [305] The challenge was denied because the arbitrator declared that he is no longer involved in procedures before the IACHR and the CERD. It was held that the continued instruction of students in CERD related matters is not sufficient to sustain the challenge.[306]

b. In another NAFTA dispute, the prospective arbitrator was challenged because he also advised Mexico, albeit only in a minimal scope. Although the challenge was rejected, the appointed arbitrator was asked to choose between serving as an arbitrator in this

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[303] *Murphy Exploration & Production Company International v Republic of Ecuador* (Respondent's Challenge to Dr. Tawil, 21 December 2011) PCA Case No. 2012-16 <http://www.italaw.com/cases/documents/1207> accessed 8 December 2017, 5 et seqq.

[304] ibid, 13 et seq.

[305] *Grand River Enterprises Six Nations, Ltd. et al. v. United States of America* (Decision on the Challenge to Arbitrator James Anaya, 28 November 2007), <http://www.italaw.com/sites/default/files/case-documents/ita0382_0.pdf> accessed 8 December 2017, 1.

[306] ibid, 2.

case or continuing to advise Mexico because Mexico was a potential participant in the case pursuant to article 1128 of the NAFTA.[307]

c. Former ICJ judge Schwebel was challenged on grounds of an editorial comment which – according to the respondent – indicated that judge Schwebel had such "a negative pre-existing view" of one of Ecuador's counsel that he was likely to "be incapable of separating his subjective, negative view from the facts of the present case".[308] Although the appointing authority held that the editorial comment was "undoubtedly critical of certain alleged conduct by Nicaragua", it could not find sufficient grounds to support the view that judge Schwebel had attributed this alleged conduct to Ecuador's counsel.[309]

III. Comparison to Other (Investment) Arbitration Rules

As indicated above,[310] there are several other notable arbitration rules beyond the ICSID and UNCITRAL Arbitration Rules. The following is meant to give a brief overview and draw a comparison between the arbitration rules of ICSID, ICSID AF, UNCITRAL, SCC, PCA and ICC on some essential features regarding the appointment process in the absence of a party agreement (see 1.) and further control mechanisms ensuring arbitral independence and impartiality (see 2.).

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[307] *Vito G. Gallo v Government of Canada* (Decision on the Challenge to Mr. J. Christopher Thomas, QC, 14 October 2009) PCA Case No. 55798, <http://www.italaw.com/documents/Gallo-Canada-Thomas_Challenge-Decision.pdf> accessed 8 December 2017.

[308] *Merck Sharp & Dohme (I.A.) Corporation v the Republic of Ecuador* (Decision on Challenge to Arbitrator Judge Stephen M. Schwebel. 12 April 2012) PCA Case No. AA442, <http://www.italaw.com/sites/default/files/case-documents/italaw7970.pdf> accessed 8 December 2017, para 55.

[309] ibid, para 61.

[310] See above, Introduction, sec. A. III, p. 5 et seq.

1. General Control Mechanisms ensuring Arbitral Independence and Impartiality

The examined arbitration rules all undertake to secure the parties' interest in an independent and impartial tribunal. Generally, a two-fold mechanism applies:

i. Mandatory disclosure by the prospective arbitrator of relevant circumstances;

ii. Possibility to submit an arbitrator challenge within a certain time period after becoming aware of the circumstances that give rise to the challenge.

The grounds for challenging an arbitrator ("any circumstances that may give rise to justifiable doubts as to the arbitrator's impartiality or independence") are identical in UNCITRAL, PCA and SCC arbitrations. By contrast, in ICSID and ICSID AF arbitrations, a manifest lack of independence and impartiality is required. The ICC Arbitration Rules refer to "a lack of independence and impartiality". Some arbitration rules – with the exception of the UNCITRAL and PCA Arbitration Rules – also include further restrictions, mostly on nationality to secure the impartiality of the tribunal or the sole arbitrator unless the parties agree otherwise. A comparison of the relevant provisions ensuring arbitral independence and impartiality is drawn in the following table:

	Restrictions	Disclosure of the Arbitrator	(Initial) Arbitrator Challenge
ICSID	Unless the parties agree otherwise, the majority of the arbitrators or the sole arbitrator may not be of the same nationality/be a national of either party. Parties may not appoint a person who previously acted as a conciliator or arbitrator in the same matter.[311]	Statement of any past and present relationship with the parties (business, professional or other); Other circumstances that might put the independent decision-making into question.[312]	Before constitution of the tribunal: Each party may replace its appointed arbitrator or the parties may consent to replace any arbitrator;[313] After constitution: The general disqualification procedure regarding a manifest lack of independ-

[311] ICSID Arbitration Rules, rule 1(3).

[312] ibid, rule 6(2).

[313] ibid, rule 7.

			ence and impartiality applies ('appearance of bias test'); the challenge must be filed "promptly".[314]
ICSID AF	See above.[315]	See above.[316]	See above.[317]
UNCITRAL	---	Any circumstances that may give rise to justifiable doubts as to the arbitrator's impartiality or independence.[318]	The arbitrator challenge relates to circumstances described in the left column ('reasonable third party test'). A party may challenge its appointed arbitrator only for reasons that became known after appointment. Any challenge has to be submitted within 15 days after the circumstances became known to the party.[319]
SCC	Unless otherwise agreed by the parties, the sole arbitrator or chairperson of the tribunal may not be of the same nationality/be a national of either party.[320]	See above.[321]	See above.[322]
PCA	---	See above.[323]	See above.[324] The time-limit is 30 days.
ICC	The sole arbitrator or the presiding arbitrator may be of the same nationality as or a national of one of the parties in suitable circumstances and if no party objects.[325]	Facts or circumstances that may in the eyes of the parties give rise to doubt the arbitrator's independence and impartiality.[326]	Any arbitrator challenge has to be submitted within 30 days after the grounds became known to the party.[327]

[314] ibid, rule 9(1); ICSID Convention, art. 57.

[315] ICSID AF 2006 Arbitration Rules, art. 6(5) and 7(1).

[316] ibid, art. 13(2).

[317] ibid, art. 12, 15.

[318] UNCITRAL Arbitration Rules, art. 11.

[319] ibid, art. 12(1) and (2), 13(1).

[320] Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (adopted as of and in force as of 1 January 2017), SCC Arbitration Rules, art. 17(6).

[321] ibid, art. 18(2).

[322] ibid, art.19.

[323] PCA Arbitration Rules, art. 11.

[324] ibid, art. 12(1) and (2), 13(1).

[325] ICC Arbitration Rules, art. 13(5).

[326] ibid, art. 11(2).

[327] ibid, art. 14(1) and (2).

2. Appointment Procedure in the Absence of a (Previous) Party Agreement

Regarding the appointment procedure in the absence of a joint agreement by the parties, different mechanisms apply to safeguard the independence and impartiality of the sole arbitrator or the tribunal. Regarding the number of arbitrators, most arbitration rules – with the notable exception of SCC and ICC – provide for three arbitrators as a rule. SCC and ICC also provide the option of a sole arbitrator if the case complexity permits it.

While two arbitrators of the three-person tribunal are generally appointed by the parties, with regard to the presiding arbitrator the arbitration rules show more or less significant differences. In ICSID and ICSID AF arbitrations, the presiding arbitrator is generally jointly appointed by the parties, in UNCITRAL and PCA arbitrations by the party-appointed arbitrators. In ICC arbitrations, the presiding arbitrator is appointed by the International Court of Arbitration ("ICA") upon proposal of a National Committee or Group of the ICC and in SCC arbitration by the Board of the SCC. A notable difference in ICC arbitrations is that all arbitrators have to be confirmed by the ICA.

A comparison of the relevant provisions regarding the appointment process in the absence of a (previous) party agreement is drawn in the following table

	Number of Arbitrators	General Appointment Procedure	Default Method for Appointment
ICSID	Three [328]	One arbitrator appointed by each party, the third arbitrator (president of the tribunal) appointed jointly by the parties.[329]	Appointment by the Chairman of ICSID`s Administrative Council from ICSID's Panel of Arbitrators.[330]
ICSID AF	Three.[331]	See above.[332]	See above.[333]

[328] ICSID Arbitration Rules, rule 3; ICSID Convention, art. 37(2)(b).

[329] ibid, art. 37(2)(b).

[330] ibid, art. 38.

[331] ICSID AF 2006 Arbitration Rules, art. 6(1).

[332] ibid, art. 6(1).

[333] ibid, art. 6(4).

UNCITRAL	Three.[334]	One arbitrator appointed by each party, the presiding arbitrator appointed by both arbitrators. [335]	Appointment by the appointing authority[336] (criteria are *inter alia* independence and impartiality of the arbitrator, nationality).[337]
PCA	Three.[338]	See above.[339]	Appointment by the Secretary-General of the PCA (criteria are *inter alia* independence and impartiality of the arbitrator, nationality).[340]
ICC	Generally sole arbitrator, unless dispute warrants three arbitrators.[341]	Sole arbitrator: appointed by the ICA upon proposal of a National Committee or Group of the ICC (criteria are *inter alia* nationality, residence and other relationships with the parties as well as the arbitrator's availability, his independence and impartiality).[342] Three arbitrators**:** One arbitrator nominated by each party and confirmed by the ICA,[343] the presiding arbitrator appointed by the ICA.[344]	Appointment by the ICA.[345]
SCC	One or three arbitrators depending on the complexity of the case.[346]	Sole arbitrator: joint appointment by the parties or appointment by the Board (criteria are *inter alia* nature and circumstances of the dispute, applicable law, seat and language of the arbitration, nationality of the parties).[347]	Appointment by the Board.[349]

[334] UNCITRAL Arbitration Rules, art. 7(1).

[335] ibid, art. 9(1).

[336] The appointing authority is either designated by party agreement or the Secretary-General of the PCA, ibid, art. 6.

[337] ibid, art. 9(2),(3) and art. 6.

[338] PCA Arbitration Rules, art. 7(1).

[339] ibid, art. 9(1).

[340] ibid, art. 9(2) and (3), 6(3).

[341] ICC Arbitration Rules, art. 12(2).

[342] ibid, art. 13(3) and (1).

[343] ibid, art. 12(2) and (5), art. 13.

[344] ibid, art. 12(2).

[345] ibid, art 12(2).

[346] SCC Arbitration Rules, art. 16(2).

[347] ibid, art. 17(3),(6) and (7).

[349] ibid, art. 17(3) and (4).

		Three arbitrators: One arbitrator appointed by each party, the chairperson appointed by the Board.[348]	

IV. Informal Safeguards for Impartial Decision-Making

The formal safeguards to secure independence and impartiality are complemented by informal safeguards, such as the arbitrator's reputation. Brower and Schill have emphasized in this regard that a crucial factor for party-appointments is the arbitrator's reputation for impartial and independent judgment.[350] In this sense they convincingly argue that

> "[r]eputation is difficult to build up and is easily destroyed; these characteristics thus work against any incentive to taint one's decision making in favor of either party in order to secure future appointments. A reputation for independence and impartiality, in other words, is too fragile to risk by biased decisionmaking and therefore works as a control mechanism that ensures the arbitrators' independence and impartiality. Another important informal control mechanism is public scrutiny. Unlike commercial arbitration awards, most investment-treaty awards are made available to the public almost instantaneously via online resources. Consequently, arbitrators and their decisionmaking are subject to scrutiny by both the professional community of arbitrators and academics as well as the general public. Today, investment-treaty awards are discussed and scrutinized in law review articles, internet blogs, and online discussion fora. […] Thus reputational damage, made quicker and easier by public scrutiny, is arguably an effective mechanism ensuring the impartiality and independence of arbitrators and their objectivity in applying international law."[351]

While there is a risk of repeat appointments by respondent states or investors, the examples above have shown that in such instances, some arbitrators tend to withdraw the acceptance of the appointment if challenged on grounds of impartiality. As appointed arbitrators are often renowned professors, judges or practitioners, reputation matters. It stands to reason that an arbitrator known for biased decision-making will not be readily accepted and held in high esteem by his

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[348] ibid, art. 17(4).

[350] Charles N. Brower and Stephan W. Schill, 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?' (2009) 9 Chi J Int'l L 471, 492.

[351] ibid.

colleagues and other tribunal members which might adversely influence his market value *vis-à-vis* future appointments.[352]

Also, due to the increasing transparency with which investment treaty arbitration is conducted, the public scrutiny of awards might not only affect the decision-making process in the way that it is perceived as impartial but might also contribute to the reduction of inconsistent awards.[353] Yet this informal control mechanism is certainly not foolproof as Bette Shifman, the former Deputy Secretary-General of the PCA, noted. She argued that "[g]overnments do not always appoint based on who they think would be the best arbitrator or based on the person's qualifications" which could undermine the quality of a tribunal.[354]

B. The Emergence of a Common Core Standard of Arbitrator's Independence

The preceding analysis has shown that all of the arbitration rules examined above secure the parties' interest in an independent and impartial arbitrator or tribunal, respectively. The following core standard of arbitral independence and impartiality seems to have emerged:

i. Unless the parties jointly agree on a different number or procedure, the tribunal generally consists of three arbitrators of which two are party-appointed, the presiding arbitrator is either appointed by joint agreement of the parties or party-appointed arbitrators or the appointing authority;

ii. The majority of the tribunal (or the sole arbitrator) may not be a national of the respondent state or have the same nationality as the claimant, unless the parties expressly agree thereto;

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[352] ibid. See also Gabriel Bottini, 'Reform of the Investor-State Arbitration Regime: the Appeal Proposal' in Anna Joubin-Bret and Jean E. Kalicki (eds), *Reform of Investor-State Dispute Settlement: Journeys for the 21st Century* (Brill Nijhoff 2015) 470.

[353] Christian J. Tams, 'Is There a Need for an ICSID Appellate Structure?' in Rainer Hofmann and Christian J. Tams (eds), *The International Convention on the Settlement of Investment Disputes (ICSID): Taking Stock after 40 Years* (Nomos 2007) 246.

[354] Bette Shifman, 'The Challenges of Administering an Appellate System for Investment Disputes' (2005) 2 Transnat'l Disp Mgmt 60, 62.

iii. Arbitrators are generally required to disclose circumstances that may create the appearance of bias from a third party point of view;

iv. The parties may challenge arbitrators on grounds that there are facts which – from the perspective of a reasonable third party – make the inference of a lack of impartiality and independence on behalf of the arbitrator seem highly probable;

v. In this regard, the burden of proof required under the ICSID Arbitration Rules to sustain a disqualification of an arbitrator sets a higher hurdle than the UNCITRAL as well as the other examined Arbitration Rules;

vi. Parties can generally waive their right to challenge the appointment of an arbitrator if they do not timely submit the challenge, i.e. within a specific time period after gaining knowledge of the circumstances that gave rise to the challenge.

Most arbitration rules with the notable exception of the ICC Arbitration Rules do not require the confirmation of the party-appointed arbitrators by the appointing authority.

C. Summary

The theses of this chapter can be briefly summarized as follows:

- There are currently several control mechanisms ensuring arbitral independence and impartiality. Most notable are the requirement of mandatory disclosures by the arbitrator prior to or upon his appointment as well as the option of the parties to challenge an arbitrator for a perceived independence and impartiality.

- Regarding the requirements of arbitrator challenges, the decisions in UNCITRAL arbitrator challenges seem to be more consistent than the ICSID disqualification decisions. Since the former rely heavily on the IBA Guidelines which provide the same standard of "justifiable doubts", the grounds for a challenge are more easily discerned. In ICSID arbitrations, the high burden of proof seems to thwart most challenges.

- There is currently an increase in arbitrator challenges. The challenges are mostly based on an alleged conflict of interest of the arbitrator that often seems to be related to two general situations: (i) the dual role of counsel and arbitrator in investment treaty arbitration as well as (ii) multiple appointments by the same party which lead to the perception that an arbitrator is either pro-investor or pro-state minded. These conflicts also seem to be at the heart of investment treaty arbitration's legitimacy crisis.

3

The Standard of Judicial Independence and Impartiality and its Implications for Investment Treaty Arbitration

After defining a common core standard of arbitral independence and impartiality, the following analysis sets out to compare this standard to the standard of judicial independence and impartiality as employed by the international and supranational courts and tribunals. To this end, an examination of the current control mechanisms ensuring the independence and impartiality of the court and tribunal members of international (see A.) and supranational courts and tribunals (see B.) as well as the IUSCT (see C.) delivers a standard for comparison. The analysis then turns to a brief determination of the common features as well as the differences of the control mechanisms in investment treaty arbitration and the international and supranational judiciary (see D.).

A. Control Mechanisms Ensuring the Independence and Impartiality of International Judges

The following examination of the statutes of several international and supranational courts and tribunals shows that a certain common core standard of judicial independence can be derived from a comparison of the relevant provisions regarding composition, competence, selection and disqualification of court and tribunal members at the ICJ (see I.), the International Tribunal of the Law of the Sea ("ITLOS") (see II.) and the International Criminal Court ("ICC") (see III.) as well as the World Trade Organization ("WTO") (see IV.).

I. ICJ

The ICJ was established in June 1945 by the UN Charter, is the UN's principal judicial organ and deemed to be permanently in session. Nevertheless, only its president is required to permanently reside at the ICJ's seat in The Hague. Yet while the other court members are not compelled to reside in Den Haag, they need to be at the permanent disposal of the ICJ with the exception of leaves,

illnesses or judicial vacations. As a result, the majority of the court members usually spend most of their time in Den Haag.

1. Composition

The ICJ is composed of fifteen members of different nationalities that generally serve a term of nine years.[355] As the term of office is staggered, a third of the judges is replaced or re-elected every three years.[356] While decisions are principally made by the full Court, a quorum of nine judges may be sufficient to constitute the court.[357] The Court may also form chambers composed of at least three judges to deal with particular cases or in all remaining cases at any time with the consent of the parties.[358]

The bench may include judges of the same nationality as the parties and the parties are entitled to choose a person to sit as judge (preferably from the list of the nominees) in the event that either the bench includes only a judge of the same nationality as the other party or if the bench does not include a judge of either nationality.[359] This option of choosing an *ad hoc* judge is similar to the unilateral appointments in investment treaty arbitration.

The court members are required to possess a "high moral character" and the qualifications required in their respective countries for appointment to the highest judicial offices or alternatively, be legal scholars of recognized competence in international law.[360]

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[355] Statute of the International Court of Justice (1945) 59 STAT 1055, ICJ Statute, art. 3(1) and 13(1).

[356] ibid, art. 13(1).

[357] ibid, art. 25(1) and (3).

[358] ibid, art. 26.

[359] ibid, art. 31.

[360] ibid, art. 2.

2. Selection Procedure

The selection process of the court members can be divided into the nomination and the subsequent election procedure. Nominations are undertaken by the national groups in the Permanent Court of Arbitration ("PCA") or, in the absence of such, the national groups appointed for this purpose by their governments in accordance with the 1907 Hague Convention while the subsequent election of the nominees is performed by the Secretary-General and the Security Council.[361] The nomination procedure is intended to be non-political and primarily directed at producing a highly qualified and independent bench.[362] This target is promoted by assigning the nomination to (state-appointed) non-state bodies that are encouraged to consult their highest court of justice, their law schools as well as their national law academies prior to the nomination.[363] The PCA national groups are appointed by the founding States Parties to the 1899 and 1907 Hague Conventions who can appoint a maximum of four members which then constitute the PCA national groups.[364] PCA members are usually appointed by the foreign minister or legal adviser but sometimes also by the head of state and are usually "eminent international law practitioners".[365]

Every national group may nominate up to four persons with the restriction that no more than two persons may bear the same nationality as the group and that the number of candidates thus nominated may not exceed the maximum number of twice the seats that need to be filled at the election.[366] The Secretary-General

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[361] ibid, art. 4(1) and (2).

[362] Ruth Mackenzie and others, *Selecting International Judges: Principle, Process, and Politics* (International Courts and Tribunals Series, Oxford University Press 2010) 67.

[363] ibid. See also Statute of the International Court of Justice (1945) 59 STAT 1055, ICJ Statute, art. 6.

[364] 1899 Hague Convention for the Pacific Settlement of International Disputes (1898-1899) 187 Con TS 410, 1899 Hague Convention, art. 23; 1907 Hague Convention for the Pacific Settlement of International Disputes (1907) 205 Con TS 233, 1907 Hague Convention, art. 44. The current list of the 121 states that have acceded to one or both of the PCA's founding conventions can be accessed at <https://pca-cpa.org/en/about/introduction/contracting-parties/> accessed 14 December 2017.

[365] Ruth Mackenzie and others, *Selecting International Judges: Principle, Process, and Politics* (International Courts and Tribunals Series, Oxford University Press 2010) 70.

[366] Statute of the International Court of Justice (1945) 59 STAT 1055, ICJ Statute, art. 5(2).

then draws up a list of all the nominees which he submits to the General Assembly and to the Security Council.[367]

The members of the court are then selected by an absolute majority vote of both the General Assembly and the Security Council who vote independently from each other.[368] The statute of the court does not dictate a particular representation of nationalities or global regions, yet it provides that the "electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured".[369] In practice, the diversity of the ICJ members is a given as the fifteen judges stem from all regions of the world and represent different legal traditions.[370] This is evidenced by the current composition:[371]

1. Ronny Abraham, President (France)
2. Abdulqawi Ahmed Yusuf, Vice-President (Somalia)
3. Hisashi Owada (Japan)
4. Peter Tomka (Slovakia)
5. Mohamed Bennouna (Morocco)
6. Antônio Augusto Cançado Trindade (Brazil)
7. Christopher Greenwood (UK)
8. Xue Hanqin (China)
9. Joan E. Donoghue (US)
10. Giorgio Gaja (Italy)
11. Julia Sebutinde (Uganda)
12. Dalveer Bhandari (India)
13. Patrick Lipton Robinson (Jamaica)
14. James Richard Crawford (Australia)
15. Kirill Gevorgian (Russian Federation)

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[367] ibid, art. 7(2).

[368] ibid, art. 8 and 10(1).

[369] ibid, art. 9.

[370] Of the current members of the ICJ, four judges are from Eastern and Western Europe (France, Italy, UK, Slovakia); three are from Africa (Somalia, Morocco, Uganda), three are from Asia (China, Japan, India) and one respectively is from Latin America (Brazil), Australia, Russia, the US and the Caribbean (Jamaica).

[371] International Court of Justice, 'Current Members' <http://www.icj-cij.org/en/current-members> accessed 6 December 2017.

3. Institutional Safeguards

During their term of office, the independence and impartiality of the court members is secured by three major components: a substantive annual salary, statutory restrictions on dismissal and the prohibition of incompatible outside activities. The annual base salary of the court members amounted to USD 172,978 in 2016 with a special supplementary allowance of USD 15,000 for the president of the court. After serving a full term, the court members receive annual pensions in the amount of 50 percent of the annual base salary.[372] In the biennium 2016-2017, the salary, pensions and expenses of the court members amounted to USD 14,166,900 which accounted for roughly a third of the ICJ's overall budget of USD 45,814,700.[373] In comparison, the annual salary structure for the judges of the US Supreme Court is significantly higher. As of 2017, the Chief Justice earned USD 263,300, while the Associate Justices each earned USD 251,800.[374]

Court members are prohibited to "exercise any political or administrative function, or engage in any other occupation of a professional nature" while serving their term.[375] If, for some special reason, a court member considers that he should not take part in the decision of a particular case, he is required to inform the President of the ICJ.[376] The President then decides whether he shall continue to sit.[377] In case of a disagreement between the President and the court member, the ICJ decides.[378] In practice, the "special reason" often correlates to the restriction

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[372] ICJ, 'Members of the Court' <http://www.icj-cij.org/en/members> accessed 6 December 2017.

[373] UNGA, *Report of the International Court of Justice: 1 August 2016-31 July 2017* (United Nations 2017) 52.

[374] Robert Longley, 'US Supreme Court Retirement Benefits: A Full Salary for Life' (25 March 2017) <https://www.thoughtco.com/us-supreme-court-retirement-benefits-3322414> accessed 6 December 2017.

[375] Statute of the International Court of Justice (1945) 59 STAT 1055, ICJ Statute, art. 16(1).

[376] ibid, art. 24(1).

[377] ibid, art. 24(2).

[378] ibid, art. 24(3).

of article 17(2) of the *Statute of the International Court of Justice*[379] ("ICJ Statute"),[380] whereas members of the ICJ are not permitted to "act as agent, counsel, or advocate in any case" or in the decision of any case where they are previously engaged in a similar capacity or as "a member of a national or international court, or of a commission of enquiry, or in any other capacity".[381]

Finally, the tenure of the court members is ensured by the restriction of the member's dismissal to the effect that a court member can only be dismissed if the other court members unanimously decide that he does no longer meet the relevant requirements.[382]

As detailed above, once elected, ICJ judges can only be removed by a unanimous vote of the other court members. Since its inception, the ICJ only had to deal with three challenges relating to five judges.[383] None of these challenges has been upheld.[384] The ICJ has more or less dismissed the issue of the appearance of bias by developing three guidelines:

i. Statements made by the members of the ICJ in their former capacity as representatives of their governments or any activities performed in this function do not fall within the scope of art. 17(2) of the ICJ Statute and thus give not rise to a disqualification;[385]

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[379] Statute of the International Court of Justice (1945) 59 STAT 1055, ICJ Statute.

[380] Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (2nd edn, Oxford University Press 2012) art. 24 para 11 et seqq (see fn.19 for a list of decided cases).

[381] ICJ Statute, art. 17(2).

[382] ibid, art. 18(1).

[383] Chiara Giorgetti, 'Between Legitimacy and Control: Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals' (2016) 49 The Geo Wash Int'l L Rev 205, 226.

[384] ibid.

[385] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Order no. 1 - 3 of 26 January 1971), [1971] ICJ Rep 3; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Order of 30 January 2004), [2004] ICJ Rep 3, 5 para 6 et seq; Joseph R. Brubaker, 'The Judge Who Knew Too Much: Issue Conflicts in International Adjudication' (2008) 26 Berkeley J Int'l L 111, 117.

ii. The same seems to hold true for the judge's prior activities in UN organs;[386]

iii. Statements or opinions expressed in a personal capacity may only lead to a disqualification of the judge if they directly express an opinion to the question before the court.[387] The ICJ seems to exercise leniency in this regard in favor of the judge.[388]

Overall, the ICJ seems to follow a very narrow understanding of article 17(2) of the ICJ Statute.[389] It is thus much more common for ICJ judges to resign or recuse themselves from serving in a specific case.[390] An overview provided by Giorgetti summarizing the self-recusals in the history of the ICJ suggests that several self-recusals were related to article 17 and 24 of the ICJ Statute due to prior involvement in the case or with any of the parties.[391]

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[386] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion of 21 June 1971), [1971] ICJ Rep 16, 18 et seq; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Order of 30 January 2004), [2004] ICJ Rep 3, 5 para 6 et seq; Joseph R Brubaker, 'The Judge Who Knew Too Much: Issue Conflicts in International Adjudication' (2008) 26 Berkeley J Int'l L 111, 118 et seq.

[387] In *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Order of 30 January 2004), [2004] ICJ Rep 3, 5, the ICJ concluded that "in the newspaper interview of August 2001, Judge Elaraby expressed no opinion on the question put in the present case". This conclusion seems highly debatable. Judge Elaraby *inter alia* stated in an interview two months before his election to the ICJ that "Israel is occupying Palestinian territory, and the occupation itself is against international law." He also criticized Israel's strategy of consistently "establishing new facts" from which "[g]rave violations of humanitarian law ensue: the atrocities perpetrated on Palestinian civilian populations, for instance, but also such acts as the recent occupation of the PNA's headquarters". Although these personal opinions might not directly relate to the question put before the ICJ, they sufficiently relate to the subject matter that it creates an appearance of bias.

[388] Joseph R Brubaker, 'The Judge Who Knew Too Much: Issue Conflicts in International Adjudication' (2008) 26 Berkeley J Int'l L 111 119; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Order of 30 June 2004, Dissenting Opinion of Judge Buergenthal), [2004] ICJ Rep 7, 9 para 13 et seq.

[389] ibid, 9 para 12 et seq.

[390] Chiara Giorgetti, 'Between Legitimacy and Control: Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals' (2016) 49 The Geo Wash Int'l L Rev 205, 213; Chiara Giorgetti, 'The Challenge and Recusal of Judges at the International Court of Justice' in Chiara Giorgetti (ed), *Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals* (Brill Nijhoff 2015) 15 et seqq.

[391] ibid, 18 et seqq.

II. ITLOS

ITLOS was established by the *United Nations Convention on the Law of the Sea*[392] ("UNCLOS") which entered into force in 1994.

1. Composition

ITLOS is composed of 21 members of different nationalities elected by the States Parties to the Convention for a term of nine years with the option of re-election.[393] Terms are staggered; the elections of a third of the members generally take place every three years.[394] The members of the tribunal shall possess "the highest reputation for fairness and integrity" and be competent "in the field of the law of the sea".[395] To ensure the "equitable geographical distribution" of the elected members and "the representation of the principal legal systems of the world", the tribunal is required to count at least three *per* each of the UN Regional Groups ("UNRG") among its members.[396] The UNRG are currently divided into the African Group, the Asia-Pacific Group, the Eastern European Group, the Latin American and Caribbean Group ("GRULAC") as well as the Western European and Others Group (WEOG).[397]

Generally, all available members of the tribunal shall take part in proceedings before the tribunal.[398] However, a quorum of at least 11 elected members is sufficient to constitute the tribunal.[399] Comparable to the provisions within the ICJ Statute, the tribunal's bench may include a member of the same nationality as

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[392] United Nations Convention on the Law of the Sea (adopted on 10 December 1982, entered into force on 16 November 1994) 1833 UNTS 3, UNCLOS.

[393] ITLOS Statute of the International Tribunal of the Sea <https://www.itlos.org/fileadmin/itlos/documents/basic_texts/statute_en.pdf>accessed 8 December 2017, ITLOS Statute, art. 2(1), 3(1) and 5(1).

[394] ibid, art. 5(1).

[395] ibid, art. 2(1).

[396] ibid, art. 3(2).

[397] UN Department for General Assembly and Conference Management, 'United Nations Regional Groups of Member States' (9 May 2014) <http://www.un.org/depts/DGACM/RegionalGroups.shtml> accessed 6 December 2017.

[398] ITLOS Statute, art. 13(1).

[399] ibid, art. 13(1).

one of the parties to the dispute.[400] The other party has then the option of choosing a person to participate as a member of the tribunal.[401] If the bench does not include a national of either party, each of the parties may choose a person to participate as a member of the tribunal,[402] similar to the unilateral appointments in investment treaty arbitration.

To increase efficiency in a given dispute, the ITLOS has formed several chambers. Most notable was the establishment of the Seabed Disputes Chamber which exercises jurisdiction in disputes with respect to activities in the international seabed area.[403] The chamber is composed of 11 judges who are selected triennially by a majority vote of the members of the tribunal and eligible for a second term.[404] Here, too, the selection process shall ensure the "representation of the principal legal systems of the world" and "equitable geographical distribution".[405] The chamber requires a quorum of seven members.[406] Moreover, the tribunal has established special chambers to deal with particular disputes, currently being the chambers for fisheries, maritime delimitation and marine environment disputes.[407] Here, too, similarities arise to investment treaty arbitration where the tribunal is constituted on a case-by-case basis and the members are selected for their specific knowledge and experience in specific areas of investment law and related laws. These special chambers are composed of seven to ten judges and one president each; required are at least three or more judges depending on the individual necessity.[408] Beyond these chambers, there also exist a Chamber of Summary Procedure and the option of the States Parties to jointly request the formation of a special chamber to deal with a particular dispute.[409]

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[400] ibid, art. 17(1).

[401] ibid, art. 17(2).

[402] ibid, art. 17(3).

[403] ibid, art. 14 and 35 et seqq.

[404] ibid, art. 35(1) and (3).

[405] ibid, art. 15(2).

[406] ibid, art. 15(7).

[407] ibid, art. 15(1).

[408] ibid.

[409] ibid, art. 15(2) and (3).

2. Selection Procedure

The selection procedure of the tribunal's members is similar to that of the ICC judges in the way that the nomination and election is conducted by the respective States Parties. Each state party may nominate two persons that shall be of "the highest reputation for fairness and integrity" and shall also have "recognized competence in the field of the law of the sea".[410] The subsequent election process is overseen by the UN Secretary General who draws up a list of the nominees indicating which state party nominated each person which he submits to the States Parties.[411] The States Parties then elect the members of the tribunal by secret ballot.[412] Elected are those candidates who "obtain the largest number of votes and a two-thirds majority of the [s]tates [p]arties present and voting, provided that such majority includes a majority of the [s]tates [p]arties".[413] The election process requires a quorum of two thirds of the States Parties.[414]

3. Institutional Safeguards

The independence of the tribunal members from any improper outside influence demands that tribunal members are barred from any political or administrative office and any active association or financial interest "in any of the operations of any enterprise concerned with the exploration for or exploitation of the resources of the sea or the seabed or other commercial use of the sea or the seabed".[415] The tribunal members can also not act as agents, counsels or advocates.[416] To avoid any prejudice within the bench, a tribunal member is also not allowed to "participate in the decision of any case in which he has previously taken part as agent, counsel or advocate for one of the parties, or as a member of a national or international court or tribunal, or in any other capacity".[417]

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[410] ibid, art. 4(1) and 2(1).

[411] ibid, art. 4(2).

[412] ibid, art. 4(4).

[413] ibid.

[414] ibid.

[415] ibid, art. 7(1).

[416] ibid, art. 7(1) and (2).

[417] ibid, art. 8(1).

The remuneration of the tribunal members has meanwhile been adjusted to the remuneration of the ICJ judges.[418] They receive a tax-free annual allowance and a special allowance for each day on which they actually exercise their functions up until the amount of the annual allowance.[419] Hence, the president of the tribunal, who serves on a full-time basis at its seat in Hamburg, receives an overall annual remuneration of USD 168,878 plus a special annual allowance of USD 15,000.[420] The approved budget of the ITLOS for 2017-2018 amounts to EUR 21,119,900 and is borne by 168 States Parties to different percentages.[421]

The standards and rules on disqualification and recusal of ITLOS tribunal members are essentially identical with those applicable to the ICJ judges.[422] This was confirmed by the (arbitral) tribunal constituted under Annex VII UNCLOS in an inter-state arbitration between Mauritius and the UK.[423] The tribunal also rejected the application of the standards of investment treaty arbitration to inter-state disputes, in particular the "appearance of bias" test as well as the application of the IBA Guidelines in inter-state disputes.[424]

In the dispute, Mauritius sought to disqualify the arbitrator appointed by the UK on the grounds that he previously acted as counsel and in an advisory function to the UK government.[425] The tribunal held that

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[418] SPLOS, 'Decision on the adjustment mechanism for the remuneration of members of the International Tribunal for the Law of the Sea' (17 June 2011) UN Doc SPLOS/230 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N11/379/22/PDF/N1137922.pdf?OpenElement> accessed 11 December 2017.

[419] ITLOS Statute, art. 18(1) and (8).

[420] ITLOS, 'Finances' <https://www.itlos.org/general-information/finances/> accessed 6 December 2017.

[421] SPLOS, 'Annual report of the International Tribunal for the Law of the Sea for 2016' (24 March 2017) UN Doc SPLOS/304 <https://www.itlos.org/fileadmin/itlos/documents/annual_reports/N1708103.pdf> accessed 6 December 2017, 17 para 88. As of 31 December 2016, 45 of the 168 states did not make their contributions for the biennium 2015-2016 which resulted in an unpaid balance of EUR 714,286.

[422] ITLOS Statute, art. 8; *The Republic of Mauritius v the United Kingdom* (Reasoned Decision on Challenge, 30 November 2011) PCA Case No. 2011-03, <https://pcacases.com/web/sendAttach/1792> accessed 8 December 2017, para 149.

[423] ibid, para 165.

[424] ibid, para 165 and 169.

[425] O.L.O. de Witt Wijnen, 'Sailing the Waters: The Need for Good Navigation, the Right Decision and the Requirement of Confidence: A Comment on Republic of Mauritius v

> "a party challenging an arbitrator must demonstrate and prove that, applying the standards applicable to inter-State cases, there are justifiable grounds for doubting the independence and impartiality of that arbitrator in a particular case."[426]

The tribunal explicitly stated that the IBA Guidelines were not established as a source of law pursuant to article 38(1) of the ICJ Statute and were thus not considered in inter-state disputes before the ICJ or ITLOS as well as arbitral tribunals established under Annex VII of the UNCLOS.[427] The tribunal thus essentially applied the strict standard of the ICJ that requires "previous involvement in the specific case".[428]

III. ICC

The ICC was established by the *Rome Statute of the International Criminal Court*[429] ("Rome Statute"), which entered into force in 2002, as a permanent international criminal court based outside of the UN system. Its chief task as 'a court of last resort' is the contribution to the international community's quest against the impunity for the perpetrators of atrocious crimes.

1. Composition

Like the ICJ, the ICC is seated at The Hague. It comprises 18 full-time judges (plus currently one *ad litem* judge) of different nationalities that are also elected for a term of nine years but may not be re-elected.[430] While all judges are initially elected as full-time members of the court, only the president is required to serve

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United Kingdom' in Patrick Wautelet, Thalia Kruger and Govert Coppens (eds), *The Practice of Arbitration: Essays in Honour of Hans van Houtte* (Hart Publishing 2012) 26.

[426] *The Republic of Mauritius v the United Kingdom* (Reasoned Decision on Challenge, 30 November 2011) PCA Case No. 2011-03, <https://pcacases.com/web/sendAttach/1792> accessed 8 December 2017, para 166.

[427] ibid, para 167 et seq.

[428] Georgios Dimitropoulos, 'Constructing the Independence of International Investment Arbitrators: Past, Present and Future' (2016) 36 Nw J Int'l L & Bus 371, 382.

[429] Rome Statute of the International Criminal Court (adopted on 17 July 1998, entered into force on 1 July 2002, last amended 2010) <http://www.refworld.org/docid/3ae6b3a84.html> accessed 8 December 2017, Rome Statute.

[430] ibid, art. 36(1) and (7) and (9)(a) to (c). Only the judges of the first election that were determined by lot to only serve a term of three years were eligible for re-election.

his whole term on a full-time basis. [431] The remaining court members have to stay available to the court on a full-time basis throughout their term and the working periods will be determined according to the workload.[432]

As within the ICJ, terms of office are tiered; a third of the judges is generally replaced every three years to ensure continuity within the court.[433] The ICC has a Pre-Trial Division and a Trial Division each composed of at least six judges, as well as an Appeals Division composed of the President and four other judges.[434] The court carries out its judicial functions in each division by chambers. [435] While the Trial Chamber consists of three judges of the Trial Division, the functions of the Pre-Trial Chamber can also be executed by a single judge. [436] The Appeals Chamber, in turn, needs to be composed of all the judges of the Appeals Division. [437]

Just as the members of the ICJ, the judges of the ICC shall also be of "high moral character" and possess the qualifications required in their respective States for appointment to the highest judicial offices.[438] In addition, they should be impartial and integer.[439] Regarding the competence of the judges, the statute provides that they are required to be proficient in one of two broader law disciplines. They either have in-depth knowledge of criminal law and procedure with sufficient relevant experience in criminal proceedings as judge, prosecutor or lawyer or in another similar function, or they are competent as legal professionals in such areas of international law that are of relevance to the ICC, for instance international humanitarian law and the law of human rights.[440] Moreover, the judges should be fluent in at least one of the working languages of the ICC.[441]

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[431] ibid, art. 35(1) and (2).

[432] ibid, art. 35(3).

[433] ibid, art. 36(9)(b).

[434] ibid, art. 39(1).

[435] ibid, art. 39(2)(a).

[436] ibid, art. 39(2)(b).

[437] ibid, art. 39(2).

[438] ibid, art. 36(3)(a).

[439] ibid.

[440] ibid, art. 36(3)(b).

[441] ibid, art. 36(3)(c).

2. Selection Procedure

The selection of the judges is dominated by the States Parties. The States Parties may each nominate one candidate to be elected to the ICC.[442] The nominee does not need to be a national of that particular state party but must be a national of one of the States Parties.[443] The Assembly of States Parties ("ASP") may also establish an Advisory Committee on nominations.[444]

In contrast to the list prepared by the Secretary-General within the ICJ selection procedure, the statute of the ICC requires two lists of nominees, one with the candidates that are established in criminal law and procedure (list a) and one with the candidates that are competent in the other relevant international law disciplines (list b).[445] At the first election at least nine judges had to be elected from list a and at least five from list b.[446] An equivalent proportion shall be maintained through subsequent elections.[447] The ASP elects the judges by secret ballot at a meeting by majority vote and a quorum of a two-thirds majority of the States Parties present and voting.[448] Regarding the elections, the statute urges the States Parties to take into account "[t]he representation of the principal legal systems of the world", an "[e]quitable geographical representation" and a "fair representation of female and male judges" as well as "the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children."[449] Currently there are six judges from list b and twelve from list a in office. They geographically represent the States Parties as well the major legal systems.[450]

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[442] ibid, art. 36(4)(a).

[443] ibid, art. 36(4)(b).

[444] ibid, art. 36(4)(c).

[445] ibid, art. 36(5).

[446] ibid.

[447] ibid.

[448] ibid, art. 36(6).

[449] ibid, art. 36.

[450] 123 countries are State Parties to the Rome Statute. Out of them 33 are African States, 19 are Asia-Pacific States, 18 are from Eastern Europe, 28 are from Latin American and Caribbean States, and 25 are from Western European and other States; see ICC, 'The States Parties to the Rome Statute' <https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx> accessed 6 December 2017. The current members of the ICC correspond to these numbers

3. Institutional Safeguards

The independence and impartiality of the judges is ensured in a similar fashion as within the ICJ Statute. Judges required to serve on a full-time basis are barred from any other professional occupation notwithstanding the compatibility with their office. [451] This absolute prohibition is loosened for the remaining "stand-by" judges who are merely required to not "engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence". [452] The ICC's binding Code of Judicial Ethics also requires all judges to not exercise any political function. [453] Judges are also required to "avoid any conflict of interest, or being placed in a situation which might reasonably be perceived as giving rise to a conflict of interest". [454]

The ban from engaging in any other professional occupation is compensated for the full-time serving judges by a substantial annual remuneration which amounts to EUR 180,000 net with a special allowance of 10 percent of the annual remuneration tagged onto the president's salary. [455] The ICC judges are also eligible for pension benefits similar to those received by the ICJ judges. [456] For the judges not serving on a full-time basis, the salary structure is quite different. They merely receive an annual allowance of EUR 20,000 which is only supplemented if they would otherwise not reach an overall net income of a minimum of EUR

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geographically: Currently, one judge is from Latin America (Argentina); two are from the Caribbean (Dominican Republic, Trinidad and Tobago); four are from Africa (Kenya, Botswana, Nigeria, Democratic Republic of the Congo); three are from Asia (Japan, Philippines, Republic of Korea) and eight are from Eastern or Western Europe (Belgium, Italy, UK, France, Germany, Poland, Czech Republic, Hungary); see ICC, 'Who's Who' <https://www.icc-cpi.int/about/judicial-divisions/biographies/Pages/default.aspx> accessed 6 December 2017.

[451] Rome Statute, art. 40(2).

[452] ibid, art. 40(3).

[453] Code of Judicial Ethics (adopted and entered into force 9 March 2005) ICC-BD/02-01-05, <https://www.icc-cpi.int/NR/rdonlyres/A62EBC0F-D534-438F-A128-D3AC4CFDD644/140141/ICCBD020105_En.pdf> accessed 8 December 2017, art. 10(2).

[454] ibid, art. 4(2).

[455] ASP, 'Proposed Programme Budget for 2017 of the International Criminal Court' (17 August 2016) ICC-ASP/15/10 <https://asp.icc-cpi.int/iccdocs/asp_docs/ASP15/ICC-ASP-15-10-ENG.pdf> accessed 6 December 2017, 191 et seq.

[456] ASP, *Second Session New York, 8-12 September 2003: Official Records* (ICC-ASP/2/10, United Nations 2003) 198.

60,000.[457] Beyond this guarantee for a net income of EUR 60,000, the non-full-time serving judges receive a special allowance of EUR 270 for each day that they conduct court business as well as a subsistence allowance for each day that they attend court meetings per the UN rate applicable to the ICJ judges. They receive no pension benefits.[458] The ICC's budget for 2016 is exponentially higher than the ICJ budget for the biennium 2017/2018. It amounts to EUR 139,590,600 and is funded primarily by the States Parties but also by voluntary contributions from governments, international organisations, individuals, corporations and other entities.[459]

Judges are disqualified from the bench when their impartiality or independence is put in question which is the case *inter alia* if a judge might be prejudiced due to his prior involvement in the case or related municipal criminal cases involving the person being investigated or prosecuted.[460] Any decision regarding possible interfering outside activities and grounds for disqualification are decided by an absolute majority of the judges while the affected judge is precluded from voting.[461]

The ICC applies a strict standard for disqualification from the point of view of an reasonable observer.[462] In this context, it is not sufficient to establish that "a reasonable observer *could* apprehend bias, but whether any such apprehension was objectively reasonable."[463] It is thus presumed – until rebutted – that

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[457] ibid, 200.

[458] ibid, 200.

[459] ASP, 'Resolution on the Programme Budget for 2016, the Working Capital Fund and the Contingency Fund for 2016, Scale of Assessments for the Apportionment of Expenses of the International Criminal Court and Financing Appropriations for 2016' (26 November 2015) Res. No. ICC-ASP/14/Res.1 <https://asp.icc-cpi.int/iccdocs/asp_docs/resolutions/asp14/icc-asp-14-res1-eng.pdf> accessed 6 December 2017, 1.

[460] Rome Statute, art. 41(2)(a).

[461] ibid, art. 40(4) and 41(2)(c).

[462] *Prosecutor v Banda and Jerbo* (Decision of the plenary of the judges on the "Defence Request for the Disqualification of a Judge" of 2 April 2012, 5 June 2012) ICC-02/05-03/09-317, <https://www.icc-cpi.int/RelatedRecords/CR2012_06628.PDF> accessed 8 December 2017, para 14; Makane M. Mbengue, 'Challenges of Judges in International Criminal Courts and Tribunals' in Chiara Giorgetti (ed), *Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals* (Brill Nijhoff 2015) 214.

[463] *Prosecutor v Banda and Jerbo* (Decision of the plenary of the judges on the "Defence Request for the Disqualification of a Judge" of 2 April 2012, 5 June 2012) ICC-02/05-

> "the judges of the Court are professional judges, and thus, by virtue of their experience and training, capable of deciding on the issue before them while relying solely and exclusively on the evidence adduced in the particular case."[464]

In practice, within the 23 cases tried so far, five judges have been challenged in three situations;[465] yet no challenge has been upheld.[466]

IV. WTO Panels and Appellate Body

Inter-state dispute settlement at the WTO has different stages from consultations and mediations conducted at the first level to the reports of the panels at the second and finally, the report of the WTO's Appellate Body ("WTO AB").

1. Composition

The panels of the WTO Dispute Settlement Body ("WTO DSB") are set up *ad-hoc* by the DSB following a request of the complaining party.[467] The DSB is merely the General Council in disguise and as such comprised of representatives of the WTO members.[468] The panels are generally composed of three "well-qualified governmental and/or non-governmental individuals", unless the parties to the dispute request the composition of the panel with five panelists.[469]

The AB, on the other hand, is a permanent institution appointed by the DSB to deal with appeals of panel cases on the grounds of issues of law. [470] The AB is composed of seven persons with three persons sitting in on any given appeal.[471]

03/09-317, <https://www.icc-cpi.int/RelatedRecords/CR2012_06628.PDF> accessed 8 December 2017, para 13.

[464] ibid.

[465] Chiara Giorgetti, 'Between Legitimacy and Control: Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals' (2016) 49 The Geo Wash Int'l L Rev 205, 223.

[466] ibid, 226.

[467] DSU, art. 6.

[468] WTO Agreement Establishing the World Trade Organization (1994) 33 Int'l Legal Mat 1144, WTO Agreement, art. IV(2) and (3).

[469] DSU, art. 8(1) and (5).

[470] ibid, art. 17(1).

[471] ibid, art. 17(1) and (2).

The AB members serve a term of four years with the option of one re-appointment.[472] In contrast to the panelists of the DSB, the AB members are – during their term – unaffiliated with any government.[473] This criterion does not apply during the selection procedure. In fact, many AB members have come from government employment.[474] They are required to possess "recognized authority, with demonstrated expertise in law, international trade and the subject matter of the [WTO] agreements generally" and be "broadly representative of membership in the WTO".[475]

2. Selection Procedure

The panelists of the DSB are selected from a roster of qualified candidates maintained by the WTO Secretariat, the administrative body of the WTO composed of international officers appointed by the Director-General who in turn is appointed by the Ministerial Conference.[476] The Secretariat's indicative list contains information on the specific areas of experience or expertise of the individuals.[477] WTO member states may suggest the inclusion of new candidates from time to time.[478] Without the consent of the parties to a dispute, nationals of either party cannot serve on the panel.[479] The WTO Secretariat suggests nominations for the panel to the parties of the dispute which they can only oppose for compelling reasons.[480] If the dispute involves a developing country on one side and a developed country on the other, the developing country member can request the inclusion of at least one panelist from a developing country member.[481]

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[472] ibid. Since terms are staggered, elections generally take place biennially for three or four WTO AB members, respectively.

[473] ibid, art. 17(1) and (6).

[474] Arthur E Appleton, 'Judging the Judges or Judging the Members?: Pathways and Pitfalls in the Appellate Body Appointment Process' in Leila Choukroune (ed), *Judging the State in International Trade and Investment Law: Sovereignty Modern, the Law and Economics* (Springer 2016) 14.

[475] DSU, art. 17(3).

[476] ibid, art. 8(4); WTO Agreement, art. VI.

[477] DSU, art. 8(4).

[478] ibid.

[479] ibid, art.8(3).

[480] ibid, art. 8(6).

[481] ibid, art. 8(10).

3. Institutional Safeguards

The DSU provides that the panelists serve in their "individual capacities and not as government representatives, nor as representatives of any organization" and that WTO members shall respect this and refrain from instructing or influencing them regarding panel matters.[482] Since they may be government officials, this seems insufficient to ensure independent and impartial decision-making free from any political influence and underlines the fact that WTO dispute settlement is borne out of a diplomatic attempt to solve disputes.

The AB, in contrast, is composed of non-government affiliated individuals. Yet the fact that an AB member receives remuneration from the government for a function "rigorously and demonstrably independent from that government"[483] seems insufficient to ensure full independence.

Although dubbed a standing body, the AB convenes only if required, which in 2001 was 231 days to decide on nine appeals and 119 days in 2003 to decide on six appeals.[484] The AB members have to be available on short notice at all times and are required to keep up with dispute settlement activities and other relevant activities of the WTO.[485] The AB members receive a monthly retainer fee of roughly USD 8000 plus a maximum daily fee of about USD 700 per day as well as allowances for accommodation and board in Geneva.[486] The AB members are not subject to a pension plan.[487]

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[482] ibid, art. 8(9).

[483] World Trade Organization, *The WTO Dispute Settlement Procedures: A Collection of the Relevant Legal Texts* (Cambridge University Press 2012) 108.

[484] Valerie Hughes, 'The WTO Appellate Body: What Lessons Can Be Learned?: Prepared for The Second Conference of the British Institute of International and Comparative Law's Investment Treaty Forum on "Appeals and Challenges to Investment Treaty Awards: Is It Time For An International Appellate System?"' (7 May 2004) <http://www.biicl.org/files/945_valerie_hughes_presentation.pdf> accessed 8 December 2017, 25.

[485] DSU, art. 17(3).

[486] Valerie Hughes, 'The Institutional Dimension' in Daniel L Bethlehem and others (eds), *The Oxford Handbook of International Trade Law* (Oxford University Press 2009) 283.

[487] Valerie Hughes, 'The WTO Appellate Body: What Lessons Can Be Learned?: Prepared for The Second Conference of the British Institute of International and Comparative Law's Investment Treaty Forum on "Appeals and Challenges to Investment Treaty Awards: Is It Time For An International Appellate System?"' (7 May 2004)

WTO AB members are barred from participation in any disputes that would imply a direct or indirect conflict of interest and might thus in the last instance affect the integrity and impartiality of the dispute settlement mechanism as a whole.[488] The scope of this requirement needs further clarification, e.g. by a high standard of conduct.[489] To this end, the WTO AB members as well as the panelists are required to disclose "any information that could reasonably be expected to be known to them at the time which […] is likely to affect or give rise to justifiable doubts as to their independence or impartiality",[490] which includes personal, business or other interests.[491] To further ensure the independence and impartiality of AB members, they "shall not accept any employment nor pursue any professional activity that is inconsistent with [their] duties and responsibilities" and "shall exercise [their] office without accepting or seeking instructions

<http://www.biicl.org/files/945_valerie_hughes_presentation.pdf> accessed 8 December 2017 26.

[488] WTO Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes (11 December 1996) WT/DSB/RC/1 (96-5267) <https://www.wto.org/english/tratop_e/dispu_e/rc_e.htm> accessed 8 December 2017, section II:1 ("Each person covered by these Rules […] shall be independent and impartial, shall avoid direct or indirect conflicts of interest and shall respect the confidentiality of proceedings of bodies pursuant to the dispute settlement mechanism, so that through the observance of such standards of conduct the integrity and impartiality of that mechanism are preserved.").

[489] World Trade Organization, *The WTO Dispute Settlement Procedures: A Collection of the Relevant Legal Texts* (Cambridge University Press 2012) 108.

[490] WTO Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes (11 December 1996) WT/DSB/RC/1 (96-5267) <https://www.wto.org/english/tratop_e/dispu_e/rc_e.htm> accessed 8 December 2017, section VI:2.

[491] ibid, Annex 2 Illustrative list of information to be disclosed ("Each covered person, as defined in Section IV:1 of these Rules of Conduct has a continuing duty to disclose the information described in Section VI:2 of these Rules which may include the following: (a) financial interests (e.g. investments, loans, shares, interests, other debts); business interests (e.g. directorship or other contractual interests); and property interests relevant to the dispute in question; (b) professional interests (e.g. a past or present relationship with private clients, or any interests the person may have in domestic or international proceedings, and their implications, where these involve issues similar to those addressed in the dispute in question); (c) other active interests (e.g. active participation in public interest groups or other organizations which may have a declared agenda relevant to the dispute in question); (d) considered statements of personal opinion on issues relevant to the dispute in question (e.g. publications, public statements); (e) employment or family interests (e.g. the possibility of any indirect advantage or any likelihood of pressure which could arise from their employer, business associates or immediate family members).").

from any international, governmental, or non-governmental organization or any private source".[492]

The WTO Rules of Conduct also contain a disqualification procedure. The procedure is slightly different regarding disqualification of DSU panelists and AB members. Yet generally, the following applies:

> "Any party to a dispute […] who possesses or comes into possession of evidence of a material violation of the obligations of independence, impartiality or confidentiality or the avoidance of direct or indirect conflicts of interest by covered persons which may impair the integrity, impartiality or confidentiality of the dispute settlement mechanism, shall at the earliest possible time and on a confidential basis, submit such evidence to the Chair of the DSB, the Director-General or the Standing Appellate Body, as appropriate according to the respective procedures […] in a written statement specifying the relevant facts and circumstances."[493]

If the evidence is not provided at "the earliest practicable time", the party shall explain the delay.[494] The explanation will be considered in the subsequent procedures.[495] Evidence of a failure to disclose "a relevant interest, relationship or matter" is generally not considered a material violation; it depends on whether the information itself gives rise to a material violation.[496] The whole procedure is meant to be completed within fifteen working days. [497]

If the evidence relates to a DSU panelist, the Chair of the DSB will share the evidence with the panelist and – only if the matter cannot be resolved in this manner, e.g. by recusal of the panelist – will he forward the evidence to the parties.[498]

After the panelist and the parties have been heard, "the Chair of the DSB, in consultation with the Director-General and a sufficient number of Chairs of the relevant Council or Councils to provide an odd number" shall then decide

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[492] ibid, section I:2.

[493] ibid, section VIII:1 et seqq.

[494] ibid, section VIII:3.

[495] ibid, section VIII:4.

[496] ibid, section VIII:2.

[497] ibid, section VIII:2.

[498] ibid, section VIII:6 et seq.

whether a material violation occurred.[499] Yet the structure of the provision suggests that – irrespective of the confirmation of a material violation – the disqualification would depend on the parties' agreement:

> "Where the parties agree that a material violation of these Rules has occurred, it would be expected that, consistent with maintaining the integrity of the dispute settlement mechanism, the disqualification of the person concerned would be confirmed."[500]

This wording seems to be the consequence of differing opinions of WTO members in the negotiations; some thought that this should be the sole right of the parties, while others found this approach would create legitimacy concerns.[501] Thus, in practice, while the parties have a substantial role in the disqualification proceedings, the decision of the Chair of the DSB and the other WTO officials will prevail.

In contrast, the disqualification of an AB member would be decided by the AB alone after the AB member and the parties have been heard.[502] In this instance, the evidence would be first provided to the other party and then to the AB.[503]

In practice, no DSB panelist or AB member has ever been found to be in material violation of the Rules of Conduct and there have only been few rare instances where a panelist or AB member has withdrawn from the DSB.[504]

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[499] ibid.

[500] ibid, section VIII:8.

[501] Gregory J. Spak and Ron Kendler, 'Selection and Recusal in the WTO Dispute Settlement System' in Chiara Giorgetti (ed), *Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals* (Brill Nijhoff 2015) 174.

[502] WTO Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes (11 December 1996) WT/DSB/RC/1 (96-5267) <https://www.wto.org/english/tratop_e/dispu_e/rc_e.htm> accessed 8 December 2017, section VIII:16.

[503] ibid, section VIII:14.

[504] Yves Renouf, 'Challenges in Applying Codes of Ethics in A Small Professional Community: The Example of the WTO Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes' in Chris de Cooker (ed), *Accountability, Investigation And Due Process in International Organizations* (Martinus Nijhoff 2005) 127; Gregory J. Spak and Ron Kendler, 'Selection and Recusal in the WTO Dispute Settlement System' in Chiara Giorgetti (ed), *Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals* (Brill Nijhoff 2015) 176 et seq.

V. Summary

The control mechanisms contained in the statutes of the above-examined international courts and tribunals may be summarized as follows:

1. Tenure and Remuneration

Court and tribunal members each serve for a term of nine years and with the exception of the ICC are eligible for re-election. Their annual base salary exceeds USD 150,000 and during their term of office, they are banned from any conflicting activities or professional occupation, e.g. as agents, counsel, advocates, etc.[505]

WTO panelists, in contrast, are set up for each dispute and may be composed of government officials which underlines the diplomatic element of dispute settlement by the WTO panels and impedes their outside appearance as truly independent. While the AB may not be composed of government affiliates, its members are also not generally banned from acting as agents, counsel or advocates unless a conflict of interest arises. This concession is prompted by the lower annual base salary as AB members merely receive a guaranteed monthly retainer fee of about USD 8,000 which accounts for an annual base salary of about USD 96,000 which is significantly inferior to the salaries guaranteed to the judges or tribunal members of the ICJ, the ICC and the ITLOS.

	Tenure	Re-election	Annual base salary > USD 150K	Prohibition of other professional occupations
ICJ	yes, 9 years	yes	yes	yes
ITLOS	yes, 9 years	yes	yes	yes
ICC	yes, 9 years	no	yes, but only for judges serving on full-time basis	yes (full-time serving judges) no, only in case of conflict of interest (non-full-time serving judges)
WTO Panels	No, *ad hoc*	yes	no	no

[505] with the exception of those ICC judges that are not serving on a full-time basis.

WTO AB	yes, 4 years	yes, once	no (monthly retainer fee USD 8,000)	no, only if conflict of interest arises

2. Competence

The statutes of the ICJ, ITLOS and the ICC as well as the DSU further require a certain degree of competence of the persons elected to the bench. Very similar requirements are put forward for the members of the ICJ, the ICC, the ITLOS and the WTO AB as they all need to be of "recognized authority", "high moral character" or the "highest reputation" and have to be competent in the international law areas relevant to the respective judiciary body. The WTO panel is less explicit; panelists are merely required to be "well-qualified".

	Required Competence
ICJ	– "high moral character" – qualifications required in their respective countries for appointment to the highest judicial offices or alternatively, be legal scholars of recognized competence in international law
ITLOS	– "the highest reputation for fairness and integrity" – competent in the field of the law of the sea
ICC	– "high moral character" – qualifications required in their respective States for appointment to the highest judicial offices – Particular competence in either criminal law and procedure with sufficient relevant experience in criminal proceedings as judge, prosecutor or lawyer, etc., or as legal professionals in such areas of international law that are of relevance to the ICC, e.g. international humanitarian law and the law of human rights – fluency in at least one of the working languages of the ICC
WTO Panels	– "well-qualified"
WTO AB	– "recognized authority" – demonstrated expertise in law, international trade and the subject matter of the WTO Agreements

3. Selection Procedure

The selection procedures for the members of the ICJ, the ICC, the ITLOS and the WTO AB are essentially dominated by the States Parties to the respective

founding convention or agreement and ensure an equal geographical representation of the respective States Parties or members. While the selection procedure within the ICC and the ITLOS is organized quite similar, the ICJ's selection procedure differs with regard to one important feature. Nominations are generally made by the PCA national groups which are selected by the member states, yet the election is undertaken by the UN General Assembly and the Security Council who vote independent from each other. Candidates are only elected if they reach an absolute majority in both the General Assembly and the Security Council. This has led to criticism arguing that the five great powers (P5), namely China, France, Russian Federation, the UK, and the US, significantly influence the voting behavior of the other ten non-permanent members of the Security Council.[506] An absolute majority within the Security Council requires eight votes. The P5 are said to generally vote for each other's candidates and thus only need three more votes to get their favored candidate elected.[507] Although theoretically eight votes from the ten non-permanent members would also suffice to get a candidate elected, in practice, it seems that the support of the P5 is needed to succeed in getting a candidate elected.[508]

	Nomination by	Election by	Procedure	Equitable representation
ICJ	PCA national groups up to 4 nominations each, but no more than two persons of the same nationality as the group	UN General Assembly[509] (UNGA) and UN Security Council[510] (UNSC)	absolute majority vote required by UNGA and UNSC voting independently from each other	yes
ITLOS	States Parties	States Parties	secret ballot, two-thirds majority vote with a	yes

[506] Ruth Mackenzie and others, *Selecting International Judges: Principle, Process, and Politics* (International Courts and Tribunals Series, Oxford University Press 2010) 131 et seqq.

[507] ibid.

[508] ibid, 132 et seq. Currently, the ten non-permanent members of the Security Council are: Bolivia, Egypt, Ethiopia, Italy, Japan, Kazakhstan, Senegal, Sweden, Ukraine and Uruguay. See UNSC, 'Current Members' <http://www.un.org/en/sc/members/> accessed 6 December 2017.

[509] Composed of the members with equal representation.

[510] Composed of 5 permanent members from the great five powers and 10 non-permanent members elected by UNGA.

	2 nominations each		two-thirds majority of States Parties present and voting	
ICC	States Parties 1 nomination each	States Parties (ASP)	identical with ITLOS	yes
	Distinct feature: judges are elected from two lists indicating different competences (at least 9 judges have to be competent in criminal law, at least 5 in other relevant international law disciplines)			

The selection procedure within the WTO is quite distinct from the procedures of the ICJ, the ICC and the ITLOS. The WTO panels are elected *ad hoc* by the States Parties to a given dispute following the nominations of the WTO Secretariat that draws the candidates from a roster. The AB is appointed by the DSB which is comprised of representatives of the members and shall ensure an equal geographic representation of the members.

4. Disqualification Procedure

All of the statutes and court practices examined above provide for a disqualification procedure and apply a strict standard in determining any bias that sets a higher bar for any bias challenges than the standard described above[511] in UNCITRAL and ICSID arbitrations. Also, challenges seem to be less common than in investment treaty arbitration. Yet, for example at the ICJ, there is a significant number of self-recusals.

B. Control Mechanisms in Supranational Courts

The following analysis further summarizes the control mechanisms employed at supranational courts, such as the European Court of Human Rights ("ECtHR") (see I.), the Inter-American Court of Human Rights ("IACoHR") (see II.), the African Court of Human and Peoples' Rights ("ACHPR") (see III.) as well as the Arab Investment Court (see IV.).

[511] See above, chapter 2, sec. A. I. 5. and II. 3., p. 56 et seqq and p. 65 et seqq.

I. ECtHR

The ECtHR was established in 1959 on the basis of the ECHR to ensure the observance of the human rights provisions set out in the convention and its protocols.[512]

1. Composition & Selection Procedure

The number of judges of the ECtHR corresponds to the number of the contracting parties which are the 47 member states to the Council of Europe ("CoE").[513] Cases are generally heard "either in a single-judge formation, in committees of three judges, in Chambers of seven judges and in a Grand Chamber of seventeen judges".[514]

Judges are elected for a term of nine years without the option of re-election by a majority vote of the Parliamentary Assembly of the Council of Europe ("PACE") from a list of three nominated candidates of each contracting party.[515] PACE consists of 318 parliamentarians from the national parliaments of the Council of Europe's 47 member states.

To promote gender equality and avoid gender bias in decision-making processes, PACE adopted Resolution 1366 (2004)[516] according to which it would principally not consider lists of candidates if the list does not include at least one candidate of each sex.[517] As part of a reform package in 2014, PACE decided to create a general committee on the election of judges to the ECtHR comprising 20 seats.[518] The main task of the committee is to examine the candidatures and

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[512] European Convention on Human Rights (last amended 2010) <http://www.echr.coe.int/Documents/Convention_ENG.pdf> accessed 8 December 2017, ECHR, art. 19.

[513] ibid, art. 20.

[514] ibid, art. 26(1).

[515] ibid, art. 23(1).

[516] PACE, 'Candidates for the European Court of Human Rights' (30 January 2004) Resolution 1366 (2004) <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=17194&lang=en> accessed 8 December 2017.

[517] ibid, para 2.2.

[518] PACE, 'Evaluation of the implementation of the reform of the Parliamentary Assembly' (24 June 2014) Resolution 2002 (2014) Final version <http://assembly.coe.int/

make recommendations to PACE.[519] To this effect, the committee meeting *in camera* studies the curricula vitae and interviews the candidates prior to their election before making a recommendation.[520] It further reviews national procedures for the nomination of candidates in particular with regard to the criteria PACE has adopted for preparing the list of candidates.[521]

2. Institutional Safeguards

Regarding the competence of judges, the general requirements for ECtHR judges is virtually identical with the requirements for the aforementioned international courts and tribunals. Judges "shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence" and sit on the ECtHR in their individual capacity.[522] During their term of office, they are prohibited from taking up outside activities "incompatible with their independence, impartiality or with the demands of a fulltime office".[523] Arguably, this may include political and administrative functions.[524] Judges of the ECtHR earn a monthly net salary of EUR 14,672.79 which amounts to an annual net salary of EUR 176.073,48.[525]

The initial text of the ECHR did not contain provisions on the dismissal of judges; they were added with Protocol No. 11 with a provision similar to art. 18(1) of the ICJ Statute.[526] However, in contrast to the requirement of a unanimous decision of the remaining ICJ judges, art. 23(4) of the ECHR only requires

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nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=21049&lang=en> accessed 8 December 2017, para 9.

[519] ibid, appendix 1.

[520] ibid.

[521] ibid.

[522] ECHR, art. 21(1) and (2).

[523] ibid, art. 21(3).

[524] Anja Seibert-Fohr, 'International Judicial Ethics' in Cesare P. R. Romano, Karen J. Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press 2014) 763.

[525] UK Judicial Appointments Commission, 'Judge of the European Court of Human Rights - Information Pack' <https://jac.judiciary.gov.uk/sites/default/files/sync/basic_page/information_pack_final_0.pdf> accessed 6 December 2017.

[526] William A. Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 672.

a two-third majority.[527] In practice, the procedure for dismissal of a judge does not seem to have ever been initiated thus far.[528]

II. IACoHR

The IACoHR was established by the *American Convention on Human Rights*[529] ("ACHR") alongside the Inter-American Commission on Human Rights ("IACHR") as one of two organs ensuring the fulfilment of the commitments made by the States Parties.[530]

1. Composition & Selection Procedure

The court comprises seven judges elected "from among jurists of the highest moral authority and of recognized competence in the field of human rights, who possess the qualifications required for the exercise of the highest judicial functions in conformity with the law of the state of which they are nationals or of the state that proposes them as candidates".[531] No two judges may be nationals of the same Organization of American States ("OAS") member state.[532]

Judges are elected for a term of six years with the option of one re-appointment.[533] As the terms of office are staggered, three or four judges are replaced or re-elected every three years.[534] They are elected from a list of candidates proposed by the States Parties to the ACHR by secret ballot by an absolute majority vote of the States Parties in the OAS General Assembly.[535] Each of the States

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[527] ibid.

[528] ibid.

[529] American Convention on Human Rights, "Pact of San Jose", Costa Rica (published 22 November 1969, entered into force 18 July 1978) <http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.pdf> accessed 8 December 2017, ACHR.

[530] ibid, art. 33.

[531] ibid, art. 52(1); IACoHR Statute of the Inter-American Court of Human Rights <http://www.corteidh.or.cr/index.php/en/about-us/estatuto> accessed 8 December 2017, IACoHR Statute, art. 4(1).

[532] ACHR, art 52(2); IACoHR Statute, art. 4(2).

[533] ACHR, art. 54(1); IACoHR Statute, art. 5(1).

[534] ACHR, art. 54(2).

[535] ibid art. 53(1); IACoHR Statute, art. 6(1).

Parties may propose up to three candidates.[536] A distinct feature regarding the judges' terms of office is that they remain on the bench of pending cases even if their regular term of office has expired until the case is concluded.[537]

Comparable to the other court procedures examined above, the court's bench in an individual case may include a member of the same nationality as one of the parties to the dispute.[538] The other party maintains the option of choosing an *ad hoc* judge who shall possess the same qualifications as and is subject to most of the restrictions put upon the regular judges.[539] If the bench does not include a national of either party, each of the parties may choose an *ad hoc* judge.[540]

2. Institutional Safeguards

Similar to ITLOS, only the president of the IACoHR serves on a full-time basis; the judges are required to remain at the court's disposal during their term of office.[541] As of 2007, judges are remunerated at a per diem rate of USD 150.[542] In the guidelines concerning the strengthening of the inter-American justice by predictable and harmonious financing published in 2011, the court suggested a monthly remuneration of judges in the amount of USD 6,000 in order to further contribute to the independence of judges and the effectiveness of the court by gradually enabling the judges a full-time dedication to jurisdictional functions.[543]

During their term of office, judges principally cannot be officials of international organizations or members or high-ranking officials to the executive branch of government if this puts them under the direct control of the executive branch.[544]

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[536] ACHR, art. 53(2); IACoHR Statute, art. 6(2).

[537] ACHR, art. 54(3); IACoHR Statute, art. 5(3).

[538] ACHR, art. 55(1) and (4); IACoHR Statute, art. 10(1).

[539] ACHR, art. 55(2); IACoHR Statute, art. 10(2) and (5).

[540] ACHR, art. 55(3); IACoHR Statute, art. 10(3).

[541] ibid, art 16.

[542] Andrew Solomon, 'International Tribunal Spotlight: The Inter-American Court of Human Rights (IACHR)' (2007) International Judicial Monitor vol 2 issue 3 <http://www.judicialmonitor.org/archive_1007/spotlight.html> accessed 12 December 2017.

[543] IACoHR, 'Lineamientos 2011-2015: Fortaleciendo la Justicia Interamericana, a través de un financiamiento previsible y armónico' (8 June 2011) <http://scm.oas.org/pdfs/2011/CP27341S1.pdf> accessed 12 December 2017, 18.

[544] IACoHR Statute, art. 18(1)(a) and (b).

More generally, they are not allowed to participate in activities that "might prevent the judges from discharging their duties, or that might affect their independence or impartiality, or the dignity and prestige of the office".[545]

The impartiality of the judge is secured by a strict disqualification regime under which judges "may not take part in matters in which, in the opinion of the Court, they or members of their family have a direct interest or in which they have previously taken part as agents, counsel or advocates, or as members of a national or international court or an investigatory committee, or in any other capacity."[546]

III. ACHPR

The ACPHR was established by the *Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights*[547] ("Protocol ACHPR") which entered into force in 2004.

1. Composition & Selection Procedure

The court consists of eleven judges, each a national from a different member state of the Organization of African Unity ("OAU") who is elected "in an individual capacity from among jurists of high moral character and of recognized practical, judicial or academic competence and experience in the field of human and peoples' rights".[548] The Assembly of the OAU elects the judges by secret ballot from a list of candidates for a term of six years with one optional re-appointment and with the times of the elections being staggered.[549] The list contains the nominations of the States Parties with each state party being able to nominate up to three candidates of whom at least two shall be nationals of that state.[550] In

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[545] ibid, art. 18(1)(c).

[546] ibid, art. 19(1).

[547] Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights (adopted 9 June 1998, entered into force 25 January 2004) <http://en.african-court.org/images/Basic%20Documents/africancourt-humanrights.pdf> accessed 8 December 2017, Protocol ACHPR.

[548] ibid, art. 11.

[549] ibid, art. 15(1) and (2) and 14(1).

[550] ibid, art. 12(1).

the nomination process, States Parties shall give due consideration to adequate gender representation.[551] The same applies to the Assembly during the election process.[552] The Assembly also ensures that the members of the court are representative "of the main regions of Africa and of their principal legal traditions".[553]

2. Institutional Safeguards

All judges initially serve on a part-time basis with the exception of the president of the court who performs on a full-time basis. The former may be changed if the Assembly deems a different arrangement appropriate.[554]

The statute of the ACHPR explicitly provides that the "independence of the judges shall be fully ensured in accordance with international law".[555] To this end, no judge may participate in proceedings in which he was previously involved as agent, counsel or advocate or in any other capacity.[556] Beyond that, judges are required to refrain from any activity that might adversely affect their independence or impartiality or create conflicts with the demands of their office; in particular judges may not hold political, diplomatic or administrative offices at domestic level.[557] A judge is precluded from participating in cases if one party to the dispute is his home state or the state that nominated him.[558]

Impartiality may also be legitimately questioned on grounds of personal interests in a given case or the expression of a particular public opinion.[559] These

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[551] ibid, art. 12(2).

[552] ibid, art. 14(3).

[553] ibid, art. 14(2).

[554] ibid, art. 15(4).

[555] ibid, art. 17(1).

[556] ibid, art. 17(2).

[557] ibid, art. 18; Rules of Court (entered into force on 2 June 2010) <http://en.african-court.org/images/Basic%20Documents/Final_Rules_of_Court_for_Publication_after_Harmonization_-_Final__English_7_sept_1_.pdf> accessed 8 December 2017, rule 5 and 8(4).

[558] Rules of Court (entered into force on 2 June 2010) <http://en.african-court.org/images/Basic%20Documents/Final_Rules_of_Court_for_Publication_after_Harmonization_-_Final__English_7_sept_1_.pdf> accessed 8 December 2017, rule 8(2) and (3).

[559] ibid, rule 8(4).

grounds are listed in the Rules of the Court. Thus, no court member may sit in a case if

> a) he/she has previously acted, in relation to the case, as agent, counsel or advocate for one of the parties, or as a member of a national or international court or a commission of inquiry or in any other capacity;
>
> b) he/she has a personal interest in the case, including a spousal, parental or other close family, personal or professional relationship, or a subordinate relationship with any of the parties;
>
> c) he/she has expressed opinions publicly, through the communications media, in writing, through his or her public actions or otherwise, that may, objectively adversely affect his or her impartiality;
>
> d) for any other reason, his/her independence or impartiality may, legitimately, be called into doubt […]."[560]

A court member may recuse himself for any of these reasons.[561] If he is in doubt whether there is a reason to withdraw, he shall make a full disclosure to the court who then decides about his inability to sit in the given case.[562] Removal or suspension of a judge requires the unanimous decision of the other judges of the court.[563]

IV. Arab Investment Court

The Arab Investment Court was established by the *Unified Agreement for the Investment of Arab Capital in the Arab States*[564] ("UAI") and is intended to serve until the Arab Court of Justice can be established.[565] The court's jurisdiction extends to disputes brought before it by either party to an investment which relate to or arise from application of the provisions of the UAI.[566]

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[560] ibid, rule 8(4).

[561] ibid, rule 8(5).

[562] ibid, rule 8(6).

[563] Protocol ACHPR, art. 19.

[564] Unified Agreement for the Investment of Arab Capital in the Arab States (signed on 26 November 1980, entered into force on 7 September 1981) reprinted in: UNCTAD, International Investment Instruments: A Compendium (vol. 2, United Nations 1996) 211 et seqq.

[565] ibid, art. 28(1).

[566] ibid, art. 29(1).

The court is composed of at least five judges and several reserve members, each having a different Arab nationality.[567] They are chosen by the Council of the League of Arab States from a list of nominees.[568] To this end, each state party may nominate two Arab legal specialists "from amongst those having the academic and moral qualifications to assume high-ranking legal positions".[569] The members of the court serve a term of three years with the option of re-election and only serve on a full-time basis whenever the work so requires.[570] No disqualification procedure is contained in the Unified Agreement for the Investment of Arab Capital in the Arab States.[571]

V. Summary

To avoid the perception of bias, each of the statutes of the international judicial bodies and supranational courts examined above, has incorporated control mechanisms to ensure the independence and impartiality of its members. The control mechanisms can be summarized as follows:

- With the exception of the ICC, all international and supranational courts and tribunals examined above are set up by supranational or international intergovernmental organizations such as the UN, the WTO, the CoE, the OAS, the OAU or the Arab League which are to varying degrees also involved in the selection process of the judges or members.

- Virtually all judges are elected by secret ballot from a list of candidates nominated by the States Parties to the respective convention

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[567] ibid.

[568] ibid, art. 28(2).

[569] ibid.

[570] ibid, art. 28(3).

[571] Please note that art. 28(3) of the Unified Agreement for the Investment of Arab Capital in the Arab States provides that "The Court shall produce a set of rules governing work regulations, procedures in the Court and the structure of its divisions." An English set of these rules does not seem to be publicly available. Thus, it could not be examined whether these rules – if implemented at all – contain any provisions on the dismissal of court members.

- The election usually requires a majority vote by organs of the respective intergovernmental organization.[572] A universal standard is also set with respect to the competence of an international judge. Most statutes provide with nearly identical wording that judges must be of a 'high moral character' with recognized competence in the respective field they engage in and possess the qualification for the exercise of the highest judicial office in their home state.

- Beyond that, the statutes examined above generally secure the independence and impartiality of a judge by several, partly institutional features that are summed up in the table below:

Independence	Impartiality
Prohibition of incompatible outside activities such as political, governmental or diplomatic offices	no participation in proceedings in case of prior involvement as agent, counsel or advocate or in any other capacity
Disqualification or suspension of a judge requires a (unanimous or majority) decision of the court	No participation in case of conflicting personal interests
Tenure - nine years (ICJ, ICC, ITLOS, ECtHR) - six years (IACoHR, ACHPR) - four years (WTO AB) - three years (Arab Investment Court)	Each elected judge must be of a different nationality
Restrictions on re-election for members of the WTO AB, the IACoHR and the ACHPR, ICC and the ECtHR	Equitable representation of the principal legal systems of the respective States Parties
Annual base salary (ICJ, ITLOS, ICC, ECtHR, possibly IACoHR)	Either no judge of the same nationality as a state party to a dispute may sit on the bench or alternatively, the other party has the right to appoint an *ad hoc* judge or, both parties may appoint an *ad hoc*

[572] e.g. by PACE (ECtHR), the OAS General Assembly (IACoHR), the Assembly of the OAU (ACHPR), the Council of the League of Arab States (Arab Investment Court), the Secretary-General and the Security Council (ICJ), the DSB/General Council (WTO AB) or directly by the State Parties in the case of ICC or ITLOS.

	judge if no judge of either nationality sits on the bench

C. Control Mechanisms of the IUSCT

Of interest are also the control mechanisms engaged in the IUSCT which shares several procedural similarities with investment treaty arbitration but – in part – also employs similar institutional safeguards as the international courts and tribunals.

The IUSCT was established on 19 January 1981 by the Algiers Accords, in particular the *Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran*[573] ("Claims Settlement Declaration"). The tribunal was set up to resolve the crisis between the Islamic Republic of Iran and the US that had resulted from the hostage crisis at the US Embassy in Tehran in 1979 and the subsequent freezing of Iranian assets by the US.[574] To this end, the tribunal was granted *inter alia* jurisdiction to directly decide claims of US nationals against Iran and of Iranian nationals against the US that arose out of debts, contracts, expropriations or other measures affecting property rights and were filed by 19 January 1982.[575]

The IUSCT shares several essential features with investment treaty arbitration tribunals:

[573] Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (1981) 20 Int'l Legal Mat 223, Claims Settlement Declaration.

[574] ibid.

[575] ibid, art. II(1).

i. The Tribunal Rules of Procedure[576] of the IUSCT are based on the 1976 UNCITRAL Arbitration Rules[577] and were slightly modified to increase the efficiency of the tribunal;[578]

ii. Tribunals are established by an international agreement between two or more states and apply public international law, albeit not exclusively;[579]

iii. Individuals may directly claim compensation due to a wrongful conduct by a foreign state before a tribunal, to which end they are conferred a procedural capacity instead of being dependent upon their home state's discretion regarding diplomatic protection;

iv. Also, in deviation from diplomatic protection as the traditional dispute settlement mechanism, the states have waived the exhaustion of local remedies in favour of the individual's direct access to arbitration.

One distinguishing feature is the IUSCT's semi-permanent character. The IUSCT is established only for the period it takes to decide the claims that were filed until 19 January 1982. While the arbitrators in investment treaty arbitration are appointed *ad hoc* to a specific dispute by the parties to the dispute, the IUSCT is composed of nine members who execute their functions in three chambers *à* three members, one Iranian, one American and one member from a third country.

Members are appointed to the IUSCT indefinitely but in practice, they have to be replaced from time to time due to retirement or illness. As of 30 April 1997, the tribunal has had 28 members, which connotes that on average, during the

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[576] Tribunal Rules of Procedure (3 May 1983) <http://www.iusct.net/General%20Documents/5-TRIBUNAL%20RULES%20OF%20PROCEDURE.pdf> accessed 8 December 2017.

[577] UNCITRAL Arbitration Rules (adopted on 15 December 1976 by UNGA Res 31/98) UNGAOR 31st session Supp No 17 UN Doc (A/31/17), UNCITRAL 1976 Arbitration Rules.

[578] Lee M. Caplan, 'Arbitrator Challenges at the Iran-United States Claims Tribunal' in Chiara Giorgetti (ed), *Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals* (Brill Nijhoff 2015) 118.

[579] *Iran-United States Claims Tribunal: Decision in Case No. A/18 Concerning the Question of Jurisdiction over Claims of Persons with Dual Nationality* (Jurisdiction, 6 April 1984), [1984] 5 Iran-US CTR 251, 261.

first 16 years since the tribunal's inception, its nine members were each replaced three times.[580]

A member is required to be independent and impartial and disclose any "circumstances likely to give rise to justifiable doubts as to his independence and impartiality".[581] As the Tribunal Rules on Procedure are based on the 1976 UNCITRAL Arbitration Rules, the standard and challenge procedure is essentially the same as for UNCITRAL arbitrations.[582] Challenges are decided by the tribunal's appointing authority.[583] In the practice of the IUSCT, 22 challenges were brought forward, yet none was upheld.[584] In fact, three proposals were withdrawn, while nine were dismissed on technical grounds and ten were dismissed because no justifiable doubts regarding the independence and impartiality could be established.[585]

Challenges were brought by Iran *inter alia* on grounds of an informal remark allegedly critical of Iranian's judicial system, a failure to act, interference with the appointing authorities' duties as well as against third-country arbitrators allegedly favoring the US.[586] The US *inter alia* challenged arbitrators for physical assault, a breach of confidentiality, financial dependence on the Iranian Government as well as a failure to disclose a conflict.[587]

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[580] Charles N. Brower and Jason D. Brueschke, *The Iran-United States Claims Tribunal* (Martinus Nijhoff Publishers 1998) 11 [fn. 31].

[581] Tribunal Rules of Procedure (3 May 1983) <http://www.iusct.net/General%20Documents/5-TRIBUNAL%20RULES%20OF%20PROCEDURE.pdf> accessed 8 December 2017, art. 9.

[582] See above, chapter 2, sec. A. II. 3., p. 65 et seqq.

[583] ibid, art. 12.

[584] Lee M. Caplan, 'Arbitrator Challenges at the Iran-United States Claims Tribunal' in Chiara Giorgetti (ed), *Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals* (Brill Nijhoff 2015) 121 et seqq.

[585] ibid, 138 et seqq; Chiara Giorgetti, 'Between Legitimacy and Control: Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals' (2016) 49 The Geo Wash Int'l L Rev 205, 226.

[586] Lee M. Caplan, 'Arbitrator Challenges at the Iran-United States Claims Tribunal' in Chiara Giorgetti (ed), *Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals* (Brill Nijhoff 2015) 122 et seqq.

[587] ibid, 129 et seqq.

D. Summary: Comparison of the Standards of Arbitral and Judicial Independence and Impartiality

To counter the perception of bias, the respective statutes of the above-examined judicial bodies contain institutional safeguards that predominantly include fixed tenures, adequate remunerations, restrictions or the prohibition of incompatible outside activities and a carefully structured selection process. Perceived biases on the bench, in turn, are minimized by admitting the appointment of ad hoc judges and the option of disqualification. To ensure a bench's stability, the latter either requires a unanimous decision of the other judges or a majority vote.

With regard to the control mechanisms in investment treaty arbitration, there are some notable differences to the control mechanisms ensuring independence and impartiality of the international judiciary:

- In contrast to international judges, arbitrators are not tenured and do not receive an annual base salary;

- They are, however, also banned from any conflicting professional occupation as agent, counsel, advocate, etc. if it would create doubts as to their independence and impartiality;

- Like the international judiciary, most arbitration rules place restrictions on the nationality of the arbitrators providing that generally none of the arbitrators may be of the same nationality or a national of either party;

- However, due to the prevailing party autonomy that is characteristic for investment treaty arbitration, these restrictions can generally be waived by joint agreement of the parties;

- Same as the international judiciary, arbitrators may not participate in proceedings in case of prior involvement as agent, counsel or advocate or in any other capacity;

- The appointment of international judges is different from investment treaty arbitration: They are nominated and selected by (a majority vote

of) the States Parties to the respective Convention or in the case of the ICJ by UNGA and UNSC;

- Although international judges are generally not party-appointed, the parties to a dispute may each appoint an additional *ad hoc* judge to the bench that is a national of the party appointing it;

- While the disqualification of arbitrators and judges is generally possible, in contrast to investment treaty arbitration, challenges are seldom raised in international courts and tribunals (if any) and none has ever been upheld (neither within the IUSCT);

- Instead, issue conflicts are mostly regulated *via* self-recusals as the example of the ICJ illustrates;

- In determining bias challenges, international courts and tribunals tend to apply strict standards and do not rely on the IBA Guidelines for determining an issue conflict.

4

Challenges to and (In)sufficiency of the Current Control Mechanisms in Investment Treaty Arbitration

It seems that the perception of bias is one of the major triggers for the legitimacy crisis investment treaty arbitration has experienced in recent years. For this reason, the following chapter starts out to analyse the legitimacy of unilateral appointments as a common feature of investment treaty arbitration (see A.). It will also be considered whether inconsistent decisions are an (in-)tolerable side-effect of unilateral appointments or non-tenured arbitrators in general (see B.).

A. Legitimacy of Unilateral Appointments

The increase in arbitrator challenges based on (i) the dual role of counsel and arbitrator in investment treaty arbitration and (ii) multiple appointments by the same party begs the question whether indeed "something's rotten in the state of party-appointed arbitration".[588]

To answer this question, it is important to understand the criticism invoked against unilateral appointments (see I.) before turning to an analysis of the question of procedural needs for reform (see II.).

I. Criticism of Unilateral Appointments

One of the benefits of the party-appointed arbitrators in investment treaty arbitration is certainly the possibility of selecting lawyers with particular expertise which might not be common to every investment lawyer, such as knowledge of

[588] Seth H. Liebermann, 'Something's Rotten in the State of Party-Appointed Arbitration: Healing ADR's Black Eye that is "Nonneutral Neutrals"' (2004) 5 Cardozo J Conflict Resol 215.

"the usages of petroleum concessions" which the disputing parties may find a necessary requirement to adequately deal with the dispute. [589]

On the other hand, the concept of investment treaty arbitration has been challenged on exactly this feature. Paulsson for instance argues that "unilateral appointments are inconsistent with the fundamental premise of arbitration: mutual confidence in arbitrators."[590] According to Paulsson, the parties' attachment to unilateral appointments may *inter alia* be based on the expectations that

i. "My nominee will help me win the case";

ii. "Parties have greater confidence in arbitrators selected for their special knowledge or skill";

iii. "My nominee will ensure that the tribunal as a whole understands my culture".[591]

He goes on to state that "the reasons for parties' attachment to the practice of unilateral appointments are ill-conceived" and that the "reality is that everything a party does once a dispute has broken out is focussed on winning."[592] He thus suggests that all arbitrators should be chosen jointly or selected by a neutral body.[593]

Concerns about the neutrality of the party-appointed arbitrator were also raised by Albert van den Berg following a study of 150 publicly reported investment

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[589] Jack J. Coe, Jr. 'Taking Stock of NAFTA Chapter 11 in Its Tenth Year: An Interim Sketch of Selected Themes, Issues, and Methods' (2003) 36 Vand J Transnat'l L 1381, 1452 et seq.

[590] Jan Paulsson, 'Moral Hazard in International Dispute Resolution: Inaugural Lecture as Holder of the Michael R. Klein Distinguished Scholar Chair University of Miami School of Law' (29 April 2010) <http://www.arbitration-icca.org/media/0/12773749999020/paulsson_moral_hazard.pdf> accessed 8 December 2017, 9.

[591] ibid, 9 et seq.

[592] ibid, 10.

[593] ibid, 11.

arbitration decisions.[594] He concluded that in 34 (22 percent) of these cases, dissenting opinions were issued, nearly all of them by the arbitrator appointed by the party that lost the case in whole or in part.[595] He found this score to be "statistically significant" and "difficult to reconcile with the neutrality requirement.[596] Yet he also acknowledged that 78 percent of the examined decisions were unanimous and that he could not comment on "any real or perceived partisanship on the part of party-appointed arbitrators in unanimous tribunals".[597]

II. Procedural Needs for Reform

To elaborate on the validity of the criticism invoked against unilateral appointments, it is necessary to be clear on the applicable standard. For this reason, the basic prerequisites of judicial independence and impartiality are set out in the following (see 1.) before their application to investment treaty arbitration is discussed (see 2.). In a next step, the effectiveness of the current control mechanisms of investment treaty arbitration as laid out above in chapter 2 is examined (see 3.).

1. Basic Prerequisites of Judicial Independence and Impartiality: The Burgh House Principles

On the domestic level, judicial independence in the sense of article 14(1) of the *International Covenant on Civil and Political Rights*[598] is an absolute right that is mainly secured by clear and predictable procedures and objective criteria re-

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[594] Van den Berg, Albert Jan, 'Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration' in Mahnoush H Arsanjani and others (eds), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Martinus Nijhoff Publishers 2010) 824.

[595] ibid.

[596] ibid, 825.

[597] ibid, 825.

[598] International Covenant on Civil and Political Rights (adopted on 16 December 1966, entered into force on 23 March 1976) 999 UNTS 171, ICCPR.

garding the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary.[599] The realization of judicial independence in domestic adjudication is thus largely depending on the states' adoption of institutional guarantees.[600]

Tenure, in particular, is a focal point of ensuring a judge's independence and impartial decision-making free from extraneous influence.[601] Judges should only be dismissed from their position "on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law".[602]

On the international level, the Burgh House Principles found that – to ensure the independence of the judiciary – the following principles of international law generally apply:

- "judges must enjoy independence from the parties to cases before them, their own states of nationality or residence, the host countries in which they serve, and the international organisations under the auspices of which the court or tribunal is established;

- judges must be free from undue influence from any source;

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[599] UNHRC, 'General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial' (23 August 2007) UN Doc CCPR/C/GC/32 <http://www.refworld.org/docid/478b2b2f2.html> accessed 8 December 2017, 5 et seq para 19.

[600] ibid, 6 para 21 ("States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them. […] In order to safeguard their independence, the status of judges, including their term of office, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.").

[601] See e.g. Gus van Harten, 'Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law' in Stephan W. Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press 2010) 643; Roger G. Noll and Barry R. Weingast, 'Conditions for Judicial Independence' (2006) 15 J Contemp Legal Issues 105 et seq; Eric A. Posner and John C. Yoo, 'Judicial Independence in International Tribunals' (2005) 93 Cal L Rev 1, 12 et seqq; International Commission of Jurists, 'International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors - A Practitioners Guide' (2007) Practitioners Guide No. 1 <http://www.refworld.org/docid/4a7837af2.html> accessed 8 December 2017, 51.

[602] UNHRC, 'General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial' (23 August 2007) UN Doc CCPR/C/GC/32 <http://www.refworld.org/docid/478b2b2f2.html> accessed 8 December 2017, 6 para 20.

- judges shall decide cases impartially, on the basis of the facts of the case and the applicable law;

- judges shall avoid any conflict of interest, as well as being placed in a situation which might reasonably be perceived as giving rise to any conflict of interests;

- judges shall refrain from impropriety in their judicial and related activities".[603]

To secure the scope of these principles, the Burgh House Principles *inter alia* require that the nomination, election and appointment procedures

i. consider the appropriate personal and professional qualifications of the candidates as well as fair representation of different geographic regions;[604]

ii. are transparent and provides "appropriate safeguards against nomination, election and appointment motivated by improper considerations",[605]

iii. make publicly available the information about the candidates as well as the nomination, election and appointment procedures.[606]

Judges shall have security of tenure during their term of office and may only be dismissed on specific grounds agreed upon in advance and receive adequate remuneration.[607] Judges may also not engage in any extra-judicial activities incompatible with their judicial function and may not exercise any political functions.[608]

Issue conflicts are prevented by strict limitations. Accordingly, judges may not serve in a case if they have

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[603] International Law Association Study Group on the Practice and Procedure of International Courts and Tribunals, 'The Burgh House Principles On The Independence Of The International Judiciary' (June 2004) <http://www.pict-pcti.org/activities/Burgh%20House%20English.pdf> accessed 8 December 2017, preamble.

[604] ibid, Principle 2.2.

[605] ibid, Principle 2.3.

[606] ibid, Principle 2.4.

[607] ibid, Principles 3 and 4.

[608] ibid, Principle 8.

i. past links to the case (e.g. if they previously acted as counsel, agent, etc. or where they had any other form of association with the subject-matter of the case that may reasonably affect their independence or impartiality);[609]

ii. past professional, business or personal links to any of the parties within the previous three years;[610]

iii. a material, financial or personal interest in the outcome of the case (also applies to interests of closely related persons or entities).[611]

The Burgh House Principles also provide that *ex parte* communications should generally be discouraged yet – if permitted by the rules of court – the content should be disclosed to the court and the other party.[612] Judges are also subject to several post-service limitations. During their term of office, they should not accept any offer of future appointments or employment by any of the parties; after their term of office, they should still exercise appropriate caution as regards any offer of employment or appointment by any of the parties to a case.[613]

2. Application to Investment Treaty Arbitration "As Appropriate"

The Burgh House Principles note that each court and tribunal "has its own characteristics and functions" and that the principles described above generally apply to full-time judges.[614] They can thus not be transferred to investment treaty arbitration without considering the procedural differences between investment treaty arbitration and the international judiciary. The Burgh House Principles confirm this finding by stating that the principles should be applied "as appropriate" to international arbitration tribunals.[615] This raises the question of the

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[609] ibid, Principle 9.

[610] ibid, Principle 10.

[611] ibid, Principle 11.

[612] ibid, Principle 12.2.

[613] ibid, Principle 13.

[614] ibid, Preamble.

[615] ibid, Preamble.

meaning of "as appropriate". Are unilateral appointments as a general feature of investment treaty arbitration irreconcilable with the requirement of independence and impartiality applicable to the party-appointed arbitrator? It is argued here that unilateral appointments are about balancing the tribunal (see a)) and are not irreconcilable with independence and impartiality if subject to strict regulations avoiding any improper conduct (b)).

a) Arbitral Independence vs. Balancing the Tribunal

The findings by Paulsson and van den Berg have been heavily criticized for assuming a lack of good faith on the part of party-appointed arbitrators.[616] Indeed, it is doubtful that the unilateral appointment of an arbitrator is really sufficient grounds to presume a lack of impartiality on his behalf.

Yet the selection of a party-appointed arbitrator certainly is a strategic decision not made lightly. While overt partisanship is not desirable for legitimacy reasons, the party-appointed arbitrator should nevertheless display a "maximum predisposition" towards the party nominating him, without appearing biased.[617] This is not surprising as the overall objective of the parties will certainly be to win the case.

The selection of the party-appointed arbitrator thus seems to be about balancing the tribunal. To this end, the unilateral appointment may give the parties several comforts in the procedure. Among these are certainly the possibility to select an arbitrator with specific knowledge and skill who understands the culture and

[616] Charles N. Brower and Charles B. Rosenberg, 'The Death of the Two-Headed Nightingale: Why the Paulsson—van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded' (2013) 29 Arb Int'l 7, 7 et seqq; Catherine A. Rogers, 'The Politics of International Investment Arbitration' (2014) 12 Santa Clara J Int'l L 223, 246.

[617] Martin Hunter, 'Ethics of the International Arbitrator' (1987) 53 Arb 219.

legal philosophy of "his party".[618] It is also argued that the influence of the appointment process advances the trust in the system and thus the inclination to resort to investment treaty arbitration.[619]

In this context, a survey of Queen Mary University of London in 2012 revealed that, *vis-à-vis* international arbitration, a significant majority of respondents[620] (76 percent) preferred the unilateral selection of the two co-arbitrators in a three-member tribunal.[621] Respondents explained their preference by the following reasons:

> "(i) it gives the parties control over the constitution of the tribunal and inspires confidence in the arbitral process, which consequently raises the legitimacy of the final award;
>
> (ii) parties are better placed to know what skills and knowledge are required for resolving the dispute; and
>
> (iii) many interviewees expressed some distrust in arbitral institutions selecting arbitrators. In particular, they were concerned about the small and static pool from which some institutions pick their arbitrators, and of the fact that not all institutions are paying sufficient attention to the availability of arbitrator."

However, since the survey does not differentiate between commercial arbitration and investment arbitration, its significance is limited *vis-à-vis* unilateral appointments in investment treaty arbitration. As indicated above,[622] the criticism

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[618] Yuval Shany, 'Squaring the Circle? Independence and Impartiality of Party-Appointed Adjudicators in International Legal Proceedings' (2008) 30 Loy LA Int'l & Comp L Rev 473, 473 et seq; Jan Paulsson, 'Moral Hazard in International Dispute Resolution: Inaugural Lecture as Holder of the Michael R. Klein Distinguished Scholar Chair University of Miami School of Law' (29 April 2010) <http://www.arbitration-icca.org/media/0/12773749999020/paulsson_moral_hazard.pdf> accessed 8 December 2017, 9 et seqq.

[619] ibid.

[620] The 710 respondents were primarily private practitioners (53%), arbitrators (26%), in-house counsel (10%), as well as counsel from arbitral institutions, academics and expert witnesses (together, 11%). The majority of respondents (71%) were involved in more than 5 international arbitrations in the past 5 years, and most of them (57%) worked for organisations that were involved in more than 20 arbitrations in the past 5 years. Queen Mary University of London, '2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process' (2012) <http://www.arbitration.qmul.ac.uk/docs/164483.pdf> accessed 8 December 2017, 44.

[621] ibid, 5.

[622] See above, Introduction, sec. C. p. 15 et seqq.

of investment treaty arbitration at least partially results from the public (international) law element of the investment regime which sets it apart from commercial arbitration. Accordingly, the respondents may assess the legitimacy of unilateral appointments differently for commercial arbitration and for investment arbitration which is not reflected in the survey.

b) Mitigation of Risks associated with Unilateral Appointments

The risks of the appearance of bias related to unilateral appointments are currently mitigated by several control mechanisms.[623] These control mechanisms deviate to some extent from the control mechanisms employed by the international judiciary[624] and those suggested by the Burgh House Principles[625].

The differences essentially relate to the lack of tenure and restriction of outside activities, among others, on one hand and the option of unilateral appointments, on the other.[626] While the Burgh House Principles consider the security of a minimum term of office to contribute to the independence of international full-time judges,[627] this requirement is irreconcilable with unilateral appointments.

Yet independence and impartiality can and are also be secured by other measures, in particular, restrictions on incompatible outside activities, mandatory disclosures and effective challenge procedures. These safeguards are common in investment treaty arbitration as well as the international judiciary.

While the success rate of challenges is low in investment treaty arbitration, it is even lower within the international judiciary. The international judiciary, in particular the ICJ, seems to be more restrictive in deciding on the appearance of bias which might be explained by the following factors: (i) judges are tenured

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[623] See above, chapter 2, sec. A., p. 50 et seqq.

[624] See above, chapter 3, sec. D., p. 120 et seq.

[625] See above in this chapter, sec. A. II. 1., p. 124 et seqq.

[626] Yuval Shany, 'Squaring the Circle? Independence and Impartiality of Party-Appointed Adjudicators in International Legal Proceedings' (2008) 30 Loy LA Int'l & Comp L Rev 473, 485 et seq.

[627] International Law Association Study Group on the Practice and Procedure of International Courts and Tribunals, 'The Burgh House Principles On The Independence Of The International Judiciary' (June 2004) <http://www.pict-pcti.org/activities/Burgh%20House%20English.pdf> accessed 8 December 2017, Principle 3.2.

and outside activities are restricted; (ii) the court generally decides cases in full composition with at least nine judges or – with the consent of the parties – in chambers composed of three judges, none of which are party-appointed; (iii) *ad hoc* judges may only be appointed additionally to regular judges. Due to these additional safeguards against the appearance of bias, it stands to reason that challenges are seldom raised and generally decided restrictively.

In investment treaty arbitration, justifiable doubts or a manifest lack of independence and impartiality may give rise to a challenge. The exemplary challenges examined above indicate that the challenged conduct is often related to (i) multiple appointments of the same arbitrator in different arbitrations, (ii) prejudgment of key issues and (iii) the dual role as arbitrator and counsel (to one of the parties).[628] These issues of challenges are not surprising: It stands to reason that a party may want to appoint an arbitrator who has already decided on a relevant issue of the case in another arbitration if that decision was beneficial to one of the parties. The same applies if the arbitrator previously sat in a tribunal that decided in favor of the party or if he published an article that supports a specific legal position.

These conflicts seem to be a consequence of the party autonomy associated with unilateral appointments that are mitigated by the equality of arms on the sides of both parties. In this context, the legitimacy of unilateral appointments may be questioned on grounds that the existing control mechanisms[629] are not sufficient to avoid situations and (improper) conduct that give rise to the appearance of bias.

3. Effectiveness of the Current Control Mechanisms

Under the current investment arbitration regime, the appearance of bias on behalf of the party-appointed arbitrator may *inter alia* arise from undue influence in the pre-appointment process (see a)), multiple appointments by the same party (see b)) as well as the dual role of arbitrator and counsel (see c)). In this context, the legitimacy of investment treaty arbitration *inter alia* depends on the control mechanisms implemented to ensure procedural fairness. The following analysis

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[628] See above, chapter 2, sec. A. I. 5. b) and A. II. 3. c), p. 60 et seqq and 70 et seqq.

[629] See above, chapter 2, sec. A., p. 50 et seqq.

thus concludes that the regulation of undue influence in the pre-appointment process – in particular with regard to unilateral appointments – needs to be regulated more strictly (see a)). This finding also applies to the regulation of multiple appointments (see b)). To avoid issue conflicts, the IBA Guidelines or similar guidelines should be introduced in the arbitration rules or referred to in the investment chapter of the respective IIA (see c)).

a) Regulation of Undue Influence in the Pre-Appointment Process

Although rather the exception than the rule, the Loewen case may be an example for undue influence in the pre-appointment process (see (a)). It might explain the general restraint exercised by arbitrators and practitioners when it comes to the pre-appointment interviews. There also seems to be no coherent approach regarding the appropriate content or the general appropriateness of pre-appointment interviews (see (b)). To ensure procedural fairness, it might be beneficial to further regulate arbitrator and counsel conduct by binding instruments (see (c)).

(a) The Loewen Case as a Disgraceful but Unique Example of Undue Influence in the Pre-Appointment Process

To avoid the appearance of bias, regulation of the proper conduct in the pre-appointment process is essential. In this context, the Loewen case has been cited as a disgraceful example of undue party influence on the pre-appointment process.[630] This is because the American arbitrator of the case revealed during his reflections on the experience that he had met with officials of the US Department of Justice prior to accepting the appointment and that they had told him: "You know, judge, if we lose this case we could lose NAFTA."[631] He remembered his answer as having been: "Well, if you want to put pressure on me, then that does it."[632]

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[630] Jan Paulsson, *The Idea of Arbitration* (Oxford University Press 2013) 151.

[631] Jan Paulsson, 'Moral Hazard in International Dispute Resolution: Inaugural Lecture as Holder of the Michael R. Klein Distinguished Scholar Chair University of Miami School of Law' (29 April 2010) <http://www.arbitration-icca.org/media/0/12773749999020/paulsson_moral_hazard.pdf> accessed 8 December 2017, 6.

[632] ibid.

Paulsson concludes from this excerpt that the parties were deprived of an independent and impartial tribunal.[633] Regardless of whether or not this assessment is correct, two things should be considered:

i. It should be kept in mind that the proceedings started in the late 1990s when investment treaty arbitration – albeit being on the rise – was essentially still in its infancy;

ii. It should also be considered that in the US, tribunals have historically been allowed a certain degree of partisanship,[634] which might have factored in the pre-appointment interview.

Since the 1990s, investment treaty arbitration has come a long way. While pre-appointment interviews were – in the early days – rather the exception than the rule, they seem to have become more acceptable to arbitrators if conducted properly.[635]

(b) Appropriateness of Pre-Appointment Interviews

Guidance on the appropriate content is offered by the IBA Guidelines. According to the IBA Guidelines, pre-appointment interviews are proper and need not be disclosed if they relate to "the arbitrator's availability and qualifications to serve, or to the names of possible candidates for a chairperson, and [do] not address the merits or procedural aspects of the dispute, other than to provide the arbitrator with a basic understanding of the case".[636]

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[633] Jan Paulsson, *The Idea of Arbitration* (Oxford University Press 2013) 151.

[634] David McLean, 'Selecting a Party-Appointed Arbitrator in the US' (11 March 2014) <https://www.lw.com/thoughtLeadership/appointed-arbitrator-us-mclean> accessed 8 December 2017, 1 et seqq.

[635] Kabir Singh and Elan Krishna, 'Interviewing Prospective Arbitrators' (29 September 2015) Kluwer Arbitration Blog <http://kluwerarbitrationblog.com/2015/09/29/interviewing-prospective-arbitrators/> accessed 8 December 2017; Jörg Risse and Thomas Klich, 'How much is too much? Rules for pre-appointment interviews between a party and a potential arbitrator' (23 November 2015) Global Arbitration News <https://globalarbitrationnews.com/how-much-is-too-much-rules-for-pre-appointment-interviews-between-a-party-and-a-potential-arbitrator-20151116/> accessed 8 December 2017.

[636] IBA Guidelines on Conflicts of Interest in International Arbitration (adopted by resolution of the IBA Council on 23 October 2014) <http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx> accessed 8 December 2017, Green List, rule 4.4.1 in conjunction with Explanation to General Standard 3.

A similar understanding is found in the *IBA Guidelines on Party Representation in International Arbitration*[637]. According to Guideline 7, party representatives are generally not allowed to conduct *ex parte* communications with the arbitrators, if not agreed otherwise by the parties.[638] Nevertheless, the following exceptions – which are congruent to the IBA Guidelines on Conflicts of Interest – are permissible:

> "(a) A Party Representative may communicate with a prospective Party-Nominated Arbitrator to determine his or her expertise, experience, ability, availability, willingness and the existence of potential conflicts of interest.
>
> (b) A Party Representative may communicate with a prospective or appointed Party-Nominated Arbitrator for the purpose of the selection of the Presiding Arbitrator."[639]

Ex parte communication with the prospective presiding arbitrator regarding these subjects, on the other hand, generally requires the consent of the parties.[640] The communications with the party-appointed arbitrator and the prospective presiding arbitrator may include a general description of the dispute.[641] They may not, however, relate to their views on the substance of the dispute.[642]

Although not differentiating between commercial and investment treaty arbitration, the revelations in the Queen Mary survey regarding the appropriateness and scope of pre-appointment interviews is interesting as it provides some insight into the perception by stakeholders:

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[637] IBA Guidelines on Party Representation in International Arbitration (adopted by a resolution of the IBA Council on 25 May 2013) <http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx> accessed 8 December 2017, Guideline 7.

[638] ibid, Guideline 8.

[639] ibid, Guideline 8(a) and (b).

[640] ibid, Guideline 8(c).

[641] ibid, Guideline 8(d).

[642] ibid.

i. In fact, (only) 46 percent of the interviewees considered pre-appointment interviews generally appropriate, 40 percent found them to be sometimes appropriate and 12 percent did not find them appropriate at all;[643]

ii. Two-thirds of respondents submitted that they had interviewed or had been interviewed as potential arbitrators;[644]

iii. Regarding the contents of pre-appointment interviews, the majority of interviewees seems to be of the opinion that discussing legal questions relevant to the case is inappropriate;[645]

iv. Most interviewees were also against discussing prior views expressed by the prospective arbitrator or whether he is a strict constructionist or influenced by the equities of the case.[646]

The results of the survey suggest that practitioners, in-house counsel and other stakeholders are cognizant of the fact that undue influence in the pre-appointment process may be incompatible with the requirement of impartiality. It also seems that the general appropriateness is not universally accepted which might be due to the fact that there are also differing views on which topics are appropriate in a pre-appointment interview.

(c) Further Regulation of Arbitrator Conduct

The question thus arises whether the issue of pre-appointment interviews and *ex parte* communications in general should be more strictly regulated to ensure the procedural fairness and hence, the legitimacy of the system.

The Burgh House Principles provide in this context that judges should "exercise appropriate caution in their personal contacts with parties, agents, counsel, ad-

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[643] Queen Mary University of London, '2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process' (2012) <http://www.arbitration.qmul.ac.uk/docs/164483.pdf> accessed 8 December 2017, 6.

[644] ibid.

[645] ibid.

[646] ibid.

vocates," etc. and that *ex parte* communications should generally be discouraged.[647] In any event, if the rules of court permit *ex parte* communications, the content should be disclosed to the court and the other party.[648] These standards are stricter than those provided in the IBA Guidelines.

The current arbitration rules only provide mandatory disclosures regarding circumstances that may create the appearance of bias from a third party point of view. Arbitrators thus enjoy a certain discretion *vis-à-vis* the content of their disclosures. Despite the clear regulations in the non-binding IBA Guidelines, the results of the Queen Mary survey show that there is no coherent approach on the appropriate content among practitioners and arbitrators. This suggests that a binding regulation may be useful.

In this context, the results of a more recent survey of the Queen Mary University of London *vis-à-vis* international arbitration are of interest:

i. The survey revealed that most interviewees were aware of the IBA Guidelines on Conflicts of Interest (90 percent) and have also see them used in practice (71 percent);[649]

ii. The effectiveness of the IBA Guidelines was rated 3,63 of 5 (1-2=ineffective, 3=neutral, 4-5=effective);[650]

iii. A small majority of respondents (55 percent of which 33 percent were arbitrators and 62 percent private practitioners) were of the opinion that the conduct of arbitrators should be regulated more;[651]

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[647] International Law Association Study Group on the Practice and Procedure of International Courts and Tribunals, 'The Burgh House Principles On The Independence Of The International Judiciary' (June 2004) <http://www.pict-pcti.org/activities/Burgh%20House%20English.pdf> accessed 8 December 2017, Principle 12.1 and 12.2.

[648] ibid, Principle 12.2.

[649] Queen Mary University of London, '2015 International Arbitration Survey: Improvements and Innovations in International Arbitration' (2015) <http://www.arbitration.qmul.ac.uk/docs/164761.pdf> accessed 8 December 2017, 35.

[650] ibid, 36.

[651] ibid, 37.

iv. However, the respondents had differing views on what would be the most effective way to regulate arbitrator conduct; none of the options provided in the survey were clearly favored;[652]

v. Among these options were: instruments issued by arbitral institutions (23 percent); a code of conduct by a professional body (22 percent) and databases providing information about arbitrator performance (21 percent).[653]

Since party-appointed arbitrators seem – to some extent – more susceptible to the appearance of improper conduct, their conduct should be regulated more restrictively. If pre-appointment interviews are permitted within the limits provided by the IBA Guidelines, the content should – in accordance with the Burgh House Principles – be disclosed to the other party. It might also be an option to conduct the interviews in writing based on a template with generally acceptable questions.

It might also contribute to the perception of a legitimate pre-appointment process, if proper guidelines are adopted as an annex to the arbitration rules or their application is agreed upon by the parties to an IIA.

b) Regulation of Multiple Appointments by the Same Party

Another area that is not regulated by binding rules is that of multiple appointments by the same party. While the IBA Guidelines provide some guidance on the issue (see (a)), the perception of the arbitrators' independence and impartiality might be further increased by further regulation (see (b)).

[652] ibid, 38.

[653] ibid, 38.

(a) Scope of the IBA Guidelines

Vis-à-vis repeat nominations, the IBA Guidelines *inter alia* provide that the following circumstances contained in the Orange List may – in the eyes of the parties – give rise to justifiable doubts as to the arbitrator's independence and thus have to be disclosed upon appointment[654]:

i. The arbitrator has within the past three years received more than two appointments by the same party or one of its affiliates;[655]

ii. The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties, or one of their affiliates;[656]

iii. Within the past three years, the arbitrator has been appointed on more than three occasions by the same counsel, or the same law firm.[657]

The IBA Guidelines have thus clearly identified multiple appointments within three years as a potential risk to the appearance of the arbitrator's independence and impartiality, although the final assessment clearly depends on the specific circumstances of the case. In practice, tribunals have applied a strict standard in this respect and have required some additional element to mere repeat nominations.[658]

(b) Further Regulation of Repeat Nominations

The current approach to multiple nominations has repeatedly been criticized in the public discourse. In this context, legitimacy concerns of repeat appointments

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[654] See also above, chapter 2, sec. A. II. 3. b), p. 66 et seqq.

[655] IBA Guidelines on Conflicts of Interest in International Arbitration (adopted by resolution of the IBA Council on 23 October 2014) <http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx> accessed 8 December 2017, part II para 3.1.3.

[656] ibid, part II para 3.1.5.

[657] ibid, part II para 3.3.8.

[658] Luke A. Sobota, 'Repeat Arbitrator Appointments in International Investment Disputes' in Chiara Giorgetti (ed), *Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals* (Brill Nijhoff 2015) 309.

may arise from the potential risk of an appearance of bias: If an arbitrator is nominated multiple times by the same party or the law firm of the counsel of the party or currently serves as arbitrator in another arbitration in which the nominating party is also a party, the appointment may be challenged by the other party on grounds of doubts as to the arbitrator's independence and impartiality. The challenges examined above indicate that this has happened several times in recent times. In this context, the remaining two arbitrators in *OPIC Karimum* noted:

> "In our opinion, **multiple appointments** of an arbitrator by a party or its counsel constitute a consideration that must be **carefully considered** in the context of a challenge. In an environment where parties have the capacity to choose arbitrators, damage to the confidence that investors and States have in the institution of Investor-State dispute resolution may be adversely affected by a perception that multiple appointments of the same arbitrator by a party or its counsel arise from a relationship of familiarity and confidence inimical to the requirement of independence established by the Convention. […]
>
> In a dispute resolution environment, a party's choice of arbitrator involves a **forensic decision** that is clearly related to a judgment by the appointing party and its counsel of its **prospects of success** in the dispute. In our view, multiple appointments of an arbitrator are an **objective indication** of the **view of parties** and their counsel that the outcome of the dispute is more likely to be successful with the multiple appointee as a member of the tribunal than would otherwise be the case."[659]

Newcombe criticized this assessment on grounds that it would be too far-reaching to consider that every unilateral appointment "always reflects a forensic assessment that the appointee will play a role in contributing to a successful outcome of the dispute".[660] While the generalization of the parties' intentions by the tribunal may indeed not apply to every case, the criteria for selection may – as has been argued above (see 2. a)) – in practice include a "maximum predisposition" of the prospective arbitrator in favour of the nominating party.

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[659] *OPIC Karimum Corporation v the Bolivarian Republic of Venezuela* (Decision on the Proposal to Disqualify Professor Philippe Sands, 5 May 2011) ICSID Case No. ARB/10/14, <http://www.italaw.com/sites/default/files/case-documents/ita0588.pdf> accessed 8 December 2017, para 47.

[660] Andrew P. Newcombe, 'Disqualification Based on Multiple Appointments—Divergence in Recent ICSID Decisions?' (23 June 2011) Kluwer Arbitration Blog <http://kluwerarbitrationblog.com/2011/06/23/disqualification-based-on-multiple-appointments-divergence-in-recent-icsid-decisions/> accessed 8 December 2017.

The Burgh House Principles provide that while in office, judges shall not accept any future appointments by one of the parties to a case if that acceptance "may affect or may reasonably appear to affect their independence or impartiality".[661] In this respect, there seems to be an overlap between the IBA Guidelines and the Burgh House Principles, as both seem to consider future appointments by one of the parties to a case not generally incompatible with the independence and impartiality requirement. The determination would be subject to a case-by-case assessment.

However, although multiple appointments cannot be considered an objective indication of actual bias, they might create the appearance of bias. And such perceptions may, as the tribunal in *OPIC Karimum* aptly noted, undermine the confidence of the investors and states in the system.[662]

On the question whether repeat nominations by parties or counsels should be specifically regulated, the Queen Mary survey of 2015 – although not differentiating between commercial and investment arbitration – revealed that the majority of respondents (76 percent and 72 percent respectively) were indeed of the opinion that these area requires further regulation. As already indicated above with regard to pre-appointment interviews,[663] there was however no consensus on how this regulation should be implemented.

Restricting the practice of repeat nominations may have several benefits. For one, it "would enhance the credibility of the international investment arbitration regime by minimizing doubts as to the impartiality and independence of party-appointed arbitrators".[664] This, in turn, may decrease the number of arbitrator

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[661] International Law Association Study Group on the Practice and Procedure of International Courts and Tribunals, 'The Burgh House Principles On The Independence Of The International Judiciary' (June 2004) <http://www.pict-pcti.org/activities/Burgh%20House%20English.pdf> accessed 8 December 2017, Principle 13.1.

[662] See also Luke A. Sobota, 'Repeat Arbitrator Appointments in International Investment Disputes' in Chiara Giorgetti (ed), *Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals* (Brill Nijhoff 2015) 309.

[663] See also above in this chapter, sec. A. II. 3. a) (c), p. 135 et seq.

[664] ibid, 319.

challenges.[665] An objective standard on the general admissibility of repeat nominations as well as the exact limits in which they are admissible may also "provide greater *ex ante* clarity".[666]

In this context, reform may *inter alia* include (i) a general obligation of the arbitrator to disclose all previous appointments by the nominating party within the last three years or at least the relevant situations described in the Orange List of the IBA Guidelines as well as (ii) a right to reserve approval of the appointment by the other party in situations described in the Orange List or a presumption that these situations indicate a manifest lack of independence or impartiality or justifiable doubts thereto.

c) Regulation of Issue Conflicts Related to the Dual Role of Arbitrator and Counsel

In investment treaty arbitration, the dual role of lawyers as counsel in one case and arbitrator in another case refers to the so-called "double hat" debate. This dual role is a general feature of investment treaty arbitration that does not *per se* create the appearance of bias as for example the District Court of The Hague held in the decision on a challenge in *Telekom Malaysia Berhad v The Republic of Ghana*:

> "After all, it is generally known that in (international) arbitrations, **lawyers frequently act as arbitrators**. It could happen in arbitrations that an arbitrator has to decide on a question pertaining to which he has previously in another case, defended a point of view. Save in exceptional circumstances, there is no reason to assume however that such an arbitrator would decide such a question less open-minded than if he had not defended such a point of view before. Therefore, in such a situation, there is, in our opinion, **no automatic appearance of partiality** vis-a-vis the party that argues the opposite in the arbitration."[667]

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[665] ibid, 318.

[666] ibid.

[667] *Telekom Malaysia Berhad v The Republic of Ghana* (Decision of the District Court of the Hague, 5 November 2004) Case No. HA/RK 2004, 788 <http://www.italaw.com/sites/default/files/case-documents/ita0922.pdf> accessed 8 December 2017, para 11 [emphasis added].

Nevertheless, as the exemplary case analysis above has shown, arbitrator challenges often refer to the arbitrator's or his law firm's prior or current involvement in another arbitration. This raises the question whether this issue needs to be regulated more strictly.

The dual role of arbitrator and counsel is a side-effect of the lack of tenure. Within the international judiciary, only the judges of the ICJ, ITLOS and the full-time judges of the ICC are generally prohibited from engaging in any other outside occupations.[668] This general prohibition does not apply to non-full time judges at the ICC as well as WTO panelists and AB members. The Burgh House Principles do also not provide a general prohibition of outside activities, not even for full-time judges.[669] Limitations only apply with regard to incompatible extra-judicial activities that "may affect or may reasonably appear to affect their independence and impartiality".[670]

Such circumstances that may – to varying degrees – objectively give rise to justifiable doubts regarding the independence and impartiality of arbitrators are listed in the IBA Guidelines. This not only extends to past and present business relationships between arbitrator and counsel or party but also in several instances to the arbitrator's law firm. It seems that the comprehensive list of situations provided by the IBA Guidelines that have to be disclosed upon appointment are sufficient for the other party to evaluate whether the extra-judicial activity as counsel conflicts with the arbitrator's independence or impartiality in the specific case.

Although already constituting best practices, the IBA Guidelines should be made binding upon the parties to ensure a coherent approach of prospective arbitrators which would further enhance the legitimacy of the system with regard to the dual role of arbitrators and counsels.

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[668] See above, chapter 3, sec. A. V. 1., p. 104.

[669] International Law Association Study Group on the Practice and Procedure of International Courts and Tribunals, 'The Burgh House Principles On The Independence Of The International Judiciary' (June 2004) <http://www.pict-pcti.org/activities/Burgh%20House%20English.pdf> accessed 8 December 2017, Principle 8.1.

[670] ibid.

B. Inconsistent Awards: An (In)tolerable Side-Effect of Non-Tenured Arbitrators?

One further *critique* that has been invoked against the legitimacy of investment treaty arbitration is the potential of inconsistent awards that arises from the case-by-case establishment of the tribunals and may as such be a side-effect of the lack of tenure. Yet while the system has indeed produced some inconsistent awards, those are not a general feature of investment treaty arbitration (see I.). The risk of inconsistent awards is mitigated by reliance of tribunals on earlier awards (see II. 1.) as well as the option of consolidating claims (see II. 2.). Regarding procedural reform, while investment treaty arbitration is legitimized by the states' consent, it might benefit from further safeguards which preserve the party autonomy in the arbitral proceedings but provide the parties with the comfort of a further control mechanism (III.).

I. Notable Inconsistent Arbitral Awards

In investment treaty arbitration, inconsistency of awards may come in different shapes. Franck found three categories to apply:

> "First, different tribunals can come to different conclusions about the same standard in the same treaty. […] Second, different tribunals organized under different treaties can come to different conclusions about disputes involving the same facts, related parties, and similar investment rights. […] Finally, different tribunals organized under different investment treaties will consider disputes involving a similar commercial situation and similar investment rights, but will come to opposite conclusions."[671]

[671] Susan D. Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through inconsistent Decisions' (2005) 73 Fordham L Rev 1521, 1545 et seq. See also *Canfor Corporation v United States of America; Terminal Forest Products Ltd. v United States of America* (Order of the Consolidation Tribunal, 7 September 2005) <http://www.italaw.com/sites/default/files/case-documents/ita0115.pdf> accessed 8 December 2017, 51 para 133 ("The desirability of avoiding conflicting results is not limited to cases where the parties are the same. Cases with different parties may present the same legal issues arising out of the same event or related to the same measure. Conflicting results then may take place if the findings with respect to those issues differ in two or more cases"). See also August Reinisch, 'The Future of Investment Arbitration' in Christina Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Scheuer* (Oxford University Press 2009) 906 et seqq.

That being said, the *CME*[672] and *Lauder*[673] arbitrations are well-known examples – falling within the second category – where two different tribunals, one seated in Stockholm and one in London that had essentially the same facts before them, arrived at two inconsistent conclusions.[674] The tribunal in the *CME* arbitration found that the Czech Republic, by reversing critical prior approvals, violated several of its obligations towards *CME*, *inter alia*, to provide fair and equitable treatment to *CME*, among several other treaty obligations.[675] In contrast, the *Lauder* tribunal *inter alia* found that the reversal of these approvals did not amount to a violation of fair and equitable treatment.[676] The inconsistency of these two awards was also noted by the tribunal in *Canfor Corporation v United States of America; Terminal Forest Products Ltd. v United States of America* which stated:

> "[E]xperience has shown that inconsistent results do occur as was unfortunately demonstrated by the **conflicting outcomes in the cases of CME/Lauder v. The Czech Republic**. These cases are the more regrettable because, for all practical purposes, the parties and the claims

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[672] *CME Czech Republic B.V. v The Czech Republic* (Partial Award, 13 September 2001), <http://www.italaw.com/sites/default/files/case-documents/ita0178.pdf> accessed 8 December 2017.

[673] *Ronald S. Lauder v The Czech Republic* (Final Award, 3 September 2001), <http://www.italaw.com/sites/default/files/case-documents/ita0451.pdf> accessed 8 December 2017.

[674] Susan D. Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through inconsistent Decisions' (2005) 73 Fordham L Rev 1521, 1559 et seqq; Judith Gill, 'Inconsistent Decisions: An Issue to be Addressed or a Fact of Life?' (2005) 2 Transnat'l Disp Mgmt 12; Andrea Menaker, 'Seeking Consistency in Investment Arbitration: The Evolution of ICSID and Alternatives for Reform' in Van den Berg, Albert Jan (ed), *International Arbitration: The Coming of a New Age?* (ICCA Congress Series vol 17. Kluwer Law International 2013) 614; William W. Burke-White, 'The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System' (2008) 3 AJWH 199, 221; Thomas W. Wälde, 'Alternatives for Obtaining Greater Consistency in Investment Arbitration: An Appellate Institution after the WTO, Authoritative Treaty Arbitration or Mandatory Consolidation?' (2005) 2 Transnat'l Disp Mgmt 71, 76; Christoph Schreuer and Matthew Weiniger, 'Conversations Across Cases - Is There a Doctrine of Precedent in Investment Arbitration?' (5 January 2007) <http://www.univie.ac.at/intlaw/conv_across_90.pdf> accessed 8 December 2017, 10 [fn. 45].

[675] *CME Czech Republic B.V. v The Czech Republic* (Partial Award, 13 September 2001), <http://www.italaw.com/sites/default/files/case-documents/ita0178.pdf> accessed 8 December 2017, 52 para 166 et seqq.

[676] *Ronald S. Lauder v The Czech Republic* (Final Award, 3 September 2001), <http://www.italaw.com/sites/default/files/case-documents/ita0451.pdf> accessed 8 December 2017, 68 para 289 et seqq.

> were the same (even though the bilateral investment treaties in those cases were partly between different States Parties)."[677]

Other notable examples include the *SGS* arbitrations[678] as well as the well-known Argentine arbitrations involving *CMS, LG&E, Enron and Sempra*[679]. In the latter, Argentina's necessity defence was interpreted differently by four tribunals: While *CMS, Enron and Sempra* tribunals found that Argentina could not rely on the necessity defense notwithstanding the extreme financial crisis it faced, the *LG&E* tribunal accepted Argentina's necessity plea.[680]

While these are only a few examples, with the increasing number of IIAs and investment treaty arbitrations, there is a certain potential for inconsistent awards

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[677] See also *Canfor Corporation v United States of America; Terminal Forest Products Ltd. v United States of America* (Order of the Consolidation Tribunal, 7 September 2005) <http://www.italaw.com/sites/default/files/case-documents/ita0115.pdf> accessed 8 December 2017, 50 et seq para 132 [References omitted].

[678] Cf. *SGS Société Générale de Surveillance SA v Pakistan* (Decision on Jurisdiction, 6 August 2003), [2003] 18 ICSID Rev-FILJ 307; *SGS Société Générale de Surveillance S.A. v Republic of the Philippines* (Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004) ICSID Case No. ARB/02/6; see for a detailed discussion Susan D. Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through inconsistent Decisions' (2005) 73 Fordham L Rev 1521, 1570 et seqq; Andrea Bjorklund, 'The Continuing Appeal of Annulment: Lessons from *Amco Asia* and *CME*' in Todd Weiler (ed), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May 2005) 486.

[679] See for a detailed discussion on the inconsistency of these awards and the tribunal's divergent interpretation of Argentine's necessity defence, William W. Burke-White, 'The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System' (2008) 3 AJWH 199, 209 et seqq. See also Eun Y. Park, 'Appellate Review in Investor State Arbitration' in Anna Joubin-Bret and Jean E. Kalicki (eds), *Reform of Investor-State Dispute Settlement: Journeys for the 21st Century* (Brill Nijhoff 2015) 443.

[680] William W. Burke-White, 'The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System' (2008) 3 AJWH 199, 216 et seqq; cf. *CMS Gas Transmission Co. v Argentine Republic* (Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, 25 September 2007) ICSID Case No. ARB/01/8, <http://www.italaw.com/sites/default/files/case-documents/ita0187.pdf> accessed 8 December 2017; *CMS Gas Transmission Company v The Republic of Argentina* (Award, 12 May 2005) ICSID Case No. ARB/01/8, [2005] 44 Int'l Legal Mat 1205, <http://www.italaw.com/sites/default/files/case-documents/ita0184.pdf> accessed 8 December 2017; *LG&E Energy Corp. v Argentine Republic* (Decision on Liability, 3 October 2006) ICSID Case No. ARB/02/1, [2006] 21 ICSID Rev-Foreign Int'l L J 203; *Enron Corp. Ponderosa Asset, L.P. v Argentine Republic* (Award, 22 May 2007) ICSID Case No. ARB/01/3, <http://www.italaw.com/sites/default/files/case-documents/ita0293.pdf> accessed 8 December 2017; *Sempra Energy International v Argentine Republic* (Award, 28 September 2007) ICSID Case No. ARB/02/16, <http://www.italaw.com/sites/default/files/case-documents/ita0770.pdf> accessed 8 December 2017.

dealing with the same issues, sometimes even the same state measures and possibly involving the same obligations under an IIA.[681]

II. Current Control Mechanisms in Investment Treaty Arbitration

There are currently no generally applicable formal control mechanisms to ensure consistency of awards. Yet while there is no *stare decisis* in investment treaty arbitration, tribunals often make reference to prior awards (see 1.). Also, several recent treaties as well as the revised UNCITRAL Arbitration Rules provide for the consolidation of claims to avoid inconsistent outcomes (see 2.).

1. Persuasive Precedent

While the current system of investment treaty arbitration lacks a vertical hierarchy that could provide a basis for a '*de facto* vertical precedent', it is sometimes argued that arbitrators consider earlier awards as persuasive precedents.[682] In that vein, it has been argued that investment tribunals already "undoubtedly engage in lawmaking in the broadest sense" and that as "adjudicators who have the last word on the interpretation of investment treaties, the relevance of investment awards extends far beyond the disputes they resolve".[683]

This assessment does not seem self-evident as investment treaty arbitration does not subscribe to *stare decisis,* or as it is more commonly known in civil law countries, the doctrine of precedent.[684] Following this approach, a tribunal's duty

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[681] Gabrielle Kaufmann-Kohler, 'Annulment of ICSID Awards in Contract and Treaty Arbitrations: Are There Differences?' in Emmanuel Gaillard and Yas Banifatemi (eds), *Annulment of ICSID Awards: A Joint IAI-ASIL Conference Washington, D.C.- April 1, 2003* (IAI Series No. 1. Juris 2004) 219.

[682] Ian A. Laird and Rebecca Askew, 'Finality Versus Consistency: Does Investor-State Arbitration Need an Appellate System' (2005) 7 J App Prac & Process 285, 299; Christoph Schreuer and Matthew Weiniger, 'Conversations Across Cases - Is There a Doctrine of Precedent in Investment Arbitration?' (5 January 2007) <http://www.univie.ac.at/intlaw/conv_across_90.pdf> accessed 8 December 2017 10.

[683] Ten Irene M ten Cate, 'International Arbitration and the Ends of Appellate Review' (2012) 44 NYU J Int'l L & Pol 1109, 1186.

[684] Kendall Grant, 'The ICSID Under Siege: UNASUR and the Rise of a Hybrid Regime for International Investment Arbitration' (2015) Osgoode Legal Studies Research Paper 26 <http://ssrn.com/abstract=2626498> accessed 8 December 2017, 8; Susan D. Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law

would extend to not only the payment of 'due consideration' to the prior award but also to the reasoning why it has or has not followed a prior decision.[685]

Indeed, apart from the awards examined above regarding the 'appearance of bias test', reference to previous investment awards "has become a standard feature in most decisions of ICSID",[686] which may be considered a subsidiary means for the determination of the rules of law in the sense of article 38(1)(d) of the ICJ

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through inconsistent Decisions' (2005) 73 Fordham L Rev 1521, 1611; Todd Weiler, 'NAFTA Investment Arbitration and the Growth of International Economic Law' (2002) 36 Can Bus L Int'l 405, 407; Christoph Schreuer and Matthew Weiniger, 'Conversations Across Cases - Is There a Doctrine of Precedent in Investment Arbitration?' (5 January 2007) <http://www.univie.ac.at/intlaw/conv_across_90.pdf> accessed 8 December 2017, 1 et seqq. Noemi Gal-or, 'The Concept of Appeal in International Dispute Settlement' (2008) 19 Eur J Int'l L 43, 47 [fn. 27] ("This principle is a pillar of the common law legal system, whereas in civil (continental) law, precedent performs a secondary role. Of course, in practice, civil law courts refer to earlier judgments, which is important. However, they may depart from earlier judgments the next time, and are not bound to them as common law is bound to stare decisis."); Charles N. Brower, Michael Ottolenghi and Peter Prows, 'The Saga of CMS: *Res Judicata*, Precedent, and the Legitimacy of ICSID Arbitration' in Christina Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Scheuer* (Oxford University Press 2009) 851.

[685] Joshua Karton, 'Reform of Investor-State Dispute Settlement: Lessons From International Uniform Law' in Anna Joubin-Bret and Jean E. Kalicki (eds), *Reform of Investor-State Dispute Settlement: Journeys for the 21st Century* (Brill Nijhoff 2015) 20.

[686] Christoph H Schreuer and others (eds), *The ICSID Convention: A Commentary* (2nd edn, Cambridge University Press 2009) art. 42 para 184. See also *Saipem S.p.A. v The People's Republic of Bangladesh* (Jurisdiction, 21 March 2007) ICSID Case No. ARB/05/07, <http://www.italaw.com/sites/default/files/case-documents/ita0733.pdf> accessed 8 December 2017, 20 para 67 [references omitted] ("The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must **pay due consideration to earlier decisions of international tribunals**. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law") [Emphasis added]; *Gas Natural SDG, S.A. v The Argentine Republic* (Decision of the Tribunal on Preliminary Questions on Jurisdiction, 17 June 2005) ICSID Case No. ARB/03/10, <http://www.italaw.com/sites/default/files/case-documents/ita0354.pdf> accessed 8 December 2017, 23 para 36 ("The Tribunal wishes to emphasize that it has rendered its decision independently, without considering itself bound by any other judgments or arbitral awards. Having reached its conclusions, however, the Tribunal thought it **useful to compare its conclusion with the conclusions reached in other recent arbitrations** conducted pursuant to the ICSID Arbitration Rules and arising out of claims under contemporary bilateral investment treaties. We summarize a few of these decisions here, and confirm that we have not found or been referred to any decisions or awards reaching a contrary conclusion.") [emphasis added]; Joshua Karton, 'Reform of Investor-State Dispute Settlement: Lessons From International Uniform Law' in Anna Joubin-Bret and Jean E. Kalicki (eds), *Reform of Investor-State Dispute Settlement: Journeys for the 21st Century* (Brill Nijhoff 2015) 14.

Statute.[687] The development of a *jurisprudence constante* increases with the proliferation of investment treaty arbitration.

The persuasive quality of precedent awards has been acknowledged by several investment tribunals, *inter alia,* the tribunal in *ADC Affiliate Limited and ADC & ADMC Management Limited v The Republic of Hungary*[688] which held that

> "[i]t is true that arbitral awards do not constitute binding precedent. It is also true that a number of cases are fact-driven and that the findings in those cases cannot be transposed in and of themselves to other cases. It is further true that a number of cases are based on treaties that differ from the present BIT in certain respects. However, cautious reliance on certain principles developed in a number of those cases, **as persuasive authority**, may **advance the body of law**, which in turn may serve **predictability** in the interest of both investors and host States."[689]

In that vein, Bjorklund has concluded that while an "informal and dispersed regime of investment treaty arbitrations is not well suited to developing a system of formal precedent", eventually "an accretion of decisions will likely develop a *jurisprudence constante*—a 'persisting jurisprudence' that secures 'unification and stability of judicial activity.'"[690]

This conclusion clashes with Dolzer's assertion whereas "consistency will not be considered as the primary objective of a regime such as ICSID" since "consistency of jurisprudence is at best one value to be observed within ICSID: the

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[687] *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v Argentine Republic* (Decision on Liability, 30 July 2010) ICSID Case No. ARB/03/19, <http://www.italaw.com/sites/default/files/case-documents/ita0826.pdf> accessed 8 December 2017, 73 para 189; Guillaume submits that arbitral awards can under certain conditions be considered as subsidiary means for the determination of the rule of law, see Gilbert Guillaume, 'Can Arbitral Awards Constitute a Source of International Law under Article 38 of the Statute of the International Court of Justice?' in Emmanuel Gaillard and Yas Banifatemi (eds), *Precedent in International Arbitration: IAI Seminar Paris - December 14, 2007* (IAI Series No. 5. Juris 2008) 112.

[688] *ADC Affiliate Limited and ADC & ADMC Management Limited v The Republic of Hungary* (Award, 2 October 2006) ICSID Case No. ARB/03/16, <http://www.italaw.com/sites/default/files/case-documents/ita0006.pdf> accessed 8 December 2017.

[689] ibid, 50 et seq para 293 [emphasis added].

[690] Andrea Bjorklund, 'Investment Treaty Arbitral Decisions as Jurisprudence Constante' (December 2008) UC Davis Legal Studies Research Paper Series No. 158 <http://dx.doi.org/10.2139/ssrn.1319834> accessed 8 December 2017, 1; see also Ten Irene M ten Cate, 'International Arbitration and the Ends of Appellate Review' (2012) 44 NYU J Int'l L & Pol 1109, 1189 et seq.

proper outcome in each case as presented and argued by the parties before the arbitrators chosen by these parties is the primary objective of the ICSID arbitral process, and not the concern for an aesthetically attractive jurisprudential architecture".[691]

Both approaches ring partly true. While the case-law provides a clear indication that investment tribunals do not take a blind eye to precedent decisions and the *problematique* of inconsistent decisions, it also emphasizes two important aspects of investment treaty arbitration:

i. For one, investment treaty arbitration is still in the progress of coming of age as it was a relatively underutilized mechanism until the year 2000, which implies a legal discourse on the key issues from which a *jurisprudence constante* hopefully emerges;[692]

ii. On the other hand, complete consistency is difficult to promote in the context of investment law as full harmonization would be best achieved by adopting a multilateral investment treaty.

2. Consolidation of Claims

Currently there does not exist a coherent approach *vis-à-vis* consolidation.[693] While the MAI draft envisaged a consolidation mechanism to deal with multiple

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[691] Rudolf Dolzer, 'Perspectives for Investment Arbitration: Consistency as a Policy Goal?' (2014) 11 Transnat'l Disp Mgmt 1, 5.

[692] Judith Gill, 'Inconsistent Decisions: An Issue to be Addressed or a Fact of Life?' (2005) 2 Transnat'l Disp Mgmt 12, 15 ("The second basis on which I would say that an appellate system is not necessary in treaty arbitration is that it may in any event be the case that over time the position in relation to many of the issues that are currently being debated will become more settled. In other words, the inconsistent decisions themselves will give rise to one approach being generally regarded as more preferable than another and so it will be adopted more frequently thereafter."). See also Andrea Bjorklund, 'Investment Treaty Arbitral Decisions as Jurisprudence Constante' (December 2008) UC Davis Legal Studies Research Paper Series No. 158 <http://dx.doi.org/10.2139/ssrn.1319834> accessed 8 December 2017, 1 et seqq.

[693] UNCTAD, 'Investor-State Dispute Settlement: A Sequel' (2014) UNCTAD Series on Issues in International Investment Agreements II <http://unctad.org/en/PublicationsLibrary/diaeia2013d2_en.pdf> accessed 8 December 2017, 112.

proceedings,[694] the *Rules of Procedure for Arbitration Proceedings in ICSID*[695] ("ICSID Rules") as well as the *UNCITRAL Arbitration Rules*[696] of 1979 ("UNCITRAL 1976 Rules") do not provide for the consolidation of claims. Yet after the revisions in 2010, the UNCITRAL Arbitration Rules now address the possibility of a third person joining a disputing party in arbitration:

> "The arbitral tribunal may, at the request of any party, allow one or more third persons to be joined in the arbitration as a party provided such person is a party to the arbitration agreement, unless the arbitral tribunal finds, after giving all parties, including the person or persons to be joined, the opportunity to be heard, that joinder should not be permitted because of prejudice to any of those parties. The arbitral tribunal may make a single award or several awards in respect of all parties so involved in the arbitration."[697]

This option is, however, tied to the arbitration agreement and thus dependent on the consent of all parties and also to some extent the discretion of the tribunal ("unless the tribunal finds").[698] Following the example of NAFTA, a number of FTAs have also included provisions on consolidation. The *ASEAN Australia New Zealand Free Trade Agreement*[699] ("AANZFTA"), for instance, allows for consent-based consolidation but remains silent on the exact consolidation procedure:

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[694] Negotiating Group on the Multilateral Agreement on Investment (MAI), 'The Multilateral Agreement on Investment: Draft Consolidated Text' (22 April 1998) DAFFE/MAI(98)7/REV1 <http://www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf> accessed 8 December 2017, 72, chapter V section D, art. 9(a) ("In the event that two or more disputes submitted to arbitration with a Contracting Party under paragraph […] have a question of law or fact in common, the Contracting Party may submit to a separate arbitral tribunal, established under this paragraph, a request for the consolidated consideration of all or part of them.").

[695] Rules of Procedure for Arbitration Proceedings in ICSID, 'ICSID Convention, Regulations and Rules' (April 2006) ICSID/15 <https://icsid.worldbank.org/en/Documents/resources/2006%20CRR_English-final.pdf> accessed 11 December 2017, 99 et seqq.

[696] UNCITRAL 1976 Arbitration Rules.

[697] UNCITRAL Arbitration Rules, art. 17(5).

[698] UNCTAD, 'Investor-State Dispute Settlement: A Sequel' (2014) UNCTAD Series on Issues in International Investment Agreements II <http://unctad.org/en/PublicationsLibrary/diaeia2013d2_en.pdf> accessed 8 December 2017, 112.

[699] ASEAN Australia New Zealand Free Trade Agreement (signed 27 February 2009, entered into force on 1 January 2010) <https://www.mfat.govt.nz/assets/FTAs-agreements-in-force/AANZFTA-ASEAN/Agreement-Establishing-the-ASEAN-Australia-New-Zealand-Free-Trade-Area-1.pdf> accessed 11 December 2017, AANZFTA.

> "Where two or more claims have been submitted separately to arbitration under Article 20 (Claim by an Investor of a Party) and the claims have a question of law or fact in common and arise out of the same or similar events or circumstances, all concerned disputing parties may agree to consolidate those claims in any manner they deem appropriate."[700]

In contrast, other recent FTAs incorporated a consolidation clause modelled after article 1126(2) of the NAFTA which provides a comprehensive mechanism for the consolidation of multiple claims having in common a question of law or fact.[701] The NAFTA consolidation mechanism does not require the consent of the parties involved; after a disputing party submits a request for consolidation to the Secretary-General, the latter appoints a consolidation tribunal composed of three arbitrators from a roster within a period of 60 days which will decide on the consolidation of the claims after hearing the parties.[702]

Along these lines, other FTAs, *inter alia* the recently renegotiated CETA and the TPP, include similar provisions on a self-contained consolidation mechanism for claims having in common a question of law or fact and arising out of the same treaty as well as the same events or circumstances.[703] Regarding the appointment of arbitrators, TPP deviates from the practice of the NAFTA consolidation whereby the Secretary-General principally appoints the arbitrators of

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[700] ibid, chapter 11 section B, art. 24.

[701] North American Free Trade Agreement (signed on 17 December 1992, entered into force on 1 January 1994) <https://www.nafta-sec-alena.org/Home/Legal-Texts/North-American-Free-Trade-Agreement> accessed 7 December 2017, NAFTA, chapter 11 section B, art. 1126(2). The NAFTA consolidation regime seems to be based on the Draft MAI consolidation procedure.

[702] ibid, chapter 11 section B, art. 1126(3) et seqq.

[703] See e.g. Trans-Pacific Partnership Agreement (signed on 4 February 2016) <http://www.tpp.mfat.govt.nz/text> accessed 7 December 2017, TPP, chapter 9 section B, art. 9.28; 2016 CETA, chapter 8 section F, art. 8.43; Dominican Republic-Central America Free Trade Agreement (signed 5 August 2004, in force) <https://ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file328_4718.pdf> accessed 8 December 2017, CAFTA-DR, chapter 10 section B, art. 10.25; United States-Singapore Free Trade Agreement (signed on 6 May 2003, entered into force on 1 January 2004) <https://ustr.gov/trade-agreements/free-trade-agreements/singapore-fta/final-text> accessed 8 December 2017, chapter 15 section B, art. 15.24; United States-Morocco Free Trade Agreement (signed on 15 June 2004, entered into force on 1 January 2006) <https://ustr.gov/trade-agreements/free-trade-agreements/morocco-fta/final-text> accessed 8 December 2017, chapter 10 section B, art. 10.24; United States-Chile Free Trade Agreement (signed on 6 June 2003, entered into force on 1 January 2004) <https://ustr.gov/trade-agreements/free-trade-agreements/chile-fta/final-text> accessed 8 December 2017, CLFTA, chapter 10 section B, art. 10.24.

the consolidation tribunal and endows him only with a default competence in case the parties fail to appoint the arbitrators:

> "Unless all the disputing parties sought to be covered by the order agree otherwise, a tribunal established under this Article shall comprise three arbitrators:
>
> (a) one arbitrator appointed by agreement of the claimants;
>
> (b) one arbitrator appointed by the respondent; and
>
> (c) the presiding arbitrator appointed by the Secretary-General, provided that the presiding arbitrator is not a national of the respondent or of a Party of any claimant."[704]

Another difference to the NAFTA-model is that TPP allows for the rejection of the consolidation request by the Secretary-General if he "finds within a period of 30 days after the date of receiving a request […] that the request is manifestly unfounded".[705]

III. Procedural Needs for Reform

Consistency of awards is essential for creating a predictable and thus stable investment environment and also necessary to ensure the fairness of the system (see 1.). If approached with the appropriate objectives in mind, reform in this context might further ensure procedural and also distributive fairness and thus increase the perception of legitimacy (see 2.).

1. General Rule of Law Requirements

On this backdrop, criticism of the current system of investment treaty arbitration may have one of its main causes in the inconsistent awards that have been reached in some arbitration proceedings and initially propelled the proposals for an appeals facility.[706] Such inconsistencies may be problematic for various reasons: They hinder the creation of a predictable investment environment (see a))

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[704] Trans-Pacific Partnership Agreement (signed on 4 February 2016) <http://www.tpp.mfat.govt.nz/text> accessed 7 December 2017, TPP, chapter 9 section B, art. 9.28(4).

[705] ibid, chapter 9 section B, art. 9.28(3).

[706] James Crawford, 'The Case for an Appellate Panel and its Scope of Review' (2005) 2 Transnat'l Disp Mgmt 8.

and may create doubts regarding the fairness and legitimacy of the system (see b)).

a) Stable Legal Framework for Investors

Consistency of arbitral awards is one of the key factors promoting a predictable investment environment as it ensures "that like cases are treated the same".[707] Inconsistent decisions may run counter the rule of law which requires a certain degree of consistency to create a predictable investment environment.[708] Also, investors and states need "to know with some reasonable certainty what obligations are contained within investment treaties and general international law, and what conduct runs afoul of those obligations".[709]

The tribunal in *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v Argentine Republic*[710] clarified the importance of including earlier decisions in the reasoning of awards and underlined the relevance of "the basic judicial principle that 'like cases should be decided alike'" as well as "the goal of international investment law […] to establish a predictable, stable legal framework for investments":

> "In interpreting this vague, flexible, basic, and widely used treaty term [the fair and equitable treatment standard], this Tribunal has the benefit of decisions by prior tribunals that have struggled strenuously, knowledgeably, and sometimes painfully, to interpret the words "fair and equitable" in a wide variety of factual situations and investment relationships. […] Although this tribunal is not bound by such prior decisions, they do constitute "a subsidiary means for the determination of the rules of [international] law." Moreover, considerations of basic justice would lead tribunals to be guided by the basic judicial principle that 'like cases should be decided alike,' unless a strong reason exists to distinguish the current case from previous ones. In addition, a recognized goal of international investment law is to establish a predictable, stable legal

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[707] Ten Irene M ten Cate, 'International Arbitration and the Ends of Appellate Review' (2012) 44 NYU J Int'l L & Pol 1109, 1182.

[708] Andrea Menaker, 'Seeking Consistency in Investment Arbitration: The Evolution of ICSID and Alternatives for Reform' in Van den Berg, Albert Jan (ed), *International Arbitration: The Coming of a New Age?* (ICCA Congress Series vol 17. Kluwer Law International 2013) 613.

[709] ibid.

[710] *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v Argentine Republic* (Decision on Liability, 30 July 2010) ICSID Case No. ARB/03/19, <http://www.italaw.com/sites/default/files/case-documents/ita0826.pdf> accessed 8 December 2017.

> framework for investments, a factor that justifies tribunals in giving due regard to previous decisions on similar issues."[711]

The tribunal thus concluded that "absent compelling reasons to the contrary, a tribunal should always consider heavily solutions established in a series of consistent cases."[712]

b) Fairness and Legitimacy

A related issue is that of fairness; if like cases are decided differently, this may be interpreted to imply that "in terms of legal correctness, some parties are getting 'better' decisions than others".[713]

Since a great number of investment treaty arbitrations deal with sensitive public-interest measures and with high financial stakes – the tribunal in the *CMS* arbitration, for instance, awarded *CMS* compensation of USD 133.2 million after rejecting Argentina's state of necessity defense[714] – the perceived legitimacy of the system is of utmost importance. There is a risk that inconsistent decisions could adversely affect the stakeholders' confidence in investment treaty arbitration and thus discredit the entire system.[715]

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[711] ibid, 73 para 189 [references omitted]. See also *AES Corporation v The Argentine Republic* (Decision on Jurisdiction, 26 April 2005) ICSID Case No. ARB/02/17, <http://www.italaw.com/sites/default/files/case-documents/ita0011.pdf> accessed 8 December 2017, 12 para 33 ("From a more general point of view, one can hardly deny that the institutional dimension of the control mechanisms provided for under the ICSID Convention might well be a factor, in the longer term, for contributing to the development of a common legal opinion or jurisprudence constante, to resolve some difficult legal issues discussed in many cases, inasmuch as these issues share the same substantial features.").

[712] *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v Argentine Republic* (Decision on Liability, 30 July 2010) ICSID Case No. ARB/03/19, <http://www.italaw.com/sites/default/files/case-documents/ita0826.pdf> accessed 8 December 2017. See also *Saipem S.p.A. v The People's Republic of Bangladesh* (Jurisdiction, 21 March 2007) ICSID Case No. ARB/05/07, <http://www.italaw.com/sites/default/files/case-documents/ita0733.pdf> accessed 8 December 2017, 20 para 67.

[713] Gabriel Bottini, 'Reform of the Investor-State Arbitration Regime: the Appeal Proposal' in Anna Joubin-Bret and Jean E. Kalicki (eds), *Reform of Investor-State Dispute Settlement: Journeys for the 21st Century* (Brill Nijhoff 2015) 467.

[714] *CMS Gas Transmission Company v The Republic of Argentina* (Award, 12 May 2005) ICSID Case No. ARB/01/8, [2005] 44 Int'l Legal Mat 1205, <http://www.italaw.com/sites/default/files/case-documents/ita0184.pdf> accessed 8 December 2017, 139.

[715] Gabrielle Kaufmann-Kohler, 'Annulment of ICSID Awards in Contract and Treaty Arbitrations: Are There Differences?' in Emmanuel Gaillard and Yas Banifatemi (eds), *Annulment of ICSID Awards: A Joint IAI-ASIL Conference Washington, D.C.- April 1, 2003*

While inconsistency seems to have been a calculated risk of the founders of the system to the benefit of finality, the proliferation of investment treaty arbitration seems to have induced a shift in legal thinking.[716] Legal scholars as well as practitioners advocate the "need to legitimize the investor-state arbitration process by creating greater consistency, predictability and objectivity".[717] Even after ICSID tabled the appeals facility discussion in 2005, the creation of an appellate body or – more generally speaking – a standing body has been encouraged in legal publications to achieve this goal.[718]

(IAI Series No. 1. Juris 2004) 219; Irene M ten Cate, 'International Arbitration and the Ends of Appellate Review' (2012) 44 NYU J Int'l L & Pol 1109, 1181 et seq.

[716] Christopher Smith, 'The Appeal of ICSID Awards: How the AMINZ Appellate Mechanism Can Guide Reform of ICSID Procedure' (2013) 41 GA J Int'l & Comp L 567, 593.

[717] Ian A. Laird and Rebecca Askew, 'Finality Versus Consistency: Does Investor-State Arbitration Need an Appellate System' (2005) 7 J App Prac & Process 285, 294.

[718] See e.g. Susan D. Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through inconsistent Decisions' (2005) 73 Fordham L Rev 1521, 1617 et seqq; Katia Yannaca-Small, 'Improving the System of Investor-State Dispute Settlement' (2006) OECD Working Papers on International Investment 2006/01 <http://dx.doi.org/10.1787/631230863687> accessed 8 December 2017, 12; Gus van Harten, 'A Case for an International Investment Court' [Geneva, 2008] Working Paper No 22/08 for the Society of International Economic Law Inaugural Conference <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1153424> accessed 8 December 2017, 1 et seqq; Jaemin Lee, 'Introduction of an Appellate Review Mechanism for International Investment Disputes - Expected Benefits and Remaining Tasks' in Anna Joubin-Bret and Jean E. Kalicki (eds), *Reform of Investor-State Dispute Settlement: Journeys for the 21st Century* (Brill Nijhoff 2015) 476; David A. Gantz, 'An Appellate Mechanism for Review of Arbitral Decisions In Investor - State Disputes: Prospects and Challenges' (8 September 2005) Bepress Legal Series Working Paper 703 <http://law.bepress.com/cgi/viewcontent.cgi?article=3890&context=expresso> accessed 8 December 2017, 1 et seqq; Christian J. Tams, 'Is There a Need for an ICSID Appellate Structure?' in Rainer Hofmann and Christian J. Tams (eds), *The International Convention on the Settlement of Investment Disputes (ICSID): Taking Stock after 40 Years* (Nomos 2007) 223 et seqq; Andrea Bjorklund, 'The Continuing Appeal of Annulment: Lessons from *Amco Asia* and *CME*' in Todd Weiler (ed), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May 2005) 513 et seqq; Asif H. Qureshi, 'An Appellate System in International Investment Arbitration?' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) 1155 et seqq; W. M. Reisman, 'The Breakdown of the Control Mechanism in ICSID Arbitration' (1989) 1989 Duke L J 739, 804; Anna Joubin-Bret, 'Why we need a global appellate mechanism for international investment law' (27 April 2015) Columbia FDI Perspectives No. 146 <http://ccsi.columbia.edu/files/2013/10/No-146-Joubin-Bret-FINAL.pdf> accessed 8 December 2017, 1 et seqq; Andrea Menaker, 'Seeking Consistency in Investment Arbitration: The Evolution of ICSID and Alternatives for Reform' in Van den Berg, Albert Jan (ed), *International Arbitration: The Coming of a New Age?* (ICCA Congress Series vol 17. Kluwer Law International 2013) 624; Stephan W. Schill, 'Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach' (2011) 52 Va J Int'l L 57, 69.

2. Mitigating the Risk of Inconsistency by Implementing Further Control Mechanisms

Generally, the lack of tenure in investment treaty arbitration is legitimized by the states' consent to an IIA.[719] Inconsistent awards do not impede the procedural fairness; yet they might be contrary to the moral fairness in the sense of distributive justice if like cases are not treated alike. There certainly is a corresponding risk inherent in investment treaty arbitration due to the lack of binding precedent.

In this context, it should be noted that the tribunal in *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*[720] emphasized that the lack of precedent in investment treaty arbitration does not preempt the development of a *jurisprudence constante* and that inconsistent decisions are not *per se* incompatible with this objective but rather a preliminary stage to it:

> "In the Tribunal's view, although **different tribunals constituted under the ICSID system should in general seek to act consistently** with each other, in the end it must be for each tribunal to exercise its competence in accordance with the applicable law, which will by definition be different for each BIT and each Respondent State. Moreover there is **no doctrine of precedent** in international law, if by precedent is meant a rule of the binding effect of a single decision. There is no hierarchy of international tribunals, and even if there were, there is no good reason for allowing the first tribunal in time to resolve issues for all later tribunals. It must be initially for the control mechanisms provided for under the BIT and the ICSID Convention, and in the longer term for the **development of a common legal opinion** or **jurisprudence constante**, to **resolve the difficult legal questions**."[721]

As the *SGS* arbitrations fall within the category of the often-cited inconsistent awards that seem to have propelled the reform discussions, the tribunal's clear recognizance of this issue surprises. Yet it reminds of the domestic sphere in civil-law countries, where it is not uncommon that lower courts interpret legal questions differently. It is generally on this premise that a *jurisprudence constante* develops but admittedly, clarification often arrives in the form of a judgement of a supreme court to which the lower courts then generally refer in future

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[719] See above, chapter 1, sec. C. I., p. 42.

[720] *SGS Société Générale de Surveillance S.A. v Republic of the Philippines* (Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004) ICSID Case No. ARB/02/6.

[721] ibid, 37 para 97 [references omitted, emphasis added].

proceedings to avoid the reversal of their judgments.[722] This creates a sort of '*de facto* vertical precedent'.[723] Yet the example also elucidates that "[o]ne should not ignore the likelihood that a degree of inconsistency is inherent in any legal system and is not intolerable".[724] In this context, it should be kept in mind that investment treaty arbitration is a fledgling discipline. A few inconsistent awards may thus not be considered an indication that the system is a failure but that it is still in its infancy.

It should also be considered, as Yannaca-Small aptly noted, that the question of consistency should be approached with due consideration for the intent of States Parties to an IIA:

> "The notion of consistency has been viewed to go beyond the situation when two panels constituted under different agreements deal with the same set of facts and give conflicting opinions or reach a different conclusion. It might also encompass coherence of interpretation of basic principles which may underlie differently worded provisions in particular agreements and therefore might enhance the development of a more consistent international investment law. However, it was also pointed out that one needs to **approach the question of consistency with some caution and clarity** in terms of one's objectives. For example, the discussions in the OECD Investment Committee on the substantive obligations in investment agreements has revealed that countries' intent with respect to the interpretation of a similar provision in their investment agreements may differ in some respects. Thus, the development of consistent international legal principles needs to be **balanced by respect for the intent of the parties to specific agreements**. Even where the intent of the countries may differ in some respects in relation to similar provisions in their investment agreements, it was argued that, there is value in encouraging consistency in interpretation

[722] Ten Irene M ten Cate, 'International Arbitration and the Ends of Appellate Review' (2012) 44 NYU J Int'l L & Pol 1109, 1192.

[723] ibid, 1192; Charles N. Brower, Michael Ottolenghi and Peter Prows, 'The Saga of CMS: *Res Judicata*, Precedent, and the Legitimacy of ICSID Arbitration' in Christina Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Scheuer* (Oxford University Press 2009) 851 et seqq. Brower emphasizes that the acknowledgment of a '*de facto* precedent' by no means implies that ICSID tribunals are bound in any way by precedent which is a key attribute of ICSID arbitration.

[724] Gabrielle Kaufmann-Kohler, 'Is Consistency a Myth?' in Emmanuel Gaillard and Yas Banifatemi (eds), *Precedent in International Arbitration: IAI Seminar Paris - December 14, 2007* (IAI Series No. 5. Juris 2008) 143 [references omitted].

> across the agreements of a particular country or countries where the intent of the parties do not differ."[725]

An important aspect of Yannaca-Small's elaboration on the issue of consistency is the emphasis of respecting the sometimes divergent intent with which States Parties to a treaty approach treaty provisions. The tribunal in *AES Corporation v The Argentine Republic*[726] shared this assessment and stressed that

> "each BIT has its own identity; its very terms should consequently be carefully analyzed for determining the exact scope of consent expressed by its two Parties. This is in particular the case if one considers that striking similarities in the wording of many BITs often dissimulate real differences in the definition of some key concepts, as it may be the case, in particular, for the determination of "investments" or for the precise definition of rights and obligations for each party."[727]

Along these lines, it may be said that absolute harmonization might neither be possible in the current fragmented investment landscape nor desirable and would "be bad law as well as bad policy".[728] The often-cited success story of the WTO AB in shaping international trade law – to which some authors have even referred as a sort of 'constitutionalization'[729] – emerged against a wholly different backdrop. The WTO DSB and AB only deal with disputes brought under the WTO Agreement and explicitly covered trade agreements.[730]

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[725] Katia Yannaca-Small, 'Improving the System of Investor-State Dispute Settlement' (2006) OECD Working Papers on International Investment 2006/01 <http://dx.doi.org/10.1787/631230863687> accessed 8 December 2017, 11 para 39 [emphasis added].

[726] *AES Corporation v The Argentine Republic* (Decision on Jurisdiction, 26 April 2005) ICSID Case No. ARB/02/17, <http://www.italaw.com/sites/default/files/case-documents/ita0011.pdf> accessed 8 December 2017.

[727] ibid, 10 para 24 et seq.

[728] Joshua Karton, 'Reform of Investor-State Dispute Settlement: Lessons From International Uniform Law' in Anna Joubin-Bret and Jean E. Kalicki (eds), *Reform of Investor-State Dispute Settlement: Journeys for the 21st Century* (Brill Nijhoff 2015) 56.

[729] See e.g. Ten Irene M ten Cate, 'International Arbitration and the Ends of Appellate Review' (2012) 44 NYU J Int'l L & Pol 1109, 1187; Deborah Z. Cass, 'The "Constitutionalization" of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade' (2001) 12 Eur J Int'l L 39, 40 et seqq. Ensuring the consistency in decision-making seems to be a central objective of the WTO AB, see Working Procedures for Appellate Review (16 August 2010) WT/AB/WP/6 <https://www.wto.org/english/tratop_e/dispu_e/ab_e.htm#annexii> accessed 8 December 2017IV:4(1) ("To ensure consistency and coherence in decision-making, and to draw on the individual and collective expertise of the Members, the Members shall convene on a regular basis to discuss matters of policy, practice and procedure").

[730] DSU art. 1(1) in conjunction with appendix 1.

It thus has been argued that procedural reform alone without the development of substantive investment law to achieve a balance between the regulatory interest of the host state and effective investment protection would be insufficient.[731] Since a revival of the attempt to conclude a multilateral investment agreement seems unlikely after the multitude of failed attempts of adopting a multilateral investment agreement during the 20th century,[732] absolute harmonization does not seem to be a realistic reform goal at present.

The most recent greater multilateral initiative was the Multilateral Agreement on Investment[733] ("MAI") which did not gain sufficient support among the states within the Organisation for Economic Co-operation and Development ("OECD") and the Doha roundtable and was thus abandoned in April 1998. At this time, after three years of negotiations, the draft text of the MAI contained the most essential elements of the agreement, many of which were inspired by BITs and other IIAs.[734] Yet – similar to the current debate – the MAI became the focus of public scrutiny and encountered strong opposition by non-governmental organisations ("NGOs"), anti-globalisation organisations and human rights

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[731] Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge University Press 2013) 381 et seq; Luis González García, 'Making impossible investor-state reform possible' in Anna Joubin-Bret and Jean E. Kalicki (eds), *Reform of Investor-State Dispute Settlement: Journeys for the 21st Century* (Brill Nijhoff 2015) 432.

[732] Thomas W. Wälde, 'Alternatives for Obtaining Greater Consistency in Investment Arbitration: An Appellate Institution after the WTO, Authoritative Treaty Arbitration or Mandatory Consolidation?' (2005) 2 Transnat'l Disp Mgmt 71, 76.

[733] See Negotiating Group on the Multilateral Agreement on Investment (MAI), 'The Multilateral Agreement on Investment: Draft Consolidated Text' (22 April 1998) DAFFE/MAI(98)7/REV1 <http://www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf> accessed 8 December 2017 (Draft MAI); for commentary see Negotiating Group on the Multilateral Agreement on Investment (MAI), 'The Multilateral Agreement on Investment: Draft Commentary to the Consolidated Text' (22 April 1998) DAFFE/MAI(98)8/REV1 <http://www1.oecd.org/daf/mai/pdf/ng/ng988r1e.pdf> accessed 8 December 2017; Negotiating Group on the Multilateral Agreement on Investment (MAI), 'The Multilateral Agreement on Investment: Draft Consolidated Text' (22 April 1998) DAFFE/MAI(98)7/REV1 <http://www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf> accessed 8 December 2017 (MAI Commentary).

[734] Negotiating Group on the Multilateral Agreement on Investment (MAI), 'Multilateral Agreement on Investment: Report by the Chairman of the Negotiating Group' (20 April 1998) DAFFE/MAI(98)9/FINAL <http://www1.oecd.org/daf/mai/pdf/ng/ng989fe.pdf> accessed 8 December 2017.

groups around the world.[735] The NGOs in particular argued in favour of the developing countries and criticised that the MAI only considered and supported the position of the mostly industrialized OECD member states.[736] Since the demise of the MAI, no comparable initiative seems to have been attempted at the multilateral level. Yet full harmonization of investment law may only be achieved *via* a multilateral investment treaty, the adoption of which does not seem likely at this point.

Nevertheless, an appellate mechanism with tenured arbitrators may be a viable reform option to ensure an even greater degree of consistency if approached with the right objective and respect for the sometimes divergent intentions of the parties to a treaty.[737] As such, it may contribute to the predictability and stability of the legal framework while still accepting party autonomy in the arbitral proceedings. It might also improve the reasoning of awards in some cases. A further

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[735] Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge University Press 2013) 117. See also Negotiating Group on the Multilateral Agreement on Investment (MAI), 'Multilateral Agreement on Investment: Report by the Chairman of the Negotiating Group' (20 April 1998) DAFFE/MAI(98)9/FINAL <http://www1.oecd.org/daf/mai/pdf/ng/ng989fe.pdf> accessed 8 December 2017; Michael J. Trebilcock and Robert Howse, *The Regulation of International Trade* (2nd edn, Routledge 1999) 362 et seqq.

[736] 'Joint NGO Statement on the Multilateral Agreement on Investment (MAI): NGO/OECD Consultation on the MAI' (Paris 27 October 1997) <http://www.gwb.com.au/gwb/news/mai/ngos1.html> accessed 8 December 2017; David C Korten, 'Let's Try Something Radical. Like a Market Economy: Plenary Presentation to the Peoples' Summit 1997 (TOES97)' (Denver, Colorado 20 June 1997) <http://davidkorten.org/toes97/> accessed 11 December 2017; see also Mick Hillyard, 'Multilateral Agreement on Investment: Research Paper 98/31' (4 March 1998) House of Commons Library <http://researchbriefings.files.parliament.uk/documents/RP98-31/RP98-31.pdf> accessed 8 December 2017, 22 ("At this moment the governments of the Northern industrial countries are working in secret in Paris to craft what may be the most anti-democratic, anti-people, anti-community international agreement ever conceived by supposedly democratic governments. It's called the Multilateral Agreement on Investment (MAI). More accurately known as "The Corporate Rule Treaty," it is being written by and for corporations to prohibit any government or locality from establishing performance or accountability standards for foreign investors. In essence it says that foreign investors have the right to buy, sell, and move assets without restriction, and to challenge in special courts — in which they will have standing comparable to that of nation states — any measure that limits their freedom of action or deprives them of profits to which they feel entitled. In short if this agreement is approved the rights of corporations will trump the rights of people."). The research paper also reproduces and sums up the positions taken by other NGOs such as the World Development Movement (WDM), Oxfam, CAFOD, International Business Organisations as well as the Trade Union Advisory Committee.

[737] See below, chapter 5, sec. A. III. 2., p. 175 et seqq.

beneficial side-effect may be an increased acceptance of unilateral appointments. Both parties to an arbitration would have the comfort knowing that – even if a party feels that a party-appointed arbitrator was not only somewhat predisposed but actually biased towards the other party – any unfavorable legal reasoning could be made subject to appeal. This may also have the added bonus of decreasing the number of "late in the day" arbitrator challenges.

C. Summary

The theses of this chapter can be briefly summarized as follows:

- In investment treaty arbitration, legitimacy may generally depend on three aspects: (i) the states' consent to an IIA to submit disputes to investment treaty arbitration; (ii) the procedural fairness of the decision-making process and (iii) distributive justice.

- To ensure the legitimacy of the system, there need to be sufficient procedural safeguards securing the independence and impartiality of the decision-making process.

- Criticism against the legitimacy of investment treaty arbitration often relates to unilateral appointments. They are considered to undermine the confidence of the parties in an independent and impartial decision-making process.

- This criticism is not persuasive: While unilateral appointments may – to some extent – be about balancing the tribunal, they are not irreconcilable with independence and impartiality if subject to strict regulations avoiding any improper conduct.

- The legitimacy of investment treaty arbitration thus *inter alia* depends on the safeguards implemented to ensure procedural fairness. In this context, it is argued here that *vis-à-vis* unilateral appointments, the possibility of undue influence in the pre-appointment process as well as multiple appointments need to be regulated more strictly. Also, to avoid issue conflicts, the IBA Guidelines or similar guidelines should be introduced in

the arbitration rules or referred to in the investment chapter of the respective IIA to ensure a coherent approach.

- Although there is a potential in investment treaty arbitration for inconsistent awards, this risk is mitigated by reliance of tribunals on earlier awards as well as the option of consolidating claims. Nevertheless, an appellate mechanism with tenured arbitrators may be a viable reform option to ensure an even greater degree of consistency if approached with the right objective and respect for the sometimes divergent intentions of the parties to a treaty.

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The Way Forward: The Possible Contribution of the EU to the Future of Investment Treaty Arbitration

The proliferation of investment treaty arbitration has exposed some systemic challenges regarding the independence and impartiality of arbitrators. In this context, having regard to the TTIP negotiations with the US, the EU Commission published a proposal in September 2015 endorsing the creation of a bilateral two-tier court system at treaty-level to be included in the final TTIP text.[738] The bilateral two-tier investment court structure envisioned by the EU was then adopted with slight amendments in the final texts of CETA as well as the EUVFTA in 2016. In CETA, the EU and Canada further committed to the creation of a MIC with an appellate mechanism to substitute the investment court structure under CETA.

The following analysis concentrates on an evaluation of the bilateral two-tier investment court structure ("ICS") in the TTIP Proposal (see A. I.) as well as in CETA and EUVFTA (see A. II.). It also considers the case for a permanent MIC or a permanent Multilateral Appeal Tribunal ("MAT") as currently considered by the EU Commission (see B.).

A. The Investment Court System (ICS) and its Potential Contribution towards More Legitimacy

The TTIP Proposal, CETA and EUVFTA envision a two-tier court system consisting of a Tribunal of First Instance ("TFI") and a Permanent Appeal Tribunal ("PAT") that are both subject to built-in time constraints to avoid any undue delays in the proceedings. The provisions on tenure, composition and selection as well as the required competences and disqualification procedure in the TTIP Proposal (see I.) do not essentially differ from the control mechanisms contained

[738] See European Commission, 'Commission Draft Text TTIP - Investment' (16 September 2015) <http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf> accessed 7 December 2017 and TTIP Proposal.

in CETA and EUVFTA (see II.). Yet they deviate notably from the control mechanisms of investment treaty arbitration.[739] While the ICS has the potential to contribute to the legitimacy of investment treaty arbitration, its departure from several key features of investment treaty arbitration does not come without its own legitimacy risks (see III.).

I. Control Mechanisms vis-à-vis Independence and Impartiality in the TTIP Proposal

The following section sets out the characteristics of the TFI (see 1.) and the PAT (see 2.) as well as the required competences and ethics of their members (see 3.) and the disqualification procedure (see 4.).

1. Characteristics of the TFI

In the TTIP Proposal, the TFI comprises 15 members appointed by a specific committee to be established according to provisions in a different chapter that have not yet been developed.[740] Five members each should be nationals of a Member State of the EU, the US and third countries.[741] The number of members may be increased or decreased by multiples of three following a decision of the committee.[742]

Members regularly serve a six-year term with the option of one re-appointment. To stagger the terms, seven members serve an initial term of nine years instead of six; after the first six years, election will thus occur every three years for seven or eight members, respectively.[743] The president and vice-president of the TFI are drawn by lot from among the members who are nationals of third countries and serve on a rotational basis for a two-year term in which they are responsible for organizational issues.[744]

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[739] See above, chapter 2, p. 50 et seqq.

[740] ibid, art. 9(2).

[741] ibid, art. 9(3).

[742] ibid.

[743] ibid, art. 9(5).

[744] European Commission, 'Commission Draft Text TTIP - Investment' (16 September 2015) <http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf> accessed 7 December 2017.

The TFI hears cases in divisions consisting of three members with one judge each being a national of a Member State of the EU, the US and a third country.[745] The latter will also be chair of the division.[746] The divisions serve on a rotational basis to ensure that their composition is random and unpredictable.[747]

The parties may agree, however, to a sole judge from a third country to be selected by the president of the tribunal. The claimant may put in such a request at the time of filing the claim and the TTIP Proposal provides that "[t]he respondent shall give sympathetic consideration to such a request from the claimant, in particular where the claimant is a small or medium-sized enterprise or the compensation or damages claimed are relatively low."[748]

Members do not receive an annual base salary but a monthly retainer fee of about one third of the retainer fee of the WTO AB members which would be around EUR 2,000 according to the TTIP Proposal.[749] The president of the tribunal and – where applicable – the vice-president shall receive an additional fee for each day worked in their functions, the amount being determined by the committee.[750] The retainer fee shall compensate for the members' permanent availability; all members are required to be available at all times and on a short notice and shall stay up to date regarding the dispute settlement activities of the tribunal.[751]

On top of the retainer fee, members receive a fee for each day where they participate in meetings of the tribunal or work an eight hour day in connection with pending proceedings and may be eligible for subsistence and travel expenses as

[745] ibid, art. 9(6).

[746] ibid, art. 9(8).

[747] ibid, art. 9(7).

[748] ibid, art. 9(9).

[749] ibid, art. 9(12).

[750] ibid.

[751] ibid, art. 9(11).

well as *per diem* allowances in accordance with Regulation 14(1) of the *Administrative and Financial Regulations*[752] of the ICSID Convention in force on the date of the submission of the claim.[753]

While the retainer fees are paid in equal shares by the US and the EU to an account managed by either the PCA or ICSID,[754] the other fees and expenses incurred by the members along with the other costs of the proceedings are generally allocated to the unsuccessful disputing parties barring exceptional circumstances.[755] The Secretariat of ICSID or the PCA shall also function as secretariat for the tribunal; its expenses are to be met equally by the EU and the US. [756]

The TTIP Proposal further provides for the possibility to transform the retainer fee and the other fees and expenses into a regular annual salary in which case the members will serve on a full-time basis and are principally precluded from engaging in any other occupation.[757]

2. Characteristics of the PAT

The PAT is comprised of six members appointed for a six-year term with the option of one re-appointment.[758] Three of the six members initially serve for a term of nine years to ensure that terms are tiered with the result that three of the six members are appointed every three years.[759]
The appointment is made by the competent committee following the proposal of three candidates by both the US and the EU, with at least one candidate being either a non-national of the US or a Member State of the EU.[760]

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[752] reprinted in ICSID, 'ICSID Convention, Regulations and Rules' (April 2006) ICSID/15 <https://icsid.worldbank.org/en/Documents/resources/2006%20CRR_English-final.pdf> accessed 11 December 2017, 53 et seqq.

[753] TTIP Proposal, art. 9(14).

[754] ibid, art. 9(13).

[755] ibid, art. 9(14) in conjunction with art. 28(4).

[756] ibid, art. 9(16).

[757] ibid, art. 9(15).

[758] ibid, art. 10(2) and (5).

[759] ibid, art. 10(5).

[760] ibid, art. 10(2) and (3).

As in the TFI, one third of the appointed PAT members shall be nationals of a Member State of the EU, the US and third countries, respectively.[761] The committee has the option to increase the number of members by multiples of three.[762] The president and vice-president of the PAT each serve on rotation for a term of two years and are selected by lot from the members that are nationals of third countries.[763]

The PAT hears appeals in divisions of three members; these divisions are formed analogously to the divisions of the TFI.[764] While the general remuneration model for the members is identical with that applicable to the TFI members, the monthly retainer fee is significantly higher and – based on the retainer fee received by the WTO AB – shall be somewhere in the region of EUR 7.000.[765]

3. Required Competences and Ethics of TFI and PAT Members

The competences required of the members of the TFI as well as of the members of the PAT are similar to those required of members of the international judiciary such as the ICJ, the ITLOS or the ICC.[766]

They shall each possess "the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognised competence".[767] They are further required to have "demonstrated expertise in public international law" and preferably also in "international investment law, international trade law and the resolution of disputes arising under international investment or international trade agreements".[768]

The TFI and PAT members are chosen "from persons whose independence is beyond doubt" and shall neither be affiliated with any government nor taking

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[761] ibid, art. 10(2).

[762] ibid, art. 10(2) and (4).

[763] ibid, art. 10(6).

[764] ibid, art. 10(8) and (9).

[765] ibid, art. 10(12) et seqq.

[766] Cf. above, chapter 3, sec. A. I., p. 82 et seqq.

[767] TTIP Proposal, art. 9(4) and 10(7).

[768] ibid.

"any instructions from any government or organisation with regard to matters related to the dispute".[769] While this requirement is in line with most statutes of international and supranational courts and tribunals, it is stricter than in the WTO dispute settlement procedure where this requirement only applies to the members of the WTO AB and not the panelists of the WTO DSB.[770]

The TFI and PAT members are barred from participating in proceedings that would create a direct or indirect conflict of interest and shall comply with the tribunal's code of conduct.[771] To further ensure the absence of any conflict of interest emanating from another occupation, they are required upon appointment to "refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment protection dispute under [TTIP] or any other agreement or domestic law".[772] The TTIP Proposal thus makes it clear that the occupation as legal counsel is incompatible with the office of the members.[773]

This is another difference to the WTO dispute settlement bodies since both the panelists of the WTO DSB as well as the members of the WTO AB are not generally prohibited to act as counsel.[774] Also within the ICC, only full-time members – and not the part-time members – are prohibited from acting as counsel alongside their activities as judge for the ICC.[775]

The TTIP Proposal includes a Code of Conduct for Members of the Tribunal, the Appeal Tribunal and Mediators ("TTIP CoC").[776] According to the TTIP CoC, members of the TFI and the PAT "shall perform their duties thoroughly and expeditiously throughout the course of the proceeding and shall do so with fairness and diligence".[777]

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[769] ibid, art. 11(1).

[770] See above, chapter 3, sec. A. IV. 1., p. 98 et seq.

[771] TTIP Proposal, art. 11(1).

[772] ibid.

[773] ibid.

[774] See above, chapter 3, sec. A. IV. 3., p. 100 et seqq.

[775] See above, chapter 3, sec. A. III. 3, p. 96 et seqq.

[776] TTIP Proposal, Annex II.

[777] ibid, Annex II, art. 4(1).

The TTIP CoC includes provisions on mandatory disclosure of candidates and members of the TFI or PAT, a general prohibition of *ex parte* communications and provisions on the avoidance of conflicts of interest.[778]

Accordingly, candidates are required to disclose "any past and present interest, relationship or matter that is likely to affect their independence or impartiality or that might reasonably create an appearance of impropriety or bias in the proceeding".[779] Prior and after selection, candidates "shall make all reasonable efforts to become aware of any such interests, relationships or matters."[780]

To avoid the appearance of bias during and after their term, members of the TFI and PAT shall *inter alia* avoid (i) incurring any obligation or accepting any benefit that would, directly or indirectly, interfere or appear to interfere with the proper performance of their duties as well as (ii) any relationships or financial interests likely to affect their impartiality or reasonably create the appearance of bias.[781] Even after the end of their term, former members of the TFI and the PAT are required to avoid any actions likely to create the appearance that they were biased in carrying out their duties or derived advantage from the decision or award they participated in.[782]

4. Disqualification Procedure

The appointments of TFI and PAT members can be challenged by the disputing parties on grounds of a conflict of interest in which case a notice shall be sent to the president of the respective tribunal within 15 days after the composition of the division has been communicated or within 15 days after the relevant facts for the challenge become known to the disputing party if they could not have been reasonably known at the time of the composition of the division.[783] If the challenged TFI judge or PAT member has not resigned within 15 days from the

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[778] ibid, Annex II, art. 3(1) and (3), art. 4(4) and art. 5.

[779] ibid, Annex II, art. 3(1).

[780] ibid, Annex II, art. 3(1) and (3).

[781] ibid, Annex II, art. 5(2) and (5).

[782] ibid, Annex II, art. 6.

[783] ibid, art. 11(2).

date of the challenge notice, the president of the respective tribunal issues a decision within 45 days of receipt of the notice after hearing the disputing parties and providing the judge or member with the opportunity to submit any observations.[784] In cases where the challenge concerns the president of the PAT, the TFI president issues the decision and vice-versa.[785]

The removal of TFI and PAT members requires a reasoned recommendation of the president of the PAT upon which the US and the EU by decision of the competent committee may decide to remove a TFI judge or PAT member provided that his behavior is inconsistent with the obligations set out in article 11(1) of the TTIP Proposal and incompatible with his membership in the respective tribunal.[786] In the event that the behavior in question relates to the president of the TFI or PAT, the other president, respectively, is required to submit the reasoned recommendation.[787]

II. Control Mechanisms in CETA and EUVFTA

The control mechanisms in CETA and EUVFTA are essentially based on the TTIP Proposal with slight modifications. Regarding tenure, composition and selection of the TFI members in CETA and EUVFTA, the following differences should be noted:

i. While TTIP and CETA provide for the appointment of 15 members to the TFI, EUVFTA only provides for nine members.

ii. Also, the terms of the members of the TFI vary slightly; TTIP envisages a term of six years, while CETA provides for a term of five and EUVFTA for a term of four years. All terms are renewable once. Regarding the members of the PAT, the TTIP Proposal and EUVFTA provide that PAT members are appointed by the competent committee for a six-year term, renewable once, whereas CETA does not make provisions regarding the term of the PAT.

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[784] ibid, art. 11(3).

[785] ibid, art. 11(4).

[786] ibid, art. 11(5).

[787] ibid.

iii. In contrast to the TTIP Proposal, under CETA and EUVFTA, each state party may propose the appointment of nationals of any nationality to the tribunal.[788]

iv. This does not affect the appointment of third country members but relates solely to those tribunal members that would have the same nationality as the respective state party, e.g. Canada may propose the appointment of one Spanish, two Austrian, one Chilean and one Canadian national instead of solely proposing the appointment of five Canadian nationals.

v. This option also applies *vis-à-vis* the composition of the appeal tribunal under both agreements. CETA does not stipulate details of the appellate procedure but leaves them to be worked out by the CETA Joint Trade Committee.

Comparison of the TFI

	TTIP	CETA	EUVFTA
Appointing Authority	15	15	9
	[…] Committee	CETA Joint Trade Committee	Trade Committee
Tripartite Composition	(+) 5 US nationals 5 EU nationals 5 third country nationals	not compulsive Option to also choose members of another nationality instead of 5 Canadian/EU nationals	not compulsive Option to also choose members of another nationality instead of 3 Vietnamese/EU nationals
Term	6 years	5 years	4 years
Renewable	once	(+)	(+)
Remuneration	Retainer fee + allowances / optional transformation in permanent salary	(+)	(+)

Regarding ethics, the texts of CETA and EUVFTA each include a binding code of conduct that is based on the TTIP CoC.[789] The code of conduct contained in CETA includes a list of exemplary circumstances that fall under the mandatory

[788] EUVFTA, chapter 8, art. 12 and 13; 2016 CETA, chapter 8, sec. F, art. 8.27 and 8.28.

[789] ibid, Annex 29-B; EUVFTA, chapter 8-II, sec. 3, Annex II.

disclosure obligations.[790] CETA and EUVFTA have also both added the obligation of the tribunal members to comply with the IBA Guidelines.[791] This obligation was not contained in the TTIP Proposal.

While the TTIP Proposal includes a general prohibition of *ex parte* communications between a tribunal member and a party to the dispute, CETA seems more lenient in this regard by providing that no tribunal member may discuss aspects of the subject-matter of the dispute with a party in the absence of the other arbitrators and that the tribunal shall not meet or contact a party in the absence of the other party.[792]

CETA and EUVFTA also contain a challenge procedure that is similar to the procedure envisioned in the TTIP Proposal. However, while challenges of tribunal members under the TTIP Proposal and EUVFTA are decided by the president of the TFI or PAT, challenges under CETA are decided by the president of the ICJ.[793]

A new feature of CETA and EUVFTA is the commitment of the parties to the establishment of a MIC. Yet while in CETA the parties seem to be clear on the negotiation of a multilateral two-tier court structure,[794] in the EUVFTA the parties appear to contemplate the possibility of substituting the bilateral two-tier court structure with a MIC without an appeals mechanism:

> "The Parties shall enter into negotiations for an international agreement providing for a multilateral investment tribunal in combination with, or separate from, a multilateral appellate mechanism applicable to disputes under this Agreement. The Parties may consequently agree on the non-application of relevant parts of this Section. The Trade

[790] 2016 CETA, Annex-29B, sec. 4.

[791] ibid, chapter 8, sec. F, art. 8.30(1); EUVFTA, chapter 8-II, sec. 3, art. 14(1).

[792] 2016 CETA, Annex 29-A, sec. 40 et seq.

[793] ibid, chapter 8, sec. F, art. 8.30(1); EUVFTA, chapter 8-II, sec. 3, art. 14(1).

[794] 2016 CETA, 8.29. ("The Parties shall pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes. Upon establishment of such a multilateral mechanism, the CETA Joint Committee shall adopt a decision providing that investment disputes under this Section will be decided pursuant to the multilateral mechanism and make appropriate transitional arrangements.").

> Committee may adopt a decision specifying any necessary transitional arrangements."[795] [Emphasis added]

It thus seems that the EU – although generally promoting a two-tier court structure at bilateral level – is not averse to considering the possibility of a one-tier MIC.

III. Departure from Several Key Features of Investment Treaty Arbitration – A 'SWOT' Analysis vis-à-vis Legitimacy

An analysis of the strengths, weaknesses, opportunities and threats shows that the advantages of the departure from several key features of the current standard of arbitral independence and impartiality towards a dispute settlement system largely based on the WTO model are limited. While the ICS strengthens some control mechanisms, these advantages come at the price of the restriction of party autonomy (see 1.). And although the ICS may contribute to a certain extent to the consistency of future awards (see 2.), it is susceptible to its own legitimacy concerns (see 3.). Also, there does not seem to be a compelling need for a two-tier structure within the ICS (see 4.).

1. Strengthening of Several Control Mechanisms vs. Restriction of Party Autonomy

The TTIP Proposal as well as CETA and EUVFTA set out to create a permanent two-tiered court system with strong institutional and procedural safeguards to *inter alia* ensure the independence and impartiality of its decision-makers.

It has been argued in this context that the tribunals in the ICS are still arbitral tribunals as they *inter alia* rely on arbitration rules, and as specific procedures share essential features with the currently provided investment treaty arbitration.[796] Yet the control mechanisms of the ICS differ in some essential points

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[795] EUVFTA, chapter 8 sec. 3, art. 15.

[796] Céline Lévesque, 'The European Union Commission Proposal for the Creation of an "Investment Court System": The Q and A that the Commission Won't Be Issuing' (6 April 2016) Kluwer Arbitration Blog <http://kluwerarbitrationblog.com/2016/04/06/the-european-union-commission-proposal-for-the-creation-of-an-investment-court-system-the-q-and-a-that-the-commission-wont-be-issuing/> accessed 8 December 2017.

from the standard of arbitral independence and impartiality as currently employed in investment treaty arbitration. The ICS is largely based on the WTO dispute resolution system. The main differences to the current system of investment treaty arbitration *vis-à-vis* the control mechanisms ensuring independence and impartiality *inter alia* are:

i. Tenure of the tribunal members of four to six years;
ii. Retainer fee for the members of the TFI and the PAT (may be subject to change, in particular transformation into salary possible);
iii. Appointments to the tribunal are made solely by the States Parties;
iv. No appointments can be made by the investor;
v. Investor has also no influence on the composition of the division;
vi. Binding code of conduct for tribunal members (including binding provisions on circumstances that require mandatory disclosures, prohibition or restriction of *ex parte* communications, incompatible actions that may create the appearance of bias, etc.);
vii. Obligation of the tribunal members to comply with the IBA Guidelines (CETA; EUVFTA);
viii. General restriction on some outside activities, in particular counsel activities.

There are, however, also common features of the current system of investment treaty arbitration and the ICS, in particular, the general requirement of independence and impartiality of the arbitrator, the general obligation of mandatory disclosures *vis-à-vis* circumstances that may create the appearance of bias as well as the option to challenge a tribunal member or arbitrator for a conflict of interest.[797] Similar to investment treaty arbitration, the TFI and PAT members are barred from participating in proceedings that would create a direct or indirect conflict of interest, and the disputing parties may challenge the tribunal members based on the appearance of bias.

In light of the already available control mechanisms in investment treaty arbitration, it is not clear that the benefits of tenure would outweigh its drawbacks *vis-à-vis* the restriction of party autonomy. While tenure is a general feature of

[797] ibid.

international courts and tribunals, it is not a mandatory prerequisite to ensure the independence and impartiality of tribunal members. Tenured tribunal members may also be subject to conflicts of interest which is evidenced for instance by the recusals of judges within the ICJ[798].

As indicated above,[799] the current system of unilateral appointments is not generally incompatible with procedural fairness. They are an essential feature of party autonomy that may strengthen the faith of the parties in the fairness of the process as well as its quality. Parties may appoint specialized arbitrators with the required competences to determine the dispute. There is also an equality of arms as both parties may appoint an arbitrator to the tribunal. This element of equality of arms is completely missing in the ICS as all tribunal members are appointed by the States Parties without input or influence of the investor.

Some of the elements of the ICS, in particular the binding code of conduct and obligation to comply with the IBA Guidelines, have also been suggested as possible reform options to the current system of investment treaty arbitration. They may contribute to the (further) legitimacy of the system of investment treaty arbitration as they strengthen the currently available control mechanisms. Their implementation in the ICS may thus be considered a substantial advantage to the current system.

2. Contribution to the Consistency of Awards

As discussed above,[800] the potential for inconsistent decisions is a side effect of the current case-by-case constitution of investment tribunals. While permanent tribunals may generally contribute to the consistency of awards, the merit of the ICS has been cast into doubt in this regard.[801] This skepticism stems from the

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[798] See above, chapter 3, sec. A. I. 3., p. 86 et seqq.

[799] See above, chapter 4, sec. B. II., p. 146 et seqq.

[800] See above, chapter 4, sec. C., p. 161 et seq.

[801] Christoph Schreuer and Matthew Weiniger, 'Conversations Across Cases - Is There a Doctrine of Precedent in Investment Arbitration?' (5 January 2007) <http://www.univie.ac.at/intlaw/conv_across_90.pdf> accessed 8 December 2017 15; Debra P. Steger, 'Enhancing the Legitimacy of International Investment Law by Establishing an Appellate Mechanism' (18 October 2012) <http://ssrn.com/abstract=2223714> accessed 8 December 2017, 16; David A. Gantz, 'An Appellate Mechanism for Review of Arbitral Decisions In Investor - State Disputes: Prospects and Challenges' (8 September 2005) Bepress Legal

limited reach the awards would have within the bilateral approach.[802] Also, if the ICS prevails, there could be several different court systems in place in the future, each tied to the respective IIA within whose scope it is established.

It has been submitted that this parallel existence of several different bilateral investment courts would not be able to contribute to the unification and harmonization of investment law in general.[803] This criticism, while not entirely unwarranted, does not diminish the appeal of the bilateral approach. Established at the bilateral level, the ICS would not have to deal with a multitude of different IIAs; rather it would be restricted to the interpretation of a unitary treaty. In this environment, a consistent treaty interpretation would not be subject to the potential pitfalls of premature harmonization attempts.[804] Yet States Parties must be clear on the outset of negotiating such a mechanism that the objective would not be enhancing the harmonization of investment law as a whole but enabling a consistent interpretation of the negotiated treaty.

Consistent interpretation at treaty-level would be further aided within the ICS by enabling comprehensive public scrutiny through the implementation of full

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Series Working Paper 703 <http://law.bepress.com/cgi/viewcontent.cgi?article=3890&context=expresso> accessed 8 December 2017, 31; ICSID Secretariat, 'Possible Improvements of the Framework for ICSID Arbitration' (22 October 2004) Discussion Paper <https://icsid.worldbank.org/en/Documents/resources/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf> accessed 11 December 2017, 15 para 23.

[802] Christoph Schreuer and Matthew Weiniger, 'Conversations Across Cases - Is There a Doctrine of Precedent in Investment Arbitration?' (5 January 2007) <http://www.univie.ac.at/intlaw/conv_across_90.pdf> accessed 8 December 2017, 15.

[803] Asif H. Qureshi, 'An Appellate System in International Investment Arbitration?' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) 1160; Markus Krajewski, 'Modalities for Investment Protection and Investor-State Dispute Settlement (ISDS) in TTIP from a Trade Union Perspective' (2014) <http://library.fes.de/pdf-files/bueros/bruessel/11044.pdf> accessed 8 December 2017, 20 ("The EU approach contains the possibility of establishing an appellate body which would apply only to the respective agreement, i.e. the CETA or the TTIP. It is hence questionable whether the decisions of this appellate body would significantly contribute to the general and systemic coherence of ISDS decisions in general. In fact, an appellate body that only reviews awards issued on the basis of one agreement may also contribute to incoherencies.").

[804] See also Barton Legum, 'Appellate Mechanisms for Investment Arbitration: Worth a Second Look for the Trans-Pacific Partnership and the Proposed EU-US FTA?' in Anna Joubin-Bret and Jean E. Kalicki (eds), *Reform of Investor-State Dispute Settlement: Journeys for the 21st Century* (Brill Nijhoff 2015) 439.

transparency.[805] UNCTAD has provided a good summary of the implications of transparency with regard to investment treaty arbitration:

> "The word "transparency" is used to mean different things. The three most frequently discussed issues falling under the notion of "transparency" have been: (1) the access to information about disputes, including awards and sometimes the submissions of the disputing parties; (2) the opening of arbitral hearings to the public; and (3) the ability of third parties to participate as *amici curiae* in the disputes."[806]

Within the ICS, all three notions of transparency are implemented by reference to the *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*[807] ("UNCITRAL Transparency Rules"),[808] which generally provide for the online publication of all significant documents of the case,[809] public hearings[810] as well as *amici curiae* briefs[811]. The UNCITRAL Transparency Rules

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[805] Thomas W. Wälde, 'Alternatives for Obtaining Greater Consistency in Investment Arbitration: An Appellate Institution after the WTO, Authoritative Treaty Arbitration or Mandatory Consolidation?' (2005) 2 Transnat'l Disp Mgmt 71, 77 ("Quality control is also achieved by transparency, publication and informed and professional peer discussion. We are moving towards a much better quality and consistency by the very fact that arbitral awards are now increasingly published.").

[806] UNCTAD, 'Investor-State Dispute Settlement: A Sequel' (2014) UNCTAD Series on Issues in International Investment Agreements II <http://unctad.org/en/PublicationsLibrary/diaeia2013d2_en.pdf> accessed 8 December 2017, 122.

[807] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (adopted on 16 December 2013 UNGA Res 68/109) <http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf> accessed 8 December 2017.

[808] TTIP Proposal, art. 18(1). See also Markus Krajewski, 'Modalities for Investment Protection and Investor-State Dispute Settlement (ISDS) in TTIP from a Trade Union Perspective' (2014) <http://library.fes.de/pdf-files/bueros/bruessel/11044.pdf> accessed 8 December 2017, 16 et seq ("It is to be welcomed that the EU's approach embraces the most far-reaching transparency rules for investment arbitration that exist today. In fairness, it should be said, however, that many of the standards that have been incorporated into the UNCITRAL Rules already exist in the context of some North American investment agreements.").

[809] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (adopted on 16 December 2013 UNGA Res 68/109) <http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf> accessed 8 December 2017, art. 2 and 3.

[810] ibid, art. 6.

[811] ibid, art. 4 and 5.

have, however, carved out exceptions to protect confidential business information.[812] With this transparency regime in place, a deficit in transparency should no longer be an issue in investment treaty arbitration or the ICS, respectively.

3. Legitimacy Concerns of the ICS

The ICS suffers from substantial drawbacks that may interfere with the perceived legitimacy of the system. These drawbacks mainly relate to the restriction of the candidate pool due to the prohibition of the dual role of arbitrator and counsel as well as the design of the remuneration system as envisaged in the TTIP Proposal (see a)), the potential appearance of bias based on the composition of the tribunal (see b)) as well as the appointment of the tribunal members solely by the States Parties (see c)).

a) Restriction of the Candidate Pool due to Prohibition of 'Double-Hatting' and the Inadequate Remuneration

While the restriction of the dual role of arbitrator and counsel is necessary to avoid conflicts of interest,[813] a complete ban of the dual role would reduce the pool of potential candidates considerably and may thus endanger the system as a whole.[814] All counsels that may have the desired practical experience in the field of investment law as well as in investment arbitrations would potentially be excluded from the role of arbitrator. This problem is heightened by the the inadequate remuneration system considered in the TTIP Proposal, i.e. the retainer fee of EUR 2,000/month for TFI members and EUR 7,000/month for PAT members plus a daily fee for each day worked and expenses.

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[812] ibid, art. 7.

[813] See above, chapter 4, sec. A. II. 3. c), p. 141 et seq.

[814] Deutscher Industrie- und Handelskammertag, 'Public Consultation on a Multilateral Reform of Investment Dispute Resolution' (15 March 2017) <https://www.google.de/url?sa=t&rct=j&q=&esrc=s&source=web&cd=6&ved=0ahUKEwj7vq65ucvTAhUCtxQKHXb4CpUQFghGMAU&url=https%3A%2F%2Fwww.dihk.de%2Fthemenfelder%2Frecht-steuern%2Feu-internationales-recht%2Frecht-der-europaeischen-union%2Fdihk-positionen-zu-eu-gesetzesvorhaben%2Fdihk-stellungnahme-multilateraler-investitionsgerichtshof-engl.pdf%2Fat_download%2Ffile%3Fmdate%3D1489671666078&usg=AFQjCNFnEb6BbgpePaujMh7JJRbHTYnV6Q&cad=rja> accessed 8 December 2017, 2.

This may prove to be another deterrent for potential highly qualified candidates in light of the general restriction of counsel activities and the low number of cases in the beginning. Under BITs generally only a small number of investment treaty arbitrations arise, e.g. under most BITs less than five cases have arisen.[815] With regard to treaties with investment provisions, the case statistic is higher *vis-à-vis* the ECT and NAFTA. Under the ECT, 99 cases have arisen since 1998; under NAFTA, 59 cases since 1994.[816] Yet under the ASEAN Comprehensive Investment Agreement, in force since 29 March 2012, only one case has been registered so far. It is thus unclear with which workload the TFI and PAT would have to deal. It may be that the TFI and PAT would not have to deal with any cases in the beginning and even after that, they might have to deal with cases only every so often.

This circumstance is not adequately reflected in the remuneration system and once again illustrates the problem in prohibiting counsel activities during the term. It cannot be expected that a highly qualified international lawyer would apply to the TFI for such a low retainer fee as EUR 2,000 if he has to refrain from any counsel activities in return. At present, a counsel, e.g. partner in a law firm, acting as an arbitrator would receive the remuneration from his counsel activities as well as the arbitrator fees.

The arbitrator fees vary under the different arbitration rules: An arbitrator in an ICSID arbitration receives a fee of USD 3,000/day plus expenses (corresponding to USD 375/hour) for meetings or other work performed in connection with the proceedings.[817] The fees are determined by the Secretary-General.[818] In UNCITRAL and PCA arbitrations, the arbitrators set their own fees.[819] There is no fee cap although the amount shall generally be "reasonable".[820] Tribunal costs in UNCITRAL arbitrations are thus slightly higher than in ICSID arbitration, in

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[815] UNCTAD, 'Database of Investor-State Dispute Settlement (ISDS)' <http://unctad.org/en/Pages/DIAE/ISDS.aspx> accessed 7 December 2017.

[816] ibid.

[817] ICSID, 'Claims for Fees and Expenses' <https://icsid.worldbank.org/en/Pages/arbitrators/Claims-for-Fees-and-Expenses.aspx> accessed 8 December 2017.

[818] ICSID Administrative and Financial Regulations (2006) Regulation 14; ICSID Convention, art. 60.

[819] UNCITRAL Arbitration Rules, art. 40 and 41; PCA Arbitration Rules, art. 40 and 41.

[820] UNCITRAL Arbitration Rules, art. 41 para 1 and 2.

average about 10 percent.[821] The arbitrators' fees in SCC and ICC arbitrations are scheduled according to the amount in dispute and determined by the SCC Board or the ICC's International Court of Arbitration, respectively.[822] For example: The average fee of an arbitrator in an ICC arbitration with a tripartite tribunal and a dispute amount of USD 10 million would be USD 113,284 (min. USD 39,167 to max. USD 187,400); with a dispute amount of USD 100 million, USD 214,584.[823] In SCC arbitrations, with a dispute amount of USD 10 million, the chairperson would receive in median EUR 94,500 and the co-arbitrators 60 percent thereof, i.e. EUR 56,700.[824]

Since it is uncertain that the TFI and PAT members would receive a per diem remuneration on top of the retainer fee due to the unknown workload of the TFI and PAT, it is doubtful that a retainer fee of about EUR 2,000 plus for TFI members will motivate a highly qualified international lawyer to apply for an appointment to the tribunal. The same might also be true for the higher retainer fee received by members of the PAT.

In this context, it must also be considered that in contrast to the PAT members, the members of the WTO AB on whose positions the remuneration system of the PAT is modelled, are not prohibited from any other occupation; they are thus able to act as counsel with the exception of participation in disputes creating a direct or indirect conflict of interest.[825] The restriction of TFI and PAT members in their ability to act as counsel should thus be adequately reflected in the remuneration which would mean a higher compensation than that of the WTO AB members and not – as is the case for the TFI members – a significantly lower one.

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[821] Matthew Hodgson, 'Counting the Costs of Investment Treaty Arbitration' (24 March 2014) first published in (2014) 9(2) GAR <http://www.allenovery.com/SiteCollectionDocuments/Counting_the_costs_of_investment_treaty.pdf> accessed 8 December 2017, 3.

[822] SCC Arbitration Rules, appendix IV, art. 2 (1); ICC Arbitration Rules, appendix III, art. 2 (4).

[823] Cf. ICC, 'Cost Calculator' <https://iccwbo.org/dispute-resolution-services/arbitration/costs-and-payments/cost-calculator/> accessed 8 December 2017.

[824] Cf. SCC, 'Calculator' <http://www.sccinstitute.com/dispute-resolution/calculator/> accessed 8 December 2017.

[825] DSU, art. 17(3).

Also, the differences of the remuneration of the TFI and PAT members cannot be reasonably justified in light of the fact that the requirements on competence and ethics are identical; why then should a TFI judge only receive a third of the retainer fee of a PAT member? This does neither exclude fairness nor does it contribute to a highly qualified bench.

If the complete ban on external (counsel) activities during the term is upheld – which does not seem necessary –, the remuneration system must be adjusted accordingly. The amount of remuneration awarded to TFI and PAT members under CETA and EUVFTA should thus be more inclined towards the ICJ, ITLOS, ICC or ECtHR where the court and tribunal members are adequately compensated for the restrictions on outside activities by a salary of more than USD 166,000 or more than EUR 176,000 in the case of the ECtHR and ICC.[826] A significant drawback of the ICS would however be the high running costs which could only be justified if the costs correlate to the workload.

b) The Potential Appearance of Bias Based on the Tribunal's Composition and Alternative Options

The composition of the tribunal as well as of the bench seems to be another substantial drawback within the ICS. While the composition of the TFI and PAT might have been fashioned after the IUSCT as a role model, this model cannot be easily translated to TTIP, CETA and EUVFTA as these FTAs are to be concluded with the 28 Member States of the EU standing on one side and only one state on the other. The ICS is thus designed to decide disputes between investors from all 28 EU Member States and the US, Canada or Vietnam, respectively, and vice-versa. The IUSCT, in contrast, was merely established between the US and Iran to regulate relations after the hostage crisis and subsequent asset freeze.[827]

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[826] See above, chapter 3, sec. A. and B., p. 82 et seqq and p. 107 et seqq for details.

[827] See above, chapter 3 sec. C., p. 117 et seqq for details. The IUSCT consists of nine members, three appointed by each government and three members from third countries appointed by the six government-appointed members. See Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (1981) 20 Int'l Legal Mat 223, Claims Settlement Declaration, art. III(1).

The TFI is composed of fifteen tribunal members of which five are US/Canada/Vietnam nationals, five are nationals from a Member State of the EU and another five are nationals from third countries, while a division generally consists of one US/Canada/Vietnam national, one EU national and one national from a third country. This leads to a structural imbalance with the possibility of impairing the appreciation of the tribunal as impartial. The composition does not make adequate allowance for the fact that the EU is a union of states while the other states are single countries each. Expressed in somewhat exaggerated terms: A national from Greece might not be inclined to feel any more patriotism towards Germany than a national from a third country, while a Canadian national might be more inclined to tend towards this home country. This imbalance in the composition of the tribunal might thwart the general appreciation of the fairness of the proceedings by both, the host state and the investor.

The option provided in CETA to also appoint third country nationals as "nationals" is a step in the right direction, but not sufficient to compensate for the structural imbalance. Canada would still be able solely to present its own nationals as candidates, while each single EU Member State does not have a comparable option.

The easiest apparent solution to the structural imbalance would be to include a tribunal member of every European Member State; however, this is not a viable solution for obvious reasons. For one, this would not be cost-efficient. Also, there might not be enough or even any disputes at all to employ these members since they would only be appointed to disputes in which their home country is involved. It might also not promote a 'best candidate selection'.

In this respect, it may be considered foregoing the inclusion of any tribunal members from either contracting party and solely appointing nationals from third countries.[828] To ensure the equitable geographical distribution of these

[828] Cf. the IISD Model Agreement incorporating a dispute settlement system modelled after the WTO framework; Howard Mann and others, 'IISD Model International Agreement on Investment for Sustainable Development' (April 2005) <https://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf> accessed 8 December 2017, art. 40(E) ("There shall be a standing body of 35 panelists from which all panel members shall be drawn. The Director of the Council shall appoint all panelists on disputes on a lottery basis, and subject to: i) no panelist being called to serve more than twice before all other panelists have served at least once; and ii) no panelist being from a state of a disputing Party.").

'third country' members and the representation of the principal legal systems of the world, respectively, the common law and civil law traditions, it might be beneficial to adopt a procedure similar to that of ITLOS which would require the tribunal to count at least two members per each of the UNRGs among its members.[829]

Also, similar to the general approach in international courts and tribunals, the option of providing for the appointment of *ad hoc* arbitrators might be considered. This could imply that the bench would generally consist of three tribunal members or – subject to the parties' request – of five tribunal members of whom two are party-appointed arbitrators and three are permanent members of the tribunal. This approach would also be in line with the long-term intention of the EU Commission to create a MIC[830] as it would lend more credibility to the system from a third country point of view.

c) The Appointment of Tribunal Members solely by the States Parties

Regarding the composition of the tribunal, perceived bias may also arise from the fact that the tribunal members are selected solely by the States Parties with no input from the public or a neutral authority. This has led some authors to believe that there is a risk that States Parties may appoint pro-state minded tribunal members which might in turn impede the fairness of the system as a whole.[831] The European Federation for Investment Law and Arbitration as well as the American Bar Association both suggested to add more transparency to the selection process, for instance by involving stakeholders to minimize any

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[829] See above, chapter 3, sec. A. II. 2., p. 91 et seq, for details.

[830] See below in this chapter, sec. B., p. 190 et seqq.

[831] American Bar Association, 'Investment Treaty Working Group: Task Force Report on the Investment Court System Proposal' (14 October 2016) Discussion Paper <https://www.google.de/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjegZbevpTTAhXBthQKHduZDYcQFggcMAA&url=http%3A%2F%2Fapps.americanbar.org%2Fdch%2Fthedl.cfm%3Ffilename%3D%2FIC730000%2Fnewsletterpubs%2FExecutiveSummaryDiscussionPaper101416.pdf&usg=AFQjCNHAaU-C_REq6O-_RG58fxNihxt-Qg> accessed 8 December 2017, 24; European Federation for Investment Law and Arbitration, 'Task Force Paper regarding the proposed International Court System (ICS)' (1 February 2016) Draft <http://efila.org/wp-content/uploads/2016/02/EFILA_TASK_FORCE_on_ICS_proposal_1-2-2016.pdf> accessed 8 December 2017, 15.

potential perception of bias arising from the state appointments.[832] A similar concern was previously noted with regard to the proposed list procedure contained in a prior draft of CETA whereas the States Parties pre-select potential candidates using an arbitrator list from which appointments can be made.[833] This proposed selection procedure also gave rise to legitimacy concerns as it would undermine the key aspect of arbitration, namely to choose an arbitrator. Due to the fact that it would ultimately lead to a clear restriction of potential candidates unilaterally pre-selected by the states, it was thought to potentially increase the suspicion towards the system and not to eliminate it.[834]

Having regard to the TTIP Proposal, Schwebel also refers to the contradictory nature of the EU approach and essentially claims that there is no reason to assume that the risk of real or perceived bias would be any less pronounced in a tribunal solely appointed by states than it would be *vis-à-vis* the current system of unilateral appointments:

> "The question arises, if there is a risk, real or perceived, of bias of ad hoc arbitral tribunals, as the EU Commission seems to insinuate, is there not a risk, real or perceived, of bias in favor of states and against investors in the EU Commission's proposals? If the fact of appointment by a party of an arbitration is taken to import bias, real or perceived, is not appointment by arbitrators solely by states a formula for establishment of a court biased against investors? […] If it is to be presumed that an arbitrator appointed by an investor is biased in favour of the investor, a presumption that the record of investor-state arbitration does

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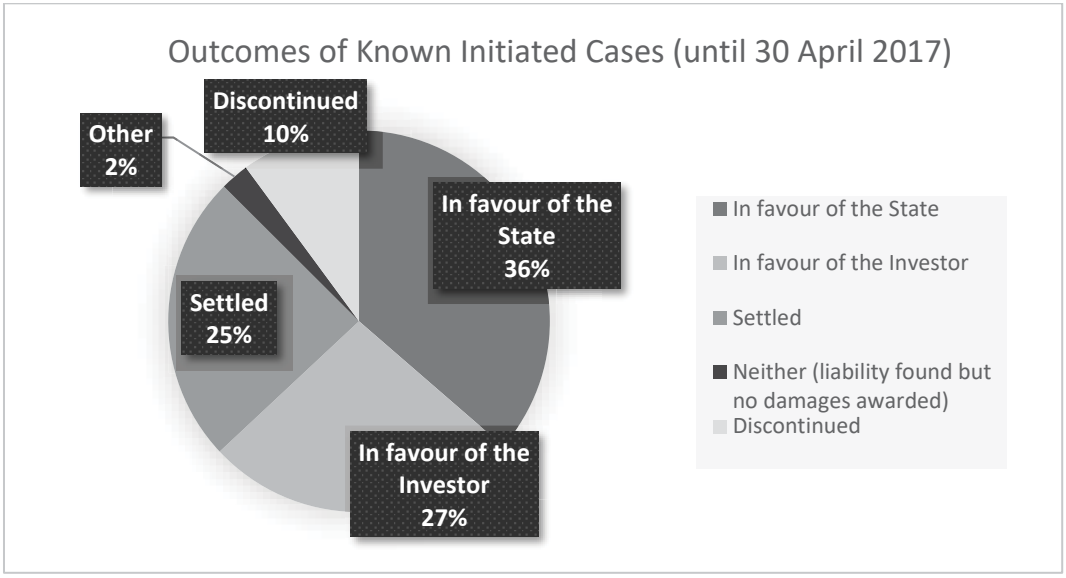
[832] ibid, 15; American Bar Association, 'Investment Treaty Working Group: Task Force Report on the Investment Court System Proposal' (14 October 2016) Discussion Paper <https://www.google.de/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjegZbevpTTAhXBthQKHduZDYcQFggcMAA&url=http%3A%2F%2Fapps.americanbar.org%2Fdch%2Fthedl.cfm%3Ffilename%3D%2FIC730000%2Fnewsletterpubs%2FExecutiveSummaryDiscussionPaper101416.pdf&usg=AFQjCNHAaU-C_REq6O-_RG58fxNihxt-Qg> accessed 8 December 2017, 26 et seq.

[833] Steffen Hindelang and Stephan Wernicke, 'Essentials of a Modern Investment Protection Regime – Objectives and Recommendations for Action: Organised by the Free University Berlin and the Association of German Chambers of Commerce and Industry (DIHK e.V.)' (26 August 2015) Harnack-Haus Reflections <https://www.google.de/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwjT5dzO-NDTAhWQZ1AKHaRICbEQFggnMAA&url=https%3A%2F%2Fwww.dihk.de%2Fressourcen%2Fdownloads%2Fharnack-haus-reflections-engl%2Fat_download%2Ffile%3Fmdate%3D1453731785898&usg=AFQjCNFI0Cc2my7Lm0czWVO3YwNvpc_zOQ&sig2=DmXrotZAlhT0TmYa8sSc3w&cad=rja> accessed 8 December 2017, 16.

[834] ibid.

> not sustain, is there reason to presume that judges appointed only by states will not be biased in favour of states?"[835]

Schwebel emphasizes that in his view investment arbitrators as well as state-appointed judges achieve sufficient objectivity. Indeed, claims that investment tribunals are biased in favour of investors who are the main beneficiaries of the system are statistically unfounded. Based on the data available on UNCTAD's ISDS database, states won 180 cases (58 percent) while investors won only 132 cases (42 percent). An overview of all outcomes further illustrates that there is – from a statistically point of view – no significant 'winner' in investment treaty arbitration:



Source: ISDS Database [836]

Hence, Schwebel justifiably does not seem to be persuaded by the EU Commission's reasons for procedural reform, namely to terminate the "rule of lawyers"

[835] Stephen M. Schwebel, 'Outlook for the Continued Vitality, or Lack Thereof, of Investor-state Arbitration' in Arthur W. Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2015* (Brill Nijhoff 2017) 4.

[836] UNCTAD, 'Database of Investor-State Dispute Settlement (ISDS)' <http://unctad.org/en/Pages/DIAE/ISDS.aspx> accessed 7 December 2017.

allegedly inherent in investment treaty arbitration.[837] Indeed, as already concluded above,[838] the alleged "rule of lawyers" does not create a compelling reason to abandon investment treaty arbitration as a whole. Schwebel's pointed statement accurately underlines that it is not evident that the ICS would be any less at risk *vis-à-vis* the perception of bias as investment treaty arbitration. In this respect, the drawbacks – mainly the elimination of party autonomy from the selection process that offers both sides a comparable influence – do not seem to outweigh the potential benefits of the ICS, e.g. *vis-à-vis* consistency.[839]

4. Merit of the Appeal Mechanism

The two-tiered system of dispute settlement at WTO-level seems to have inspired the appellate mechanism of the ICS.[840] An appellate mechanism as an addition to the current system of investment treaty arbitration – as suggested by ICSID in 2004[841] – may have some merit as it would alleviate concerns regarding inconsistent decisions to some extent and offer parties the option to challenge an award on the basis of – narrowly defined – legal errors.[842]

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[837] Stephen M. Schwebel, 'Outlook for the Continued Vitality, or Lack Thereof, of Investor-state Arbitration' in Arthur W. Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2015* (Brill Nijhoff 2017) 4 et seq.

[838] See above, chapter 4, p. 122 et seqq.

[839] See also Sonja Heppner, 'A Critical Appraisal of the Investment Court System Proposed by the European Commission' (2016) 19 Irish J Eur L 38, 60.

[840] David A. Gantz, 'An Appellate Mechanism for Review of Arbitral Decisions In Investor - State Disputes: Prospects and Challenges' (8 September 2005) Bepress Legal Series Working Paper 703 <http://law.bepress.com/cgi/viewcontent.cgi?article=3890&context=expresso> accessed 8 December 2017, 18 [references omitted] ("Consideration of the investment appellate mechanism concept has and will continue to be influenced by the general success of the WTO's Appellate Body in resolving international trade disputes. During the past nearly eleven years, the WTO Appellate Body has generally proved itself able to produce consistent decisions in a very timely (90 days) fashion, with a high level of expertise and analysis.").

[841] See also below in this chapter, sec. B. I. 4., p. 190 et seqq.

[842] Deutscher Industrie- und Handelskammertag, 'Public Consultation on a Multilateral Reform of Investment Dispute Resolution' (15 March 2017) <https://www.google.de/url?sa=t&rct=j&q=&esrc=s&source=web&cd=6&ved=0ahUKEwj7vq65ucvTAhUCtxQKHXb4CpUQFghGMAU&url=https%3A%2F%2Fwww.dihk.de%2Fthemenfelder%2Frecht-steuern%2Feu-internationales-recht%2Frecht-der-europaeischen-union%2Fdihk-positionen-zu-eu-gesetzesvorhaben%2Fdihk-stellungnahme-multilateraler-investitionsgerichtshof-engl.pdf%2Fat_download%2Ffile%3Fmdate%3D1489671666078&usg=AFQjCNFnEb6BbgpePaujMh7JJRbHTYnV6Q&cad=rja> accessed 8 December 2017, 5.

The option to appeal may further increase the confidence in the system. Yet it should be noted that the notion of appeal is not a general feature in international or supranational judicial bodies. Article 14 ICCPR does not envisage a general right to appeal but does so solely with respect to criminal proceedings.[843] The UN Human Rights Committee ("UNHRC") has further clarified that the right to equal access to a court pursuant to article 14(1) ICCPR does not relate to appellate proceedings.[844] With the exceptions of the WTO, the ICC and the ECtHR, the courts and tribunals examined above do not contain an appellate mechanism.[845]

Within the creation of a permanent court structure such as the ICS, there may not be a compelling need for a two-tier structure depending on the caseload. The TFI itself may already contribute to the consistency and harmonization of investment law in a similar manner as the ICJ or ITLOS in their respective field of law if the caseload does not require several chambers. Also, the often-cited WTO AB may not be a fitting role model since the first instance panels of the WTO did not start out as "a strong, cohesive, institutional, first instance dispute settlement process" and the success story of WTO dispute settlement might largely be contributed to the existence of the WTO AB.[846] This may be due to the fact that the WTO panels of the DSB are generally composed of "well-qualified governmental and/or non-governmental individuals",[847] and are set up *ad-hoc* by the DSB which is in turn comprised of representatives of the WTO members.[848] Hence, there is a certain level of politization at play in the first instance

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[843] ICCPR, art. 14(5) ("Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."). See also UNHRC, 'General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial' (23 August 2007) UN Doc CCPR/C/GC/32 <http://www.refworld.org/docid/478b2b2f2.html> accessed 8 December 2017, 14 para 46 ("Article 14, paragraph 5 does not apply to procedures determining rights and obligations in a suit at law or any other procedure not being part of a criminal appeal process, such as constitutional motions.").

[844] ibid, 3 para 12 ("The right of equal access to a court, embodied in article 14, paragraph 1, concerns access to first instance procedures and does not address the issue of the right to appeal or other remedies.").

[845] See above, chapter 3, sec. A. through C., p. 82 et seqq.

[846] Debra P. Steger, 'Enhancing the Legitimacy of International Investment Law by Establishing an Appellate Mechanism' (18 October 2012) <http://ssrn.com/abstract=2223714> accessed 8 December 2017, 13.

[847] DSU, art. 8(1) and (5).

[848] ibid, art. 6 and WTO Agreement, art. IV(2) and (3).

disputes that is evened out by the WTO AB whose permanent members have no affiliation with any government.[849] The situation in the TFI would be different since it would be created with similar or even stronger institutional safeguards than are currently in place for the WTO AB.[850]

A drawback of the two-tier structure within the ICS may also the additional costs and delays that would be inherent in any appellate system.[851] These added costs could prove to be a deterrent for developing countries and smaller investors.[852] The benefit of the appellate mechanism would then likely fall to "large, well-resourced governments and corporations".[853] To some extent these risks are mitigated within the ICS by the incorporation of the 'loser pays' principle as well as the fixed time limits for the appeal procedure and some sort of legal aid.

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[849] DSU, art. 17(1) and (6).

[850] The TFI members would preferably receive an annual base salary in the regions of the salary of judges and members of the ICJ, ITLOS or the ICC.

[851] Gabriel Bottini, 'Reform of the Investor-State Arbitration Regime: the Appeal Proposal' in Anna Joubin-Bret and Jean E. Kalicki (eds), *Reform of Investor-State Dispute Settlement: Journeys for the 21st Century* (Brill Nijhoff 2015) 471; Katia Yannaca-Small, 'Improving the System of Investor-State Dispute Settlement' (2006) OECD Working Papers on International Investment 2006/01 <http://dx.doi.org/10.1787/631230863687> accessed 8 December 2017, 13 para 46; Kristina Anđelić, 'Why ICSID Doesn't Need an Appellate Procedure, and What to Do Instead' in Anna Joubin-Bret and Jean E. Kalicki (eds), *Reform of Investor-State Dispute Settlement: Journeys for the 21st Century* (Brill Nijhoff 2015) 498; Luis González García, 'Making impossible investor-state reform possible' in Anna Joubin-Bret and Jean E. Kalicki (eds), *Reform of Investor-State Dispute Settlement: Journeys for the 21st Century* (Brill Nijhoff 2015) 430.

[852] Guido Tawil, 'An International Appellate System: Progress or Pitfall?' (2005) 2 Transnat'l Disp Mgmt 69, 71; Jaemin Lee, 'Introduction of an Appellate Review Mechanism for International Investment Disputes - Expected Benefits and Remaining Tasks' in Anna Joubin-Bret and Jean E. Kalicki (eds), *Reform of Investor-State Dispute Settlement: Journeys for the 21st Century* (Brill Nijhoff 2015) 483; Ian A. Laird and Rebecca Askew, 'Finality Versus Consistency: Does Investor-State Arbitration Need an Appellate System' (2005) 7 J App Prac & Process 285, 298; Thomas W. Wälde, 'Alternatives for Obtaining Greater Consistency in Investment Arbitration: An Appellate Institution after the WTO, Authoritative Treaty Arbitration or Mandatory Consolidation?' (2005) 2 Transnat'l Disp Mgmt 71, 74 ("The winners of an appeals' facility are mainly well-resourced governments; they are less sensitive to the cost (using largely in-house lawyers anyway) of the additional level of litigation. In addition, their chance of ultimate success increases substantially. The losers will be largely smaller, entrepreneurial companies on early forays into foreign territory. They will have even more difficulties of mobilising the risk capital for high-risk litigation investment as both the cost goes up and their chance of winning goes down. Large multinational companies, the usual devils for uncivil activists from 'civil society' are likely to suffer least. […] As everywhere in law, the more expensive and risky litigation, the more the rich gain and the poor suffer.").

[853] Ian A. Laird and Rebecca Askew, 'Finality Versus Consistency: Does Investor-State Arbitration Need an Appellate System' (2005) 7 J App Prac & Process 285, 298; Thomas

On this backdrop, an appeal mechanism should only be considered if (i) the caseload warrants it to ensure consistency of awards and (ii) the legitimacy concerns described above[854] are adequately handled.

IV. Summary

To briefly sum up the preceding analysis of the TTIP Proposal, CETA and EUVFTA in a few key theses, the following points have to be made:

- The ICS may be susceptible to its own legitimacy concerns. Beyond the complete restriction of the dual role of arbitrator and counsel, the (potentially) inadequate remuneration, the selection and composition of the tribunal as well as the states' influence on pending proceedings are the most problematic features of the ICS.

- The composition of equal numbers of EU members, third country members and e.g. Canadian members may lead to perceived structural imbalance in the event that no tribunal member is of the same nationality as the respondent European host state while one member is of the same nationality as the investor.

- Also, the selection of the tribunal members solely by the States Parties – without input from the investor or at least the public – may not offer greater confidence in the system as tribunals might be perceived to be biased in favor of the states.

- The states' influence on pending proceedings by adopting binding interpretations with retroactive effect as well as the option to adapt procedural rules limits the independence and impartiality of tribunal members and introduces a diplomatic element to the settlement of investment disputes that is missing in investment treaty arbitration.

W. Wälde, 'Alternatives for Obtaining Greater Consistency in Investment Arbitration: An Appellate Institution after the WTO, Authoritative Treaty Arbitration or Mandatory Consolidation?' (2005) 2 Transnat'l Disp Mgmt 71, 74.

[854] See above in this chapter, sec. A. III. 3., p. 178 et seqq.

- Regarding the two-tier structure, it should be considered that there may not be a compelling need for an appeal mechanism in light of consistency concerns within the ICS if there is only one chamber due to the low case-load.

B. The Case for a Multilateral Investment Court (MIC)

The EU's multilateral approach to reform ISDS by establishing a MIC is historically preceded by several earlier reform proposals including the ICSID proposal in 2004 to establish a permanent appeals facility (see I.). The currently envisaged key features of the proposed MIC *inter alia* implement the key features of the standard of judicial independence and impartiality (see II.). Similar to the ICS, a MIC may thus contribute to the consistency of investment law but may also suffer from several drawbacks although they seem to have been somewhat exaggerated in the reform discussions (see III.). Instead of establishing a MIC, the creation of a permanent MAT might be an option (see IV.).

I. Rejected Historical Proposals for Permanent Tribunals

The initiative of the EU Commission is not the first attempt at a multilateral reform. Prior to the establishment of ICSID, several attempts were conducted to establish a permanent investment court (see 1. to 3.). These attempts ceased after the creation of ICSID, until in 2004, ICSID launched a proposal promoting the establishment of a permanent appeals facility as addition to the current system of investment treaty arbitration (see 4.).

1. Proposal for a Permanent Court of Arbitral Justice (1907)

The first notable proposal for a permanent court dealing (also) with investment disputes was made at the second Hague Peace Conference in 1907. Although ultimately the Conference only led to revisions of the 1899 Hague Convention, some participants would have preferred to work towards the creation of a permanent tribunal. The US was one of the states promoting such an approach during the Conference:

> "The […] United States has […] always believed and said that the Court of 1899 is only the first step toward a Permanent Court of Arbitral Justice which since 1899 it has wished to see created, and in so

> saying it merely consults its own recent past. It may not be known generally that the United States instituted a court of arbitration exactly a hundred and thirty years ago. […] The life of the American court of arbitration was short: it failed to justify its existence; lacking the essential elements of a court of justice, it was superseded within ten years of its creation by the present Supreme Court […].Conscious of the weakness and defects of the American court of arbitration, and recognizing the admirable results of the judicial settlement of international controversies by a permanent court, composed of judges, the delegation of the United States presented a project for the establishment of a court of law composed of learned and experienced judges, open to all the signatory Powers without the delays and formality necessarily involved in the organization for each case of a special tribunal."[855]

In his speech on 'The American Sentiment of Humanity' during the first national peace congress on 15 April 1907, the US Secretary of State, Elihu Root, had previously addressed the issue of impartiality of tribunals which he considered as one of the main reasons that international arbitration failed to mandate universal adoption:

> "It has seemed to me that the great obstacle to the universal adoption of arbitration is not the unwillingness of civilized nations to submit their disputes to the decision of an impartial tribunal; it is rather an apprehension that the tribunal selected will not be impartial."[856]

To finally ensure the impartiality and independence of tribunal members Root formulated a remedy to be achieved at the 1907 Hague Conference in his instructions to the US delegation to the Conference on 31 May 1907:

> "It should be your effort to bring about in the Second Conference a development of the Hague Tribunal into a permanent tribunal composed of judges who are judicial officers and nothing else, who are paid adequate salaries, who have no other occupation, and who will devote their entire time to the trial and decision of international causes by judicial methods and under a sense of judicial responsibility. These judges should be so selected from the different countries that the different systems of law and procedure and the principle languages shall be fairly represented."[857]

The proposal for the creation of a Permanent Court of Arbitral Justice at the second Hague Conference which had been jointly submitted by the US, the UK and Germany during the Conference, failed in its efforts due to the delegates'

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[855] James B. Scott, *The Proceedings of the Hague Peace Conferences: The Conference of 1907* (vol 1, Plenary Meetings of the Conference, Oxford University Press 1920) 344 para 350.

[856] Denys P. Myers, 'The Origin of the Hague Arbitral Courts' (1916) 10 Am J Int'l L 270, 271.

[857] ibid, 273.

inability of achieving an agreement on the court's composition.[858] It was not until in 1922 when the PCIJ was established that a permanent court for the settlement of inter-state disputes was created.

2. The ILA Statute Promoting a Multilateral Investment Court (1948)

In 1948, the International Law Association ("ILA") then put forward the first specific proposal for a multilateral investment court by publishing the *International Law Association Draft Statutes of the Arbitral Tribunal for Foreign Investment and the Foreign Investment Court*[859] ("ILA Statute").

The ILA Statute provided the procedure for arbitral proceedings as well as a multilateral investment court but was never adopted.[860] Regarding the arbitral proceedings, the application of the convention was dependent on the states' consent, which could be granted by specific agreements or unilateral declarations.[861] In the absence of any such consent, the statute provided the state party with the option to submit the case to the ICJ.[862] The statute did not define any treatment standards apart from certain procedural obligations such as the parties' cooperation regarding the tribunal's handling of evidence.[863]

Although the ILA Statute did not directly provide for an appellate procedure and in principle considered the arbitral award final and binding,[864] it permitted the revision of the award under certain circumstances that were narrowly defined. Article 34 of the ILA Statute stated in this respect:

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[858] W. F. Dodd, 'The Work of the Second Hague Conference' (1908) 6 Mich L Rev 294, 296; Manley O. Hudson, 'The Permanent Court of International Justice' (1922) 35 Harv L Rev 245, 246.

[859] International Law Association Draft Statutes of the Arbitral Tribunal for Foreign Investment and the Foreign Investment Court (1948) reprinted in: UNCTAD, International Investment Instruments: A Compendium, Vol. 3 (United Nations 1996) 259, ILA Statute.

[860] Andrew P. Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009) 21.

[861] ILA Statute, art. 2(1).

[862] ibid.

[863] ibid, art. 20(2).

[864] Cf. ibid, art. 29 ("Once rendered, the award shall be binding upon the Parties […]").

> "(1) An application for the revision of the award may be made by either Party on the ground of the discovery of some fact of such a nature as to constitute a decisive factor, provided that, when the award was rendered, that fact was unknown to the tribunal and to the Party requesting revision, and that such ignorance was not due to the negligence of the Party requesting revision.
>
> (2) The application for revision must be made within six months of the discovery of the new fact and, in any case, within ten years of the rendering of the award.
>
> (3) In the proceedings for revision, the tribunal shall, in the first instance, make a finding as to the existence of the alleged new fact and rule on the admissibility of the application.
>
> (4) If the tribunal finds the application admissible, it shall then decide on the merits of the dispute. […]"[865]

The revision of article 34 of the ILA Statute allowed the parties to reinstate the proceedings in the event that within a timespan of ten years after issuing the award new facts would emerge that had not been previously considered by the arbitral tribunal. The practical implications of this revision option could have been far-reaching and might *de facto* even have led to the circumvention of the supposed finality of the award.

With regard to its provisions on the foreign investment court, the ILA Statute seems to have been greatly influenced by the ICJ Statute which had been published only three years prior. According to article I of the ILA Statute regarding the foreign investment court provided for the jurisdiction of the court for "any dispute arising out of any unreasonable or discriminatory impairment within the territory of any Contracting Party of the property of nationals of the other Parties."[866] The court was further meant to deal with "any dispute concerning the observance or interpretation of any undertaking which a Party may have given in relation to investments made by nationals of any other Party".[867] Yet the application of the convention was dependent on the states' consent; the relevant provision in article II(1) of the ILA Statute was identical with the provision in

[865] ibid, art. 34.

[866] ILA Statute, art. 1.

[867] ibid.

article 2(1) with regard to arbitral proceedings.[868] The provisions on the composition of the foreign investment court within the ILA Statute and the provisions of the ICJ Statute have to a considerable extent virtually the same wording.[869]

3. The ICC Code Promoting Inter-State Arbitration before an International Court of Arbitration (1949)

Only one year later in 1949, the International Chamber of Commerce ("ICC") proposed the *International Code of Fair Treatment for Foreign Investment*[870] ("ICC Code") providing for investment protection and binding inter-state dispute resolution before an international court of arbitration. In contrast to the ILA Statute, however, the ICC Code dispensed with provisions on the procedure of the envisaged international court of arbitration and left its details to be worked out between the governments of the prospective States Parties.[871] The ICC Code instead focussed on the codification of substantial investment treatment standards.[872] Yet like the ILA Statute, the ICC Code was not adopted by the states.

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[868] ibid, art. II(1) ("The Parties agree that any such dispute may, with the consent of the interested Parties, be submitted to this Court. Such consent may take the form of specific agreements or of unilateral declarations. In the absence of such consent or of agreement for settlement by other specific means, the dispute may be submitted by either Party to the International Court of Justice.").

[869] Cf. e.g. ibid, art. 4 and ICJ Statute, art. 2; ILA Statute, art. 5 and ICJ Statute, art. 3; ILA Statute, art. 10 and ICJ Statute, art.13; ILA Statute, art. 13 and ICJ Statute, art. 16; ILA Statute, art. 18 and ICJ Statute, art. 25.

[870] International Code of Fair Treatment for Foreign Investment (1949) ICC Pub. No. 129 (Lecraw Press, 1948) reprinted in: UNCTAD, International Investment Instruments: A Compendium, Vol. 3 (United Nations 1996) 273, ICC Code. Published in 1949, the ICC Code was prepared by the ICC's Committee on Foreign Investments and its Committee on Foreign Establishments. The Code was endorsed by a resolution adopted by the ICC's Quebec Congress.

[871] ibid, art. 14.

[872] ibid, preamble ("The High Contracting Parties, desirous of promoting an expanding world economy and convinced that an ample flow of private investments is essential to the economic and industrial growth of their countries and to the welfare of their peoples, decide to establish, by the provision of civil, legal and fiscal safeguards, conditions of fair and non-discriminatory treatment for investments made in their territories by the nationals (physical or legal persons) of the other High Contracting Parties.") [Emphasis added].

4. The ICSID Proposal for a Multilateral Appeal Facility (2004)

In 2004, ICSID as the most utilized institution administering investor-state arbitration proposed the creation of an appeals facility "to foster coherence and consistency in the case law emerging under investment treaties".[873] ICSID stated in its discussion paper on the subject that "[s]ignificant inconsistencies have not to date been a general feature of the jurisprudence of ICSID".[874] The proposal for the establishment of an appeals facility was preceded by several legal publications on this issue as well as the US approach in a number of IIAs which targeted the creation of appellate bodies at treaty-level.

a) Background

Already at the beginning of the 1990s, awareness of the issue of appeal emerged.[875] It became more pronounced after the US enacted the Bipartisan Trade Promotion Authority Act[876] in 2002 which provides for the negotiation of "an appellate body or similar mechanism to provide coherence to the interpretations of investment provisions in trade agreements".[877] The US implemented this negotiation goal in subsequently concluded FTAs, for instance, the *Dominican Republic-Central America Free Trade Agreement*[878] ("CAFTA-DR") which provides:

> "Within three months of the date of entry into force of this Agreement, the Commission shall establish a Negotiating Group to develop an appellate body or similar mechanism to review awards rendered by tribunals under this Chapter. Such appellate body or similar mechanism

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[873] ICSID Secretariat, 'Possible Improvements of the Framework for ICSID Arbitration' (22 October 2004) Discussion Paper <https://icsid.worldbank.org/en/Documents/resources/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf> accessed 11 December 2017, 14 et seq para 21.

[874] ibid.

[875] Elihu Lauterpacht, *Aspects of the Administration of International Justice* (Hersch Lauterpacht Memorial Series, Grotius 1991) 109 et seqq.

[876] Bipartisan Trade Promotion Authority Act of 2002 [2002] 116 Stat 933.

[877] ibid, 19 US Code sec. 3802(b)(3)(G)(iv).

[878] Dominican Republic-Central America Free Trade Agreement (signed 5 August 2004, in force) <https://ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file328_4718.pdf> accessed 8 December 2017, CAFTA-DR.

> shall be designed to provide coherence to the interpretation of investment provisions in the Agreement. […]
>
> 2. The Commission shall direct the Negotiating Group to provide to the Commission, within one year of establishment of the Negotiating Group, a draft amendment to the Agreement that establishes an appellate body or similar mechanism. On approval of the draft amendment by the Parties, in accordance with Article 22.2 (Amendments), the Agreement shall be so amended."[879]

ICSID's proposal for an appeals facility was propelled by the inclusion of such clauses on the possibility of negotiating bilateral appeals facilities. ICSID envisaged that

> "[b]y mid-2005, as many as 20 countries may have signed treaties with provisions on an appeal mechanism for awards rendered in investor-to-State arbitrations under the treaties. Most of these countries are also Contracting States of the ICSID Convention."[880]

ICSID felt that appellate bodies set-up by IIAs would "run counter to the objectives of coherence and consistency" and that "[e]fficiency and economy, as well as coherence and consistency, might best be served by ICSID offering a single appeal mechanism as an alternative to multiple mechanisms".[881]

Yet although the CAFTA-DR has long since been in force for all States Parties, an appellate mechanism has not been established to date.[882] The same can be said

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[879] ibid, chapter 10, annex 10-F.

[880] ICSID Secretariat, 'Possible Improvements of the Framework for ICSID Arbitration' (22 October 2004) Discussion Paper <https://icsid.worldbank.org/en/Documents/resources/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf> accessed 11 December 2017, 14 para 20.

[881] ibid, 15 et seq para 23.

[882] CAFTA-DR entered into force for El Salvador on 1 March 2006, for Honduras and Nicaragua on 1 April 2006, for Guatemala on 1 July 2006, for the Dominican Republic on 1 March 2007 and for Costa Rica on 1 January 2009. See <http://www.sice.oas.org/Trade/CAFTA/CAFTADR_e/CAFTADRin_e.asp> accessed 14 December 2017.

or the FTAs concluded with Chile[883], Morocco[884] and Singapore[885]. Although they all contain a similar if somewhat pruned version of the clause providing for the negotiation of an appellate mechanism and have long since been in force,[886] no appeals facility has been brought to fruition as of yet. In the new 2012 US Model BIT, the US has foregone the clause on appeals negotiation, yet the Model BIT is still open to the possibility of submitting disputes to an appeals facility established under other institutional arrangements in the future.[887]

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[883] United States-Chile Free Trade Agreement (signed on 6 June 2003, entered into force on 1 January 2004) <https://ustr.gov/trade-agreements/free-trade-agreements/chile-fta/final-text> accessed 8 December 2017, CLFTA.

[884] United States-Morocco Free Trade Agreement (signed on 15 June 2004, entered into force on 1 January 2006) <https://ustr.gov/trade-agreements/free-trade-agreements/morocco-fta/final-text> accessed 8 December 2017 (US-Morocco FTA).

[885] United States-Singapore Free Trade Agreement (signed on 6 May 2003, entered into force on 1 January 2004) <https://ustr.gov/trade-agreements/free-trade-agreements/singapore-fta/final-text> accessed 8 December 2017 (US-Singapore FTA).

[886] United States-Chile Free Trade Agreement (signed on 6 June 2003, entered into force on 1 January 2004) <https://ustr.gov/trade-agreements/free-trade-agreements/chile-fta/final-text> accessed 8 December 2017, CLFTA, chapter 10 annex 10-H ("Within three years after the date of entry into force of this Agreement, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards rendered under Article […] in arbitrations commenced after they establish the appellate body or similar mechanism."); the same clause is contained in the FTAs with Singapore and Morocco and in the US 2004 Model BIT. See United States-Singapore Free Trade Agreement (signed on 6 May 2003, entered into force on 1 January 2004) <https://ustr.gov/trade-agreements/free-trade-agreements/singapore-fta/final-text> accessed 8 December 2017, art. 15.26(d) in conjunction with Exchange of Letters on the Possibility of Bilateral Appellate Mechanism of 6 May 2003 between Mr Zoellick and Mr Yeo; United States-Morocco Free Trade Agreement (signed on 15 June 2004, entered into force on 1 January 2006) <https://ustr.gov/trade-agreements/free-trade-agreements/morocco-fta/final-text> accessed 8 December 2017, chapter 10, annex 10-D; US 2004 Model BIT <http://www.state.gov/documents/organization/117601.pdf> accessed 8 December 2017, 40 annex D.

[887] US 2012 Model BIT <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> accessed 8 December 2017, art. 28(10) ("In the event that an appellate mechanism for reviewing awards rendered by investor-State dispute settlement tribunals is developed in the future under other institutional arrangements, the Parties shall consider whether awards rendered under Article 34 should be subject to that appellate mechanism. The Parties shall strive to ensure that any such appellate mechanism they consider adopting provides for transparency of proceedings similar to the transparency provisions established in Article 29.").

b) Characteristics of the ICSID Proposal

ICSID suggested that the appeals facility could "be established and operate under a set of ICSID Appeals Facility Rules adopted by the Administrative Council of ICSID".[888] IIAs would then make reference to these rules and the appeals facility should be designed to be compatible not only with both forms of ICSID arbitration, but also with any other form of investor-state arbitration.[889] ICSID recognized the conflict such an endeavour would create with article 53(1) of the ICSID Convention according to which ICSID awards are not subject to any sort of appeal other than provided for in the ICSID Convention.[890] Since any amendment to the ICSID Convention requires the unanimous ratification of the States Parties,[891] the reference in individual IIAs would seemingly resolve this obstacle. However, if taken into account, article 41 VCLT could prove to be a stumbling block. Article 41 VCLT provides:

> "1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:
>
> (a) the possibility of such a modification is provided for by the treaty; or
>
> (b) the modification in question is not prohibited by the treaty and:
>
> (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
>
> (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.
>
> 2. Unless in a case falling under paragraph 1 (a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides."[892]

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[888] ICSID Secretariat, 'Possible Improvements of the Framework for ICSID Arbitration' (22 October 2004) Discussion Paper <https://icsid.worldbank.org/en/Documents/resources/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf> accessed 11 December 2017, annex 1 para 1.

[889] ibid.

[890] ibid, annex, 1 para 2.

[891] ibid.

[892] Vienna Convention on the Law of Treaties (published on 23 May 1969, entered into force on 27 January 1980) 1155 UNTS 331, VCLT, art. 41.

This creates a hurdle for the validity of the reference to the ICSID Appeals Facility Rules since an indirect modification of article 53(1) of the ICSID Convention *via* an IIA would have to be in compliance with the overall object and purpose of the ICSID Convention and must not adversely impact the conventional rights of the other States Parties to the ICSID Convention. The derogating parties would also be obliged to notify the other States Parties to the ICSID Convention of their intention to conclude the modification to article 53(1) of the ICSID Convention. ICSID took note of this difficulty in its proposal.[893]

This issue aside, the ICSID proposal envisaged the following institutional setup. An Appeals Panel would be established composed of 15 persons elected by the ICSID Administrative Council following the nomination of ICSID's Secretary-General.[894] The panel members would each serve for six years; yet the terms would be staggered so that of the initial 15 members eight would only serve for three years.[895] Each member would be "of recognized authority, with demonstrated expertise in law, international investment and investment treaties" and have a different nationality.[896] The appeal tribunals would be composed of three panel members and would be constituted *ad hoc.*[897] ICSID's Secretary-General would make the appointment after consultation with the parties.[898]

Grounds for appeal would be limited to a "clear error of law" or any of the five grounds for annulment of an award provided in Article 52 of the ICSID Convention.[899] If serious errors of fact were considered to be eligible appeal grounds, they would have to be "narrowly defined to preserve appropriate deference to the findings of fact of the arbitral tribunal remedies".[900] The tribunal would

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[893] ICSID Secretariat, 'Possible Improvements of the Framework for ICSID Arbitration' (22 October 2004) Discussion Paper <https://icsid.worldbank.org/en/Documents/resources/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf> accessed 11 December 2017, annex 2 para 2.

[894] ibid, annex 3 para 5.

[895] ibid.

[896] ibid.

[897] ibid.

[898] ibid, annex 3 para 6.

[899] ibid, annex 4 para 7.

[900] ibid.

have the competence to not only "uphold, modify or reverse the award concerned" but could also decide on the annulment grounds of article 52 of the ICSID Convention.[901] The latter seems somewhat problematic as this would also imply a modification of article 52 of the ICSID Convention in the sense of article 41 VCLT. In any event, the appeal tribunal's decision would be final and binding on the parties.[902]

The cost of the appeals facility would be distributed in the same manner as within the annulment proceedings; the requesting party would thus initially be solely responsible for the fees and expenses of the appeal tribunal members as well as any other direct costs of the review advanced to ICSID notwithstanding the ultimate cost allocation possibly made by the tribunal.[903] To avoid undue delays, the ICSID proposal considered advance time limits for the filing of an appeal, the parties' submissions and the rendering of the appeal decision by the tribunal. As time limit for the latter, ICSID envisaged a time limit of either 120 days or 60 days from the closure of the proceedings.[904]

c) The Rejection by ICSID States Parties

The ICSID itself noted a number of potential pitfalls in its proposal. Among the concerns extended by ICSID were *inter alia* the possible fragmentation of the ICSID arbitral regimes,[905] the circumvention of the principle of finality of awards,[906] the difficulties of implementing an appeals facility either by unanimous ratification of the States Parties to ICSID or by amendment of IIAs or conclusion of new IIAs, respectively.[907] ICSID further pointed out the conflict with article 53 of the ICSID Convention as well as article 41 VCLT if a modification of the ICSID Convention would be sought by agreement in an IIA.[908]

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[901] ibid, annex 5 para 9.

[902] ibid.

[903] ibid, annex 6 para 10.

[904] ibid, annex 7 para 12.

[905] ibid, 15 para 21.

[906] ibid.

[907] ibid, annex 1 et seq para 2.

[908] ibid.

It seems that these difficulties acted as a deterrent. Only about half a year after the publication of the discussion paper, ICSID dropped the issue of an appeals facility from its agenda with the following statement:

> "The members of the Administrative Council and others who provided comments on the Discussion Paper expressed appreciation for the initiative to review the framework for ICSID arbitration and identify possible improvements. There was general agreement that, if international appellate procedures were to be introduced for investment treaty arbitrations, then this might best be done through a single ICSID mechanism rather than by different mechanisms established under each treaty concerned. Most, however, considered that it would be premature to attempt to establish such an ICSID mechanism at this stage, particularly in view of the difficult technical and policy issues raised in the Discussion Paper."[909]

The EU proposal for a MIC is the first serious attempt since the ICSID proposal to achieve a multilateral reform of investment treaty arbitration.

II. The MIC Project of the EU Commission

To evaluate a potential set-up of a MIC and gather important stakeholder input, the EU Commission launched a public consultation on a multilateral reform of ISDS on 21 December 2016.[910] The public consultation specifically related to questions regarding the desirability of a multilateral reform of the investment dispute settlement system, possible features and options of such a multilateral reform including the possible establishment, design, composition and features of a MIC or a permanent MAT. After evaluating the results, the EU Commission released a recommendation to the EU Council on 13 September 2017 that – if adopted – would authorise the Commission to take part in negotiations for a convention establishing a MIC ("Convention") with the following key attributes:[911]

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[909] ICSID, 'Suggested Changes to the ICSID Rules and Regulations' (12 May 2005) Working Paper of the ICSID Secretariat <https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/Suggested%20Changes%20to%20the%20ICSID%20Rules%20and%20Regulations.pdf> accessed 11 December 2017, 4.

[910] European Commission, 'European Commission launches public consultation on a multilateral reform of investment dispute resolution' (21 December 2016) <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1610> accessed 8 December 2017.

[911] European Commission, 'Recommendation for a Council Decision Authorising the Opening of Negotiations for a Convention Establishing a Multilateral Court for the Settlement

- **Jurisdiction:** The jurisdiction of the MIC extends to IIAs when both parties (in the case of a BIT) or two or more parties (in the case of a multilateral agreement) have agreed to submit disputes arising under the IIA to the jurisdiction of the MIC.

- **Appeal Mechanism:** The court shall have a two tier structure. The review of the appeal tribunal is limited to errors of law or manifest errors in the appreciation of facts. It may remand cases, i.e. send them back to the TFI for completion of the proceedings if warranted.
- **Independence and Impartiality:** The independence of the court members shall *inter alia* be ensured by strict requirements regarding their qualifications and impartiality, security of tenure, a permanent remuneration as well as non-renewable and fixed long-term appointments. The Convention shall further contain rules on ethics and a challenge mechanism as well as all necessary guarantees of independence including an objective and transparent appointment process.

- **Transparency:** Proceedings before the MIC shall be transparent with the possibility of submitting third party interventions. The rules and standards provided for within the *UNCITRAL Rules on Transparency for Treaty-Based Investor-State Arbitration* or similar rules shall apply.

Other attributes and considerations *inter alia* include an effective enforcement regime, cost-effective operation, ensuring the availability to developing and least developed states.

With regard to the standard of independence and impartiality, the attributes of the proposed MIC are similar to those of the international courts and tribunals described above[912]. In contrast, an appeal mechanism is not a general feature of international and supranational courts. The merit of a two-tier structure in ISDS has already been discussed above.[913]

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of Investment Disputes' (13 September 2017) COM(2017) 493 final <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1505306108510&uri=COM:2017:493:FIN> accessed 7 December 2017, 8.

[912] See above, chapter 3, sec. A. through C., p. 82 et seqq.

[913] See above in this chapter, sec. A. III. 4., p. 186 et seqq.

III. Potential Benefits and Drawbacks of a MIC

Similar to the ICS, the MIC would have the potential to strengthen existing control mechanisms. It might also contribute to the clarification, consistency and development of investment law (see 1.). If the MIC is set up by procedural reform alone without substantive provisions, this – while not allowing for full harmonization – would nevertheless not impede its contribution to the consistency of investment law (see 2.). Further, while the procedural set-up of the MIC may lead to a restriction of state sovereignty, this is a necessary result of the independence and impartiality of the tribunal and thus a rule of law requirement and should not be considered a legitimacy concern (see 3.). Yet a drawback of the MIC may be its restriction of party autonomy (see 4.).

1. Contribution to the Clarification, Consistency and Development of Investment Law

International investment law is characterized by the absence of a multilateral investment agreement and the existence of more than 3300 IIAs regulating the protection of private foreign investment.[914] In this landscape, it has been argued that consistency might not prosper in the way it is envisaged by the stakeholders.[915]

Yet it is not clear why a MIC as a sort of 'supreme investment court' would not contribute to the determination of international investment law.[916] In this context, it should be noted that one of the key functions of international courts *inter alia*

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[914] See above, chapter 1, sec. A., p. 19 et seqq.

[915] Barton Legum, 'Appellate Mechanisms for Investment Arbitration: Worth a Second Look for the Trans-Pacific Partnership and the Proposed EU-US FTA?' in Anna Joubin-Bret and Jean E. Kalicki (eds), *Reform of Investor-State Dispute Settlement: Journeys for the 21st Century* (Brill Nijhoff 2015) 438 ("The diverse nature of the contemporary investment law environment cannot promote a truly consistent and coherent interpretation by a common appellate mechanism. This contrasts with the environment in which the rare examples of international appellate mechanisms have successfully emerged, such as the WTO Appellate Body or the Appeals Chamber of the International Criminal Court. These mechanisms address multilateral agreements with identical texts for all contracting States – a markedly different environment from that of contemporary international investment law. I observed that the cure here could be worse than the disease.").

[916] Asif H. Qureshi, 'An Appellate System in International Investment Arbitration?' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) 1167.

includes "the provision of authoritative interpretations and clarifications of the law, as well as the promotion of the development of the law".[917]

The law-determining component of international courts is generally considered to not imply that the courts determine law independently from the legislature; it describes the practice of courts to uncover the law that is already out there by interpretation which promotes the law's development beyond what is already written legislation.[918] It has two aspects: For one, courts determine the rights applicable to the disputing parties by applying the law to the facts,[919] yet for another, they also engage in judicial law-making through (1) the decision and its justification (*ratio decidendi*) and (2) with everything said by the way (*obiter dictum*)".[920]

Thus, the assertion endorsed by various authors that "a standing court would have the advantage of centralizing control of the interpretation and application of investment treaties in a single body, thereby reducing inconsistencies and fragmentation, and increasing the predictability of investment jurisprudence",[921]

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[917] Geert de Baere, Anna-Luise Chané and Jan Wouters, 'The contribution of international and supranational courts to the rule of law: A framework for analysis' in Geert de Baere and Jan Wouters (eds), *The Contribution of International and Supranational Courts to the Rule of Law* (Elgar 2015) 22; Armin von Bogdandy and Ingo Venzke, 'On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority' (14 June 2012) Amsterdam Law School Research Paper No. 2012-69 <http://ssrn.com/abstract=2084079> accessed 8 December 2017, 7 et seqq. Bogdandy and Venzke attribute four main functions to international courts: the settlement of disputes, the stabilization of normative expectations, law-making and the control and legitimation of public authority.

[918] Ingo Venzke, 'The Role of International Courts as Interpreters and Developers of the Law: Working Out the Jurisgenerative Practice of Interpretation' (20 June 2011) <http://dx.doi.org/10.2139/ssrn.1868423> accessed 8 December 2017, 1 et seq.

[919] Armin von Bogdandy and Ingo Venzke, 'On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority' (14 June 2012) Amsterdam Law School Research Paper No. 2012-69 <http://ssrn.com/abstract=2084079> accessed 8 December 2017, 10; Ingo Venzke, 'The Role of International Courts as Interpreters and Developers of the Law: Working Out the Jurisgenerative Practice of Interpretation' (20 June 2011) <http://dx.doi.org/10.2139/ssrn.1868423> accessed 8 December 2017, 1.

[920] Armin von Bogdandy and Ingo Venzke, 'On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority' (14 June 2012) Amsterdam Law School Research Paper No. 2012-69 <http://ssrn.com/abstract=2084079> accessed 8 December 2017, 10.

[921] Stephan W. Schill, 'Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach' (2011) 52 Va J Int'l L 57, 69; see also Susan D. Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through inconsistent Decisions' (2005) 73 Fordham L Rev 1521, 1617 et seqq; Katia Yannaca-Small, 'Improving the System of Investor-State

rings true. The MIC may promote consistency where consistency is desirable by interpreting and applying similar treaty provisions in similar ways and giving rational bases for distinction.[922]

Dispute Settlement' (2006) OECD Working Papers on International Investment 2006/01 <http://dx.doi.org/10.1787/631230863687> accessed 8 December 2017, 12; Gus van Harten, 'A Case for an International Investment Court' [Geneva, 2008] Working Paper No 22/08 for the Society of International Economic Law Inaugural Conference <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1153424> accessed 8 December 2017, 1 et seqq; Jaemin Lee, 'Introduction of an Appellate Review Mechanism for International Investment Disputes - Expected Benefits and Remaining Tasks' in Anna Joubin-Bret and Jean E. Kalicki (eds), *Reform of Investor-State Dispute Settlement: Journeys for the 21st Century* (Brill Nijhoff 2015) 476; David A. Gantz, 'An Appellate Mechanism for Review of Arbitral Decisions In Investor - State Disputes: Prospects and Challenges' (8 September 2005) Bepress Legal Series Working Paper 703 <http://law.bepress.com/cgi/viewcontent.cgi?article=3890&context=expresso> accessed 8 December 2017, 1 et seqq; Christian J. Tams, 'Is There a Need for an ICSID Appellate Structure?' in Rainer Hofmann and Christian J. Tams (eds), *The International Convention on the Settlement of Investment Disputes (ICSID): Taking Stock after 40 Years* (Nomos 2007) 223 et seqq; Andrea Bjorklund, 'The Continuing Appeal of Annulment: Lessons from *Amco Asia* and *CME*' in Todd Weiler (ed), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May 2005) 513 et seqq; Asif H. Qureshi, 'An Appellate System in International Investment Arbitration?' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) 1155 et seqq; W. M. Reisman, 'The Breakdown of the Control Mechanism in ICSID Arbitration' (1989) 1989 Duke L J 739, 804; Anna Joubin-Bret, 'Why we need a global appellate mechanism for international investment law' (27 April 2015) Columbia FDI Perspectives No. 146 <http://ccsi.columbia.edu/files/2013/10/No-146-Joubin-Bret-FINAL.pdf> accessed 8 December 2017, 1 et seqq; Andrea Menaker, 'Seeking Consistency in Investment Arbitration: The Evolution of ICSID and Alternatives for Reform' in Van den Berg, Albert Jan (ed), *International Arbitration: The Coming of a New Age?* (ICCA Congress Series vol 17. Kluwer Law International 2013) 624.

[922] Susan D. Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through inconsistent Decisions' (2005) 73 Fordham L Rev 1521, 1624. See also Andrea Menaker, 'Seeking Consistency in Investment Arbitration: The Evolution of ICSID and Alternatives for Reform' in Van den Berg, Albert Jan (ed), *International Arbitration: The Coming of a New Age?* (ICCA Congress Series vol 17. Kluwer Law International 2013); Andrea Menaker, 'Seeking Consistency in Investment Arbitration: The Evolution of ICSID and Alternatives for Reform' in Van den Berg, Albert Jan (ed), *International Arbitration: The Coming of a New Age?* (ICCA Congress Series vol 17. Kluwer Law International 2013) 624 [fn. 71] ("Although it would undoubtedly be complicated to establish an appellate tribunal that would be responsible for interpreting multiple treaties, this complexity does not imply that such a task would be impossible or that precedent could not develop. The development of precedence in this situation would be no different from that of domestic jurisprudence, in which judges must issue decisions based on a variety of statutes with distinct language or provisions.").

Beyond providing predictable standards and treaty interpretation, the MIC may contribute to the development of investment law which may at some point be codified in a multilateral investment treaty.

2. Necessity of a Multilateral Investment Agreement Containing Substantive Provisions

It has been argued that the establishment of a MIC by procedural reform alone without touching upon substantive provisions would contain the risk of a decrease in the investor protection standards because even though many provisions in the existing IIAs contain a similar wording, there are still differences *vis-à-vis* the protection standards.[923] Indeed, past experience has shown that most international or supranational dispute settlement bodies have been established by a convention providing a self-contained body of substantive provisions.[924] Yet this fact alone does not seem to be a persuasive argument against establishing a MIC by procedural reform.

It is true that without a multilateral investment treaty, there would be no full harmonization of investment law. Protection standards may vary depending on the content of the respective IIA. The different protection standards are particularly precarious *vis-à-vis* older BITs. In this context, it has been submitted that the risk of investor-state arbitration may cause a regulatory chill on the actions of the host government.[925] Intended to protect the investor abroad, older BITs strongly favour the investor and thus tend to be one-sided and not necessarily

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[923] Deutscher Industrie- und Handelskammertag, 'Public Consultation on a Multilateral Reform of Investment Dispute Resolution' (15 March 2017) <https://www.google.de/url?sa=t&rct=j&q=&esrc=s&source=web&cd=6&ved=0ahUKEwj7vq65ucvTAhUCtxQKHXb4CpUQFghGMAU&url=https%3A%2F%2Fwww.dihk.de%2Fthemenfelder%2Frecht-steuern%2Feu-internationales-recht%2Frecht-der-europaeischen-uni on%2Fdihk-positionen-zu-eu-gesetzesvorhaben%2Fdihk-stellungnahme-multilateraler-investitionsgerichtshof-engl.pdf%2Fat_download%2Ffile%3Fmdate%3D1489671666078&usg=AFQjCNFnEb6BbgpePaujMh7JJRbHTYnV6Q&cad=rja> accessed 8 December 2017, 4; International Institute for Sustainable Development (IISD), 'Reply to the European Commission's Public consultation on a multilateral reform of investment dispute resolution' (March 2017) <https://www.iisd.org/sites/default/files/publications/reply-european-commission-consultation-investment-dispute-resolution.pdf> accessed 8 December 2017, 2.

[924] e.g. the ICJ, the ITLOS, the WTO DSB and AB, the ECtHR, the IACoHR, the ACPHR and the Arab Investment Court.

[925] Aikaterini Titi, *The Right to Regulate in International Investment Law* (Studies in international investment law volume 10, Nomos 2014) 72.

consider the interests of the host state.[926] The issue of the right to regulate and the risk of a regulatory chill have been broadly discussed in the current reform debate and seem to have factored into the EU approach.

Yet – as discussed above[927] – consistency could still be achieved even without a uniform body of law if like cases are treated alike. It would not be the task of the MIC to retroactively restrict the protection of the investors under a treaty but for the states to renegotiate the existing treaties to modify the investment chapter. It should thus be clear from the outset that the benefit of the MIC would be its contribution to the consistency and clarification of investment law but not a full harmonization thereof.

3. Restriction of Party Autonomy and State Sovereignty

It has been argued that one of the pitfalls of a permanent investment court with tenured judges could consist in a restriction of state sovereignty. Brower and Schill submitted in this respect that the creation of "a permanent court that is even less deferential to state sovereignty than contemporary arbitration […] may make the system of investor-state dispute settlement even less acceptable to states and thus less legitimate".[928] This argument is premised on the reasoning that

> "the possibility of appointing decision makers in investment treaty arbitrations […] ensures that states have, by means of appointing an arbitrator, a certain degree of control over the future direction of investment arbitration. They can thereby react to jurisprudential developments of which they disapprove by appointing individuals who support a line of thinking and reasoning that is aligned with the understanding states have of the way investment treaties should be applied and interpreted. The possibility of influencing the appointment of arbitrators on an ad hoc basis is all the more important for states as it is one of the

[926] ibid.

[927] See above, chapter 4, sec. B. III. 2., p. 156 et seqq and this chapter, sec. B. III. 1., p. 203 et seqq.

[928] Charles N. Brower and Stephan W. Schill, 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?' (2009) 9 Chi J Int'l L 471, 495. See also Luis González García, 'Making impossible investor-state reform possible' in Anna Joubin-Bret and Jean E. Kalicki (eds), *Reform of Investor-State Dispute Settlement: Journeys for the 21st Century* (Brill Nijhoff 2015) 430.

> few ways in which they can influence the direction of investment jurisprudence after an investment treaty has been signed."[929]

As already indicated above,[930] unilateral appointments offer the disputing parties several comforts in the proceedings and create a certain 'equality of arms'. Whether a MIC would achieve more credibility than the current system of investment treaty arbitration would thus depend on several factors, *inter alia*, on the selection procedure and composition of the court. To avoid any appearance of bias within the MIC, it is essential to design a selection process that would achieve the utmost credibility among the States Parties. The selection procedure of its members would thus have to be carefully crafted to ensure an equal geographical representation of the respective States Parties to the founding convention. The selection procedure could thus be designed as a cross-over of the ICJ and ITLOS selection procedures. The perceived legitimacy would also depend on how balanced the decisions of the MIC would be, in particular regarding investor protection and the state's right to regulate.[931]

IV. Permanent Multilateral Appeal Tribunal (MAT)

Similar to the ICS, there might not be a need for a two-tier structure within the MIC depending on the caseload and on how many chambers have to be established to deal with the caseload.[932]

Instead of establishing a MIC, a viable reform option could also be the establishment of a MAT as addition to the current system of investment treaty arbitration. This would maintain the party autonomy inherent in investment treaty

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[929] Charles N. Brower and Stephan W. Schill, 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?' (2009) 9 Chi J Int'l L 471, 494.

[930] See above, chapter 4, sec. A. II. 2. a), p. 128 et seqq.

[931] See e.g. Bundesrechtsanwaltskammer, 'Stellungnahme Nr. 19/2017 zur öffentlichen Konsultation der Europäische n Kommission über eine multilaterale Reform der Beilegung von Investitionsstreitigkeiten' (7 March 2017) Registernummer: 25412265365-88 <http://www.brak.de/zur-rechtspolitik/stellungnahmen-pdf/stellungnahmen-deutschland/2017/maerz/stellungnahme-der-brak-2017-19.pdf> accessed 8 December 2017, 14.

[932] See above in this chapter, sec. A. III. 4., p. 186 et seqq.

arbitration while at the same time granting the disputing parties access to additional legal control in the event of a (potentially) legally erroneous decision.[933] It may also contribute to the consistency of investment law.[934]

However, several aspects – as already indicated above[935] – need to be taken into account: (i) There should be no significant cost burdens and delays related to the MAT; (ii) *Vis-à-vis* SMEs, some kind of legal aid might be considered to grant effective access to justice; (iii) The review must be limited to errors of law, the main focus should be to revoke arbitrary decisions or manifest errors of law;[936] (iv) An equitable representation of all major legal systems of the world should be ensured within the tribunal as well as adequate qualifications and remuneration.

Tribunal members could either serve full-time – if the caseload allows for it – and receive an annual salary or work on retainer on a part-time basis. In both events, there need to be binding ethics guidelines prohibiting external incompatible activities and restricting other activities that might potentially lead to the perception of bias. Also, the selection procedure should be carefully crafted to ensure its perceived legitimacy.

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[933] Steffen Hindelang and Stephan Wernicke, 'Essentials of a Modern Investment Protection Regime – Objectives and Recommendations for Action: Organised by the Free University Berlin and the Association of German Chambers of Commerce and Industry (DIHK e.V.)' (26 August 2015) Harnack-Haus Reflections <https://www.google.de/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwjT5dzO-NDTAhWQZ1AKHaRICbEQFggnMAA&url=https%3A%2F%2Fwww.dihk.de%2Fressourcen%2Fdownloads%2Fharnack-haus-reflections-engl%2Fat_download%2Ffile%3Fmdate%3D1453731785898&usg=AFQjCNFI0Cc2my7Lm0czWVO3YwNvpc_zOQ&sig2=DmXrotZAlhT0TmYa8sSc3 w&cad=rja> accessed 8 December 2017, 17.

[934] See above, chapter 4, sec. B. III. 2., p. 156 et seqq.

[935] See above in this chapter, sec. A. III. 4., p. 186 et seqq.

[936] Deutscher Industrie- und Handelskammertag, 'Public Consultation on a Multilateral Reform of Investment Dispute Resolution' (15 March 2017) <https://www.google.de/url?sa=t&rct=j&q=&esrc=s&source=web&cd=6&ved=0ahUKEwj7vq65ucvTAhUCtxQKHXb4CpUQFghGMAU&url=https%3A%2F%2Fwww.dihk.de%2Fthemenfelder%2Frecht-steuern%2Feu-internationales-recht%2Frecht-der-europaeischen-union%2Fdihk-positionen-zu-eu-gesetzesvorhaben%2Fdihk-stellungnahme-multilateraler-investitionsgerichtshof-engl.pdf%2Fat_download%2Ffile%3Fmdate%3D1489671666078&usg=AFQjCNFnEb6BbgpePaujMh7JJRbHTYnV6Q&cad=rja> accessed 8 December 2017, 5.

Regarding the institutional home of the MAT, several possibilities arise. An alternate suggestion to the ICSID proposal for a MAT comprises the proposal of setting up an appellate chamber within the ICJ. In a speech to the 6th Committee of UNGA, the former president of the ICJ, Guillaume, referred to the possibility of entrusting the ICJ "with the task of acting as a court of appeal or review from judgments rendered by other international courts". He acknowledged that such an endeavour would require "a powerful political will on the part of States and far-reaching changes in the Court, which would need to be given substantial resources". An appellate chamber within the ICJ may, however, have some benefits:

> "[A]n ICJ Chamber established to review investment awards would have several apparent virtues. In addition to meeting the criterion of centralization, the court is a standing body with continuity of membership. No new appointment process would be necessary, except as may be required to form the chamber. The court's members are independent, and possess, *ex hypothesi*, considerable public international law expertise. Even if merits review were excluded from the appellate mandate, the oft-raised cluster of questions regarding excess of mandate will typically be a function of treaty interpretation."[937]

Yet this proposal does not come without its own potential pitfalls: Beyond the issue of jurisdiction *ratione personae*[938] – since the ICJ's jurisdiction only extends to inter-state disputes[939] – Franck submits two other considerations to this approach: (i) The enforcement of ICJ judgments through the UNSC and (ii) the ICJ's lack in experience *vis-à-vis* appellate proceedings.[940]

Another option could be reviving the underutilized PCA. Obvious benefits of this approach would be the experience of the PCA as appointing authority and

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[937] Jack J. Coe, Jr. 'Taking Stock of NAFTA Chapter 11 in Its Tenth Year: An Interim Sketch of Selected Themes, Issues, and Methods' (2003) 36 Vand J Transnat'l L 1381, 1451 [references omitted]; see also Susan D. Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through inconsistent Decisions' (2005) 73 Fordham L Rev 1521 1609; Asif H. Qureshi, 'An Appellate System in International Investment Arbitration?' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) 1165.

[938] Jack J. Coe, Jr. 'Taking Stock of NAFTA Chapter 11 in Its Tenth Year: An Interim Sketch of Selected Themes, Issues, and Methods' (2003) 36 Vand J Transnat'l L 1381, 1451.

[939] ICJ Statute, art. 34(1) („Only states may be parties in cases before the Court").

[940] Susan D. Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through inconsistent Decisions' (2005) 73 Fordham L Rev 1521, 1610.

with the administration of investor-state arbitration proceedings.[941] The jurisdictional aspect of the ICJ proposal could thus be avoided by inaugurating an appellate chamber under the auspices of the PCA.[942] It has been suggested that current and retired ICJ judges – among other jurists – could serve in the appellate chamber of the PCA which would be facilitated by the common location at the Peace Palace in The Hague. Chambers could be comprised of three or five judges.[943]

V. Summary

The analysis of the potential benefits and drawbacks of establishing a MIC can be summed up in a few brief key conclusions:

- The MIC may strengthen several control mechanisms currently available in investment treaty arbitration. Yet, the selection procedure and composition of the MIC would have to be carefully crafted to ensure its perceived legitimacy and avoid the pitfalls of the ICS. Thus set up, the MIC could contribute to the consistency of international investment law.
- An alternative to the MIC (and the ICS) may be the establishment of a MAT. A MAT may contribute to consistency of investment law in the same manner as a MIC but would still maintain many of the advantages of investment treaty arbitration.

- Although there is no compelling need to establish an appellate mechanism as inconsistent or grossly erroneous awards are the exception and not the rule in investment treaty arbitration, the MAT could be a compromise in the reform debate between those pushing for vigorous reform and those who want to maintain the *status quo*.

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[941] Jack J. Coe, Jr. 'Taking Stock of NAFTA Chapter 11 in Its Tenth Year: An Interim Sketch of Selected Themes, Issues, and Methods' (2003) 36 Vand J Transnat'l L 1381, 1452; Susan D. Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through inconsistent Decisions' (2005) 73 Fordham L Rev 1521, 1610.

[942] Jack J. Coe, Jr. 'Taking Stock of NAFTA Chapter 11 in Its Tenth Year: An Interim Sketch of Selected Themes, Issues, and Methods' (2003) 36 Vand J Transnat'l L 1381, 1452.

[943] ibid.

Concluding Remarks

This thesis has presented a strong case for reforming investment treaty arbitration yet simultaneously cautioned that the implementation of such an undertaking should ensure that "the cure is not worse than the disease". The main conclusions that may be taken from this thesis are:

- It should be emphasized from the outset that investment treaty arbitration has generally proven to fulfil its purpose: the protection of investors even in the event that domestic remedies are insufficient or ineffective.[944] The conclusion drawn from the analysis above is that there is no general lack of legitimacy apparent in investment treaty arbitration. Although some legitimacy concerns seem to have emerged with regard to the practice of unilateral appointments, these may be alleviated by reforming the current system.

- It is not evident that there is a general lack of independence and impartiality on behalf of investment arbitrators. Indeed, the independence and impartiality of arbitrators is ensured by several control mechanisms. Most notable are the requirement of mandatory disclosures by the arbitrator prior to or upon his appointment as well as the option of the parties

[944] Deutscher Industrie- und Handelskammertag, 'Public Consultation on a Multilateral Reform of Investment Dispute Resolution' (15 March 2017) <https://www.google.de/url?sa=t&rct=j&q=&esrc=s&source=web&cd=6&ved=0ahUKEwj7vq65ucvTAhUCtxQKHXb4CpUQFghGMAU&url=https%3A%2F%2Fwww.dihk.de%2Fthemenfelder%2Frecht-steuern%2Feu-internationales-recht%2Frecht-der-europaeischen-union%2Fdihk-positionen-zu-eu-gesetzesvorhaben%2Fdihk-stellungnahme-multilateraler-investitionsgerichtshof-engl.pdf%2Fat_download%2Ffile%3Fmdate%3D1489671666078&usg=AFQjCNFnEb6BbgpePaujMh7JJRbHTYnV6Q&cad=rja> accessed 8 December 2017 3; Steffen Hindelang and Stephan Wernicke, 'Essentials of a Modern Investment Protection Regime – Objectives and Recommendations for Action: Organised by the Free University Berlin and the Association of German Chambers of Commerce and Industry (DIHK e.V.)' (26 August 2015) Harnack-Haus Reflections <https://www.google.de/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwjT5dzO-NDTAhWQZ1AKHaRICbEQFggnMAA&url=https%3A%2F%2Fwww.dihk.de%2Fressourcen%2Fdownloads%2Fharnack-haus-reflections-engl%2Fat_download%2Ffile%3Fmdate%3D1453731785898&usg=AFQjCNFI0Cc2my7Lm0czWVO3YwNvpc_zOQ&sig2=DmXrotZAlhT0TmYa8sSc3w&cad=rja> accessed 8 December 2017, 16.

to challenge an arbitrator for a perceived lack of independence and impartiality.

- Criticism against the legitimacy of investment treaty arbitration often seems to relate to the dual role of arbitrator and counsel as well as multiple appointments by the same party. In this context, unilateral appointments seem to heighten the perception of bias and are considered to undermine the confidence of the parties in an independent and impartial decision-making process.

- This criticism is not persuasive: While unilateral appointments may – to some extent – be about balancing the tribunal, they are not irreconcilable with independence and impartiality if subject to strict regulations avoiding any improper conduct. In this context, it is argued here that *vis-à-vis* unilateral appointments, the regulation of undue influence in the pre-appointment process as well as of multiple appointments needs to be performed more strictly.

- Against this backdrop, the EU approach in the TTIP Proposal, CETA and EUVFTA goes beyond what is needed. And while the ICS seems to apply an even stricter standard regarding independence and impartiality than the current standard of arbitral independence and impartiality, the ICS may be susceptible to its own legitimacy concerns.

- In this context, the comprehensive restriction of the dual role of arbitrator and counsel, the imbalanced selection procedure and composition of the tribunal as well as the states' influence on pending proceedings are among the most problematic features of the ICS. The ICS also eliminates several benefits of investment treaty arbitration, *inter alia*, the party autonomy inherent in unilateral appointments, which may not contribute to greater confidence in the system as a whole.

- Also, there may not seem to be a compelling need for a two-tier structure within the ICS depending on the caseload. If only one chamber is established due to the low caseload, the TFI would already sufficiently contribute to the consistency of awards. The same applies to the proposed

MIC. The MIC could contribute to the consistency of international investment law. Yet to achieve absolute harmonization, the conclusion of a multilateral investment agreement which includes substantive provisions would be necessary.

- An alternative to the MIC and the ICS could be reforming the current system of investment treaty arbitration which seems to be sufficient to alleviate the existing legitimacy concerns. In this regard, to avoid issue conflicts, strict ethics guidelines should be introduced in the arbitration rules or referred to in the investment chapter of the respective IIA to ensure a coherent approach. The IBA Guidelines or the ethics requirements of CETA may serve as a blueprint although several adjustments would still be needed.

- To further ensure the consistency of arbitral awards, a permanent MAT with tenured arbitrators may be worth considering as addition to the current system. A MAT could contribute to the consistency of investment law in the same manner as a MIC but would still maintain most of the advantages of investment treaty arbitration to some extent. Although there seems to be no compelling need to establish an appellate mechanism as inconsistent or grossly erroneous awards are the exception and not the rule in investment treaty arbitration, the MAT could prove to be a compromise in the reform debate.

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