Paradigm Shift in Investment Treaty Arbitration: Toward Stricter Control over the Qualifications and Conduct of Arbitrators

by

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We acknowledge and respect the lək̓ʷəŋən peoples on whose traditional territory the university stands and the Songhees, Esquimalt and W̱SÁNEĆ peoples whose historical relationships with the land continue to this day.

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Abstract

There is a growing concern over the qualifications and social interactions of investment treaty arbitrators. The characteristics of this class of international adjudicators have significantly evolved over the past few decades. The contemporary arbitration panelist interacts within a broad and complex network of arbitration participants. Their patterns of social behavior both within the community of panelists and within the broader network of actors in arbitration proceedings have fundamentally reshaped the composition, dynamics and culture of the arbitration community. These new forms of relationships and patterns of conduct are new in the context of public international law. These have created unprecedented challenges to the investment treaty arbitration system. New manifestations of attributes and social behavior of panelists demonstrate inadequacies of the existing standards, rules and procedures that govern panelists.

This study surveys problematic patterns of social behavior of investment treaty adjudicators and shows how certain instances of social behavior inevitably or potentially jeopardize the very foundations of the system. This research empirically examines the voting behavior of two distinct groups of party-appointed panelists, and the results reveal a relationship between appointments and the decision-making attitude of adjudicators. It further methodically maps the pool of ICSID panelists and answers the question 'who are ICSID panelists?' It reviews the evolution of the attributes of ICSID adjudicators, assesses the composition of the ICSID pool, and evaluates the social interactions of this group of investment treaty adjudicators.

To address the challenges that investment treaty arbitration faces, a radical and multidimensional shift is occurring in the system. This transformation is directed towards greater control over the qualifications and conduct of adjudicators. These developments reconstruct the composition of the pool of adjudicators and influence how they interact with other actors in investment treaty arbitration proceedings. The ongoing reform progress indicates that the attributes and behavior of future investment treaty adjudicators would likely be different from the characteristics and conduct of the contemporary generation of panelists.

Table of Contents

Abbreviations

Arab Investment Agreement	(AIA)
Arab Investment Court	(AIC)
Bilateral investment treaties	(BITs)
Canada-European Union Comprehensive Economic and Trade Agreement	(CETA)
Canada-United States-Mexico Agreement	(CUSMA)
Community Court of Justice	(CCJ)
Comprehensive and Progressive Agreement for Trans-Pacific Partnership	(CPTPP)
EU - Singapore Investment Protection Agreement	(ESIPA)
EU - Vietnam Investment Protection Agreement	(EVIPA)
European Convention on Human Rights	(ECHR)
European Court of Human Rights	(ECtHR)
European Court of Justice	(ECJ)
Free Trade Agreements	(FTAs)
International Centre for Settlement of Investment Disputes	(ICSID)
International commercial arbitration	(ICA)
International Court of Justice	(ICJ)
International Criminal Court	(ICC)
International Tribunal for the Law of the Sea	(ITLOS)
Investment treaty arbitration	(ITA)
Investor-state dispute settlement	(ISDS)
North American Free Trade Agreement	(NAFTA)
Permanent Court of Arbitration	(PCA)

Permanent Court of International Justice	(PCIJ)
Public international law	(PIL)
Treaty on the Functioning of the European Union	(TFEU)
United Nations Commission on International Trade Law	(UNCITRAL)
World Trade Organization	(WTO)

List of Tables

List of Figures

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Introduction: Research Overview

I) Investment Treaty Arbitrators: The Quest for Reform

Arbitrators are an essential component of investment treaty arbitration (ITA).[1] As a frequent arbitrator points out, the key elements in ITA are 'arbitrator, arbitrator, arbitrator'.[2] This is because without whom the arbitration process does not take place and their function comes with tremendous responsibilities. The nature of disputes involves issues of public policy and sovereign measures. The amount of damages claimed are substantial, sometimes in billions of dollars - that is a considerable portion of a country's GDP.[3] These international actors also contribute to the global governance of foreign investment.

These responsibilities highlight the importance of their qualifications and behavior.[4] However, while the law of investment treaties has significantly evolved over the last few decades, arbitrators have remained under-regulated. Elsewhere, it has been said that professionals like barbers and taxi drivers are subject to far greater restrictions than international arbitrators.[5] The traditional generations of investment treaties do not address arbitrators' eligibility requirements, and *ad hoc* or institutional arbitration rules do not have rigorous standards for this purpose.

Arbitrators appear to be at the crux of concerns in ITA. The outlook of investment treaty arbitrators has rapidly evolved over the past two decades. More notably, the characteristics of contemporary arbitrators are different from those of 'the grand old men'[6] who were members of a small pool of arbitrators. Also, this class of arbitrators behave distinctively from the traditional international adjudicator. These new forms of relationships and patterns of social behavior are new in the context

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[1] Emmanuel Gaillard, 'Sociology of International Arbitration' in David Caron and others (eds), *Practising Virtue: Inside International Arbitration* (OUP 2015) 190.

[2] William W. Park, 'Arbitration in Autumn' (2011) 2(2) J. Int. Disput. Settl. 287, 311.

[3] The UNCTAD database indicates that, as of June 30, 2022, the majority of investment treaty disputes (60 percent) involved claims of $100 million or more sought by claimants. In 113 disputes the amount of compensation claimed by claimants was $1 billion or over.

[4] For our purpose, the terms 'behavior' and 'conduct' are used interchangeably.

[5] Richard C. Reuben, 'Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice' (2000) 47(4) UCLA L. Rev. 949, 1013.

[6] See Yves Dezalay and Bryant G. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (UCP 1998) 34-41.

of public international law (PIL), though such relationships and conduct have long existed in the climate of ICA. This change in arbitrators' properties and conduct has created growing complexities in ITA.

The contemporary arbitrator is a partner at a global law firm[7] who offers different services in investment treaty disputes. These elite arbitrators rotate as arbitrator, counsel and expert within an interconnected web of arbitration participants. They concurrently adjudicate disputes submitted to them, appear as counsel representing a party and act as expert providing opinions in support of a party's position. Within the ITA framework, two arbitration practitioners who work closely in different disputes simultaneously held roles as co-arbitrator, co-counsel, counsel-arbitrator, or expert-arbitrator. Wearing more than one hat in ITA disputes increases the risk of conflict of interests[8] and in some instances, this risk is inherent in nature. This pattern of behavior raises serious concerns about the impartiality and independence of arbitrations. However, arbitration practitioners interact within an 'invisible college' creating a complex social phenomenon[9] and, thus, the extent of their engagement in the double-hatting practice is unclear.

Both the conduct and decisions of ITA arbitrators have been subject of fierce criticism. Some have argued that they act like an 'exclusive club',[10] 'cartel',[11] and 'mafia'.[12] Some have challenged their

[7] See Malcolm Langford and others, 'The Revolving Door in International Investment Arbitration' (2017) 20 J. Int. Econ. Law 301–332.

[8] "Conflict of interest" is a situation in which potential private interests of the arbitrator and the outcome of the dispute coincide. A related concept is "issue conflict". Issue conflict refers to a state of mind that gives rise to an appearance of bias. It is a situation where an arbitrator's commitments to a particular idea relating to the subject matter of the dispute, not the parties to dispute. See Joseph R. Brubaker, 'The Judge Who Knew Too Much: Issue Conflicts in International Adjudication' (2008) 26(1) Berkeley J. Int'l L. 111-152; Gavan Griffith and Daniel Kalderimis, ''Pure' Issue Conflicts in Investment Treaty Arbitration' in David D. Caron and others (eds), *Practising Virtue: Inside International Arbitration* (OUP 2015) 607-625; Romain Zamour, '8 Issue Conflicts and the Reasonable Expectation of an Open Mind: The Challenge Decision in Devas v. India and Its Impact' in Chiara Giorgetti (ed), *Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals* (Brill Nijhoff 2015) 227–246; Lucy Reed and Dafina Atanasova, 'Issue Conflict: International Arbitration' in Hélène Ruiz-Fabri (ed), *Max Planck Encyclopedias of International Law* (OUP 2018); Sergio Puig and Anton Strezhnev, 'Testing Cognitive Bias: Experimental Approaches and Investment Arbitration' in Daniel Behn and others (eds), *The Legitimacy of Investment Arbitration: Empirical Perspectives* (CUP 2022) 85-99.

[9] See Oscar Schachter, 'Invisible College of International Lawyers' (1977) 72 Nw. U. L. Rev. 217-226.

[10] *Islamic Republic of Iran v. United States of America*, IUSCT Case No. A-18, Dissenting Opinion of the Iranian Arbitrators (April 6, 1984) 71.

[11] Ralf Michaels, 'Roles and Role Perception of International Arbitration' in Walter Mattli and Thomas Dietz (eds) *International Arbitration and Global Governance: Contending Theories and Evidence* (OUP 2014) 54.

[12] See Yves Dezalay and Bryant G. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (UCP 1998) 10, 50; Florian Grisel, 'Marginals and Elites in International

decisions as being inconsistent and 'unacceptable'.[13] Others have tagged their findings as 'dynamite'[14] - that is the very force that destroys the foundations of the ITA mechanism.

Some commentators believe that there exists a systemic bias[15] in ITA.[16] A prominent arbitrator claims that ITA arbitrators advocate for the party that appointed them.[17] More notably, another leading panellist concluded that arbitrators' dissenting opinions are a tool to support the claims of the party that offered them the appointment.[18] Given the dramatic increase in dissenting opinions over the last decade, it is not clear whether this study reflects the current circumstances of the relationships between dissenting opinions and appointments in ITA.

Further, one can find two distinct groups of frequent arbitrators within the pool of ITA arbitrators who hold high or exclusive appointments only from one disputing 'side', i.e., investors or States, but not both. One ponders why each of these two rings has received excessive or exclusive appointments from one disputing side, not the other. It is uncertain if there is a correlation between high or exclusive appointments and arbitrators' decision-making behavior.

Arbitration' in Thomas Schultz and Federico Ortino (eds), *The Oxford Handbook of International Arbitration* (OUP 2020) 26.

[13] See Julian Arato and others 'Parsing and Managing Inconsistency in Investor-State Dispute Settlement' (2020) 21(2-3) J. World Invest. Trade 336-373.

[14] See *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Dissenting Opinion of Arbitrator Santiago Torres Bernárdez (June 20, 2018) ¶51 (stating that the interpretations of treaty clauses given by his "co-arbitrators dynamite the BIT system as it has been functioning until the present").

[15] The Black's Law Dictionary defines the term 'bias' as inclination, prejudice and predilection. Bias has different variations: actual bias that means a genuine prejudice that a person has against another person or a relevant subject, and implied bias meaning that prejudice is inferred from the experiences or relationships of a person against another person or a relevant object. See Bryan A. Garner, *Black's Law Dictionary* (9th edn, West 2010) 183. Merriam Webster Law Dictionary defines bias as a mental tendency, inclination, preconception and prejudice. See Susan E. Wild (ed), *Merriam Webster Law Dictionary* (Wiley Publishing 2006) 47. For the purpose of this research, 'bias' refers to both notions of genuine and implied prejudice. See also Holly Stout, 'Bias' (2011) 16(4) Judicial Rev. 458-482; Sam Luttrell, *Bias Challenges in International Commercial Arbitration: The Need for a 'Real Danger' Test* (Kluwer 2009) 14-19.

[16] See Gus Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration' (2012) 50 Osgoode Hall Law J. 211-268; Gus Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication (Part Two): An Examination of Hypotheses of Bias in Investment Treaty Arbitration' (2016) 53 Osgoode Hall Law J. 540-586.

[17] See Jan Paulsson, 'appointment of arbitrators' in Federico Ortino and others (eds), *Oxford Handbook of International Arbitration* (OUP 2020) 106.

[18] See Albert Jan van den Berg, '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* (Brill 2010) 821-844.

With the emergence of new patterns of conduct of ITA arbitrators, which are unprecedented in PIL, recourse to disqualification procedures has significantly increased over the past two decades. While the majority of these challenges involve the arbitrator appointed by the other party to the dispute, it is no longer a rare occasion for the appointing party to challenge its appointee, nor is it uncommon for a party to request the disqualification of all members of the tribunal including its own party-appointed arbitrator. One may infer that the increased number of challenges against arbitrators indicates a growing concern on the part of disputing parties about the required personal qualifications of arbitrators. In spite of this, it appears that challenge mechanisms, e.g., the ICSID disqualification mechanism, suffer from both normative and structural deficiencies and fail to operate properly. One may argue that the existing control procedures cannot efficiently address instances of conflict of interests arising out of complex interactions of arbitrators with other participants in investment treaty disputes.

As ITA involves reviewing whether the host State has violated its treaty obligations, the search for a qualified arbitrator requires consideration of distinct elements including the panelist's expertise in PIL.[19] However, apparently panelists who have private law expertise have secured a strong foothold in the pool of investment treaty arbitrators meaning that a considerable proportion, though not the majority, of the pool of ITA arbitrators have private law background.[20]

Studies suggest that the professional background of the adjudicator instructs his or her approach to legal issues.[21] Some argue that the engagement of private law experts in the ITA pool has arguably created a clash of cultures as these practitioners may not consider international legal norms such as human rights values in their decision-making mentality.[22] As one scholar claims, the considerable socio-cultural tensions between international investment law and other branches

[19] Piero Bernardini, 'International Commercial Arbitration and Investment Treaty Arbitration - Analogies and Differences' in David D. Caron, and others, *Practising Virtue: Inside International Arbitration* (OUP 2016) 55-56.
[20] It should be noted that by the term "private law arbitration" a broad meaning is intended, and it includes sports, commercial and other arbitrations that is not governed by PIL.
[21] See Erik Voeten, 'The Impartiality of International Judges: Evidence from the European Court of Human Rights' (2008) 102(4) Am. Polit. Sci. Rev. 417-433; Erik Voeten, 'The Politics of International Judicial Appointments' (2009) 9(2) Chic. J. Int. L. 387 - 405; William W. Burke-White and Andreas von Staden, 'Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations' (2010) 35 Yale J. Int'l L. 283-346; Cosette Creamer and Zuzanna Godzimirska, 'The Job Market for Justice: Screening and Selecting Candidates for the International Court of Justice' (2017) 30(4) Leiden J. Int. L. 947-966.
[22] Anthea Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System, (2013) 107 AJIL 54.

of international law such as human rights influence arbitrators' inclination to consider human rights norms in their decisions.[23] Nevertheless, the extent of the contribution of these experts to the pool of investment treaty arbitrators is not known.

Under the *ad hoc* appointment mechanism, disputing parties have considerable freedom as to "who" to select as arbitrator. Each disputing party appoints its party-arbitrator unilaterally and, in its consideration of candidates, it gives priority to the positions it holds in the dispute. There exists no established screening process through which disputing parties can jointly assess the personal and professional qualifications of party-appointed arbitrators prior to their appointment, nor is there a procedure in place for an independent third party to perform this task. It can be argued that due to lack of screening procedures, the existing appointment mechanism are not able to properly respond to challenges surrounding the qualifications of arbitrators.

The above concerns combined with the alleged failure of the arbitration community to become self-regulated seemingly necessitate reforms in ITA. To address these and other challenges arising out of ITA and its panelists, ongoing reforms are taking place both at institutional and treaty-making levels and signal the return of the State. These reforms can be described as a top-down transformation as the reform issue has been taken off the hands of arbitration practitioners.

One may characterize this transformation as a multi-dimensional solution as it addresses various interconnected issues. Arguably, the objectives of these reforms are to eliminate the structural deficiencies in the appointment and challenge review procedures, reinforce the impartiality and independence qualities of arbitrators and set a higher bar with regard to the expertise and professional qualifications of arbitrators. This transformation, if carried out successfully, would create radical changes in the characteristics of future generations of ITA panelists.

II) Literature Review

This section discusses how commentators have approached the concerns regarding the qualifications and characteristics of ITA arbitrators. This discussion helps understand the limits of the existing literature and the extent upon which the concerns over ITA arbitrators are

[23] See Moshe Hirsch, 'The Sociology of International Investment Law' in Zachary Douglas and others (eds) *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP 2014) 142–167.

substantiated. This also assists in understanding how the present study contributes to the existing scholarly works on ITA panelists.

Most studies on arbitrators are based on academic viewpoints of commentators or observation of arbitrators. Although providing valuable insights on arbitrators, these opinions or observations are not tested by empirical evidence. Nevertheless, due to the exponential increase in data volume over the past years, the empirical study of arbitrators has garnered the attention of commentators. This assessment provides a selective review of the existing literature on investment treaty arbitrators as well as written works on international commercial arbitrators that are relevant to our discussion.

In their well-known book published in the late 1990s, sociologist Yves Dezalay and lawyer Bryant Garth explored who makes a successful international commercial arbitrator. Dezalay and Garth identified two distinct generations of arbitrators. They referred to the first group as 'grande old men' who were generalists and had a credible character. Generalists are international lawyers who have the knowledge and command of the fundamentals of the law. The second generation constituted arbitrators who moved from generalism to specialization. They called this group 'technocrats'. A successful arbitrator from this generation is a legal expert who received training and built a career in arbitration.[24]

Since Dezalay and Garth's book, scholars have explored international arbitrators including investment treaty arbitrators from various sociological viewpoints. In 2012, Schultz and Kovacs reviewed the changes that occurred since Dezalay and Garth's survey. They identified the emergence of the third generation of arbitrators - the managers. This study concluded that the recent generation of arbitrators act as business managers because disputing parties demand their management capabilities and organizational skills in solving disputes.[25]

There is a blossoming of empirical scholarship on the diversity of international arbitrators. Some studies have explored the personal characteristics of international arbitrators from a diversity perspective. In her 2007 piece, Frank attempted to review the nationality and gender of investment treaty arbitrators and evaluated if arbitrators were a 'Pale, Male, and Stale' 'Mafia'. Although she concluded females formed a tiny fraction of arbitration practitioners, she refuted the claim that

[24] See Dezalay and Garth, (n 3) 34-41.

[25] See Thomas Schultz and Robert Kovacs, 'The Rise of a Third Generation of Arbitrators? Fifteen Years after Dezalay and Garth' (2012) 28 Arbitr. Int. 161-171.

arbitrators are 'mafia' as a large number of individuals participate in the pool of investment treaty arbitrators.[26]

A study examining gender diversity in the pool of investment arbitrators uncovered that while arbitration participants, i.e., disputing parties, institutions, and law firms, promise increased diversity by appointing more female panelists, they often appoint Caucasian women who share similar backgrounds and exclude women who do not have this single dimensional characteristic such as females who are black, indigenous or Asian.[27]

In his empirical study on panelists of the World Trade Organization (WTO) and the International Centre for Settlement of Investment Disputes (ICSID), Pauwelyn compared these two groups of adjudicators based on their country of nationality, expertise, diversity, and ideology. He found that ICSID adjudicators are influential elite private lawyers or academics from Western Europe or the US, while WTO panelists are modest technocrats from developing countries and the majority of them are not legal experts.[28]

In a survey reviewing the extent of diversity challenges in investor-State arbitration, Bjorklund and others conclude that the chronic diversity problems in the system have a deep historical root. They examine how real and perceived diversity deficits undermine the legitimacy of the system and suggest that the remedy is to break from the existing system, while basic concepts of fairness, justice, and equal treatment should be highlighted.[29]

A 2021 paper examined the relationship between a homogeneous pool of investment treaty arbitrators and a more balanced decision-making. It reviewed how diverse values and backgrounds of arbitrators could shape their decision-making and assessed whether increased diversity could improve the decision-making quality of panelists. It revealed that a more diverse pool could add substantive values to tribunal decisions than a homogeneous pool. It further argued that the over-representation of panelists from developed countries and private law backgrounds in the pool of

[26] See Susan Franck, 'Empirically Evaluating Claims About Investment Treaty Arbitration' (2007) 86 N.C. L. Rev. F. 75-83.
[27] See Ksenia Polonskaya, 'Diversity in the Investor-State Arbitration: Intersectionality Must Be Part of the Conversation' (2018) 19 Melb. J. Int. L. 259-298.
[28] See Joost Pauwelyn, 'Who Decides Matters: The Legitimacy Capital of WTO Adjudicators versus ICSID Arbitrators' in Nienke Grossman and others (eds), *Legitimacy and International Courts* (CUP 2018) 216-233.
[29] Andrea K. Bjorklund and others, 'The Diversity Deficit in International Investment Arbitration' (2020) 21 JWIT 410-440

investment treaty arbitrators could negatively contribute to the imbalance in the jurisprudence of investment treaty tribunals.[30]

In their recent piece, Langford and others map the diversity of investor-State panelists in terms of their nationality and residence and evaluate if a greater diversity offers a different outcome that is more favorable to non-Western respondent States. While their examination suggests that a lack of geographic representativeness favors Western countries as home States of investors or host States, it finds no evidence indicating that nationality significantly influences the outcome of arbitral decisions.[31]

A few commentators have scrutinized the network of investment treaty arbitrators and explored the interactions of panelists both within and outside the pool of arbitration practitioners. Puig's 2014 article provides an intriguing analysis of social dynamics in the investment arbitration community. Using network analytics, the article assesses the social construction of investor-State panelists and maps elite arbitrators by relying on formal appointments to arbitration tribunals. It reveals who the 'power brokers who dominate the arbitration profession are. The evidence presented in the article shows that the network of arbitrators heavily depends on a small ring of prominent actors.[32]

In their paper, Langford and others using social network analysis investigated the relationships between 3,910 individuals who participated in 1,039 investment disputes (including ICSID annulments). Their study identified a small circle in the community that retains a high and powerful influence over the system. Their evaluation suggests that an assessment of power and influence over the system is not limited to the arbitral role, but also includes other roles. It also found that double-hatting is prevalent amongst 'power brokers' and substantiated normative concerns scholars raised over this practice.[33]

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[30] See Richard Chen, 'The Substantive Value of Diversity in Investment Treaty Arbitration' (2021) 61 Va. J. Int'l L. 431-488.

[31] See Malcolm Langford and others, 'The West and the Rest: Geographic Diversity and the Role of Arbitrator Nationality in Investment Arbitration' in Daniel Behn and others (eds), *The Legitimacy of Investment Arbitration: Empirical Perspectives* (CUP 2022) 283-314.

[32] See Sergio Puig, 'Social Capital in the Arbitration Market' (2014) 25(2) EJIL 387–424.

[33] See Malcolm Langford and others, 'The Revolving Door in International Investment Arbitration' (2017) 20(2) J. Int. Econ. Law (2017) 301–332.

In a recent experimental work, a commentator examines the interactions of global law firms within the community of investor-State arbitrators. Building on the social networks of arbitrators, this work studies the relationships between the most influential law firms and 'power broker' arbitrators and evaluates how such engagements could create a real or perceived conflict of interests for the investment arbitration system. This study indicates how the top law firms have secured a solid foothold in the network of arbitrators by creating strong relationships with the most influential arbitrators. It concludes that the leading law firms act as 'gatekeepers' to the system, in particular in terms of the distribution of appointments among panelists and facilitating the entry of new arbitrators.[34]

While physiological assessments of arbitrator's behavior and application of psychology in arbitration scholarship are under-scrutinized, few scholarly works have tested the decision-making psychology of arbitrators. In 2010, an empirical study analyzed the voting behavior of repeatedly appointed arbitrators and refuted alleged relationships between repeat appointments and biased decision-making. It concluded that to maintain their reputation as impartial panelists, they are uninfluenced by potential future appointments. It also found that repeat presiding panelists are disinclined to extreme outcomes compared to party-appointed arbitrators.[35]

In a 2017 experiment, Puig and Strezhnev conducted an experiment on 257 international arbitrators. Participants were presented with a brief scenario of an investor-State dispute and were assigned different features at random to evaluate their effects on arbitrators' decision-making behavior. With respect to cases where the respondent won the dispute, the results revealed that panelists were more likely to side with relatively low-income states in ordering reimbursement of their legal expenses in contrast to wealthy States.[36]

Frank and others conducted an experimental study on how international arbitrators adjudicate disputes. The experiment found that panelists generally make congenital decisions rather than fully deliberate decisions. It also contravened the conventional wisdom that panelists issue 'split the baby' decisions, i.e., to decide the case in a manner that disadvantages both claimants and

[34] See Runar Hilleren Lie, 'The Influence of Law Firms in Investment Arbitration' in Daniel Behn and others (eds), *The Legitimacy of Investment Arbitration: Empirical Perspectives* (CUP 2022) 100-132.
[35] Daphna Kapeliuk, 'The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators', 96 Cornell L. Rev. 47 (2010) 47-90.
[36] See Sergio Puig and Anton Strezhnev, 'The David Effect and ISDS' (2017) 28 EJIL 731–761.

respondents. In addition, it indicated that the quality of judgment and decision- making is not a reason to prefer judges to international arbitrators.[37]

Langford and Behn analyzed the behavior of investment treaty arbitrators with respect to the alleged 'legitimacy crisis' that has troubled the investment treaty dispute mechanism. In their 2018 piece, they found that panelists adjust their behavior in response to legitimacy critiques. Arbitrators are responsive to signals received from States, in particular those that are influential, developed, and outspoken.[38]

A 2018 research work by Polanco Lazo and Desilvestro explored whether arbitrators' previous appointments to inter-State dispute panels (arbitration tribunals or ICSID annulment committees) or their personal characteristics could affect arbitral awards. Personal characteristics included gender, language, nationality, legal studies, and profession, e.g., academic or judicial appointments, private practice, and in-house counsel. The research found that, with a few exceptions, in general, there exists no decisive influence between an arbitrator's prior involvement in inter-State disputes or personal attributes and the outcome of disputes.[39] This study did not examine the private law background of arbitrators or their experience in private arbitrations.

In his 2018 research, Strezhnev reviewed the influence of the nationality and career background of presiding panelists over the likelihood of the investor's victory in ICSID cases. This empirical research found conditional evidence of pro-investor bias. Claimants were 25% more likely to receive a favorable damage award where the tribunal president was a national of a developed economy and had previously served a government employee, in contrast to situations where the presiding panelist was purely engaged in private law practice or academic position.[40]

Donaubauer and others examined the relationship between presiding panelists' prior appointment by investors and the odds that the investor wins the dispute. It uncovered that presiding members are not neutral, and their prior appointments influence the outcome of disputes. There is a greater

[37] Susan D. Franck and others, 'Inside the Arbitrator's Mind' (2017) 66 Emory L. J. 1115-1173.

[38] See Malcolm Langford and Daniel Behn, 'Managing Backlash: The Evolving Investment Treaty Arbitrator?' (2018) 29(2) EJIL 551–580.

[39] See Rodrigo Polanco Lazo and Valentino Desilvestro, 'Does an Arbitrator's Background Influence the Outcome of an Investor-State Arbitration?' (2018) 17 Law Pract. Int. Court. Trib. 18-48.

[40] Anton Strezhnev, 'Detecting Bias in International Investment Arbitration' Paper presented at the 57th Annual Convention of the International Studies Association - Atlanta, Georgia (March 16-19, 2016).

likelihood for an investor to win an ICSID dispute if a tribunal president had previously received more nominations by claimants than respondents. It also found that this bias disappears when panelists appointed by respondent States are extremely experienced in the field or if they are more frequently appointed by respondent States than claimant investors.[41]

Studies also explore the culture of ITA. They in particular evaluate cultural differences between investment treaty arbitrators and other legal professionals. In her 2013 paper, Roberts reviews competing paradigms in ITA. She claims that the investment treaty system is dramatically distinct from any other legal discipline and, thus, its identity should not be forged by comparisons made between it and other legal fields. In particular, she argues that the pool of ITA is populated by two different groups of professionals. One group consists of PIL lawyers and the other includes specialists who hold a private law background and have experience in ICA. In her view, this has resulted in a clash of cultures in the investment treaty system.[42]

Basing his analysis on an exhaustive review of the appointments of arbitrators at ICSID since 1972, Grisel reviews how the elites of international commercial arbitration (ICA) have gained a strong and growing position in investor-State arbitration, while there are considerable structural differences between the two disciplines. He concludes that members of these two pools of arbitrators significantly overlap, and claimant investors enormously contribute to the creation of an investment arbitration community that shares key features with the pool of ICA. Further, these elites use similar social strategies in both fields to secure legitimacy.[43]

The interplay between ITA and international human rights and arbitrators' perception of these two disciplines of PIL have particularly attracted widespread attention. Commentators criticize investment treaty arbitrators for how they deal with situations of human rights in their decisions. Simma opines that the foreign investment arbitration profession has a degree of reticence vis-a-vis human rights. In his opinion, this barrier to reconciliation between these two branches of PIL might have its root in 'the investment arbitrators' genes'. In his opinion, this is because a large proportion

[41] Julian Donaubauer, and others, 'Winning or Losing in Investor-to-State Dispute Resolution: The Role of Arbitrator Bias and Experience' (2018) 26(4) Rev. Int. Econ. 892-916.
[42] See Anthea Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' (2013) 107(1) AJIL 45-94.
[43] See Florian Grisel, 'Marginals and Elites in International Arbitration' in Thomas Schultz and Federico Ortino (eds), *Oxford Handbook of International Arbitration* (OUP 2020) 260–282.

of arbitrators have expertise in private or commercial law rather than in public law or PIL. Arbitrators with a private or commercial law background may characterize human rights as political disturbance interfering with their 'purely legal' autonomous discipline which has its foundations in neoliberal thoughts.[44]

Hirsch discusses the social interactions between the investment treaty arbitrators and human rights communities and their respective legal cultures. In his view, the analysis of such interactions suggests that there exists a considerable socio-cultural distance between the two communities. He claims that a deep-rooted tension between these communities has influenced the disinclination of arbitrators to accord a proper weight to human rights considerations in their decisions.[45]

A survey examining investor-State awards in which human rights were invoked concluded that arbitrators selectively consider human rights values in their decisions. It found that arbitrators are generally more open to human rights arguments when issues of due process rights and as principles of procedural fairness are involved than when a party bases its arguments on substantive human rights (e.g., indigenous rights or the right to water). The study also uncovered an exception to this general approach - arbitrators are more open to the consideration of substantive human rights when the right to property is at issue.[46]

Another study examined arbitrators' use of language when characterizing 'rights' of foreign investors. It revealed that arbitrators characterize investors' claims as 'rights' in general and property rights in particular and concluded that this approach places human rights considerations at a structural disadvantage in investment treaty disputes and results in granting less weight to human rights claims in their decision-making.[47]

The *ad hoc* appointment mechanism and in particular whether arbitrators are indifferent in their decision-making have created heated debates among scholars. There is a rich literature on the

[44] See Bruno Simma, 'Foreign Investment Arbitration: A Place for Human Rights?' (2011) 60(3) ICLQ 576-577.
[45] See Moshe Hirsch, 'The Sociological Dimension of International Arbitration: The Investment Arbitration Culture' in Thomas Schultz and Federico Ortino (eds), *Oxford Handbook of International Arbitration* (OUP 2020) 718-739.
[46] See Vivian Kube and Ernst-Ulrich Petersmann, 'Human Rights Law in International Investment Arbitration' (2016) 11 AJWH 65-114.
[47] Tomer Broude and Caroline Henckels, 'Not all Rights are Created Equal: A Loss-Gain Frame of Investor Rights and Human Rights' (2021) 34(1) Leiden J. Int. L. 93-108.

appointment of arbitrators, though only a small number of studies have tested the impartiality of arbitrators against empirical evidence.

In 2009, Van den Berg examined dissenting opinions issued in investment arbitrations to determine whether party-appointed arbitrators are biased. The results were thought-provoking. It revealed that nearly all dissenting opinions issued by party-appointed arbitrators supported the position of the party that appointed the arbitrators, either fully or partially.[48]

In a study, Kapeliukt analyzed the decision patterns of repeatedly appointed arbitrators. She argued that empirical evidence dismisses the conventional perception that repeat appointments affects arbitrators' inclination toward issuing compromise decisions and that evidence refutes the argument that repeat arbitrators are biased. She further concluded that repeat panelists are less averse to extreme outcomes compared to arbitrators appointed by the parties.[49]

In a 2012 piece, Van Harten employed the method of content analysis to test hypotheses of systemic bias in ITA. The results showed that panelists tend to side with the position of investors rather than the States. Also, arbitrators are more inclined to the position of a certain group of claimants. Moreover, arbitrators are more likely to demonstrate sympathy toward the position of investors from major capital exporting countries in the West compared to the claims of investors from other countries.[50] In a 2016 study, he reported on this issue. The results of this analysis revealed that arbitrators generally tend to endorse claimants rather than respondents. Panelists in general were more likely to side with the position of a certain class of claimants, i.e., those from major capital exporting countries in the West, than other claimants. Furthermore, arbitrators tend to favor one specific respondent State, i.e., the U.S., over other respondent States. While acknowledging that the study had significant limitations, Van Harten concluded that the evidence on its face supports the argument that there exists a systematic bias in ITA.[51]

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[48] Albert Jan van den Berg, '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* (Brill 2011) 821–843.

[49] Daphna Kapeliuk, 'The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators' (2010) 96 Cornell L. Rev. 47-90.

[50] See Gus Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration' (2012) 50 Osgoode Hall Law J. 211-268.

[51] See Gus Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication (Part Two): An Examination of Hypotheses of Bias in Investment Treaty Arbitration' (2016) 53 Osgoode Hall Law J. 540-586.

In a 2022 study, Kapeliuk evaluated 118 individual opinions including dissenting opinions of investment arbitrators. She examined whether in legal education backgrounds of the presiding chair, be it a collegial jurisdiction or an individualist jurisdiction, affect the frequency of dissents. The results indicated that differences in legal training of the presiding member are unrelated to arbitrators' tendency to render individual opinions. She argued that the relationship between the dissenting party-appointed arbitrator and the appointing party is the main driver for him or her to issue a dissenting opinion. She also concluded that, except for dissents issued by tribunal chairs, all dissenting opinions favored the party that appointed the dissenting panelist.[52] While this study covered a smaller number of opinions of arbitrators than those explored in Chapter 2 of this essay (118 opinions compared to 250 opinions - dissenting, concurring or separate), its conclusion with respect to the correlation between dissenting opinions and appointments aligns with the findings of our examination in Chapter 2.

While the present work differs from the scholarly publications discussed above, it contributes to the existing empirical literature on ITA arbitrators. It continues van den Berg's 2009 research and conducts a thorough analysis of 250 opinions of arbitrators to determine if the conclusions of this analysis reflect the current situation of dissenting opinions. Further, there is no experimental inquiry on the relationship between high or excessive appointments from one disputing 'side' and the voting behavior of arbitrators. This study assesses the decision-making behavior of arbitrators who received high or exclusive appointments from one disputing 'side', but not both, to uncover if these panelists tend to favor the appointing 'side' over the other 'side'. Another contribution of this treatise to the literature is the assessment of who sits at ICSID and what characteristics they have. Using quantitative data, it reviews the evolution of the attributes of the ICSID pool of panelists between 1972 to 2019. This work also includes an empirical examination of disqualification decisions issued at ICSID and examines the engagement of unchallenged arbitrators and the ICSID Chairman in reviewing challenge decisions. Finally, the academic scholarship has paid little attention to the position of States on arbitrators' qualifications and behavior. This research endeavors to remedy this and offer a thorough examination of the positions

[52] See Daphna Kapeliuk, 'Dissents in investment Arbitration: On Collegiality and Individualism' in Daniel Behn and others (eds), *The Legitimacy of Investment Arbitration: Empirical Perspectives* (CUP 2022) 159-168.

of States on the conduct and qualifications of ITA panelists including by reviewing States' treaty-making practice.

III) Questions, Methodology, and Structure of the Thesis

A) Research Questions

This research seeks answers to a few questions about investment treaty arbitrators that form the pillars of this project. These are:

- How do arbitrators interact with other participants in investment treaty disputes?
- Are there any correlations between appointments and the voting behavior of dissenting panelists or frequent panelists who receive high or exclusive appointments only from one disputing 'side'?
- What are the characteristics of ICSID panelists and how has the ICSID community of panelists evolved over the past few decades?
- What are the deficiencies of the ICSID disqualification mechanism?
- What are the deficits of the *ad hoc* appointment mechanism?
- How will the ongoing reforms at the institutional and State levels reshape the qualifications and behavior of arbitrators?

B) Research Methodology

This research follows an evidence-based approach to the qualifications and conduct of ITA panelists. It endeavours to answer the above questions on the basis of the existing evidence and 'what's out there', and its arguments and conclusions are limited to what is supported by the data currently available. The scope of the research is restricted to challenges arising out of the qualifications and conduct of panelists. It does not address other challenges that ITA, as a field, currently faces, e.g., interpretations of substantive clauses of investment treaties, excessive awards in damages, and criticism against ITA itself, and where appropriate, due reference is made to other scholarly works.

Testing investment treaty arbitrators presents a significant challenge both in terms of the availability of data and inferences that can be made based on them. A cautious approach is followed during the data collection and data analysis phases. The conclusions arrived at are based

on the currently available public data, and because of the limits posed by the fact that not all the information is publicly available, the availability of new data may affect the findings of this research.

To develop answers to the questions raised above, this study uses different methods for the conduct of the empirical research for the purposes of Chapters 2, 3, and 5. Assessing the attributes of ICSID panelists and exploring ICSID disqualification decisions are conducted primarily by using quantitative data. The content analysis method is used for examining the voting behavior of arbitrators and the treaty practice of States with respect to the qualifications and conduct of arbitrators.

C) Research Structure

Chapter 1 explores the historical foundation of the existing rules that regulate investment treaty arbitrators. It examines the competencies of arbitrators in the early history and old inter-State disputes and reviews the developments that occurred. It discusses the transformation of arbitration from a system of social moralities to a formal control mechanism and outlines challenges that the contemporary pool of investment treaty arbitrators experience.

Chapter 2 investigates how the social behavior of arbitrators is likely to decrease the confidence in the investment arbitration system and, in some instances, jeopardize the very foundations of the system. It evaluates different patterns of social behavior of arbitration practitioners and how the network of investment treaty arbitrators functions. Building upon empirical data, it then analyzes the extent that party-appointed arbitrators support the position of their appointing party and if there is a relationship between appointments and voting behavior of arbitrators. Further, it outlines certain legitimacy concerns arising out of the party appointment mechanism and analyzes the data collected for this purpose.

Using empirical evidence, Chapter 3 seeks answers to the question: ‘who are ICSID arbitrators?’. It explores the diversity of ICSID panelists in terms of gender, geographical distribution, and development status and demonstrates long-standing challenges the institution has faced in this regard. It also discusses the educational backgrounds of panelists including their legal level of education and field of expertise. It further studies panelists' experience in private arbitrations and inter-State disputes. It then explores the occupational background of panelists and their connection

to law firms. Finally, it evaluates the practice of double-hatting by ICSID arbitrators. The annex to Chapter 3 includes graphical representation of data.

Chapter 4 outlines the requirements for impartiality and independence of adjudicators within the ICSID framework and developments that occurred at ICSID including the draft Code of Conduct for Adjudicators in International Investment Disputes. In particular, it examines the practice of double hatting at ICSID and investigates panelists' duty to disclose.

Chapter 5 weighs up the ongoing shift in the treaty-making practice of States with respect to the personal and professional qualifications of arbitrators. It discusses the inclusion of certain requirements for arbitrators in the new generation of investment treaties and explores the evolution of investment treaties in removing bias from arbitrators. Finally, it assesses the prospects of the creation of a permanent investment court and the implications of the ongoing structural reforms on arbitrators.

Chapter 1

Investment Treaty Arbitrators: The Origins, History and Evolution

I) Introduction

Historically, procedures and standards regarding the qualifications and behaviour of international arbitrators were imported from domestic laws.[1] Nevertheless, the content and boundaries of these procedures and standards were largely unclear. Early arbitration treaties contained some requirements for the competence of international arbitrators. These treaties expressly required arbitrators to be impartial,[2] contrary to the requirement for independence which was later slowly introduced to the system.

During the early history of international arbitrations, arbitrators were generally selected from "jurists of repute",[3] and instances of arbitrator's unacceptable behavior or misconduct[4] were

[1] For instance, see the discussions of issues of selection, capacities and powers of arbitrators made by Watson in his 1846 book. William Henry Watson, *A Treatise on the Law of Arbitration and Awards* (2nd edn, Sweet, Stevens and Norton & Maxwell and Son 1846).

[2] See the Jay Treaty, 19 November 1794, Articles 5 and 6.

[3] See, e.g., Treaty between the United States and the United Kingdom of Great Britain and Ireland, 11 January 1897, Article III, Convention between Canada and the United States relating to Certain Complaints arising from the Operation of the Smelter at Trail, British Columbia, 15 April 1935, Article II. No general limitation existed as to the professional capabilities of arbitrators. Indeed, it was not uncommon for heads of States, diplomats and Popes to sit as sole empires to rule on inter-State disputes. Currently, there is no rule of customary international law preventing disputing parties from selecting non-legal practitioners as arbitrators. See e.g., John Hyde, 'International Arbitration: Its Difficulties and Advantages' (1873) A Paper Read at a Conference of Ministers to Consider the Subject of International Arbitration, Held at Manchester, 30 September 1873. Also, there was no prohibition in the Law of England if two private parties decided to choose, for instance, an architect as the arbitrator to rule on their dispute. See The British Architect, 'Independent Arbitrator' (20 August 1886), printed in *The British Architect: A Journal of Architecture and the Accessory Arts*, vol 26 (1886) 176.

[4] Misconduct is a vague notion. It is a moral concept, and its types vary. However, it bears a legal meaning as well. The Oxford Dictionary of Law defines misconduct as incorrect or erroneous conduct. Also, according to the American Heritage Dictionary describes, it is a behavior that is not conforming to prevailing standards or laws. See Elizabeth A. Martin (ed), *Oxford Dictionary of Law* (5th edn, OUP 2003), s.v. 'misconduct'; Anne H. Soukhanov and others (eds), *The American Heritage Dictionary of the English Language* (3rd edn, Houghton Mifflin 1992), s.v. 'misconduct'. For the purpose of the present research, it can be defined as behavior that is professionally or ethically improper or unacceptable from an arbitration practitioner. 'Misconduct' can be understood as the most serious instances of improper and unacceptable actions, though not all such acts may necessarily be in breach of legal requirements. The term does not cover any errors in law or reasoning but focuses on disorderly conduct of arbitrators that is ethically unacceptable from a professional practitioner. See also Barbara Alicja Warwas, *The Liability of Arbitral Institutions: Legitimacy Challenges and Functional Responses* (T.M.C. Asser Press 2016) 229.

extremely rare.[5] Though it was widely acknowledged that "[i]t was extremely difficult to find an arbitrator or arbitrators of whose absolute, rigid, judicial impartiality there could be no reasonable degree of doubt".[6]

Conventional generations of investment treaties incorporating arbitration clauses did not follow the practice of States in drafting treaties for the settlement of inter-State disputes where certain requirements were imposed on arbitrators. Traditionally, investment treaties were drafted to provide specific assurances to foreign investors, rather than imposing obligations and duties on arbitrators. This approach was a response to the growing cross-border economic activities of private actors after the Second World War. Investment treaties were not designed to include provisions on the competencies and conduct of arbitrators.

The governance of these matters was left for *ad hoc* or institutional procedural rules. In this approach, the arbitration community was entrusted with governing and exercising control over arbitrators. Nevertheless, the community has allegedly faced challenges to properly regulate its members. To borrow Veeder's words, the inability of the arbitration community to self-regulate has led to a 'reputational disaster'.[7]

The purpose of this chapter is to elucidate the origins, history, and evolution of investment treaty arbitrators. It offers a historical background about the governance of this class of arbitration practitioners and the conception of contemporary problems. This chapter first reviews the early foundations of the existing rules that govern investment treaty panelists. It examines the competencies of arbitrators in the early history and old inter-State disputes. It then explores the

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It also should be noted that while during the negotiations of the ICSID Convention delegates referred to the term "misconduct" of arbitrators on various occasions, nor record has been found of an instance where an ICSID tribunal and annulment committee uses this term in the context of the discussion of the behaviour of an arbitrator, even in cases where the conduct of the arbitrator resulted in their disqualification. See, e.g., 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*, vol II-1 (ICSID Publications 1968) 166 and 224; 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*, vol II-2 (ICSID Publications 1968) 851-852 and 854.

[5] See Hersch Lauterpacht, *The Function of Law in the International Community* (OUP 2011) 219-220 (discussing the proven corruption of some members of the United States - Venezuela Mixed Commission that resulted in a mutual agreement of the disputing parties on a new dispute settlement agreement).

[6] United States Department of State, *Papers Relating to Foreign Relations of the United States* (Government Printing Office 1871) 459-460.

[7] Leo Szolnoki, 'London: Veeder Backs Paulsson's Call to Self-Regulate' *Global Arbitration Review* (27 March 2014).

developments that occurred over the past century. It further assesses the transformation of investor-State arbitration from a system of social moralities to a formal control mechanism.

II) International Arbitrators: The Origins

The competencies and duties of contemporary international arbitrators, in particular investment treaty arbitrators, find their origin in early history dating back to ancient Greek and Rome. Although the nature of the relations between city-states and nations from ancient Greek to the Early Modern Era remained at a nascent stage, there existed primitive norms that governed arbitrators deciding controversies between city-states and nations. Parallel to arbitrations between city-states and nations, private arbitration, especially in ancient Rome, played a role in formulating the competencies and responsibilities of modern international arbitrators.

From a historical point of view, there existed certain essential requirements for an arbitrator to be qualified for selection and for their decisions to be valid. Arbitrators in private and inter-State disputes shared some key features. Notably, arbitrators were selected from persons who were considered impartial and reputable. As to their power, they possessed an authority that went beyond the law allowing them to decide controversies based on the principles of fairness, equity, and good conscience.[8]

[8] John T. Morse, *The Law of Arbitration and Award* (Little, Brown 1872) 217. The concepts of equity and fairness and their differences are ambiguous, and they do not bear the exact same meaning in different places and times. In its general meaning the term equity in international dispute settlement refers to fairness and reasonableness in the administration of justice. Black's Law Dictionary defines the term fair as being "[i]mpartial; just; equitable; disinterested". The notion of fairness in international adjudication refers to the state of affairs when a dispute is reviewed and decided according to the principles of natural justice such as the equality between the disputing parties or impartiality of adjudicators. See Bryan A. Garner, *Black's Law Dictionary* (9th edn, West 2010) 618 and 674. See also Ruth Lapidoth, 'Equity in International Law' (1987) 81 Proceedings of the Annual Meeting (American Society of International Law) 138-147; S. K. Chattopadhyay, 'Equity in International Law: Its Growth and Development', 5 Ga. J. Int'l & Comp. L. 381 (1975), Thomas M. Franck, *Fairness in International Law and Institutions* (OUP 1998), and Catharine Titi, *The Function of Equity in International Law* (OUP 2021).

Prior to the emergence of the contemporary nation-State system,[9] the conditions expected from adjudicators were part of natural law.[10] With the Treaty of Westphalia and emancipation of the law of nations from natural law, the long-standing normative expectations demanded from arbitrators were imported into the positive law[11] that currently governs the relations between sovereign States.[12] These developments form the basis for the competence and behaviour of the contemporary international arbitrator. In particular, it shows that the qualifications and conduct of arbitrators were not entirely unsupervised.

A) Qualifications of Arbitrators from Ancient Greek to Modern Era

The qualifications of arbitrators are as old as arbitration dating back to classical antiquity, a period when civilizations of ancient Greece and Rome flourished. The legacy of early history arbitrations is that impartiality, fairness, and sound reputation were essential characteristics of those selected as arbitrators.

Recourse to arbitrators was a method for settling controversies between Greek city-states as a substitute for war. In ancient Greek, arbitrators were expected to discharge their duties in the most

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[9] The Treaty of Westphalia in 1648 ending a thirty-year war in Europe founded the basis for the contemporary concept of State. See David Armstrong, *Revolution and World Order: The Revolutionary State in International Society* (Clarendon Press 1993) 12-41; Heinz Duchhardt, 'Peace Treaties from Westphalia to the Revolutionary Era' in Randall Lesaffer (ed), *Peace Treaties and International Law in European History: From the Late Middle Ages to World War One* (CUP 2004) 45-58; Jack L. Schwartzwald, *The Rise of the Nation-State in Europe: Absolutism, Enlightenment and Revolution, 1603-1815* (McFarland 2017); Will Hickey, *The Sovereignty Game: Neo-Colonialism and the Westphalian System* (Springer 2020) 1-40.

[10] Natural law is considered as a universal system of law that is based on human nature and ethical values, rather than positive law, i.e., the law enacted by the society. See Alessandro Passerin d'Entrèves, *Natural Law: An Introduction to Legal Philosophy* (Hutchinson's University Library 1951); Knud Haakonssen (ed), *Grotius, Pufendorf and Modern Natural Law* (Dartmouth 1999); Tim J. Hochstrasser, *Natural Law Theories in the Early Enlightenment* (CUP 2000).

[11] Contrary to natural law, positive law refers to a body of human-made law enacted by a political entity, rather than by human nature and morals. In the context of international relations, it means that international rules are created through express or implicit agreements made between sovereign States. However, these two often overlap. See Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (CUP 2005) 63-77; James Bernard Murphy, *The Philosophy of Positive Law: Foundations of Jurisprudence* (Yale University Press 2005); Alan Boyle and Christine Chinkin, *The Making of International Law* (OUP 2007); Lauterpacht (n 5); Rain Liivoja and Jarna Petman (eds), *International Law-making: Essays in Honour of Jan Klabbers* (Routledge 2013).

[12] With the conclusion of the Treaty of Westphalia, the discipline that governed the relationships between sovereign entities emancipated itself from natural law. Initially, the term 'law of nations' was used. Displeased with this concept, the English philosopher Jeremy Bentham coined the term 'international law' which has become a dominant term. See Cornelis van Vollenhoven, *The Three Stages in the Evolution of the Law of Nations* (Springer Netherlands 1919); Mark W. Janis, 'Jeremy Bentham and the Fashioning of 'International Law'' (1984) 78(2) Am. J. Int'l L. 405-418; Simone Zurbuchen (ed), *The Law of Nations and Natural Law 1625–1800* (Brill 2019).

solemn manner and conduct the dispute meticulously.[13] In a dispute with the Athenians in about 340 B.C., Philip of Macedon demanded a peaceful resolution of the dispute by arbitrators from an impartial city-state, though his proposal was rejected because no neutral arbitrator with an uncorrupt mind could be found.[14] Holm believed that an impartial arbitrator could be found and the real reason for refusing referral to an arbitrator was that the warring party preferred battle over arbitration.[15] Mahaffy stated that the Rhodians from the Greek city-state of Rhodia were acknowledged arbitrators and found to be "thoroughly just and trustworthy in their decisions".[16]

Influenced by the Greeks, the use of arbitrators was a widespread practice for settling private disputes in ancient Rome,[17] where the appointment of sole arbitrators was mainstream.[18] Unlike arbitrators in ancient Greek whose neutral characteristic is highlighted by commentators, little is said about this quality of arbitrators in the history of the Roman Empire. In this period, due to deficiencies in the state court system, commercial and non-commercial disputes between private citizens were frequently referred to as canonical jurists and Christian bishops.[19] Foreign controversies were initially adjudicated by the Roman senate, and later by the emperor who sought to establish a universal authority.[20]

Trusted and reputed adjudicators were relied upon in arbitrations during the Middle Ages (from the fifth to the late 15th centuries). In this period, acting as mediators between warring parties and to retain their political influence in Europe, Popes displayed an appearance of impartiality and underlined their neutral positions.[21]

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[13] John Bassett Moore, *History and Digest of the International Arbitrations to which the United States Has Been a Party* (U.S. Government Printing Office 1898) 4823.

[14] Thomas Leland, *The History of the Life and Reign of Philip King of Macedon*, vol 2 (3rd edn, William M'Kenzie 1794) 298-297.

[15] Adolf Holm, *The History of Greece from Its Commencement to the Close of the Independence of the Greek Nation: The Fourth Century B.C. up to the Death of Alexander* (Macmillan 1907) 266-267.

[16] John Pentland Mahaffy, *Greek Life and Thought* (Macmillan & Company 1887) 344.

[17] See Louise E. Matthael, 'The Place of Arbitration and Mediation in Ancient Systems of International Ethics' (1908) 2(4) Class. Q. 241-264.

[18] Alfonso Gómez-Acebo, *Party-Appointed Arbitrators in International Commercial Arbitration* (Wolters Kluwer 2016) paras 2.10-2.12.

[19] Gary B. Born, *International Commercial Arbitration* (3rd edn, Wolters Kluwer 2021) 28-29.

[20] Manuel Indlekofer, *International Arbitration and the Permanent Court of Arbitration* (Wolters Kluwer 2013) 13.

[21] See Christian Scneider, ''Types' of Peacemakers: Exploring the Authority and Self-Perception of the Early Modern Papacy' in Laura Kounine and Stephen Cummins (eds), *Cultures of Conflict Resolution in Early Modern Europe* (Taylor & Francis 2017) 77-104.

An instance of referring controversies to an arbitrator based on his qualifications was a dispute between the Scottish crown and his principal competitors in the late 13th century. As a historian wrote, "[t]he Scots were ... little qualified to discuss the claims of their two competitors; in consequence of which the Scottish parliament resolved to refer the dispute to the king of England, who had already shown himself as an able and impartial arbitrator in several contentions between different princes of Europe, and who was sufficiently powerful to compel the unsuccessful claimant to submit to his decision".[22]

Another occasion highlighting the quality expected from adjudicators in this period was a dispute in the early 14th century where arbitration was proposed to settle controversies over the recovery of the Holy Land. The proposed court was to be composed of nine men whose character was beyond reproach. It was proposed that each disputing party should nominate three persons, in addition to three ecclesiastical umpires. In his treatise, *The Recovery of the Holy Land* written between 1305 and 1307 A.D., Pierre Dubois suggested that umpires "should be] men of substance, and of such character that it would be unlikely that they could be corrupted by love, hatred, fear, greed, or by other means".[23] (bracket in the original translated text)

Publications of jurists in the early Modern Era (from 1450 to 1750A.D.) which were the main source of the law of nations also attest that there existed fundamental principles that governed the qualifications of arbitrators. As Pufendorf expressed in his 1729 book, "it is manifest that a man who has any interest in the success of either party, ought not to be an arbitrator between them; for fear he should not be able to observe exactly that indifference and impartiality which he ought".[24]

With the creation of a new nation-state system, the same fundamental principles formed the basis for the selection of international arbitrators. According to Morse, the impartiality of arbitrators was considered as a fundamental requirement such that a violation of this rule could render the arbitral decision void.[25] Also, a communication of the Dominion of Canada to the United States expressly

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[22] George Frederick Raymond, *A New, Universal, and Impartial History of England from the Earliest Authentic Records and Most Genuine Historical Evidence to the End of the Present Year* (C. Cooke 1790) 167.
[23] Pierre Dubois, *The Recovery of the Holy Land, Translated with an Introduction and Notes By Walther I. Brandt* (Columbia University Press 1956) 78-79.
[24] Samuel Freiherr von Pufendorf, *Of the Law of Nature and Nations: Eight Books* (J. Walthoe, R. Wilkin, J. and J. Bonwicke, S. Birt, T. Ward, and T. Osborne 1729) 554.
[25] Morse (n 8) 107.

stated that possessing "a high reputation for judicial and moral qualities" was a reasonable eligibility criterion for the selection of arbitrators.[26]

Another development in the law of nations was the wearing away of the concept of equity in international dispute settlement. During the eighteenth century, the notion of equity on which basis arbitrators had the authority to decide disputes became subject to erosion. As Kotuby and Sobota expressed, the main reason was that notions of equity were considered too malleable to form a lasting foundation for an emerging international dispute settlement system.[27]

As an alternative to equity, rules of customary law or treaty law substituted the notions of equity. With the positivist doctrine becoming the dominant foundation of the law of nations, not only the decision-making power of international arbitrators was transformed but also inter-State agreements, such as the Jay Treaty of 1794, expressly included qualifications for arbitrators. These treaties triggered the early development of arbitrator control rules in modern treaty practice.

Parallel to developments at the inter-State level during the modern period, US domestic courts developed case laws on the conduct and qualifications of arbitrators deciding private disputes.[28] Certain principles of the US legal system such as the impartiality of arbitrators correspond to the general principles incorporated into the law of nations. It was a common practice in the 1800s that private citizens in the US referred their disputes to arbitrators who were free from bias. In 1875 a US court ruled that "[a] person who accepts the office of an arbitrator, should approach his duty with clean hands and a pure heart".[29] In the same line, the US court of equity held that it would "interfere and set aside an award of arbitrators, whenever such manifest and palpable injustice is done as to show fraud, misconduct or evident mistake on the part of the arbitrators".[30] There was little reference to the term 'independence' in academic writings of this period when they discussed the requirements of arbitrators.

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[26] *Correspondence with the Government of Canada in Connection with the Appointment of the Joint High Commission and the Treaty of Washington* (William Clowes & Sons 1872) 83.

[27] Charles T. Kotuby and Luke Sobota, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes* (OUP 2017) 4.

[28] See John M. Bell, *Treatise on the Law of Arbitration in Scotland* (2nd edn, T. & T. Clark 1877) 19-30.

[29] *Beattie v. Hilliard*, 55 N.H. 428 (N.H. 1875) reprinted in John Shirley, *55 Reports of Cases in the Superior Court of Judicature of New Hampshire* (Republican Press Association 1876) 429.

[30] *Tracy v. Herrick*, 25 N.H. 381 (N.H. 1852). See also other cases mentioned in William A. Wait, *A Treatise Upon Some of the General Principles of the Law* (W. Gould & Son 1879) 448-554.

Similarly, there existed established rules in the English legal system on the competencies and authority of arbitrators. On the qualifications of arbitrators in England, Russell writes that "[i]t is hardly necessary to state, that in conducting the reference, the first duty of the arbitrator is to be incorrupt and impartial. If there be any ground for imputing corruption, fraud, or partiality to him, the award cannot stand".[31] British courts developed jurisprudence on the criteria for setting aside arbitration awards due to misconduct of arbitrators. In his 1861 treatise, Archbold wrote that for a "court to interfere with the award on the ground of misconduct of the arbitrator … something more than mere suspicion [was required]".[32] Thus, English courts were able to annul awards where there was sufficient evidence demonstrating the arbitrator's misconduct.

B) International Arbitrators in Early Treaties

The idea that the law of nations endorses the right of a national State to provide diplomatic protection to its subjects including via dispute settlement process was a turning point regarding the qualifications, conduct, and power of international arbitrators.[33] Particularly, in the 19th century, the use of international arbitrators emerged as a common, if not prevailing, practice for the settlement of inter-State disputes including disputes relating to the treatment of foreign nations, and the role of arbitrators received international recognition. Dispute settlement treaties granted broad authority to arbitrators,[34] while a smaller number of these treaties also incorporated

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[31] Francis Russell, *A Treatise on the Power and Duty of an Arbitrator, and the Law of Submissions and Awards* (William Benning & Co 1849) 110.

[32] Ibid. 110-116. See also John Frederick Archbold, *The Law and Practice of Arbitration and Award, with Forms* (W. H. Bond 1861) 53-88.

[33] Vattel was first to suggest the idea of diplomatic protection: "[w]hoever uses a citizen ill, indirectly offends the State, which is bound to protect its citizen". Emerich de Vattel, *The Law of Nations: Or, Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* (G.G. and J. Robinson 1797) 162. In a period with frequent instances of civil wars and subsequent confiscations of, or damages to, the properties of aliens, the protection of citizens abroad gradually became a serious concern for European States. As the law of nations was not sufficient in offering desired protections to foreign citizens, the idea of diplomatic protection led these States to enter into mutual amity and commerce agreements that included provisions granting protections to assets and properties of nationals of one contracting party in the territory of the other. For instance, the Treaty of Amity and Commerce between the United States and Russia (1785) offered various protections to properties of citizens of each contracting party in the territory of the other (Articles 7 and 10). See Thomas Herty, *A Digest of the Laws of the United States of America. Being a Complete System, Alphabetically Arranged of All the Public Acts of Congress Now in Force* (W. Pechin 1800) 497-498, and also other US treaties reprinted therein. For a discussion of the issue in the early 20th century see Edwin M. Borchard, 'Basic Elements of Diplomatic Protection of Citizens Abroad' (1913) 7(3) Am. J. Int'l L. 497-520.

[34] Paul de Auer, 'The Competency of Mixed Arbitral Tribunals' (1927) 13 Problems of Peace and War, Papers Read before the Society in the Year 1927 xix; John W. Foster, *Arbitration and The Hague Court* (Riverside Press 1904) 76.

competency requirements for arbitrators. These developments were mainly due to the treaty practice of a few States in the settlement of international disputes.

The Jay Treaty of 1794 between Britain and the United States is the bedrock of the contemporary principles governing international arbitrators.[35] The Treaty laid down core components for the competencies and behaviour of arbitrators. Article 5 of the Treaty provided that the three members of the commission tasked with addressing boundary disputes "shall be sworn impartially to examine and decide" the disputed issue referred to them.[36] The Treaty implicitly recognized the right of a disputing party to dispute the appointment of an arbitrator in case the arbitrator lacked the impartiality requirement.

The Jay Treaty only included the requirement of impartiality of party-appointed arbitrators and the presiding commissioner. This term refers to a state of mind, i.e., freedom from bias in decision-making. The independence of arbitrators was not expressly mentioned in the Treaty, likely because States normally preferred to appoint their officials as arbitrators expecting them to elaborate their government's positions to their co-arbitrators. As Derains and Schwartz point out, in the early ages of international arbitration, the degree of independence required from an arbitrator was not necessarily the same as that expected from a judge.[37]

Further, the notion of impartiality in Article 5 of the Jay Treaty was not considered broad enough to encompass the meaning of independence. The definition of these two terms in dictionaries published at that time supports this understanding. Johnson's 1799 Dictionary of English described the word 'impartial' as "[e]quitable; free from regard to party; indifferent; disinterested; equal in distribution of justice; just", while the expression 'independent' was explained as "not depending; not supported by other; not relying on another; not controlled... [n]ot relating to another else".[38] Also, Webster's 1842 dictionary defined the word 'impartial' as "not biased in favour of one party

[35] The Jay Treaty Commissions dealt with disputes over wartime debts and the American–Canadian boundary. See Richard B. Lillich, 'The Jay Treaty Commissions' (1963) 37(2) St. John's L. Rev. 260-284.

[36] Treaty of Amity, Commerce, and Navigation between His Britannick Majesty and The United States of America, November 19, 1794, reprinted in *Treaties and Conventions: Concluded Between the United States of America and Other Powers, Since July 4, 1776* (U.S. Government Printing Office 1871) 321.

[37] Yves Derains and Eric A. Schwartz, *A Guide to the ICC Rules of Arbitration* (2nd edn, Kluwer Law International 2005) 120.

[38] Samuel Johnson, *A Dictionary of the English Language*, Vol. I (W. Strahan 1773), s.v. 'impartial' and s.v. 'independent'.

more than another; indifferent; unprejudiced; dis-interested". And the term 'independent' was defined as "not subject to the control of others; not subordinate, ...not relying on others".[39]

The five commissioners appointed under the Jay Treaty were required to meet further criteria. Additional requirements were set out under Article 6 of the Treaty. These requirements included the running of the arbitration in an honest, diligent, and careful manner, and refraining from acting as adjudicator when the arbitrator was probably "personally interested" in a given dispute.[40]

The Jay Treaty is the first international dispute settlement instrument in the modern history of international arbitration that prohibited conflict of interest. Article 6 imposed obligations that related to the conduct of the arbitration proceedings. Further, they were instructed under Article 6 to decide the disputes according to both justice and equity and the law of nations. Indeed, the arbitrators were expressly authorized to go beyond the law of nations and decide the differences based on what their conscience considered as just and fair.

In 1796, the treaty concluded between Spain and the United States to settle the confiscation claims of U.S. private citizens set out similar requirements as to the qualifications and authority of arbitrators, including party-appointed arbitrators. According to Article 21 of the Treaty, the members of the Commission were required "impartially to examine and decide the claims in question according to the merits of the several cases, and to justice, equity, and the laws of Nations".[41]

Article 21 of the 1796 Treaty mainly followed the wordings of Article 5 of the Jay Treaty that required impartiality of arbitrators, while no reference was made to their independence. Similar to Article 6 of the Jay Treaty, the governing rules under Article 21 upon which the decisions of arbitrators had to be based included both the law of nations and principles of justice and equity. Nonetheless, contrary to Article 6 of the Jay Treaty, Article 21 of the 1796 Treaty did not expressly require arbitrators to forbear to act as arbitrator in any activity in which they were personally

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[39] Noah Webster, *An American Dictionary of the English Language: Exhibiting the Origin, Orthography, Pronunciation, and Definitions of Words*, Revised Edition with an Appendix (White & Sheffield 1842) 414 and 432.
[40] Treaty of Amity, Commerce, and Navigation between His Britannick Majesty and The United States of America, 19 November 1794, reprinted in *Treaties and Conventions: Concluded Between the United States of America and Other Powers, Since July 4, 1776* (U.S. Government Printing Office 1871) 322.
[41] Treaty of Friendship, Limits, and Navigation between the United States of America and the Kingdom of Spain, 27 October 1796 reprinted in *The Annual Register, or A view of the History, Politics and Literature for the Year* (*2nd edn*, J. Wright, St. John's Square 1807) 293.

interested. Further, unlike the Jay Treaty, the 1796 Treaty did not expressly incorporate the obligation of arbitrators to conduct the proceedings honestly, diligently, and carefully.

Similar requirements for arbitrators were introduced in subsequent treaties concluded between the United States and other governments in the 19th century, though the wordings of these treaties were not consistent. Article 1 of the 1839 Treaty between Mexico and the United States on the Adjustment of Claims of Citizens of the United States provided that the four party-appointed arbitrators "shall be sworn impartially to examine and decide" upon the claims submitted to them.[42] However, the Treaty did not contain any provisions on other qualifications of arbitrators such as lack of interest in the dispute or the conduct of arbitration.

Under Article II of the 1863 Treaty on the Claims of the Hudson's Bay and Puget's Sound companies, arbitrators were required to declare that they would "impartially and carefully examine and decide, to the best of their judgment and according to justice and equity, without fear, favour or affection".[43] Article II required arbitrators to be free from fear, favour, or affection to a disputing party; elements that affect the impartial qualification of an arbitrator. Unlike some treaties, the governing principles under the 1863 Treaty only include principles of justice and equity, and no reference was made to legal principles.

Similarly, Article XII of the 1871 Treaty of Washington provided that the Commissioners appointed to examine claims of companies or citizens of the United States against the British government were required to declare that "they will impartially and carefully examine and decide, to the best of their judgment, and according to justice and equity".[44] Like all other treaties concluded prior to this Treaty, the 1871 Treaty did not include a provision on the professional competency of arbitrators.

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[42] Convention for the Adjustment of Claims of Citizens of the United States of America upon the Government of the Mexican Republic, 11 April 1839, reprinted in *Treaties and Conventions: Concluded Between the United States of America and Other Powers, Since July 4, 1776* (U.S. Government Printing Office 1871) 558.

[43] Treaty for the Final Settlement of the Claims of the Hudson's Bay and Puget's Sound Agricultural Companies between Great Britain and the United States, 1 July 1863, reprinted in *United States Congressional Serial Set,* vol 3267(5) (U.S. Government Printing Office 1895) 4750. See also Article IV of the Convention for the Settlement of Claims between Chile and the United States, 7 August 1892, reprinted in ibid 4692.

[44] Treaty between the United States and Great Britain for the settlement of pending questions between the two countries, concluded at Washington, on the 8th of May 1871.

The 1891 Treaty establishing the *Behring Sea* commission introduced further developments to international arbitration in terms of both personal and professional qualifications of arbitrators. Article I of the Treaty provided that arbitrators "shall be jurists of distinguished reputation in their respective countries; and the selecting Powers shall be requested to choose, if possible, jurists who are acquainted with the English Language".[45]

The 1891 Treaty expressly required arbitrators to be with a high level of legal knowledge, excluding professionals with no legal proficiency. As an 1891 dictionary states, the term jurist at the time was meant to refer to a person "who [was] skilled in the civil law, or the law of nations. [and was] applied to those who ha[d] distinguished themselves by their writings on legal subjects".[46] In other words, the term required more than familiarity with the law, and persons selected as arbitrators were required to be legal publicists.

Further, under the 1891 Treaty, arbitrators were required to be persons recognized for their high reputation in their country of origin. Although the term 'high reputation' bears some ambiguity, it is understood to refer to a high moral personality. Article I of the Treaty required that each disputing party appoint two arbitrators, and each of the kings of France and Italy and the King of Sweden and Norway to select one arbitrator. The required qualifications were applicable to all arbitrators, whether party-appointed arbitrators or not.

The *Behring Sea* arbitration is an early example of a State raising concerns over the qualifications of persons proposed by the other disputing party as members of the arbitration commission. In that case, the US "express[ed] regret that the British Government had selected persons who seemed 'disqualified for an impartial investigation and determination of the questions submitted to them.'"[47] However, little is known about the factual grounds underlying the US' objection to the qualifications of Great Britain's appointees.

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[45] Treaty between Great Britain and the United States of America on Arbitration Respecting the Seal Fisheries in Behring Sea (1892) reprinted in Canada Department of Marine, *Annual Report*, vol 25 (S.E. Dawwson 1893) 44.
[46] Henry C. Black, *A Dictionary of Law* (West Publishing Company 1891) 664. See also William C. Anderson, *A Dictionary of Law* (T.H. Flood 1893) 583.

[47] *Proceedings of the Tribunal of Arbitration, Convened at Paris, Under the Treaty Between the United States of America and Great Britain, Concluded at Washington, February 20, 1892, for the Determination of Questions Between the Two Governments Concerning the Jurisdictional Rights of the United States in the Waters of Bering Sea*, Vol. 7 (U.S. Government Printing Office 1895) 45-46.

The US practice in respect of arbitrators' requirements continued throughout the 20th century. For instance, the 1903 Protocol between the United States and Venezuela required commissioners and the presiding arbitrator to be impartial and decide the disputes according to justice and the provisions of the Protocol.[48] Similar to the U.S. treaties concluded in the 18th and 19th centuries, Article I of the Protocol recognized that the decision-making power of the arbitrators would extend beyond the law, and arbitrators were given a broad discretion to rule based on what they found just and fair. The article instructed the arbitrators to decide the claims on the "basis of absolute equity",[49] though the term is vague.

During the modern era, it was a common practice for states to appoint their nationals as party-appointed arbitrators. While no rule of the general international law prevents this practice as long as the arbitrator meets the required qualifications, party-appointed arbitrators have long been criticized for being biased towards claims of their appointers. As a commentator states, "from the seventeenth Century onwards, there was criticism in Europe and the United States of party-appointed arbitrators who acted rather as advocates than judges, both in arbitration between private parties and in interstate arbitration".[50] In 1875, elsewhere it was stated that "the arbitrator may be influenced in his decisions by his nationality or creed. However impartial an arbitrator may resolve to be, the question of how his decision is likely to affect his own country must in some degree inevitably bias his judgment".[51]

C) Developments in The Hague and Paris

By the late 19th century, a treaty practice on the qualifications of international arbitrators was developed. Particularly, this development was due to the policy of a few Western powers such as

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[48] Protocol of Agreement between the Secretary of State of the United States and the Republic of Venezuela for Submission to Arbitration of All Unsettled Claims of Citizens of the United States of America against the Republic of Venezuela, February 17, 1903, reprinted in Charles I. Bevans, *Treaties and other international agreements of the United States of America, 1776-1949: Vol 13, General Index: 1776-1949* (U.S. Department of State 1976) 1101-1102.

[49] In interpreting the provision, the presiding arbitrator in the *Aroa Mines* case held that equity is not restrained by any artificial rules in its application to a dispute. In his view, "[t]he way is equity, the end is justice ... if a question arises, not readily to be apprehended, wherein equity and justice differentiate, then the former must yield because the obligation of the prescribed oath is the superior rule of action". See *Aroa Mines Case (United Kingdom v. Venezuela)* (1903), RIAA, vol IX, 443-444.

[50] Gómez-Acebo (n 18) 176.

[51] [Author unknown], 'A Proposal Established to Promote the Principles of the Workmen's Peace Association' (1875) 44 The Arbitrator 3.

the United States and Great Britain to settle their disputes through arbitration,[52] alongside pursuing their gunboat diplomacy in that period. State practice on bilateral dispute settlement treaties led to the conclusion of the first multilateral dispute settlement treaty, i.e., the 1899 Hague Convention for the Pacific Settlement of International Disputes, which established the Permanent Court of Arbitration (PCA). While misnamed as the institution is an administrative organization that provides support to *ad hoc* arbitrators with no permanent forum and standing adjudicators, the PCA is commissioned to facilitate inter-State arbitration.

The 1899 Hague Convention triggered the early stages of the institutionalization of international arbitration. With the creation of the institutional arbitration mechanisms, disputing parties and arbitrators did yield some of their autonomy to the arbitration institution such as rules of procedure or administrative tasks.[53] Arbitration institutions emerged as facilitators with disputing parties maintaining the freedom to amend or modify the governing rules of arbitration such as the method for the appointment of arbitrators, qualifications of arbitrators, and rules of procedure.

The 1899 Hague Convention was also a pioneer multilateral treaty in imposing personal qualifications and expertise requirements on arbitrators. The Convention provided for specific eligibility requirements for individuals included in the general list of PCA arbitrators that go beyond the impartiality and independence conditions. Article 23 of the Convention expresses that arbitrators must be "of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of an arbitrator".[54]

While the terms used in Article 23 of the 1899 Convention are not sufficiently unequivocal, the broad expressions indicate that individuals nominated to the list should be persons of high reputation with PIL proficiency who make themselves available to perform the duties required from an arbitrator. Further, the term "of the highest moral reputation" encompasses the

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[52] *Report of the Annual Lake Mohonk Conference on International Arbitration*, vol 2 (The Lake Mohonk Arbitration Conference 1986) 61. By the early 19th century, approximately 150 inter-State disputes were referred to arbitration with disputes involving the U.S representing more than 50 of all the cases. See Charles H. Butler, *The United States is a Nation - Historical Review of the Treaty-making Power of the United States*, vol I (Banks Law Publishing Company 1902) 165.

[53] Lord Michael Mustill, 'Arbitration - History and Background' (1989) 6(2) J. Int. Arbitr. 50.

[54] Article 23 of the 1899 Convention states: "Within the three months following its ratification of the present Act, each Signatory Power shall select four persons at the most, of known competency in questions of PIL, of the highest moral reputation, and disposed to accept the duties of Arbitrators". This provision remained unchanged in the 1907 Hague Convention (Article 44).

requirement of impartiality. Indeed, it is assumed that the impartiality of arbitrators was considered, in the eyes of the drafters of the Convention, as the core component of the personal competencies required from arbitrators. As it was stated elsewhere, the establishment of a permanent international court would be futile, unless "it were composed entirely of disinterested and impartial judges".[55] Further, early PCA arbitrators highlighted that they would act and decide disputes "with impartiality and care".[56]

However, it is more difficult to suggest that it was the understanding of the drafters of Article 23 of the 1899 Convention that the term "of the highest moral reputation" was meant to embrace the notion of independence because historically it was not uncommon for States to appoint their own officials as arbitrators.[57] Despite the prevalence of inter-State arbitration in the 19th century, the text did not include guidance on the behaviour, duties, and authority of arbitrators and lacked provisions setting out consequences for the absence of required qualifications.

The first case decided by PCA arbitrators was the *Pious Fund* in which the United States submitted claims on behalf of its citizens against Mexico.[58] The 1902 Arbitration Agreement between Mexico and the United States provided that the members of the Arbitral Commission were required to meet the personal and professional qualifications set out under the 1899 Hague Convention.[59]

Similarly, the 1902 Agreement between Great Britain and Japan involving Japanese tax on real property occupied by foreign citizens included a reference to the provisions of the 1899 Convention including the qualifications of arbitrators.[60] The requirement for the impartiality of arbitrators was specifically expressed in the Agreement. It provided that arbitrators "shall proceed

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[55] *Report of the Annual Lake Mohonk Conference on International Arbitration*, vol 2 (1986) 61.

[56] *Preferential Treatment of Claims of Blockading Powers against Venezuela (Germany, Great Britain and Italy v. Venezuela)*, PCA Case No. 1903-01, Award (22 February 1904).

[57] For instance, in the *Montijo* arbitration between the United States v. Colombia (1875), the U.S. appointed a government official as its party-appointed arbitrator. See Charles H. Butler, *The United States is a Nation - Historical Review of the Treaty-making Power of the United States*, vol I (Banks Law Publishing Company 1902) 165. In the *Alabama Claims* arbitration, the United States appointed its former ambassador to the UK, Charles Francis Adams, who had extensive involvement in the dispute prior to his appointment, while the UK made no objection to Adam's appointment. See Tom Bingham, 'The Alabama Claims Arbitration' (2005) 54(1) Int. Comp. Law Q. 16-18.

[58] *The Pious Fund of the Californias (The United States of America v. The United Mexican States)*, PCA Case No. 1902-01, Award of the Tribunal (14 October 1902).

[59] Protocol of an Agreement between the United States and the Republic of Mexico, 22 May 1902, Article II.

[60] The 1902 Protocol between Great Britain and Japan, 28 August 1902, Article IX.

impartially and carefully to examine and decide the question at issue".[61] While the reference to the provisions of the 1899 Convention, i.e., the term "of the highest moral reputation", was sufficient to cover the impartiality requirement, the disputing parties chose to specify this requirement in the Agreement.

There was no significant development in the competencies and duties of international arbitrators at the PIL level until the end of WWII. The peace treaties concluded after WWI such as the Treaty of Saint-Germain - that allowed for arbitration over disputes relating to reparation claims - only included the requirement for impartiality.[62] No other provision that could govern the qualifications, conduct, and authority of arbitrators was incorporated in these treaties.

At the private international law level, the ICC Rules of Arbitration in 1922 was the first set of codified rules to govern ICA proceedings, though there was no institution designed to host arbitration tribunals. A year later, the ICC Court of Arbitration, the only actual international arbitration institution of the time, was created.[63] The ICC Arbitration mechanism was largely built on arbitration practices between merchants that had been developed through centuries.[64] However, the 1922 Rules did not contain any provision on the qualifications and conduct of ICC arbitrators.

As to the authority of ICC arbitrators, the 1922 Arbitration Rules avoided the imposition of restrictive rules of procedure that could limit the discretionary power of arbitrators.[65] The 1922 Arbitration Rules did not expressly require arbitrators to be independent and impartial, nor did they explicitly contain any provision on the right of the disputing parties to challenge arbitrators.

Similarly, a subsequent amendment to the ICC Rules in Arbitration 1927 did not incorporate the principles of impartiality and independence. No institutionalized control mechanism was provided for in the 1927 amendments. However, the amendments regulated the selection of arbitrators by limiting appointments to those chosen by the National Committees of the International Chamber. In another development, Article 11 of the 1927 Arbitration Rules required the ICC Court of

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[61] The 1902 Protocol between Great Britain and Japan, 28 August 1902, Article VII.

[62] Treaty of Saint-Germain-en-Laye, 10 September 1919, Annex II, para 13, reprinted in John Reed, *The Treaties of Peace, 1919-1923*, vol 1 (Lawbook Exchange 2007) 339.

[63] Algot Bagge, 'The International Chamber of Commerce and the Development of International Arbitration' (1939) 10 Nordisk Tidsskrift Int'l Ret. 4.

[64] Schwartz and Derains (n 37) 13.

[65] Bagge (n 63) 10-12.

arbitration - when acting as the appointing authority - that arbitrators should be selected "from amongst technical or legal experts". Under this article, the Court of Arbitration was required to select arbitrators from a list of experts prepared by the ICC National Committee. However, such a restriction was not imposed on arbitrators appointed by disputing parties. While the notation of "legal expertise" is less confusing, Article 11 did not elaborate on the term "technical" expertise.

While any reference to the impartiality and independence requirements was absent in the ICC Arbitration Rules of 1922 and 1927, it was a well-established principle of commercial arbitration that arbitrators would "judge the dispute impartially and not as agents of either or both parties thereto".[66] To address this shortcoming in the ICC Arbitration Rules, in 1928 the ICC Court expressly declared that its policy was to "ensure[] that the arbitrator shall be absolutely neutral and impartial".[67] Further, the Court stated that "an Award can be set aside if it can be proved that the arbitrator was bribed or otherwise dishonest or was not impartial".[68]

In spite of the above developments, the ICC Court adopted a strict confidentiality practice since its creation such that it made it difficult to obtain an informed view of the identities, qualifications, and behaviour of ICC arbitrators. As Cohn noted, the question as to who acts as the arbitrator "usually disappears like magic when the ICC's scheme is mentioned", although the contracting parties may require that arbitrators should have had certain qualifications.[69]

Notwithstanding the absence of any rules on the conduct and duties of ICC arbitrators prior to the Second World War, ICC arbitrators were subject to control by domestic courts. Indeed, the same fundamental principles regarding domestic arbitrations that existed in common law and civil law systems were applicable in reviewing the qualifications and behavior of ICC arbitrators. At the time, it was an established practice that the law of the place of arbitration would determine the mechanisms for reviewing the competencies and authority of ICC arbitrators.[70]

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[66] Paul L. Sayre, 'Development of Commercial Arbitration Law' (1928) 37(5) Yale Law J. 599.

[67] International Chamber of Commerce, *The Arbitration of the International Chamber of Commerce* (H. Clarke 1928) 6.

[68] See International Chamber of Commerce, *Brochure - International Chamber of Commerce*, Issues 89-100 (ICC 1935).

[69] See Ernst. J. Cohn, 'The Rules of Arbitration of the International Chamber of Commerce' (1965) 14(1) Int. Comp. Law Q. 135 and 139.

[70] It is also reflected in part in Article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards where an award may not be recognized/enforced where arbitral proceedings are contrary to the law

D) International Arbitrators: The Historical Roots of Skepticism

While a treaty practice starting in the late 18th century supported the requirement for the impartiality of arbitrators, the history of international dispute settlement discloses reduced trust by some States in international arbitration and arbitrators. Indeed, the absence of confidence or reduction thereof was a dominant characteristic of the relationships between less powerful States (e.g., newly independent countries) and imperial powers/colonial countries between the late 18th century and early 20th century. Consequently, recourse to arbitration (often offered by the powerful State) to resolve disputes over the treatment of aliens was a ground of contestation between the home State of aliens and less powerful States. As Summers states, newly established countries such as those in Latin America opposed the submission of disputes over the treatment of foreign nationals to arbitration when the other disputing power was "one of the old imperialist powers".[71]

A likely reason for this position towards international arbitrators is that they were seen by less powerful States to be influenced by the European understanding of justice, equity and PIL. Indeed, with some exceptions, individuals who decided disputes between the 18th and early 20th century were nationals of European and North American States.[72]

International arbitrators were expected to decide disputes involving less powerful States on the basis of norms in creation of which this group of States did not play a significant role. PIL rules such as the minimum standard for the treatment of aliens[73] were the creatures of powerful States

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of the place of the arbitration. This principle was later codified by the 1985 UNCITRAL Model Law that was created to guide world governments with the modernization of their domestic arbitration laws. The Model Law included provisions on the extent to which domestic courts are allowed to exercise their authority over arbitral awards, though ambiguous provisions initially made it difficult to understand the scope and extent of court supervision over the conduct of arbitrators. Gerold Herrmann, 'The Role of the Courts under the UNCITRAL Model Law Script' in Julian Lew (ed), *Contemporary Problems in International Arbitration* (Springer 1987) 170.

[71] Lionel M. Summers, 'Arbitration and Latin America' (1972) 3 Cal. W. Int'l L.J. 3.

[72] Ibid 6.

[73] For PIL to embrace the interests of decolonized States, Latin Americans welcomed the Calvo doctrine. To eliminate the concerns stemming from the application of the international minimum standard to the treatment of aliens, the doctrine supported the national treatment approach toward disputes arising out of the treatment of foreign traders and settlers. While it did not receive a global recognition at the time, the doctrine could serve to dismiss a significant number of claims against Latin American governments. This encouraged Latin American governments to pass laws that required the inclusion of a clause to this effect in any contract concluded with foreign nationals. See Donald Richard Shea, *The Calvo Clause: A Problem of Inter-American and International Law and Diplomacy* (University of Minnesota Press 1955) 30. However, despite long-standing opposition towards the Calvo doctrine, it has experienced revival over the past decades largely due to the changes in the direction of international investment law. See Wenhua Shan, 'From "North-South Divide" to "Private-Public Debate": Revival of the Calvo Doctrine and the Changing

in Europe and North America. International dispute settlement in its contemporary meaning has its origin in these traditions.

Similarly, the terms justice and equity were introduced in dispute settlement treaties by European states and the United States. Arbitrators had discretion in terms of applicable rules and standards to decide disputes based on the notions of justice and equity that were developed in European and North American traditions. As Francis Russell noted in 1849, arbitrators had a greater degree of discretion and latitude than courts of law to reach a decision.[74]

Concerns over international arbitrators were not limited to those of less powerful States. Indeed, the behaviour of arbitrators was also subject to criticism in disputes between great powers. For instance, the arbitrators in the *Alabama* claim were criticized for awarding excessive damages. The compensation was reported to be of a magnitude at the time such that the United States government had difficulty finding enough numbers of injured citizens for the whole sum.[75]

Further, less powerful States regarded the peaceful settlement of disputes as another interventionist technique used by imperial powers to interfere in their sovereign affairs. In their view, arbitrators were representative of the policies of powerful States. In the words of Sanders, "[th]is unfavourable attitude may only be explained as a consequence of the traditional view that international arbitration was a surrogate for diplomatic intervention by the great powers".[76]

For instance, the Mexican government regarded the mixed arbitral commissions created to settle the claims of the United States citizens as ill-disguised mechanisms used by a powerful State to further its own interests.[77] Similarly, historians regarded the arbitral dispute settlement mechanism between Mexico and the United States as a Machiavellian saga, since the imperial power

Landscape in International Investment Law' (2007) 27(3) Northwest. J. Int. L. Bus. 631-664; Josef Ostřanský, 'Tobacco Investment Disputes – Public Policy, Fragmentation of International Law and Echoes of the Calvo Doctrine' (2012) 3 CYIL 161-182.

[74] Francis Russell, *A Treatise on the Power and Duty of an Arbitrator, and the Law of Submissions and Awards; with an Appendix of Forms and of the Statutes relating to Arbitration* (Stevens and Sons 1870) 110.

[75] Robert Reid, 'International Arbitration' (1902) 14 Juridical Rev. 340. For a detailed account of the *Alabama* arbitration process, see V.V. Veeder, 'The Historical Keystone to International Arbitration: The Party-Appointed Arbitrator-From Miami to Geneva' in David Caron and others (eds), *Practising Virtue: Inside International Arbitration* (OUP 2015) 132- 147.

[76] Pieter Sanders, *Arbitration in Settlement of International Commercial Disputes Involving the Far East and Arbitration in Combined Transportation* (Kluwer Law and Taxation Publishers 1989) 82.

[77] Thomas E. Carbonneau, 'The Ballad of Transborder Arbitration' 56 U. MIA L. Rev. (2002) 782.

maintained dominance over the weaker party.[78] As a matter of fact, the conduct of arbitrators proved these speculations to be true. Paulsson claims that arbitrators' decisions between the early 20th century and the 1950s demonstrated bias against developing countries[79] whose actions were often subject to dispute.

Another factor that possibly contributed to diminished confidence in international arbitrators was uncertainty about their qualifications and authority. As indicated by a commentator living in the second half of the nineteenth century, there existed no universally accepted standards for international arbitrations.[80] While in some instances arbitrators were appointed from among jurists, it was also common to appoint heads of States, diplomats, and other government officials as arbitrators.[81] There was no uniform practice as to what professional qualifications arbitrators should possess as well as the scope of their decision-making power. Indeed, it was only at the end of the nineteenth century that, as the result of Britain's proposals during the 1899 Hague Conference, certain qualifications for PCA arbitrators (such as international law expertise) were introduced in the 1899 Hague Convention.[82] For this reason, less powerful parties were to some extent reluctant to submit their disputes to unregulated adjudicators who enjoyed broad decision-making discretion with fairly unsupervised behaviour.[83]

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[78] See Richard Griswold del Castillo, *The Treaty of Guadalupe Hidalgo: A Legacy of Conflict* (University of Oklahoma Press 1992) 168.

[79] Jan Paulsson, 'Third World Participation in International Investment Arbitration' (1987) 2(1) ICSID Rev. 21.

[80] John Hyde, *International Arbitration: Its Difficulties and Advantages*, A Paper Read at a Conference of Ministers (Manchester, 30 September 1873) 4.

[81] See for instance Convention for Arbitration of Macedonian Claims between the United States and the Republic of Chili (1858) where the disputing parties agreed to submit their dispute to the King of Belgium.

[82] Convention for the Peaceful Regulation of International Conflicts (1899), Article 23. See William Evans Darby, *International Tribunals: A Collection of the Various Schemes Which Have Been Propounded; and of Instances Since 1815* (J. M. Dent and Co. 1900) 440.

[83] Consequently, it is not completely clear whether the consent of less powerful States to arbitration was genuine, or it was due to fears of military force or economic coercion. The remarkable example of this 'lasting' reluctance to solve the dispute through arbitration was Venezuela's consent to arbitration in the early 20th century. Unwilling to settle the controversies over the expropriation and seizure of properties of foreign nationals, Venezuela found its ports blockaded by British, German, and Italian forces. As the result of the gunboat diplomacy, it was forced to set up numerous claims commissions to address the disputes over alleged mistreatment of foreign nationals. The naval blockade as a means to drive Venezuela to arbitration was the subject of discontent from other Latin American governments including Argentina. See Edwin D. Dickinson, *The equality of states in international law* (Harvard University Press 1920) 164. For the documents regarding the 1903 Venezuelan arbitrations see Jackson H. Ralston, *Venezuelan Arbitrations of 1903* (Government Printing Office 1904). See also J. Lloyd Mecham, *The United States and Inter-American Security, 1889–1960* (University of Texas Press 1961) 65-66.

Against this background, the above positions towards international arbitrators did not hinder States from using arbitration for settling disputes over alleged ill-treatment of foreign subjects. According to a survey conducted by Stuyt, hundreds of disputes were referred to international arbitration between 1794 and 1938.[84] Summers estimates that from 1829 to 1910, the European States and the United States entered into almost 120 arbitrations with Latin American countries,[85] with a large proportion of them dealing with damages allegedly suffered by aliens in foreign territories.

III) The International Arbitrator after the Second World War

In the aftermath of the Second World War, the focus was more on the incorporation of arbitration clauses into concession contracts, domestic investment legislation, and investment treaties,[86] rather than on the regulation of who should decide arbitration disputes. During the post-WWII period, two competing characteristics particularly shaped the architecture of a new field of international arbitration: the creation of the institutional control mechanisms for investor-State arbitrators and granting (preserving) extensive freedom for the arbitration community in the exercise of control review provisions.

Indeed, investment instruments with an investor-State Dispute Settlement clause (ISDS) did not include provisions that could determine the eligibility requirements of arbitrators, limit their decision-making authority, or monitor their behaviour. Relying on the general principles of international adjudication such as impartiality as included in arbitration rules, conventional investment treaties skipped the imposition of requirements on who arbitrated disputes, likely

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[84] See A. M. Stuyt, *Survey of International Arbitrations 1794–1938* (Springer 1939).

[85] Lionel M. Summers, 'Arbitration and Latin America' (1972) 3(1) Cal. W. Int'l L.J. 7.

[86] Before the emergence of BITs, long-term concession contracts were concluded between foreign corporations and governments or government entities which could include dispute settlement provisions. Also, States initiated national investment laws that offered incentives to foreign investors and included provisions in which the host State demonstrated its willingness to solve any potential disputes with foreign investors through arbitration. The breakthrough was a new model of agreement that provided unprecedented protections to foreign investors. The post-WWII period experienced the initiation of BITs through which the host State granted specific rights to foreign investors to boost their economy. The first BIT was concluded in 1959 between Germany and Pakistan. Although its Article 11 included an inter-State dispute settlement clause, the provision was based on the traditional model of treaties of amity that referred any potential dispute over the treatment of nationals of one contracting party in the treaty of the other to inter-State arbitration. An investigation into the early BITs shows that the important shift in investment treaty-making was made in 1968 when the Indonesia - Netherlands BIT proposed direct access to arbitration to foreign investors in its Article 11. This BIT triggered a *sui generis* dispute settlement system according to which foreign investors could directly file a claim against the host State. By the end of 1980s, the number of investment treaties reached 385. UNCTAD, Bilateral Investment Treaties 1959-1999 (United Nations 2000) iii.

because the instances of abuse of authority and misconduct were infrequent. As Dezalay and Garth note, a small group of "grand notable" arbitrators with prominent characters contributed to the field of international arbitration throughout the post-WWII period until the late 1990s.[87]

During this period, individuals selected for the arbitration position were mainly experienced judges, legal scholars, or senior barristers in the field. Dezalay and Garth add that "[t]hese relatively few grand old men ... played a central role in the emergence and the recognition of arbitration".[88] As the arbitration community was fairly small and there were not that many arbitrations, objections against arbitrators' qualifications and conduct were infrequent and exceptional. This also was a reason for the slow development of the law on arbitrators.

However, the expansion of the community over the subsequent decades signaled the necessity of a shift from a system of social moralities to a more formal control mechanism. Thus, further limitations were set to screen and observe the eligibility requirements and behavior of arbitrators within institutional frameworks. As noted elsewhere by Branson in the late 1980s, "[t]he arbitral process alone cannot guarantee neutrality and objectivity in resolving international commercial disputes if there is any doubt about the integrity of arbitrators".[89]

A) From a System of Social Moralities to a Formal Control Mechanism

1) Further Developments in Paris: Initiation of a Control Mechanism in the ICC Arbitration Rules

At the private international law level, Article 7 of the 1955 ICC Arbitration Rules was the first major step in the history of ICA that established a monitoring mechanism for arbitrators. This article provided that "[s]hould an arbitrator be challenged by one of the parties, the decision of the Court of Arbitration, which shall be the sole judge of the grounds of challenge, shall be final". The authority to review challenges was given to an independent body, and the article disengaged unchallenged arbitrators from reviewing challenges against their peer arbitrators.

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[87] Bryant G. Garth and Yves Dezalay, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press 1998) 35.
[88] ibid.
[89] David J. Branson, 'Ethics for International Arbitrators' (1987) 3(1) Arb. Intl. 72.

Like the 1922 and 1927 ICC Arbitration Rules, the 1955 Arbitration Rules did not expressly incorporate the impartiality requirement, though it was widely accepted at the private arbitration level that arbitrators were required to be free from bias. In spite of the incorporation of a challenge mechanism in the 1955 Rules, the Rules failed to explicitly include the long-established obligation of impartiality. Perhaps the avoidance of bias was the reason that Article 7 of the 1955 Rules required that the sole arbitrator or the third arbitrator, as the case could be, be a national of countries other than those of the disputing parties.

In contrast to the ICC Arbitration Rules in place prior to 1927, Article 7 of the 1955 Rules removed the expertise qualifications of arbitrators appointed by the ICC Court of Arbitration. Indeed, although Article 11 of the 1927 Rules did not impose any qualification restrictions on arbitrators appointed by parties, it required the Court of Arbitration, in cases it needed to act as the appointing authority, to select the arbitrators or sole arbitrator from the list of technical or legal experts introduced by the ICC National Committees. With the 1955 amendments to the ICC Arbitration Rules, the Rules moved towards deregulation in terms of the qualifications of arbitrators. This reversal was considered to be supported by the mission of the ICC Court, i.e., to provide the disputing parties with a facilitated and expedited dispute settlement process such that "[o]f the various qualities to look for when selecting an arbitrator, few constitute requirements in the strict sense of the term".[90]

In spite of the above, the 1975 amendments to the ICC Arbitration Rules included some eligibility requirements that applied to all arbitrators, whether appointed by the disputing parties or the ICC Arbitration Court. While no explicit reference was made to the impartiality requirement, Article 2 of the 1975 Rules expressly required that arbitrators should be independent of their appointers. Reflecting a well-established rule of dispute settlement, party-appointed arbitrators could not be economically or otherwise affiliated to, or controlled by, their appointing parties.

While the 1975 ICC Rules remained silent on the impartiality of party-appointed arbitrators, the Rules imposed some requirements on arbitrators where the ICC Court would act as the appointing party that could help to reduce the risk of partiality. According to Article 2 of the Rules, in case the ICC Court appointed or confirmed arbitrators, "[t]he sole arbitrator or the chairman of an

[90] Stephen R. Bond, 'The International Arbitrator: From the Perspective of the ICC International Court of Arbitration' (1991) 12(1) Nw. J. Int'l L. & Bus. 10.

arbitral tribunal shall be chosen from a country other than those of which the parties are nationals" unless the circumstances required otherwise and the disputing parties did not object to the appointment of an arbitrator who has the same nationality as that of one of the parties.

The absence of an explicit reference to impartiality in the 1975 ICC Rules could not mean that ICC arbitrators were allowed to behave partially as this would have been inconsistent with the principle developed over centuries. Particularly, the inclusion of the right of disputing parties to challenge an arbitrator in Article 2 of the ICC Rules indicates that arbitrators could be disqualified for a lack of impartiality.

Further, Article 21 of the 1975 ICC Rules imposed a new requirement on arbitrators. It required arbitrators to submit the draft of the award, whether partial or final, to the ICC Court of Arbitration for scrutiny. Although not acting as an appeal body, the Court was granted authority to make modifications as to the form of the award. Notably, while it was expressly provided that the court's interference was not considered as limiting arbitrators' decision-making freedom, the Court was permitted to draw the attention of arbitrators to any point of substance.

This 'pre-approval' mechanism was introduced to ensure compliance with formal requirements. The pre-approval process was also created for ensuring that arbitrators would make neutral and independent decisions.[91] The ICC Court could potentially capture certain (e.g., most evident) instances of partiality and conflict of interest through its review of the draft award. The scrutiny mechanism can also be seen as a measure to reduce the risks of non-enforceability in national jurisdictions.

Similar to the 1975 ICC Rules, the 1988 amendments of the ICC Rules of Arbitration did not make any express reference to impartiality requirements, although it expressly provided that the party-appointed arbitrator shall remain independent of the nominating party (Article 4). In a continuous departure from the 1955 ICC Rules and aligned with the 1975 Rules, the 1988 Rules did not incorporate any provision regarding the professional qualifications of arbitrators.

The 1988 ICC Rules further elaborated the rule regarding the challenge to arbitrators. Article 8 explicitly stated that a challenge to an arbitrator can be made "for an alleged lack of independence

[91] Andreas Reiner and Christian Aschauer 'Chapter II: ICC Rules' in Rolf Schütze (ed), *Institutional Arbitration: A Commentary* (Hart Publishing 2013) 157.

or otherwise". The word "alleged" indicates that the threshold for disqualifying an arbitrator was not an actual dependence, rather an appearance of conflict of interest could be a ground for a challenge.

2) The ICSID Convention: Architectural Innovations in International Dispute Settlement

At the inter-State level after the Second World War, the ICSID Convention made a breakthrough in international dispute settlement by imposing certain eligibility requirements on arbitrators and establishing challenge and annulment mechanisms. While issues subject to the annulment process extend beyond the issues of qualifications and conduct of arbitrators, provisions relating to the eligibility requirements and challenge mechanism directly revolve around the personal and professional qualifications of arbitrators.

Over the early years of its operation, the ICSID institution faced difficulties in securing competent arbitrators particularly because of the failure of the States Parties to designate qualified persons to appear on the lists of ICSID panelists. With respect to the personal qualifications and conduct of ICSID arbitrators, no major developments were made in the ICSID Convention compared to statutes of other international courts and tribunals. Indeed, the major challenge was the lack of enough eligible individuals who could serve as arbitrators such that the insufficiency of the number of qualified arbitrators delayed the work of the ICSID Chairman pending the receipt of more designations from the State Parties.[92] In the 1970s, around two-thirds of designations were not fulfilled.[93] The attention of the Member States to this challenge remained uncaptured until the late 1970s.[94] While disputing parties are not required to appoint arbitrators from the list of ICSID panelists, the ICSID Chairman when acting as appointing authority is restricted in their options to the individuals included on the list.[95]

As to the personal qualifications, the drafters of the ICSID Convention largely followed the State practice developed over the past few centuries as well as the statutes of other international courts

[92] See ICSID, *ICSID Second Annual Report 1967/1968* (1968) 5.
[93] See ICSID, *ICSID Fifth Annual Report 1970/1971* (1971) 3.
[94] See ICSID, *ICSID Twelfth Annual Report 1977/ 1978* (1978) 4; ICSID, *ICSID Thirteenth Annual Report 1978/1979* (1979) 4.
[95] See ICSID Convention, Article 38 and 40, and see also Rules 4 and 11 of the 2006 ICSID Arbitration Rules.

and tribunals such as International Court of Justice (ICJ), European Court of Justice (ECJ) and European Court of Human Rights (ECtHR).[96] The text of Article 14(1) of the Convention on the qualifications of arbitrators is not sufficiently detailed to avoid confusion.[97]

Although the ICSID Convention requires the Member States to designate individuals with high moral character to the list of the ICSID arbitrators, the Convention does not elaborate on the meaning of the term 'high moral character' and how such a qualification should be identified and verified. Nor does it contain any code of professional conduct that would enable arbitration practitioners to follow a binding and detailed set of standards to reduce any potential conflict of interest or misconduct, i.e., conduct that is not acceptable from arbitrators. [98]

Adopting such a concise approach in treaty drafting was probably because of the infrequency of challenges to arbitrators as well as the existence of a small group of arbitrators at the time of drafting the Convention. These circumstances likely reduced the need for making detailed and stringent regulations on arbitrators' eligibility and behavior. Indeed, no imperative need existed in

[96] See Article 14(1) of the ICSID Convention, Article 20 of the ICJ Statute, and Article 21 of the European Convention on Human Rights.

[97] Article 14(1) provides that arbitrators "shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment".

[98] At the commercial arbitration level, in 1977, a code of ethics for arbitrators in commercial disputes was jointly drafted by the American Bar Association and the American Arbitration Association. While initially it was expected that the 1977 Code of Ethics could be regarded as a source for guiding international arbitrators on conflict of interest, the application of the Code to international arbitration faced criticism, particularly because the appointment of 'non-neutral' arbitrators was recognized in the domestic law of the United States, while in international arbitration such as arbitrations within the framework of the ICSID Convention, the tendency was on requiring party-appointed arbitrators to be less than partisan. See Robert Coulson, 'An American Critique of the IBA's Ethics for International Arbitrators' (1987) 4(2) J. Int. Arbitr. 103-110. For this reason, the efforts at the International Bar Association resulted in IBA Ethics for Arbitrators in International Commercial Disputes (1987). Branson claims that the final draft of the IBA Ethics represented "the highest possible standard which could be required of arbitrators". See Branson (n 89) 74. The motive behind this endeavor was the resistance at the international arbitration level against the recognition of 'non-neutral' arbitrators in the 1977 Code of Ethics. The IBA Code, as a non-binding set of rules, defines the concepts of 'impartiality' and 'independence' consistent with the common understanding of these notions. According to its fundamental rule, "[a]rbitrators shall proceed diligently and efficiently to provide the parties with a just and effective resolution of their disputes, and shall be and shall remain free from bias". This fundamental rule covers all arbitrators, whether party-appointed or not. (Rule 26(2)) The IBA Ethics also provided detailed provisions on the duty of an international arbitrator to disclose all facts or circumstances, particularly the nature of any past or present business relationship with any disputing party, witnesses or fellow arbitrators that may give rise to justifiable doubts as to his or her impartiality or independence. The disclosure requirement in the IBA Ethics would apply throughout the entire proceeding and is not limited to the initial declaration before the commencement of arbitration proceedings. Further, the Code held that non-disclosure of such facts, relationships or circumstances would demonstrate an appearance of bias, and may amount to disqualification of the arbitrator (Rule 4). Finally, despite being the commonplace approach in domestic arbitration, IBA limited the ability of international arbitrators to unilaterally communicate with the parties about procedural issues.

the 1960s for imposing draconian restrictions on the competencies, conduct, and duties of arbitrators.

That said, the ICSID Convention introduced innovations to international arbitration, partly inspired by existing statutes of international courts and tribunals. The Convention set out certain professional qualifications for arbitrators and created monitoring mechanisms consisting of a challenge process and an annulment process.

The main purpose of the ICSID monitoring features is functional and procedural, not textual. In other words, the control mechanisms, whether in respect of arbitrators' eligibility or annulment procedures, do not serve the function that appeals courts perform. As Reisman noted, the ICSID annulment procedure guarantees "that arbitral awards and the processes that precede them are fair and consistent with the expectations of the parties and the pertinent prescriptions of the community, such that confidence in arbitration as a method of dispute resolution is sustained". [99] As will be discussed, the ICSID control framework lacks features that adequately ensure its proper function.

B) The Edifice of the ICSID's Arbitrator Control Mechanism

The ICSID Convention and Arbitration Rules are the governing instruments with respect to the appointment and qualities of ICSID arbitrators and members of *ad hoc* committees. Different provisions of the ICSID legal framework reflect the monitoring architecture.

1) Competency Requirements

The ICSID Convention includes provisions on "who" should be selected as arbitrators. Within the Convention, the touchstone is Article 14(1). According to the Article, persons introduced by the State Parties to serve on arbitration panels should meet specific personal and professional requirements. More notably, the panelists shall exercise independent judgment and possess high

[99] W. Michael Reisman, 'The Breakdown of the Control Mechanism in ICSID Arbitration' (1989) 4 Duke L.J. 787. However, the subsequent jurisprudence of ICSID panels has produced divergent views about the proper role of the annulment mechanism. As Reisman states, the ICSID annulment mechanism has experienced death and rebirth. The designers of the Convention created a potentially effective tool, but the initial misapplication of the mechanism by arbitrators showed no appreciation of its significance. See W. Michael Reisman, 'Reflection on the Control Mechanism of the ICSID System' in Emmanuel Gaillard, *The Review of International Arbitral Awards* (Juris Publishing 2010) 250; W. Michael Reisman, *Systems of Control in International Adjudication and Arbitration: Breakdown and Repair* (Duke University Press 1992) 106.

moral credibility. Although there is no rule of general international law that limits the selection of arbitrators to a specific field of expertise, ICSID arbitrators must be recognized in the field of law, commerce, industry, or finance. However, the Article further adds that the "[c]ompetence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators". The phrase 'of particular importance' simply emphasizes the importance of the selection of legal practitioners but does not limit the other options available to the disputing parties.

During the negotiations of the ICSID Convention, the Lebanese delegate questioned the logic and usefulness of adding competency in the fields of commerce, industry, or law since ICSID arbitration tribunals would only seize disputes of a 'legal character'. In other words, an adjudicator deciding a legal issue is required to have undergone legal training. In response, Aron Broches, the Chairman of the consultative meetings for the negotiation of the ICSID Convention, stated that there was no inconsistency between limiting the jurisdiction of ICSID tribunals to legal disputes and having on the bench arbitrators with particular knowledge in fields other than law since persons with different expertise could help the appreciation of factual situations that caused the legal dispute.[100]

While the English and French versions of Article 14 refer to the terms 'independent judgment' and 'garantie d'indépendance' (guarantee of independence), the Spanish text employs the phrase 'imparcialidad de juicio' (impartial judgment). As all three texts are authentic and binding, ICSID arbitrators must satisfy both the requirements of independence and impartiality.[101] The ICSID jurisprudence has consistently confirmed this.[102] No derogation is allowed under the ICSID Convention from the requirement for an arbitrator to have a high moral character and issue their decision independently and impartially.

During the drafting negotiations, the Dutch delegation suggested that the personal qualifications of arbitrators should be elaborated on in detail, even though such expectations from arbitrators appear to be self-evident. In view of the Dutch delegation, "express mention should be made of

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[100] *History of the ICSID Convention*, vol II-1 (n 4) 489.

[101] Frédéric G. Sourgens, *A Nascent Common Law: The Process of Decisionmaking in International Legal Disputes between States and Foreign Investors* (Brill 2014) 124.

[102] See e.g., *BSG Resources Limited, BSG Resources (Guinea) Limited and BSG Resources (Guinea) SÀRL v. Republic of Guinea,* ICSID Case No. ARB/14/22, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal (28 December 2016) para 56, and the decisions cited therein.

the need to designate persons of independence in the sense that not only should they be capable of exercising independent judgment but also of acting with complete impartiality without accepting instructions from the parties appointing them".[103] Broches stated that "that a more rigid clause regarding independence of the arbitrators in the agreement between the parties would have been helpful".[104] Germany and Portugal supported the inclusion of detailed provisions on the independence of arbitrators.[105]

The proposals to include a detailed clause as to the personal qualifications of arbitrators faced disagreement, in particular from Norway, Spain, and Sweden.[106] The Norwegian delegate argued that 'the whole essence of arbitral procedure' is founded on the premise that the appointing party could not give instructions to the arbitrator - a fact that makes any reference to these terms useless.[107]

The provisions of Article 14(1) of the Convention are further supplemented by the ICSID Arbitration Rules. Rule 6(2) of the very first ICSID Arbitration Rules (1968) explicitly required arbitrators to declare they conduct the arbitration proceedings fairly and independently. This Rule added more clarification on the eligibility requirements under Article 14(1) as it elaborated on what would constitute elements of independence or fair conduct of the arbitration.[108] However, some uncertainty remained surrounding the concepts of independence and fairness. Particularly due to the diversity of legal regimes and differences in arbitrators' cultural backgrounds, these concepts might vary. Indeed, one's understanding of the notions of independence or fair conduct of arbitration may differ from another arbitrator. Further, the 1968 ICSID Arbitration Rules did not contain any specific provisions, mandatory or otherwise, on the conduct of arbitrators while

[103] *History of the ICSID Convention*, vol II-1 (n 4) 386.
[104] Ibid 387.
[105] Ibid 387.
[106] Ibid 387-388.
[107] Ibid 389.
[108] Rule 6(2) of the the 1968 ICSID Arbitration Rules stated in part: arbitrators "shall judge fairly as between the parties, according to the applicable law, and shall not accept any instruction or compensation with regard to the proceeding from any source except as provided in the Convention on the Settlement of Investment Disputes and in the Regulations and Rules made pursuant thereto".

the urgency of the formulation of a code of ethics for international arbitration practitioners was compelling.[109]

As to disclosure of conflict of interest, Rule 6(2) of the 1968 ICSID Arbitration Rules relied on arbitrators' statements declaring that to the best of their knowledge there was nothing that would prevent them from serving in the arbitration proceedings. Rule 6(2) did not explicitly demand that arbitrators disclose any information that would directly or indirectly put them in any potential situation of conflict of interests.[110] Arbitrators were required to self-assess the circumstances and situations that could prevent them from serving in the arbitration proceedings, without the involvement of disputing parties in this process. Because of the ambiguous language used in the 1968 Rules, it can be argued that it was practically more challenging for ICSID arbitrators to self-determine if they needed to disclose any specific circumstances or facts.

The same requirements set out under Article 14(1) apply to members of annulment committees as Article 52(3) of the Convention requires that they shall be appointed from the list of ICSID panelists. During the negotiations of the ICSID Convention, the Netherlands suggested that while persons appointed to arbitration tribunals are not necessarily needed to be jurists, the qualifications required from those serving at annulment committees are different from those sitting at the tribunal level as "the question of annulment [is] a purely legal question".[111] Broches opposed the Dutch proposal as legal expertise is intended to be the primary consideration in the appointment of those appointed to arbitration tribunals and the type of persons sitting at tribunals is not expected to be

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[109] W. Michael Reisman, *Nullity and Revision: The Review and Enforcement of International Judgments and Awards* (Yale University Press 1971) 117.

[110] Similarly, the ICC Arbitration Rules of 1975 did not contain any provision that required arbitrators to disclose situations that would potentially amount to conflict of interests. On the contrary, Article 9 of the 1976 UNCITRAL Arbitration Rules required an arbitrator to disclose to the disputing parties any circumstances and facts that would likely cause reasonable doubts as to the arbitrator's impartiality or independence. However, despite Article 11 of the 2010 UNCITRAL Arbitration Rules, Article 9 of the 1976 Rules does not expressly require arbitrators to continuously disclose circumstances or situations that cast doubt on their independence or impartiality. In spite of this, the wording of Article 9 of the 1976 has not stopped some commentators from arguing that it is generally accepted that the disclosure requirement under the 1976 Rules is a continuous obligation lasting throughout the arbitration proceeding and it ceases when the tribunal is constituted. See Loukas A. Mistelis, *Concise International Arbitration* (Kluwer 2010) 182. Following the approach adopted in Article 9 of the 1976 UNCITRAL Arbitration Rules, Article 28(1) of the 1988 amendment to the ICC Arbitration Rules partially filled this shortcoming in the ICC Arbitration Rules by providing that "[b]efore appointment or confirmation by the Court, a prospective arbitrator shall disclose in writing to the Secretary General of the Court any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties".

[111] *History of the ICSID Convention*, vol II-2 (n 4) 854.

entirely different from the type of those who deal with questions of annulment.[112] As will be reviewed in Chapter 3, in practice, the ICSID Chairman has not appointed any member of annulment committees from a field other than law.

2) The Challenge Review Mechanism

Article 57 of the Convention provides for the right of the disputing parties to request the disqualification of an arbitrator.[113] Article 57 set out two different headings for disqualification as it uses the word "disqualification" both in relation to the qualifications required from arbitrators under Article 14(1) as well as with regard to where a person is not eligible for appointment resulting in the tribunal not being properly constituted as provided for under Section 2 of Chapter IV of the Convention.[114]

During the drafting of the ICSID Convention, discussions also revolved around situations that would justify the disqualification of an arbitrator. Several specific grounds such as misconduct of an arbitrator, conflict of interest, and lack of independence were mentioned as criteria for disqualification.[115] However, the final wording of Article 57 of the Convention remained vague in this regard and did not expressly include references to these grounds.

The decision of the drafters of the ICSID Convention not to incorporate any detailed instances as grounds for disqualification was probably because they did not expect a frequent usage of the ICSID disqualification mechanism. As the German delegate stated during the drafting of the Convention, it was the drafters' understanding that "the disqualification of a member of an arbitral tribunal for lack of independence was a serious weapon which parties to the dispute might be very reluctant to use".[116]

Further, the interaction between the wordings of Articles 14 and 57 is not fully clear. For instance, it is not clear from the text whether, by the term "manifest lack of the qualities", the seriousness

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[112] Ibid 854-855.

[113] Article 57 provides that "[a] party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14. A party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV".

[114] *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Decision on annulment (11 June 2020) para 166.

[115] *History of the ICSID Convention*, vol II-1 (n 4) 166, and 387-388.

[116] Ibid 388.

of the lack of qualities is meant or the term is describing the standard according to which the lack of qualities must be established,[117] or a combination of both these meanings. The ICSID jurisprudence has not followed a consistent path in this regard. Indeed, ICSID decisions add more confusion to the question of in which context the wording "manifest lack of the qualities" should be issued. While some decisions have reviewed the term in the context of instances (such as double-hatting and failure to disclose) that might justify disqualification,[118] a number of decisions suggest that the term is understood to refer to the standard based on which the absence of the required qualities must be established.[119] A combination of both these perspectives can be inferred from some other decisions.[120]

Schreuer states that the term 'manifest lack of the qualities' in Article 57 places a "relatively heavy burden of proof" on the challenging party.[121] The expression offers a higher evidentiary bar than the one carried by the 1976 Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) which only requires justifiable doubts as to the arbitrator's impartiality or independence.[122] The ICSID disqualification procedure aims to avoid the initiation of a later annulment procedure.[123]

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[117] James Crawford, 'Challenges to Arbitrators in ICSID Arbitration' in David D. Caron and others (eds), *Practising Virtue: Inside International Arbitration* (OUP 2015) 597.

[118] See, e.g., *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Decision on Respondent's Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz (19 March 2010) para 46; *OPIC Karimum Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/14, Decision on the Proposal to Disqualify Professor Philippe Sands (5 May 2011) para 52; *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Recommendation on the Second Proposal to Disqualify the Tribunal (6 July 2020) para 111.

[119] See, e.g., *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Claimant's Proposal to Disqualify Arbitrator J. Christopher Thomas (19 December 2002) paras 19-20; *Tidewater Inc. and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Claimants' Proposal to Disqualify Professor Brigitte Stern (23 December 2010) para 39; *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator (27 February 2012) para 56.

[120] See, e.g., *Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal (22 October 2007) paras 27, 34, 40.

[121] Christoph H. Schreuer and others, *The ICSID Convention: A Commentary* (2nd edn, CUP 2009) 1202.

[122] See Philippe Sands, 'Conflict and Conflicts in investment treaty Arbitration: ethical standards for Counsel' in Arthur W. Rovine, *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2012* (Martinus Nijhoff 2013) 37. Article 10(1) of the 1976 UNCITRAL Arbitration Rules provides that "[a]ny arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence".

[123] Schreuer and others (n 121) 1198.

During the negotiation process of the ICSID Convention, India suggested that the reference to 'high moral character' in Article 14(1) should be removed as challenging an arbitrator on this ground could lead to undesirable situations and this term would unduly strict the standard qualification. Broches did not think the expression is problematic when applying the disqualification provisions. He stated that the inclusion of the term is in response to the demand from experts for the desirability of appointment of those who possess a high degree of this basic requirement. Broches added that to alleviate the difficulty in the meaning of the term, a disqualification request needs to be supported by facts that prove the manifest lack of that quality.[124]

The qualifications and behaviour of an arbitrator in the very first ICSID case, *Holiday Inns*, were subject to controversy.[125] In this case, the Tribunal chair informed the ICSID Secretary-General that he was informed by the Claimant's appointee, John, G. Foster, that he had acquired an employment position in Occidental Petroleum, one of the claimant's companies. The chair's consultation with the Secretary-General and the co-arbitrators led to the conclusion that "acceptance by an arbitrator of a post as a director of one of the parties that had designated him was totally inconsistent with the letter and spirit of the Convention and could not be countenanced".[126]

The arbitrator's conduct during the consultation process raised further doubts as to his impartiality. In his letter of resignation, Foster bargained in favour of his appointer and subjected his resignation upon a condition that the claimant should appoint his successor, not the ICSID Chairman. The other members of the tribunal found Foster's demand in the arbitrator's resignation letter an inappropriate request and decided to withhold the consent required under Article 56(3) of the ICSID Convention.[127] Article 56(3) provides that if an arbitrator resigns without the consent of the

[124] *History of the ICSID Convention*, vol II-2 (n 4) 970.

[125] *Holiday Inns S.A. and Occidental Petroleum Corporation v. Morocco*, ICSID Case No. ARB/72/1.

[126] See Aron Broches, 'Remarks to the Administrative Council of ICSID' in Aron Broches, *Selected Essays: World Bank, ICSID, and Other Subjects of Public and Private International Law* (Martinus Nijhoff 1995) 288-289. See also Antonio R. Parra, *The History of ICSID* (OUP 2012) 163-164.

[127] See Broches (n 126) 288-289. See also Antonio R. Parra, *The History of ICSID* (OUP 2012) 163-164; ICSID, *ICSID Eleventh Annual Report 1976/1977* (1977) Annex 6, 34.

tribunal, the ICSID Chairman shall appoint a person from the list of ICSID panelists to fill the vacancy.

The first request for disqualification was submitted in the *Amco* case.[128] The request provided an opportunity for the Tribunal to clarify certain ambiguities surrounding the relationships between Articles 14 and 57 of the ICSID Convention. In *Amco,* the respondent challenged the claimant's appointee on the basis that, prior to his appointment, the arbitrator had professional engagements with the claimants as he provided tax advice to a principal shareholder of a claimant company. Further, the respondent stated that there previously existed a profit-sharing arrangement between the arbitrator's law firm and the counsel representing the claimants in the arbitration. In their decision, the unchallenged members of the tribunal[129] held that "an absolute impartiality of the sole arbitrator or, as the case may be, of all the members of an arbitral tribunal, is required, and it is right to say that no distinction can and should be made, as to the standard of impartiality, between members of an arbitral tribunal, whatever the method of their appointment".[130]

The unchallenged arbitrators added that the existence of a prior professional engagement of whatever character with a party to the dispute or their counsel does not in itself jeopardize the impartiality of an arbitrator. In the view of the majority of the tribunal, the impartiality requirement does not bar the appointment of a person who before the commencement of the arbitration proceedings had some relationship with one of the disputing parties, unless such a relationship endangers the ability of the arbitrator to exercise an independent judgment.[131] Based on this position, a mere appearance of partiality or a simple possibility thereof was not a compelling ground for disqualification. In their opinion, the challenging party not only must submit facts

[128] *Amco Asia Corporation and others v. Republic of Indonesia,* ICSID Case No. ARB/81/1, Decision on Proposal to Disqualify an Arbitrator (24 June 1982) [not public].
[129] Article 58 of the ICSID Convention and Rule 9(4) of the 2006 Arbitration Rules provide that a challenge request is decided by the other members of the tribunal, unless the unchallenged arbitrators are equally divided or where a sole arbitrator or the majority of all members of the tribunal are challenged. In the latter case, the ICSID Chairman makes a decision on the challenge request.
[130] Ibid 6 [unpublished], cited in W. Michael Tupman, 'Challenge and Disqualification of Arbitrators in International Commercial Arbitration' (1989) 38(1) Int'l & Comp. L. Q. 44-45. As stated above, the tribunal in Urbaser deemed it practically impossible for a human being to be absolutely impartial. See *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan (12 August 2010) para 40.
[131] Ibid 7, cited in Tupman (n 130) 45.

demonstrating the absence of independence but also must prove that the partiality of the challenged arbitrator is 'manifest' or 'highly probable'.[132]

3) Post-Award Review Mechanism

The ICSID annulment procedure is not specifically designed as a mechanism for reviewing the qualifications and conduct of arbitrators. However, one specific ground for annulment, i.e., corruption, distinctively relates to the qualifications and behavior of arbitrators. Corruption is an unacceptable misconduct that inherently bears the risk of a conflict of interests and compromises the impartiality and independence of the arbitrator. No annulment has been invoked on the ground of corruption on the part of an arbitrator.

In addition to corruption, Article 52(1) of the ICSID Convention sets out four other grounds for annulment as post-award remedies. These are the improper constitution of the tribunal, manifest excess of power, the serious departure from fundamental rules of procedure, and lack of a reasoned decision.[133] The qualifications and conduct of arbitrators can be subject of annulment review under these grounds of annulment. A lack of the required qualifications or unacceptable behavior may satisfy a ground for annulment resulting in the annulment of an award.

The grounds of annulment listed in Article 52 are exhaustive.[134] During the negotiations of the Convention, proposals to broaden the scope of the annulment grounds did not receive sufficient support, including the proposal by the Indian delegate to replace the word "corruption" with the term "misconduct" of arbitrators as a ground for annulment.[135] India's proposal to replace the word 'corruption' with the term 'misconduct' would have set out a lower threshold for the annulment of arbitral awards. As the UK delegate stated with respect to the qualifications and conduct of

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[132] Ibid 8, cited in Tupman (n 130) 45.

[133] To prevent abuse of the decision-making power, increase transparency and maintain the coherence of the arbitration system, Article 48 requires arbitrators to give reasons for decisions they render on the questions submitted to them by the disputing parties. The *Pious Fund* Commission observed that "this rule applies not only to the judgments of tribunals created by the State, but equally to arbitral awards rendered within the limits of the jurisdiction established by the *compromise* … [and] that this same principle should, for an even stronger reason, be applied to international arbitration". *The Pious Fund of the Californias (The United States of America v. The United Mexican States)*, PCA Case No. 1902-01, Award of the Tribunal (14 October 1902) 5.

[134] Stephen Jagusch and Jeffrey Sullivan, 'A Comparison of ICSID and UNCITRAL Arbitration: Areas of Divergence and Concern' in Michael Waibel and others (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer 2010) 101.

[135] *History of the ICSID Convention*, vol II-2 (n 4) 849-855.

arbitrators, the annulment mechanism applies to "very extreme cases of serious misconduct" (i.e., corruption), not for less serious misbehaviour or minor mistakes.[136]

More notably, under the ICSID annulment control system, the influence of disputing parties on the appointment of the members of the *ad hoc* committees is far less than their freedom to designate an arbitrator for an arbitration tribunal. According to Article 52(3), it is the Chairman of the ICSID Administrative Council who appoints members of *ad hoc* committees. Indeed, under Article 52(3) the selection of committee members by the ICSID Chairman is the only possibility, with no role for the disputing party in this respect.[137] Further, no member of an annulment committee should be the national of a State party to the dispute or have the same nationality as that of the claimant. The underlying reason for these conditions is to ensure the impartiality of the members of annulment committees.[138]

Like the challenge mechanism,[139] the drafters of the ICSID Convention designed the annulment procedure as a control mechanism for use in exceptional instances.[140] It guarantees the health of the ICSID arbitration regime. As to the exceptional character of the post-award control mechanism, Schatz notes that "[i]f the frequency of annulment proceedings increases, parties may discontinue using ICSID arbitration" because generally disputing parties do not see the ICSID annulment control system as sympathetic to their claims.[141] Further, the main difference between review mechanisms under the ICSID Convention and under other regimes is that ICSID decisions can only be reviewed by *ad hoc* committees and are subject to the limited grounds established in the Convention, while decisions of other tribunals like ICC, SCC, or UNCITRAL tribunals are subject to domestic review regulations that apply to ICA.[142]

The first annulment proceeding was initiated in *Klöckner v. Cameroon* - almost a decade after the initiation of the first ICSID arbitration. The annulment committee in the *Klöckner* case elaborated

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[136] Ibid 854.
[137] Schreuer and others (n 121) 1028.
[138] Jagusch and Sullivan (n 134) 101.
[139] *History of the ICSID Convention*, vol II-1 (n 4) 388.
[140] *History of the ICSID Convention*, vol II-2 (n 4) 854.
[141] Sylvia Schatz, 'Effect of the Annulment Decisions in AMCO v. Indonesia and Klockner v. Cameroon on the Future of the International Centre for the Settlement of Investment Disputes' (1988) 3(2) Am. U. J. Int'l L. & Pol'y 3(2) 513.
[142] Juan Fernández-Armesto, 'Different Systems for the Annulment of Investment Awards' (2011) 26(1) ICSID Rev. 132.

on the provisions of the Convention. Particularly, it made a distinction between a failure to apply the applicable law and a mistaken application of the law. In the view of the committee, the former was regarded as a serious misconduct on the part of arbitrators that could constitute a reason for an annulment since it amounted to a manifest excess of power in the meaning of Article 52 of the Convention.[143] In the words of the *Klöckner* annulment committee, "[a]pplication of a law other than that agreed to by the parties constitutes an excess of powers and is a valid ground for annulment. An error in the application of the proper law, even if it leads to a manifestly incorrect application of the law, is not a ground for annulment".[144]

As to the ground of the failure of the Tribunal to state reasons for its decisions, the *Klöckner* annulment committee stated that Article 52(1) of the Convention "does not mean just any reasons, purely formal or apparent, but rather reasons having some substance, allowing the reader to follow the arbitral tribunal's reasoning, on facts and on law".[145] The *Amco* annulment committee followed the views of the *Klöckner* committee and found that the failure on the part of the arbitration tribunal to apply the applicable law caused manifest excesses of power.[146]

However, these two annulment decisions received sharp criticism in that they ignored the functional character of the control system. Indeed, the annulment committees adopted a textual approach and "did not even consider the objects and purposes of the control system". [147]

III) Investment Treaty Arbitrators in the Global Era

1) Qualifications and Conduct of Arbitrators: Contemporary Challenges

In the 1970s, investor-State arbitration emerged as a discipline separate from inter-State disputes and ICA, with the first ITA tribunal being constituted in 1986.[148] Since then the use of investment

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[143] *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Decision on Annulment (3 May 1985) [unpublished] 119 and 125, cited in Parra (n 127) 185.

[144] Schreuer and others (n 121) 955.

[145] *Klöckner* (n 143), cited in Parra (n 127) 185.

[146] *Amco Asia Corporation and others v. Republic of Indonesia, ICSID Case ARB/81/1, Decision on Annulment* (16 May 1986) [unpublished] 515–516 and 535, cited in Parra (n 127) 185.

[147] Reisman (n 99) 789-790.

[148] See *Asian Agricultural Products Limited v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award of the Tribunal (27 June 1990).

treaty arbitrators has been commonplace in the contemporary world.[149] These individuals are one of the most influential groups of non-State actors in the international community,[150] particularly due to the power granted to them to solve very contentious and sensitive controversies, decided damages (often in hundreds of millions of dollars), and their influence over the development of PIL.

The year 2001, i.e., when the Argentine great depression peaked, can be seen as the beginning of a new chapter with a heightened involvement of investment treaty arbitrators in the global governance of foreign investment as well as with the subsequent controversies around the qualifications, behaviour, duties, and authority of arbitrators.[151] The Argentine economic crisis demonstrated how regulatory measures of a host State adopted because of economic urgency could be susceptible to an international review by investment treaty arbitrators.[152]

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[149] According to the ICSID database, the recourse to ICSID arbitrators accelerated in the 2000s with more than 200 disputes initiated. In this decade, disputes referred to ICSID arbitrators increased more than four-fold compared to the combined number of cases initiated between 1972 and 1999. Investor claimants showed even greater interest in ICSID arbitrators in the 2010s, with the number of arbitrations registered with ICSID in that decade grew roughly twice greater than that of the 2000s. In the 2010s, 412 new arbitrations were registered with ICSID.

[150] For more about the role of non-state actors in PIL, see Jean d'Aspremont, *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (Routledge 2011); Math Noortmann and Cedric Ryngaert, *Non-State Actor Dynamics in International Law: From Law-Takers to Law-Makers* (Taylor and Francis 2016), and Andrea Bianchi, *Non-State Actors and International Law* (Taylor & Francis 2017).

[151] The increasing involvement of investment treaty arbitrators was the result of new liberal policies. Starting in the early 1980s, the neoliberal economic policies supported by economic powers and global financial institutions increased the availability of foreign capital to developing countries. The latter were required by the International Monetary Fund and World Bank to reform their economic agenda according to mandated liberal policies. On the other hand, world governments entered into a vast number of bilateral investment treaties (BITs) and free trade agreements (FTAs) that included broad provisions in support of foreign investors, while lacking proper clauses on the exceptions to treaty provisions to protect the State from arbitrations before an international tribunal. According to the 2000 UNCTAD World Investment Report, by the end of 1999 the number of BITs reached 1856, with 131 national investment laws that liberalized economic policies in favour of foreign investors. Further, despite the view rejecting the strong effect of the existence of an investment treaty on attracting foreign investors, studies provide empirical evidence on the close tie between the flow of foreign investment and succumbing to the restrictions included in investment treaties. See International Monetary Fund, *Evaluation Report: The IMF and Argentina, 1991-2001* (2004); James M. Boughton, *The IMF and the Silent Revolution: Global Finance and Development in the 1980s* (11 September 2000); Viktor Jakupec and Max Kelly, 'Regulatory Impact Assessment: The Forgotten Agenda in ODA' in ViktorJakupec and Max Kelly (eds), *Assessing the Impact of Foreign Aid: Value for Money and Aid for Trade* (Academic Press, 2015) 99; UNCTAD, *World Investment Report 2000: Cross-border Mergers and Acquisitions and Development* (2000); Eric Neumayer and Laura Spess, 'Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?' in Karl Sauvant and Lisa Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (OUP 2009) 225-252.

[152] In the case of Argentina, while some tribunals did not hold Argentina liable for activities undertaken during the time of the economic crisis as the crisis amounted to the state of necessity, others ruling on the same or similar facts reached an opposite conclusion. See, e.g., *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award (12 May 2005); *LG&E Energy Corp., LG&E Capital Corp., and LG&E International,*

While ITA has become the fastest growing area of international dispute settlement,[153] this greater involvement of investment treaty arbitrators in the resolution of international disputes has put arbitrators themselves under stiff examination. The surge in ITA beginning in the early 2000s resulted in an increased scrutiny into the qualifications, behavior, and decision-making authority of arbitrators. Indeed, the expectations of the drafters of the ICSID Convention for designing the ICSID control mechanism for exceptional circumstances did not materialize.[154] The use of the challenge or annulment mechanisms is not no longer an exception to the regular arbitration process.[155]

Investment treaty arbitrators have caused heated debates among States, commentators, and other stakeholders. Arbitrators' background and behaviour and their relationships with other arbitrations practitioners have generated considerable discussions. There are concerns that professional qualifications of some panelists (e.g., expertise in private law) are not aligned with the requirements needed for adjudication of matters of PIL.[156] Further, their relationships and

Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability (3 October 2006); *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability (30 July 2010); *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Liability (29 December 2014). See also Michael Waibel, 'Two Worlds of Necessity in ICSID Arbitration: CMS and LG&E' (2007) 20(3) Leiden J. Int. L. 637-648; August Reinisch, 'Necessity in International Investment Arbitration - An Unnecessary Split of Opinions in Recent ICSID Cases? Comments on CMS v. Argentina and LG&E v. Argentina' (2007) 8(2) J. World Invest. Trade 191-214; Stephan W. Schill, 'International Investment Law and the Host State's Power to Handle Economic Crises – Comment on the ICSID Decision in LG&E v. Argentina' (2007) 24(3) J. Int. Arbitr. 265–286; Stephen Park and Tim Samples, 'Tribunalizing Sovereign Debt: Argentina's Experience with Investor–State Dispute Settlement' (2017) 50(4) Vand. J. Transnat'l L. 1033-1063.

[153] Charles N. Brower and Stephan W. Schill, 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?' (2009) 9(2) Chicago J. Int'l L. 471-472.

[154] See *History of the ICSID Convention*, vol II-1 (n 4) 388; *History of the ICSID Convention*, vol II-2 (n 4) 854.

[155] As will be reviewed in Chapter five, as of 29 April 2022, at least 92 challenges requests were submitted in ICSID cases, with the overwhelming majority (92 percent) of them being filed against members of arbitration tribunals. The cases in which a challenge request was submitted represented slightly less than 10 percent (77 cases) of the total number of ICSID cases (904 cases) as of the said date. Similarly, the recourse to the annulment process has been commonplace. ICSID database indicates that as of 30 June 2022, roughly 30 percent (171 cases) out of the total concluded cases (606 cases) have been subject to the annulment review.

[156] The commonalities and differences between ICA and ITA and particularly challenges involving the use of commercial arbitration rules in ITA have caused much debate among commentators. See, e.g., Stephan Wilske and others, 'International Investment Treaty Arbitration and International Commercial Arbitration - Conceptual Difference or Only a Status Thing' (2008) 1 Contemp. Asia Arbitr. J. 213-234; Karl-Heinz Böckstiegel, 'Commercial and Investment Arbitration: How Different are they Today? The Lalive Lecture 2012' (2012) 28(4) Arb. Intl. 577-590; Piero Bernardini, 'International Commercial Arbitration and Investment Treaty Arbitration: Analogies and Differences' in David Caron and others (eds), *Practising Virtue: Inside International Arbitration* (OUP 2015) 52-68; Joel Dahlquist, *The Use of Commercial Arbitration Rules in Investment Treaty Disputes* (Brill 2021).

affiliations with other actors (e.g., parties, law firms, and quantum experts) in ITA increase the risk of conflict of interest.

Nowadays, investment treaty arbitrators are accused of advancing policies that favour investors and economic powers. Sornarajah argues that neoliberal ideas "play[] a significant role in the taking of expansionary views by arbitrators in the interpretation of investment treaties".[157] They are criticized for misunderstanding the fundamental concepts of PIL and creating considerable uncertainties in the international investment legal regime[158] - a phenomenon that Bjorklund calls 'perpetual challenges'.[159] More notably, inconsistent awards have caused a serious backlash against investment treaty arbitrators.[160] Indeed, States as the superior actors within the international legal framework have felt a loss of control over the direction of the field. This is arguably, due to the openness of investment arbitration tribunals to expansionist interpretations of treaty provisions in support of claimants,[161] as well as a lack of sufficient mechanisms for screening and monitoring the eligibility and conduct of investment treaty arbitrators.

With the expansion of the network of investment treaty arbitrators, their interactions both with the arbitration community members and other participants in arbitrations have become far more complex.[162] The extent and nature of these relationships add more complexity to the contemporary challenges over the qualifications, conduct, and duties of arbitrators.

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[157] Muthucumaraswamy Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (CUP 2015) 14. See also Christopher Dugan and others, *Investor-State Arbitration* (OUP 2011) 425; Mauro Rubino-Sammartano, *International Arbitration Law and Practice* (3rd edn., Juris Publishing 2014) 1601-1602.

[158] See, e.g., Pierre-Marie Dupuy, 'A Guided Tour of the Chorzow Factory Case: A Review of Reparation Principles in International Investment Law', Report on Lalive Lecture of 29 September 2022 (20 October 2022).

[159] Andrea K. Bjorklund, 'Constraints on Power and Authority in International Investment Arbitration' in Arthur Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2013* (Martinus Nijhoff 2014) 15.

[160] See e.g., José E. Alvarez, *The Public International Law Regime Governing International Investment* (Brill 2009) 352-366; Stephan W. Schill, 'Authority, Legitimacy, and Fragmentation in the (Envisaged) Dispute Settlement Disciplines in Mega-Regionals' in Stefan Griller and others (eds), *Mega-Regional Agreements: TTIP, CETA, TiSA. New Orientations for EU External Economic Relations* (OUP 2017) 111-150.

[161] For a different view see William W. Park, 'Arbitrator Integrity and Investor-State Disputes' in Arthur Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2009* (Martinus Nijhoff 2010) 106-111 (arguing that investor-State arbitration is the victim of its own success, and its general acceptance has made it object to criticism).

[162] Susan D. Franck, 'The Role of International Arbitrators' (2006) 12(2) ILSA J. Int'l & Comp. L. 519.

Over the last two decades, ITA has grown in an unprecedented way and in practice has become a "business". One can argue that the involvement of panelists who have expertise in private law and ICA experience in ITA has transferred the field into a profitable global market.[163] While the new generation of arbitrators (often tied to law firms) have replaced the old faces, third-party litigation funders attract law firms to facilitate the use of ITA.[164]

With the influence of chain law firms over the (re)appointment of arbitrators,[165] arbitrators who have expertise in private law are appointed to ITA panels and this may potentially result in a greater influence of private law concepts over ITA.[166] Also, arbitrators' affiliation with law firms has put their independence and impartiality into question.[167] In particular, parties' counsel plays a significant role in the selection of arbitrators and valuation experts as well as in finding third-party funders.[168] Rogers states that "[a]rbitrator selection is often in the hands of members of the same

[163] See Pia Eberhardt and Cecilia Olivet, *Profiting from injustice: How Law Firms, Arbitrators and Financiers Are Fuelling an Investment Arbitration Boom* (Corporate Europe Observatory and the Transnational Institute 2012).

[164] Rachel Denae Thrasher, 'The Regulation of Third Party Funding: Gathering Data for Future Analysis and Reform' (2018) 9 Law and Justice in the Americas Working Paper Series 1-17; Victoria Sahani, 'Reshaping Third-Party Funding' (2017) 91(3) Tul. L. Rev. 405-472.

[165] See generally, Runar Hilleren Lie, 'The Influence of Law Firms in Investment Arbitration' in Daniel Behn and others (eds), *The Legitimacy of Investment Arbitration: Empirical Perspectives* (CUP 2022) 100-132. See also Susan Segal-Horn and Alison Dean, 'The Rise of Super-Elite Law Firms: Towards Global Strategies' (2011) 31(2) Serv. Ind. J. 195-213.

[166] As will be reviewed in chapters three and five, those who had a private law background and/or ICA represent a considerable proportion, though not the majority, of the ICSID arbitration community.

[167] The *Fábrica* case demonstrates some of the complexities of the relationships between arbitrators and law firms in the contemporary world. In that case, Respondent discovered that Claimant's appointee had previously had professional ties with a Canadian law firm, Norton Rose Fulbright, that represented claimants in arbitrations against Respondent. This relationship was as a result of a merger between two law firms. Further, Respondent found that the staff of the arbitrator's law firm were receiving their salary and other employment benefits from an entity set up by Norton Rose Fulbright. Additionally, it was uncovered that an assistant of the arbitrator had an employment relationship with Norton Rose Fulbright. Respondent argued that the assistant's access to the arbitration files would put the arbitrator's independence and impartiality in question. See *Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/21, Reasoned Decision on the Proposal for Disqualification of Arbitrator L. Yves Fortier (28 March 2009); Decision on the Third Proposal to Disqualify Arbitrator L. Yves Fortier (12 September 2016); and Decision on the Proposal to Disqualify Arbitrator L. Yves Fortier (5 May 2017).

[168] In the *Burlington* case, after the Claimant-appointed arbitrator fully supported the claims of its appointer and provided partial dissenting opinions to some portions of the tribunal's decisions on jurisdictions and liability in which Claimants' claims were denied, Respondent discovered that the arbitrator had already been appointed multiple times (repeat appointments) in the cases in cases where Claimant's law firm, Freshfields Bruckhaus Deringer, represented a disputing party, while the arbitrator had not disclosed his previous appointments and relationships with the law firm. See *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña (13 December 2013).

"club," who are either operating in the institutions or already appointed as party-appointed arbitrators".[169]

With the inflow of arbitration practitioners from ICA, there are concerns that many investment treaty arbitrators do not possess sufficient expertise in PIL.[170] Although under the ICSID Convention, arbitrators are required to have a background in one of the specified fields (i.e., law or industry, finance, and commerce), the lack of understanding and appreciation of PIL significantly contributes to incorrect interpretation or misapplication of the governing law - that is often the provisions of the applicable treaty and PIL.

Further, only a small number of ITA practitioners have a full-time arbitrator position as under the current appointment mechanism appointments are made on an *ad hoc* basis and the majority of all arbitrators only receive a small number of appointments that is not sufficient for establishing a full-time arbitration career. With no permanent court system in place, it is common for arbitration practitioners to assume, concurrently or sequentially, revolving roles as arbitrator, counsel, and legal expert.[171]

With their involvement in the double-hatting practice, arbitrators' voting behavior is likely influenced by their positions in other disputes. This is particularly because the outcome of ITA frequently revolves around the same few fundamental notions that exist both in treaties and customary international law: i.e., expropriation, fair and equitable treatment, full protection and security, the MFN clause, and the umbrella clause.[172] As described by Park, the arbitrator when

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[169] Catherine A. Rogers, 'The Vocation of the International Arbitrator' (2005) 20(5) Am. Univ. Int. L. Rev. (2005) 967.

[170] See Bruno Simma, 'Foreign Investment Arbitration: A Place for Human Rights?' (2011) 60 Int. Comp. Law Q. 576. The concerns surrounding the professional education of ICSID arbitrators will be discussed in chapters three and five.

[171] Imagine a situation in which a practitioner simultaneously acts as an arbitrator in one case, counsel in an unrelated second dispute, and a legal expert in the third. The relationships between two of the arbitrators and a counsel in the *X* case exemplify the complexities of ties of a practitioner to a tribunal. In that case, 'A' was acting as the presiding arbitrator, and 'D' as Counsel for Claimant, while at the same time 'A' and 'D' were co-arbitrators in a second separate case and they were both representing a different party in a third unrelated proceeding. Furthermore, 'D' and 'C' (a co-arbitrator in the *X* case) were simultaneously co-arbitrating a distinct fourth case. This issue will be further discussed in chapters three, four and five. See also Malcolm Langford and others, 'The Revolving Door in International Investment Arbitration' (2017) 20(2) J. Int. Econ. Law 301–332.

[172] Philippe Sands, 'Conflict and Conflicts in investment treaty Arbitration: ethical standards for Counsel' in Arthur Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2012* (Martinus Nijhoff 2013) 32.

occupying conflicting roles must address the same question that is presented to him or his law firm as an advocate in another case and it is not hard to imagine how the arbitrator is subconsciously affected by 'role confusion'.[173] This phenomenon threatens the integrity of ITA as a whole.

Some argue that given the prevalence of the above circumstances in ITA, arbitrators are prone to systemic bias.[174] With deficiencies in the arbitrators' control mechanism and the *ad hoc* appointment mechanism, the likelihood of conflict of interests is strong. Indeed, conflict of interest is more prominent in ITA than in other fields of international dispute settlement. The above challenges put into question the impartiality of arbitrators and the extent of their freedom from bias.[175]

The new challenges surrounding arbitrators' qualifications (e.g., lack of sufficient familiarity with PIL), relationships (e.g., affiliations with law firms representing a disputing party), and duties (e.g., duty to disclose any circumstances that may give rise to a conflict of interest) largely stem from insufficient regulation both at the arbitration institutions level (such as the ICSID framework) as well as at the investment treaty level. The mechanisms governing the qualifications, conduct, and duties of investment treaty arbitrators are not designed to meet contemporary needs.

2) The Need to Restructure the Arbitrator Control Mechanism

The ICSID control mechanism suffers from serious deficiencies. While the ICSID legal framework incorporates certain fundamental principles of international adjudication (e.g., impartiality and independence) and provides for a control mechanism over the competencies, behaviour, and duties of arbitration practitioners, it is not sufficiently comprehensive to address all the new challenges arising out of the new patterns of social behaviour of arbitrators in the context of PIL. The ICSID architecture is not designed to efficiently respond to the conduct of arbitrators in an interconnected world. The ICSID provisions on arbitrators were drafted at a time when there was less need for

[173] William W. Park, 'Arbitrator Integrity: The Transient and the Permanent' (2009) 46 San Diego L. Rev. 648.

[174] See Gus Van Harten, *Investment Treaty Arbitration and Public Law* (OUP, 2007) 152-153 (claiming that some investor-State arbitrators incline to advocate claims of investors in order to increase the chance of their re-appointment in the marketplace and concluding that "such market-based accountability is rather weak if those who direct arbitration business down the industry ladder are themselves dependent on prospective claimants and corporate patrons").

[175] See ibid 169-174 (arguing that the creation of the network of arbitrators has caused the pro-investment bias expanding the scope of governments' obligations, and also the financial need of arbitrators to be re-designated by investors plays a part in giving expansive interpretations).

vigorous social controls over arbitrators due to the small pool of arbitrators and the infrequency of concerns over the qualifications and conduct of arbitrators.

The ICSID legal framework does not expressly impose any prohibition on arbitrators in respect of double-hatting. Similarly, the ICSID Convention or its Arbitration Rules do not prohibit 'repeat appointments'[176] or 'cross appointments'.[177] The Rules do not provide detailed rules on the nature of permitted or prohibited relationships between an arbitration practitioner and disputing parties or law firms. Nor are there clear provisions with respect to interactions between arbitrators and quantum firms or other experts.[178] Such deficiencies lay the groundwork for the creation of influential circles that Dezalay and Garth refer to as 'mafia': "[i]t's a mafia because people appoint one another. You always appoint your friends-people you know".[179]

However, Rule 19 of the 2022 ICSID Arbitration Rules and the Arbitration Declaration Form requires arbitrators, before assuming any position, to provide a statement detailing their past and present professional, business, and other relationships with parties or any other circumstance that might cause the arbitrator's reliability for independent judgment to be questioned. The arbitrator

[176] See 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 2014) 312.

[177] 'Cross appointment' is a situation where two law firms reciprocally recommend to the disputing party that they are representing the appointment of an arbitrator from the other law firms. See, e.g., *Raiffeisen Bank International AG and Raiffeisenbank Austria d.d. v. Republic of Croatia*, ICSID Case No. ARB/17/34, Decision on the Proposal to Disqualify Stanimir Alexandrov (17 May 2018) paras 29-30, 60-72, and 93- 95.

[178] As will be discussed in chapter four, this issue was raised in the *Eiser* and *Tethyan Copper* cases. *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Decision on annulment (11 June 2020), and *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/01, Opinion Pursuant to the Request by ICSID dated July 28, 2017, on the Respondent's Proposal for the Disqualification of Dr. Stanimir Alexandrov dated July 7, 2017 (31 August 2017) [not public].

[179] Yves Dezalay and Bryant G. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press 1998) 50. On the contrary, some argue against using the term 'mafia'. For a different view, see James Crawford, 'The Ideal Arbitrator: Does One Size Fit All?', (2018) 32(5) Am. Univ. Int. L. Rev. 1011 (stating that calling arbitrators 'mafia' is an exaggeration); Jan Paulsson, 'Ethics, Elitism, Eligibility' (1997) 14 J. Int. Arbitr. 19 (arguing that description of arbitrators as mafia have no basis); Tai-Heng Cheng, 'Precedent and Control in Investment Treaty Arbitration' Andrea K. Bjorklund and others, *Investment Treaty Law: Current Issues III* (BIICL 2009) 180 (stating that the fact that the pool of arbitrators is diverse and consists of hundreds of panelists show that the pool is not an exclusive club, nor a mafia); Michael D. Goldhaber, *2015 Arbitration Scorecard: Deciding the World's Biggest Disputes*, TAL Asian Lawyer (1 July 2015) 2 (addressing the authors of the 2015 Arbitrator Scorecard, Stern stated that "[s]ome people call it a mafia. A nicer way to put it would be a large family, or even an unorganized non-governmental organization of arbitrators!")

has a continuing obligation to disclose any such relationships or circumstances that may arise during the proceedings.[180]

Unlike the 2006 ICSID Arbitration Rules, the 2022 Rules add more clarity to the disclosure obligation of ICSID panelists and what information is precisely required from panelists to disclose to the disputing parties. Indeed, the contents of the disclosure obligation under Rule 6(2) of the 2006 ICSID Arbitration Rules were vague, and this ambiguity created confusion as to what was require from arbitrators, since neither the extent of the disclosure obligation nor the consequences for the failure to disclose were fully clear.

Despite some recent developments in the 2022 Arbitration Rules, the ICSID disqualification mechanism has is not fully effective in addressing concerns arising out of the conduct of arbitrators. While the number of challenge requests have dramatically increased over the past two decades, the success rate of challenges under the ICSID disqualification mechanism remains particularly low.[181] Further, as will be discussed in Chapter 2, the ICSID challenge review mechanism suffers structural deficiencies as it is prone to conflict of interest and legitimacy concerns.

Additionally, as will be reviewed in Chapter 4, the annulment mechanism falls short of ensuring that arbitrators comply with the qualifications, conduct, and duties set out under the ICSID framework. In other words, the ICSID post-award control procedure does not provide effective review tools in all cases where there might be doubt about the personal qualifications of arbitrators.

Another challenge that the ICSID legal framework has failed to properly address is the professional background of investment treaty arbitrators. The qualifications of ICSID arbitrators were

[180] As to the duty to disclose, similarly Article 11 of the 2010 UNCITRAL Rules provides that arbitrators should "disclose any circumstances likely to give rise to any justifiable doubts as to his or her impartiality or independence". The article assumes a continuous, two-stage obligation on the part of arbitrators to inform the disputing parties or the appointing authority, as the case may be, of any factual or legal circumstances that may affect the arbitrator's integrity. See David Caron and Lee M. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (OUP 2013) 194-197. Also, Article 11 of the 2017 ICC Rules of Arbitration imposes a similar two-stage duty of disclosure on arbitrators and the scope of their obligation extends throughout the arbitration proceedings. If the arbitrator fails to disclose "certain information that matter comes to a party's attention, then the arbitrator runs the risk of being challenged... and the non-disclosure of information that the Court considers should reasonably have been disclosed may, in and of itself, provide a basis for the replacement of an arbitrator, even if it would not, if originally disclosed, have justified the refusal to confirm an arbitrator". See Schwartz and Derains (n 37) 135-136.

[181] As discussed in Chapter 2, as of 29 April 2022, roughly 5 percent of all known disqualification requests at ICSID were successful.

negotiated in the 1960s in light of the commonness of arbitrations based on foreign investment contracts and domestic investment laws. The ICSID provisions on the professional qualifications of arbitrators do not reflect the contemporary situation where the overwhelming majority of ICSID arbitrations are based on investment treaties that require arbitrators to have sufficient expertise in PIL.

Chapter 2

Investment Treaty Arbitrators:

Patterns of Social Behavior

I) Introduction

Over the past two decades, commentators have scrutinized investment treaty arbitrators from a sociological perspective.[1] Critics have in particular discussed the behavior of arbitrators and their social interactions,[2] their psychology,[3] and the culture of the arbitrators' community.[4]

Investment treaty arbitrators, along with parties to arbitration, are essential social actors without whom an arbitration process would not exist.[5] The arbitrator position comes with an enormous

[1] See, e.g., Moshe Hirsch, 'The Sociology of International Investment Law' in Zachary Douglas and others (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP 2014) 142-167; Emmanuel Gaillard, 'Sociology of International Arbitration' in David Caron and others (eds), *Practising Virtue: Inside International Arbitration* (OUP 2015) 187-203; Giorgio Sacerdoti, 'From Law Professor to International Adjudicator: The WTO Appellate Body and ICSID Arbitration Compared, a Personal Account' in David Caron and others (eds), *Practising Virtue: Inside International Arbitration* (OUP 2015) 204-214; Moshe Hirsch, 'The Sociological Dimension of International Arbitration: The Investment Arbitration Culture' in Thomas Schultz and Federico Ortino (eds), *Oxford Handbook of International Arbitration* (OUP 2020) 718-739; Jan Paulsson, 'Rise of a Discipline' in C. L. Lim (ed), *The Cambridge Companion to International Arbitration* (CUP 2021) 179-203.

[2] See, e.g., Fatima-Zahra Slaoui, 'The Rising Issue of 'Repeat Arbitrators': A Call for Clarification' (2009) 25(1) Arbitr. Int. 103–120; David Branson, 'Sympathetic Party-Appointed Arbitrators: Sophisticated Strangers and Governments Demand Them' (2010) 25(2) ICSID Rev. 367-392; Gus Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration' (2012) 50(1) Osg. Hall L. J. 211-268; Sergio Puig, 'Social Capital in the Arbitration Market' (2014) 25(2) EJIL 387-424; Gus Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication (Part Two): An Examination of Hypotheses of Bias in Investment Treaty Arbitration' (2016) 53(2) Osg. Hall L. J. 540-586; Malcolm Langford and others, 'The Revolving Door in International Investment Arbitration' (2017) 20(2) J. Int. Econ. Law 301–332; Céline Lévesque, 'Canada's Pro-Ban Stance on Double-Hatting: Playing the Long Game in ISDS Reform?' (2021) 58 Can YB Int'l L. 382-407.

[3] See, e.g., Susan Franck and others, 'Inside the Arbitrator's Mind' (2017) 66 Emory L. J. 1115-1173; Edna Sussman, 'Biases and Heuristics in Arbitrator Decision-Making: Reflections on How to Counteract or Play to Them' in Tony Cole (ed), *The Roles of Psychology in International Arbitration* (Kluwer 2017) 45-74.

[4] See, e.g., Henri C. Alvarez and Mark W. Friedman, 'What Should Parties Expect from Arbitrators and What Should Arbitrators Expect from Parties?' (2009) 24(1) ICSID Review 39-48; Thomas Schultz and Robert Kovacs, 'The Rise of a Third Generation of Arbitrators?: Fifteen Years after Dezalay and Garth' (2012) 28(2) Arb. Intl. 161–172; Susan Franck and others, 'The Diversity Challenge: Exploring the 'Invisible College' of International Arbitration' (2015) Colum. J. Transnat'l L. 429-506.

[5] Gaillard (n 1) 190.

responsibility which goes beyond resolving a specific dispute. As international social actors, investment treaty arbitrators assume two main social functions. They serve as agents of the international community to peacefully resolve disputes between foreign investors and host States, thereby contributing to the global governance of foreign investments. Investment treaty arbitrators also participate in the development of PIL on foreign investment. They interpret and apply treaty provisions and provide an authoritative statement of the governing law of the dispute. It can be argued that both functions have been overshadowed by debates and criticism over the social behaviour of investment treaty arbitrators over the last two decades.

This chapter reviews how the social behavior of arbitrators could potentially decrease the confidence in the investment arbitration system and, in some instances, jeopardize the very foundations of the system. To address this issue, different patterns of social behaviour of arbitration practitioners and the way the network of investment treaty arbitrators works are examined.

Further, there is disagreement among commentators on whether there exists a systemic bias in ITA. While most commentators criticizing the behaviour of arbitrators do not submit documented evidence to support their arguments, a small number of them have provided empirical data concluding that there exists a systemic bias in the field.[6] Indeed, scholarship debates on investment treaty arbitrators have entered an experimental turn. In particular, in 2009 van den Berg examined dissenting opinions issued in investment arbitrations and found that nearly all dissenting opinions issued in the cases under examination involved arbitrators appointed by a party that lost the dispute, either fully or partially.[7] Brower and Rosenberg rebutted Van den Berg's claim;[8] however, they did not substantiate their argument with fact-based evidence.

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[6] See, e.g., Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration' (n 2); Anton Strezhnev, *Detecting Bias in International Investment Arbitration*, Paper presented at the 57th Annual Convention of the International Studies Association - Atlanta, Georgia (16-19 March 2016); Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication (Part Two): An Examination of Hypotheses of Bias in Investment Treaty Arbitration' (n 2); Sergio Puig and Anton Strezhnev, 'Testing Cognitive Bias: Experimental Approaches and Investment Arbitration' in Daniel Behn and others (eds), *The Legitimacy of Investment Arbitration: Empirical Perspectives* (CUP 2022) 85-99.

[7] See Albert Jan van den Berg, '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* (Brill 2010).

[8] See Brower and 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(1) Arb. Intl. 7-44.

While it is extremely difficult to determine the attributes of an arbitrator's mind, the voting behavior of arbitrators and the outcome of arbitration proceedings can serve as an indicator for assessing if there exists any correlation between appointment and voting behavior. This chapter examines the extent that investment treaty arbitrators support the position of their appointing party. In particular, it reviews the decision-making behavior of two rival groups of elite insiders, i.e., the most frequent party-appointed arbitrators with high or exclusive appointments from one disputing 'side' - claimants or respondents. It investigates whether collective voting records of these influential arbitrators substantiate any correlation between receiving high appointments from a disputing side and voting behavior.

This chapter further outlines certain legitimacy concerns arising out of the *ad hoc* party-appointing mechanism and analyzes the data collected for this purpose. It discusses concerns over arbitrators' dissenting opinions, reviews the concerns over the appointment of panelists who have expertise in private law, and debates the structural deficiencies of the appointment mechanism including within the ICSID framework.

II) How Do Investment Treaty Arbitrators Interact?

The current generation of investment treaty arbitrators has demonstrated different patterns of behavior from those of the 1970s generation of arbitrations,[9] while the ITA community has not been able to self-regulate according to new behavioral trends. Leading arbitration rules widely used in ITA (e.g., the 2006 ICSID Arbitration Rules and the 1976 UNCITRAL Arbitration Rules) do not expressly control, restrict, or prohibit double-hatting or repeat appointments by an arbitration practitioner. Nor do they contain detailed and vigorous provisions on an arbitrator's relationships with other participants in arbitration proceedings (e.g., parties, law firms, quantum experts, and third-party funders).

The lack of effective regulations has allowed the creation of new forms of relationships in ITA and in the context of PIL. Because of these new interactions, a complex network is created. In this

[9] In addition to the patterns of behavior presented in this section, this claim is further documented in Chapter 3. It reviews the evolution of the ICSID arbitration community over the past five decades and how the composition of the community changed from one decade to another.

interconnected web both the nature of activities in which an arbitrator practitioner is engaged as well as the extent of actors within his or her circle of contacts are vastly expanded.

An arbitrator's relationships often involve a large number of actors, and this has changed the dynamics of ITA. These interactions have created new challenges in the system. These, for example, include the possibility of use of confidential information an arbitration practitioner is privy to for another purpose, the likelihood for an individual to make a reasoned decision on a question of law as an arbitrator one day and appear as counsel or expert arguing against the same reasoning the next day in another dispute, as well as arbitrators' ability to influence legal precedent in a way that is favorable to his/her appointing party to increase the likelihood of future appointments.

These new patterns of behaviour in the context of PIL can jeopardize confidence in the ITA mechanism, with some forms of relationships involving a serious or inherent risk of conflict of interests.[10] The new social patterns of behavior can potentially influence the conduct of arbitration proceedings and influence the outcome of the dispute.

This section reviews various patterns of interactions of arbitrators that have emerged over the past few decades to show how arbitrators behave within the complex network involving different participants of ITA.[11] To highlight the extent of the challenges the arbitration community is facing as a result of the social conduct of arbitrators, the review below mainly focuses on the behavior of the most frequent arbitrators, i.e., 'power brokers' who exercise a greater influence in the arbitration community. Classifying instances of the social behavior of arbitrators both demonstrate the complexity of the network in which arbitrators operate and highlight commonplace behavioral attitudes that can inherently, or at least potentially, give rise to doubt about the required qualifications of arbitrators.

While efforts have been made in this research to thoroughly document the behavioral patterns of arbitrators, it is acknowledged that the categories of behaviour examined below are not

[10] As an instance, the *ad hoc* committee in *Eiser* stated that double hatting bears an inherent risk of conflict of interests. See *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Decision on annulment (11 June 2020) para 223.

[11] The data relied on in this section is extracted from the following databases: Investment Policy Hub, ICSID, ISLG, Ju Mundi, PCA, IA Reporter and italaw (updated as of 30 June 2022).

comprehensive. Indeed, a comprehensive examination of behavioral patterns that causes challenges in the system is extremely difficult, if not practically impossible.

i) ***Concurrent service in counsel-arbitrator roles***: The behavior of one arbitrator serves as an example of a common situation where an arbitration practitioner provides concurrent services as counsel and arbitrator. Charles Brower has been in the pool of international arbitrators since the early 1980s who assumed concurrent (and also consecutive) roles as arbitrator and counsel in ITA and international arbitration. The arbitrator served as a member of the Iran-US Claims Tribunal (IUSCT) between 1983 and 2020 and has acted as and adjudicator in *ad hoc* ICA and foreign investment disputes. While acting as an arbitrator in investment treaty disputes, he has served as a law firm partner representing disputing parties in foreign investment arbitrations and other disputes.[12]

The behavior of Emmanuel Gaillard represents another instance of concurrent services provided by an influential arbitration practitioner. The French arbitration practitioner Emmanuel Gaillard appeared as the claimant-appointed arbitrator in *Telekom v. Ghana,*[13] while simultaneously acting as a legal counsel for another claimant in *RFCC v. Morocco*.[14] With Gaillard's co-arbitrators not granting Ghana's disqualification request, Ghana challenged the arbitrator before the Hague District Court (as the Netherlands was the seat of the arbitration). In view of the respondent, Gaillard's engagement as arbitrator in *Telekom* conflicted with his capacity as counsel in *RFCC* as both disputes involved similar legal questions. Working as counsel on the same issues, the arbitrator could not remain unbiased when voting on the issues common between the two disputes. In other words, it was very likely that his approach as a counsel could influence his reasoning and mentality as an arbitrator. Agreeing with the challenging party that his behavior could give rise to

[12] These cases include *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, *Manufacturers Hanover Trust Company v. Arab Republic of Egypt and General Authority for Investment and Free Zones*, ICSID Case No. ARB/89/1, *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, and *Československa obchodní banka, a.s. v. Slovak Republic*, ICSID Case No. ARB/97/4.
[13] *Telekom Malaysia Berhad v. The Republic of Ghana*, PCA Case No. 2003-03, Decision on Respondent's Challenge to Arbitrator Emmanuel Gaillard (12 July 2004) [not public].
[14] *Consortium RFCC v. Royaume du Maroc*, ICSID Case No. ARB/00/6, Arbitration Award (22 December 2003).

an appearance of partiality, the Hague court ordered Gaillard to select whether to continue as an arbitrator in *Telekom* or represent the claimant in *RFCC*, but not both.[15]

ii) ***Assuming party-appointed expert and arbitrator functions while having previous or existing professional ties with a tribunal's arbitrators***: L. Yves Fortier's behaviour demonstrates an instance where an arbitration practitioner acted as party-appointed expert and wing arbitrator (i.e., the arbitrator appointed by one of the disputing parties), while he had previous or ongoing relationships with members of a tribunal. His behavioral choices illustrate the complexities of the relationships among investment treaty arbitrators. In this instance, Fortier worked as a legal expert supporting the position of a disputing party in *Vannessa Ventures v. Venezuela*, with V.V. Veeder presiding over the tribunal with Charles Brower and Jan Paulsson serving as co-arbitrators.[16]

While the *Vannessa Ventures* arbitration proceedings were ongoing, Fortier and Veeder were concurrently sitting on three other ICSID tribunals, i.e., *Gemplus v. Mexico*, *Talsud v. Mexico*, and *OKO Pankki v. Estonia*, in two of which Veeder chaired the tribunal. Over the subsequent years, the two also sat in other tribunals.[17] Paulsson was concomitantly acting as a counsel in *ConocoPhillips* where Fortier was a wing arbitrator.[18] Previously, Paulsson had appeared as counsel before tribunals in which Fortier was a party-appointed arbitrator or president.[19]

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[15] See *Telekom Malaysia Berhad v. The Republic of Ghana*, Case No. HA/RK 2004, 788, Decision of the District Court of The Hague (5 November 2004). See Sarah Grimmer, 'The Determination of Arbitrator Challenges by the Secretary-General of the Permanent Court of Arbitration' in Chiara Giorgetti (ed), *Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals* (Brill 2015) 107-108.

[16] See *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Hearing Transcripts, Day 1 (16 April 2007).

[17] See e.g., *Oko Pankki Oyj, VTB Bank (Deutschland) AG and Sampo Bank Plc v. The Republic of Estonia*, ICSID Case No. ARB/04/6, Award (19 November 2007); *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. United Mexican States*, ICSID Case No. ARB(AF)/04/3, Award (16 June 2010); *National Gas S.A.E. v. Arab Republic of Egypt*, ICSID Case No. ARB/11/7, Award (3 April 2014).

[18] See, e.g., *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator (27 February 2012).

[19] See *Hussein Nuaman Soufraki v. United Arab Emirates* (ICSID Case No. ARB/02/7, Award (7 July 2004); *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award (17 March 2006).

Further, Brower had previously represented a disputing party before a tribunal chaired by Fortier.[20] Over the following years, Fortier and Brower acted as arbitrators in other tribunals, with three of these tribunals chaired by Fortier.[21] This complex web of relationships is explained below:

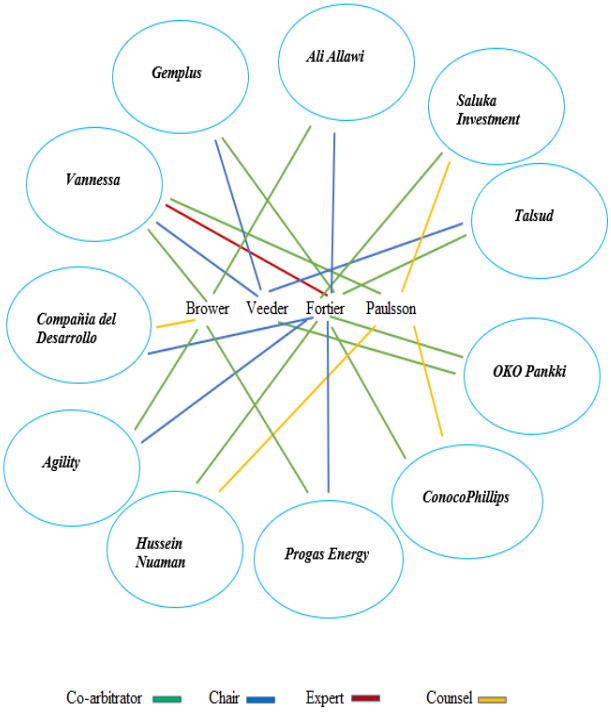

Figure 2.1.1 - Assuming party-appointed expert and arbitrator functions while having ties with a tribunal's arbitrators

iii) *Concurrent double-hatting as counsel, expert and arbitrator*: It is not uncommon among investment treaty arbitrators to serve in more than two roles concurrently or consecutively. The interactions of Christopher Greenwood, a prominent arbitration practitioner, within the arbitration community provide a real-world example for the provision of concurrent double-hatting. While

[20] *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award (17 February 2000).

[21] See, e.g., *Ali Allawi v. Pakistan*, UNCITRAL, Award (2016) [precise date unknown]; *Agility for Public Warehousing Company K.S.C. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/11/8, Award (1 August 2016); *Progas Energy Ltd v. Pakistan*, Award (30 August 2016) [not public].

acting as co-arbitrator in *European Media v. Czech Republic*[22] and *Azpetrol International*,[23] Greenwood appeared as a legal expert in *EDF v. Romania*,[24] and as a legal counsel in *Vannessa v. Venezuela*.[25] In this instance, Greenwood acted as counsel before the *Vannessa* tribunal in which Charles Brower sat as a wing arbitrator, while both of them were simultaneously serving as co-arbitrators in *Azpetrol International*. Further, Greenwood and V.V. Veeder, the chair arbitrator in *Vannessa*, were concurrently acting as co-arbitrators in a separate ICSID proceeding (i.e., *Newmont USA*),[26] while they jointly worked as co-counsel in another ICSID tribunal (i.e., *Bayindir*).[27] Additionally, all three arbitration practitioners under discussion were door tenants and affiliated to the same law chambers (i.e., Essex Court Chambers). This has been explained below:

[22] See *European Media Ventures SA v. The Czech Republic*, UNCITRAL, Final Award (28 January 2010).

[23] See *Azpetrol International Holdings B.V., Azpetrol Group B.V. and Azpetrol Oil Services Group B.V. v. Republic of Azerbaijan*, ICSID Case No. ARB/06/15, Award (8 September 2009).

[24] See *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award (8 October 2009). See also *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award (26 June 2003).

[25] See *Vannessa Ventures Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Award (16 January 2013).

[26] *Newmont USA Limited and Newmont (Uzbekistan) Limited v. Republic of Uzbekistan*, ICSID Case No. ARB/06/20, Order Taking Note of the Discontinuance of the Proceeding (25 July 2007) [not public].

[27] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award (27 August 2009).

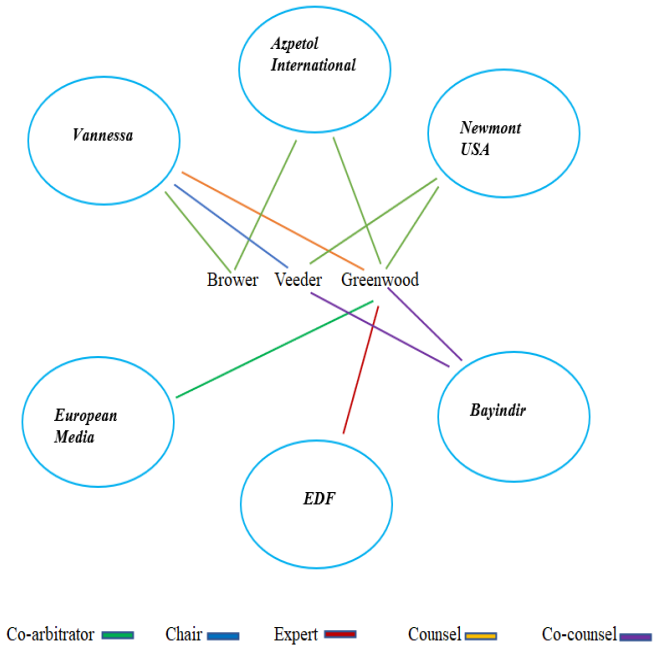

Figure 2.1.2 – Concurrent double-hatting as counsel, expert and arbitrator

iv) ***Current or previous relationships between the arbitrator and/or his law firm and one of the disputing parties:*** While disputing parties are the right holders for appointing arbitrators, law firms exercise a high degree of influence over the selection of arbitrators. They also retain influence over the choice of quantum experts, witnesses as well as third-party funders if applicable. The behavior of arbitrators and their law firms demonstrates instances where the interactions of an arbitrator and/or his or her law firm with other participants in arbitration proceedings raise serious concerns about the arbitrator's impartiality.

In July 2009, the claimant in *ICS Inspection v. Argentina* appointed Stanimir Alexandrov as its arbitrator.[28] Alexandrov was personally involved with a team from his then law firm in *Vivendi v. Argentina* (I) representing the claimants in that dispute against Argentina.[29] Further, Alexandrov

[28] *ICS Inspection and Control Services Limited (United Kingdom) v. Republic of Argentina*, PCA Case No. 2010-9, Decision on Challenge to Arbitrator (17 December 2009).
[29] See *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (20 August 2007); Decision on the Argentine Republic's Request for Annulment of the Award (10 August 2010).

and his then firm had previously represented another claimant in a dispute against Argentina.[30] Additionally, Alexandrov's then law firm had previously represented PWC Logistics, an affiliate of the claimant in *ICS Inspection*, in another dispute, though he did not personally participate in the representation of PWC Logistics in its dispute.[31]

Before the tribunal was constituted, Argentina requested the disqualification of Alexandrov. Jernej Sekolec, serving as the appointing authority and deciding the challenge under the 1976 UNCITRAL Arbitration Rules, "invited [the claimant] to appoint a substitute arbitrator, because in the view of the appointing authority it was 'prudent' to do so, not because the circumstances gave rise to justifiable doubts as to whether there were justifiable doubts about the conduct of the arbitrator in future.[32] Indeed, in spite of the above circumstances, the appointing authority found "no reason to doubt Mr. Alexandrov's personal intention to act impartially and independently".[33] Thus, he did not expressly declare that these circumstances had affected his impartiality and independence as arbitrator.[34]

v) ***Current or previous relationships between a member of the arbitrator's barristers chambers and one of the disputing parties:*** Relationships involving a member of a barristers chamber and a disputing party demonstrate further complexity arising out of behavioral interactions of participants in ITA. Interactions of members of barristers chambers create a different pattern of social behavior that is less likely to create conflict of interests compared to the relationships of lawyers affiliated with law firms. Indeed, barristers chambers as seen in the UK, Australia, and New Zealand are different from law firms. While in law firms, lawyers become partners or

[30] See *Lanco International, Inc. v. Argentine Republic*, ICSID Case No. ARB/97/6.

[31] *ICS Inspection and Control Services Limited (United Kingdom) v. Republic of Argentina*, PCA Case No. 2010-9, Decision on Challenge to Arbitrator (17 December 2009).

[32] Ibid 5.

[33] Ibid.

[34] The finding of the appointing authority in *ICS Inspection* is apparently inconsistent with the conclusion of the appointing authority in *Khaitan Holdings v. India*, where India challenged Francis Xavie based on similar circumstances. In the latter case, Xavie served as the claimant's appointee, while his law firm was serving as counsel in Singapore court proceedings against India. The domestic court proceedings related to a separate investment treaty dispute against India, i.e., *Vedanta v. India*. Although the arbitrator was not personally involved in Singapore court proceedings, the ICJ president acting as the appointing authority under the 1976 UNCITRAL Arbitration Rules concluded that he should be disqualified from sitting in the *Khaitan Holdings v. India* case. *Khaitan Holdings (Mauritius) Limited v. Republic of India*, PCA case No. 2018-50, Decision on Disqualification of Arbitrator Francis Xavier (2022) [precise date unknown - not public]. See Investment Arbitration Reporter, *ICJ President rules that investment arbitrator should be disqualified due to conflict created by his law firm's involvement in separate matter* (15 July 2022).

employed, barristers chambers act as sole practitioners and are independent from one another. Therefore, it is more difficult to establish that a relationship between a member of a barristers chamber and one of the disputing parties has influenced the independence or impartiality of an arbitrator who is a member of the same chamber. However, some circumstances provide a compelling argument to find the existence of conflict of interests.

Relationships between a member of a barristers chambers and a disputing party one were raised in *Pey Casado* (I). In this case, barristers (Alan Boyle and Samuel Wordsworth) of Essex Court Chambers, to which the tribunal's chair and the claimant-appointed arbitrator (i.e., V.V. Veeder and Franklin Berman) were members, had previously provided legal advice to Chile in ICJ proceedings, while these relationships were not disclosed to the claimants.[35] One may argue that the long-standing relationship between Chile and other members of the Essex Court Chambers may lead to an appearance of a conflict of interest. While the two arbitrators admitted that they had known about these relationships between barristers of Essex Court Chambers and Chile,[36] the ICSID Chairman denied the disqualification request concluding that Chile's representation by Essex Court Chambers barristers before ICJ was publicly known and the claimant did not promptly raise its concerns about the potential conflict of interests.[37]

In *Vannessa Ventures v. Venezuela*, the claimant instructed Christopher Greenwood to act as counsel. Veeder chaired the tribunal and Charles Brower was the claimant's appointee. As discussed above there were ongoing relationships between him and Veeder and between him and Brower. Greenwood and Veeder were affiliated to the same barristers chamber, while Greenwood co-arbitrated with Veeder in the second arbitration proceedings and was co-counsel with Veeder in a third arbitration dispute. Veeder and Greenwood's relationships were not disclosed to the tribunal, ICSID or the Respondent in a timely manner. Further, Greenwood and Brower were co-

[35] See *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Proposition motivée de récusation de Sir Franklin Berman et M. V.V. Veeder, le 22 novembre 2016, and Claimants' Submission on the Conflict of Interest between Arbitrators Berman and Veeder and Chile (27 April 2018).
[36] See *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Proposal to Disqualify Sir Franklin Berman QC and Mr V.V. Veeder QC (21 February 2017) para 12.
[37] See ibid paras 88-94. See also *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Proposal to Disqualify Mr. V.V. Veeder and Sir Franklin Berman (13 April 2017).

arbitrators in another ICSID arbitration, and he was a counsel representing a disputing party in a set aside dispute rendered by an UNCITRAL tribunal in which Brower was a member.[38]

After Venezuela requested the tribunal to reject the claimant's designation of Greenwood as its counsel, Veeder resigned from the *Vannessa Ventures* proceedings stating in his resignation letter that he was "greatly troubled by the circumstances in which Professor Greenwood was instructed as counsel by the Claimant last autumn, and that this development was not disclosed to the Tribunal, ICSID or the Respondent" in a timely manner.[39]

Subsequently, after the circumstances in *Vannessa Ventures* became public, the claimant in the *Pey Casado* (I) proceedings challenged Veeder on the grounds of his resignation in *Vannessa Ventures*. In this case, Berman recused himself from deciding the challenge request because of a conflict of interest between him and Veeder.[40] The ICSID Chairman, rejecting the challenge, concluded that nothing in the *Vannessa Ventures* case supported the claim that Veeder's resignation was because Veeder and Greenwood were door tenants in the same chambers.[41]

vi) *Relationships between the arbitrator and/or his or her law firm and quantum experts*: Quantum experts have become an integral part of the damages calculation process in both ICA and ITA. Instead of tribunal-appointed experts, party-appointed experts have increasingly been used by the disputing parties in ITA, with some of them repeatedly appearing before arbitration tribunals

[38] See *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)04/6, Venezuela's Letter re Attendance of Christopher Greenwood at the Hearing (3 April 2007), ICSID Letter re Declarations of Arbitrators V. V. Veeder and Charles Brower (37 April 2007), ICSID Letter re Attendance of Christopher Greenwood at the Hearing (4 May 2007), and ICSID Letter re Suspension of the Proceedings in Accordance with ICSID Arbitration (Additional Facility) Rule 16(2) (11 May 2007). Similar issues were raised in *Hrvatska Elektroprivreda*, where the claimant objected to the participation of the respondent's counsel in the arbitration proceedings as his participation could give rise to to an "appearance of impropriety" because the counsel and one of the arbitrators were from the same barristers chambers. See *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Order Concerning the Participation of Counsel (6 May 2008) para 22.

[39] See *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)04/6, Transcripts of Hearing (Application for the Withdrawal of Professor Greenwood from the Proceedings) (6 May 2007) 15.

[40] *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Proposal to Disqualify Mr. V.V. Veeder and Sir Franklin Berman (13 April 2017) para 59.

[41] The ICSID Chairman stated that "[t]he fact that Mr. V.V. Veeder QC resigned after Venezuela raised the Essex Court Chambers objection does not establish that this objection was the cause of the resignation". In his view, "[a] third party undertaking a reasonable evaluation of Mr. V.V. Veeder QC's explanations, the surrounding facts and the evidence relied upon in the Claimants' Veeder Proposal would not find a manifest lack of the qualities required under Article 14(1) of the ICSID Convention". Ibid paras 65-67.

working closely with a disputing party or the same law firm. Quantum experts have become part of the broader complex network of the community of arbitration participants.

The function of party-appointed experts is different from that of experts appointed by an international court or tribunal. As the tribunal in *Bridgestone* stated, the function of the latter group "forms part of the adjudicative process. It is essential that he [or she] should be both independent and impartial".[42] While acting as an expert paid by a party to support its case, they are expected to maintain their independence and objectivity when drafting their damages reports.[43] Unlike experts appointed by courts and tribunals, "[a]n appearance of partiality [on the part of a party-appointed expert] does not result in the disqualification of an expert witness. It detracts from the weight that the Tribunal will accord to his evidence".[44]

Given the potential incentive in preparing a persuasive expert report and recent instances of interactions between quantum experts and other participants in arbitration proceedings including arbitrators or their law firms, the professional independence and objectivity of these experts are the subject of serious concerns. As Knator notes, "[t]he incentive (the moral hazard) to present an opinion harmonious to the engaging party is in fact present from the very first contact with the party or Counsel regarding the expert's possible engagement, regardless of the obligation to maintain objectivity. Some prospective experts resist that lure while others succumb".[45]

Engagements between arbitrators and/or their law firms and damages experts have been subject of disqualification requests in various arbitration proceedings with the majority of challenge decisions denying the disqualification of the arbitrator. In the *Raiffeisen Bank v. Croatia* case, it was claimed that the Brattle Group, a frequently used consulting services and expert testimony

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[42] *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Tribunal's Ruling on Claimants' Application to Remove the Respondent's Expert as to Panamanian Law (13 December 2018) para 15. With respect to the requirements for tribunal-appointed experts, Article 6.2 of the IBA Rules on the Taking of Evidence in International Arbitration states that they "shall, before accepting appointment, submit to the Arbitral Tribunal and to the Parties a description of his or her qualifications and a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal".

[43] Article 5.2(c) of the IBA Rules on the Taking of Evidence in International Arbitration provides that a party-appointed expert shall provide "a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal". Also, Article 4 of the Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration states that "[a]n expert that gives evidence in the Arbitration shall be independent of the Party which has appointed the expert to give such evidence".

[44] Ibid para 16.

[45] Mark Kantor, 'A Code of Conduct for Party-Appointed Experts in International Arbitration – Can One be Found?' (2010) 26(3) Arb. Intl. 335.

firm, that provided expert evidence for the claimant had a long-standing professional relationship with the claimant-appointed arbitrator, i.e., Stanimir Alexandrov, and his then law firm, Sidley Austin.[46] Indeed, for a significant period of his time working as a partner at Sidley Austin, Alexandrov had personally worked closely with this quantum firm and retained Brattle services to deliver expert testimony in various investment treaty disputes.[47] The Alexandrov - Sidley Austin - Brattle relationships are described as below:

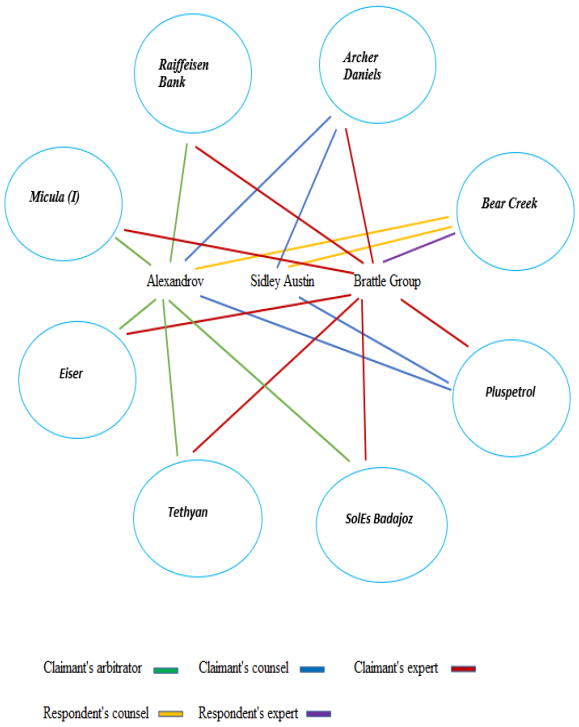

Figure 2.1.3 - Relationships between the arbitrator and/or his or her law firm and quantum experts

The respondent State requested the disqualification of the arbitrator on the basis that his long-standing relationships with the quantum firm gave rise to a lack of impartiality and independence.

[46] *Raiffeisen Bank International AG and Raiffeisenbank Austria d.d. v. Republic of Croatia*, ICSID Case No. ARB/17/34, Decision on the Proposal to Disqualify Stanimir Alexandrov (17 May 2018), paras 32-36. Further, the quantum firm was concurrently involved in another dispute against Croatia, i.e., *UniCredit Bank v. Croatia*, providing expert testimony to the claimants in that case. See *UniCredit Bank Austria AG and Zagrebačka Banka d.d. v. Republic of Croatia*, ICSID Case No. ARB/16/31, Order of the Tribunal Taking Note of the Discontinuance of the Proceeding (14 July 2021) paras 14, 32 and 47.

[47] See, e.g., *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB (AF)/04/5, Award (21 November 2007); *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award (30 November 2017); *Pluspetrol Perú Corporation and others v. Perupetro S.A*, ICSID Case No. ARB/12/28, Award (21 May 2015).

The ICSID Chairman seizing the disqualification request concluded that a high threshold is required for proving a lack of the required qualities for arbitrators and he was not satisfied that the long-lasting relationship between the arbitrator and his then law firm and the damages expert firm impaired the arbitrator's impartiality or independence.[48]

In *SolEs Badajoz v. Spain*, a disqualification request was submitted against Alexandrov on the basis of similar issues discussed above. The arbitrator resigned after the challenge was made but before a challenge decision.[49] In *Tethyan Copper v. Pakistan*, Alexandrov's qualifications were challenged twice by the Respondent due to his prior extensive engagement with the quantum expert group. As it appears from the tribunal award, both challenge requests were declined.[50]

That said, recently the *ad hoc* committee in *Eiser v. Spain* reviewing similar circumstances that occurred between Alexandrov and the same quantum expert firm took a different view, criticizing the practice of double hatting among arbitrators as the inherent risk of conflict of interests in such a practice dictates caution.[51] Annulling the award in its entirety, the committee concluded that because of the arbitrator's failure to disclose the Alexandrov-Sidley Austin-Lapuerta-Brattle Group relationship, "Spain lost the possibility of a different award".[52] The committee stated that

> The influence of Dr. Alexandrov on his co-arbitrators would have been perceived differently in every material respect, had they known the full facts and extent of his and Sidley Austin's longstanding relationship with the Brattle Group and Mr. Lapuerta. The Committee also cannot rule out the likelihood of this, in turn, having a material bearing on the outcome of the case including but not limited to a different damages evaluation.[53]

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[48] See *Raiffeisen Bank International AG and Raiffeisenbank Austria d.d. v. Republic of Croatia*, ICSID Case No. ARB/17/34, Decision on the Proposal to Disqualify Stanimir Alexandrov (17 May 2018), paras 96-98.
[49] See *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Award (31 July 2019) paras 30-31 and 33- 37, 41.
[50] See *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award (12 July 2019) paras 25-29, and 31-36. See also Luke E. Peterson, *As Damages Phase Unfolds in Pakistan Mining Case, a Challenge is Lodged against Stanimir Alexandrov – Citing his Client's Alleged Interest in a Rarely-Used Valuation Method under Scrutiny*, Investment Arbitration Reporter (11 July 2017).
[51] *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Decision on annulment (11 June 2020) para 223.
[52] Ibid para 251.
[53] Ibid para 250.

Despite the developments in *Eiser*, the ICSID Chairman *Misen v. Ukraine* followed the view adopted in *Raiffeisen* and *Tethyan* when reviewing a challenge against Alexandrov on the basis of his failure to disclose information regarding his close engagement in other disputes with a different quantum expert who acted as the claimant's expert in the *Misen* case. While the parties extensively discussed the findings of the *ad hoc* committee in *Eiser*, the ICSID Chairman failed to show how its decision in the *Misen* case was consistent with the conclusion of the committee in the *Eiser* case.[54]

vii) ***Volume appointments as arbitrator by law firms***: Investment treaty arbitrators have been challenged due to their repeat appointments in cases where the same law firm represents one of the disputing parties. A recent empirical study concluded that "arbitrators who frequently work with the most influential firms tend to improve their rankings compared to other arbitrators".[55] The study further found that "[t]he top 25 law firms assign on average 41% of their direct arbitral appointments (i.e., wing arbitrators) to top 25 arbitrators".[56]

In *Burlington Resources v. Ecuador*, Francisco Orrego Vicuña was challenged because of frequent appointments he received in various disputes by the parties that were represented by the law firm Freshfields Bruckhaus Deringer.[57] The challenging party argued that the arbitrator had been previously appointed by clients of Freshfields in "unacceptably high number of cases" (that is 8 ICSID cases between 2007 and 2013), while he did not disclose all of his prior appointments.[58] The Chairman declined to uphold the disqualification request on the basis of high repeat appointments as arbitrator by Freshfields and non-disclosure of such appointments because the challenging party already knew about four of the eight appointments and did not promptly raise its concerns.[59]

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[54] See *Misen Energy AB (publ) and Misen Enterprises AB v. Ukraine*, ICSID Case No. ARB/21/15, Decision on the Respondent's Proposal to Disqualify Dr. Stanimir A. Alexandrov (15 April 2022) paras 130-145.

[55] Runar Hilleren Lie, 'The Influence of Law Firms in Investment Arbitration' in Daniel Behn and others (eds), *The Legitimacy of Investment Arbitration: Empirical Perspectives* (CUP 2022) 118.

[56] Ibid 122.

[57] See *Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña* (13 December 2013).

[58] Ibid paras 18-29.

[59] Ibid paras 74-75. However, in this case, the Chairman disqualified the arbitrator because of his behavior during the disqualification review process. In his observations in response to the challenge request, the challenged arbitrator made allegations about the ethics of the counsel for Ecuador. In view of the Chairman the arbitrator's criticism of the

In *Misen v. Ukraine*, the respondent requested the disqualification of the claimant-appointed arbitrator, Alexandrov, on the basis of his pattern of behaviour in not disclosing previous appointments by the parties' counsel, including appointment by the challenging party's counsel.[60] The Chairman, relying on the statements from the claimants and the arbitrator that "the Claimants' counsel did not appoint Dr. Alexandrov in the Gardabani Cases", declined to uphold the challenge request on the basis that the arbitrator received appointments from the claimant's counsel.[61] With respect to the claim that the respondent's counsel appointed the arbitrator in another dispute, the Chairman did not find any reason showing that this appointment evidenced the arbitrator's manifest lack of independence or impartiality.[62]

viii) ***Cross-appointments***: In some cases, it is claimed that the appointment of an arbitrator was tainted by a corresponding appointment of another arbitrator in a separate dispute. In *Raiffeisen Bank*, it was alleged that there existed a 'cross-appointments' relationship between the arbitrator's law firm and a law firm representing one of the disputing parties - meaning that the two law firms each representing different parties in unrelated disputes propose the appointment of a counsel from the other law firm as their client's arbitrator.[63]

Alexandrov and his then law firm, Sidley Austin, acted as claimant's counsel before the *Philip Morris v. Uruguay* tribunal which included Gary Born as the claimant-appointed arbitrator,[64] while in *Raiffeisen Bank v. Croatia*, where Alexandrov acted as claimant's appointee, Born and his law firm, WilmerHale, represented the case for the claimant.[65] Further, during the disqualification request in *Raiffeisen Bank,* it was uncovered that Born received appointment as arbitrator by a

behavior of the counsel did not serve any purpose relating to the disqualification process. In his view, "a third party undertaking a reasonable evaluation of [the arbitrator's comments about Ecuador's counsel] would conclude that [his remark] manifestly evidences an appearance of lack of impartiality with respect to the Republic of Ecuador and its counsel". Ibid paras 79-80.

[60] See *Misen Energy AB (publ) and Misen Enterprises AB v. Ukraine*, ICSID Case No. ARB/21/15, Decision on the Respondent's Proposal to Disqualify Dr. Stanimir A. Alexandrov (15 April 2022) paras 53-55 and 94-98.

[61] Ibid paras 148-150.

[62] Ibid para 151.

[63] See *Raiffeisen Bank International AG and Raiffeisenbank Austria d.d. v. Republic of Croatia*, ICSID Case No. ARB/17/34, Decision on the Proposal to Disqualify Stanimir Alexandrov (17 May 2018) paras 29-30.

[64] See *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award (8 July 2016).

[65] See *Raiffeisen Bank International AG and Raiffeisenbank Austria d.d. v. Republic of Croatia*, ICSID Case No. ARB/17/34, Decision on the Proposal to Disqualify Stanimir Alexandrov (17 May 2018).

client of Alexandrov and Sidley Austin in an ICA proceeding - a matter that was not disclosed to the tribunal and parties in *Raiffeisen Bank*.[66]

Additionally, Alexandrov was acting as claimant's arbitrator in two other ongoing arbitration proceedings where WilmerHale represented those claimants.[67] Indeed, the claimants in *Raiffeisen Bank* did not dispute the existence of the ongoing extensive cross-appointments between WilmerHale and Alexandrov and between Sidley Austin and Born and expressly "acknowledge that Dr. Alexandrov ha[d] appointed Gary Born on two occasions and that WilmerHale ha[d] nominated Dr. Alexandrov on four occasions".[68] Further, Alexandrov declined WilmerHale's proposed appointment as claimant's arbitrator in *Addiko Bank v. Croatia,* where WilmerHale was acting as counsel, because of concerns raised about his multiple appointments in disputes against Croatia.[69] The above circumstances are drawn below:

[66] Ibid para 30

[67] See *J&P-AVAX S.A. v. Lebanese Republic, ICSID Case No. ARB/16/29* and *GRAND EXPRESS Non-Public Joint Stock Company v. Republic of Belarus*, ICSID Case No. ARB(AF)/18/1. It should be noted that it is not known if Born was personally acting as counsel in these two cases.

[68] *Raiffeisen Bank International AG and Raiffeisenbank Austria d.d. v. Republic of Croatia*, ICSID Case No. ARB/17/34, Decision on the Proposal to Disqualify Stanimir Alexandrov (17 May 2018) paras 60-72.

[69] See Ibid paras 17, 18, 47,93.

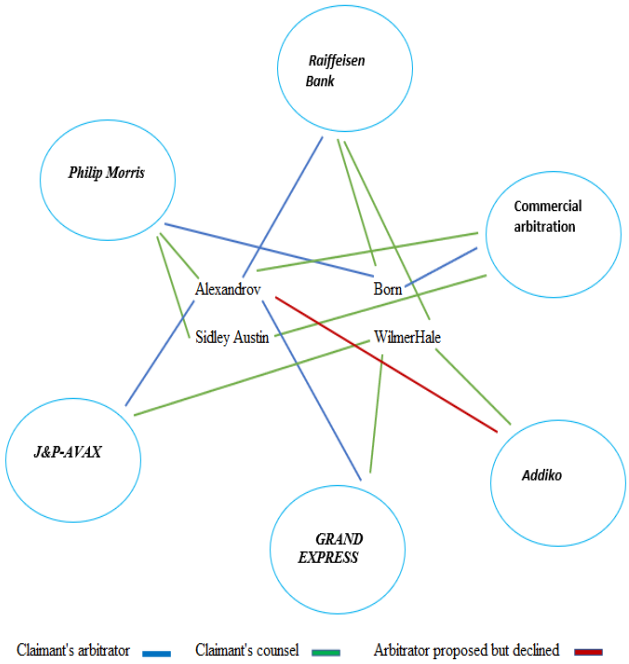

Figure 2.1.4 - Cross-appointments

However, despite Alexandrov's failure to disclose all of the above circumstances that shows a pattern of behavior posing a serious risk of conflict of interest, and while the claimant acknowledged the existence of a series of cross-appointments between WilmerHale and Alexandrov and between Sidley Austin and Born, the ICSID Chairman concluded that he was not persuaded that 'this tally of "cross appointments" would not by itself demonstrate' that the arbitrator evidently lacked the requirements for impartiality and independence under Article 14(1) of the ICSID Convention.[70]

In view of the Chairman, "something more" was needed to establish the lack of Article 14(1) qualities - confirming the high threshold for disqualification under the ICSID Convention.[71] One can argue that, given the extensive cross-appointments, the ICSID Chairman failed to see that the cross-appointment relationships created a situation where the two arbitrators potentially had

[70] Ibid paras 93- 95.
[71] Ibid para 95.

personal incentives to do reciprocal appointments to "repay" the favour - that itself is the existence of "something more".

ix)*Frequent respondent-appointees v. frequent claimant-appointees*: Only a few of the most frequent party-appointed arbitrators[72] have received a relatively high, though uneven, number of appointments from both claimants.[73] Indeed, the list of the most frequent investor-appointees does not match that of the most frequent respondent arbitrators such that the individuals in the former have often received fewer or no appointments from respondents and vice versa.

The majority of the most frequent party-appointed arbitrators fall within two groups that deserve special attention. The first group is composed of those who have received a high number of appointments from the State, while they have only received a few or no appointments as investor-appointed arbitrators. Conversely, the second group has overwhelmingly attracted investors, rather than States.[74]

Brigitte Stern is by far the top frequent arbitrator with 143 known appointments. She has been selected as the respondent-appointed arbitrator in at least 135 cases (i.e., roughly 95 percent).[75] While it appears that claimant investors have less or no interest in appointing Stern as their arbitrator, she has received high appointments from the same respondent party, both concurrently and consecutively. For instance, she received multiple appointments as respondent's arbitrator from Venezuela (seven cases), Argentina (six cases), Egypt (six cases), and Ecuador (five cases).

Accompanying Stern, respondent States have largely shown a greater interest in other arbitrators who have received a very small or negligible number of appointments from claimants. The table

[72] It should be noted that some of the most frequent investment treaty arbitrators who are mainly appointed as the chair of a tribunal or a member of an ICSID annulment committee are excluded from this examination. For example, although Gabrielle Kaufmann-Kohler is among the most frequent arbitrators, she has mostly been appointed as the chair of tribunals or the presiding member of annulment committees (62 cases). She has acted as claimant's appointee in dozen disputes and has received appointments as respondent appointed arbitrator in a few cases. Thus, she does not fall within any of the two groups discussed above.

[73] This includes, e.g., Jan Paulsson, Albert van den Berg, V.V. Veeder, and Emmanuel Gaillard.

[74] It should be noted that the data reviewed in this section are as of 30 June 2022. The data included investment treaty disputes as well as investor-state arbitrations based on contracts and domestic laws.

[75] The remaining five percent include 8 cases where she acted as the chair of the tribunal (3 cases), received appointment from the appointing authority (3 disputes), was selected as sole arbitrator (1 case) or acted as claimant's appointee (1 case).

below provides the difference in appointments of the top 15 most frequent respondent-appointed arbitrators.

Arbitrator	**Number of appointments by the State**	**Number of appointments by the investor**
Brigitte Stern	143	1
J. Christopher Thomas	50	1
Zachary Douglas	45	2
Philippe Sands	36	3
Pierre Mayer	33	4
Raúl E. Vinuesa	32	1
Toby Landau	29	1
Claus von Wobeser	21	1
Laurence Boisson de Chazournes	19	2

Pierre-Marie Dupuy	18	2
Loretta Malintoppi	18	1
Rolf Knieper	16	0
Marcelo G. Kohen	14	0
Vaughan Lowe	13	2
Gavan Griffith	12	2

Table 2.1 - High or exclusive appointments from States

On the contrary, a small circle of arbitrators has disproportionately received a high number of appointments from investors, while they are arguably less, if not least, attractive to the State. Alexandrov is the top frequent appointee by claimants. The table below compares the interests of claimants and respondents in this group of the most-frequent party-appointed arbitrators.

Arbitrator	**Number of appointments by the investor**	**Number of appointments by the State**
Stanimir A. Alexandrov	55	2
Charles N. Brower	51	1

Horacio A. Grigera Naón	39	3
Guido Santiago Tawil	36	0
L. Yves Fortier	33	1
Charles H. Poncet	25	1
John Beechey	24	1
Kaj I. Hobér	22	2
Marc Lalonde	22	5
Gary Born	21	0
Michael C. Pryles	17	0
Henri C. Álvarez	16	2
William W. Park	15	1
David R. Haigh	15	0
Doak Bishop	15	0
Oscar M. Garibaldi	15	0

Stephan Schill	15	0

Table 2.2 - High or exclusive appointments from investors

While mindful that a significant portion of arbitrators have been appointed by both the investor and the State, some arbitrators have received a higher number of appointments from one disputing side (either the claimant or the respondent) than the other disputing side. The question is what characteristics investor-appointed arbitrators and respondent's arbitrators possess, and in particular, what features distinguish between them and what similarities they share. The attributes of arbitrators that claimants and respondents prefer will be discussed in Chapter 3 in the context of the ICSID community of arbitrators and members of annulment committees. While claimant-appointed arbitrators and those appointed by States have certain common characteristics, they differ in some respects. Further, the features of members of ICSID annulment committees will also be examined and this explores the preference of the ICSID Chairman in appointing members of annulment committees.

x) ***Subsequent secretary-counsel-arbitrator services***: Secretaries of arbitral tribunals, often junior lawyers, are privy to confidential information and handle administrative tasks on behalf of the tribunal. However, if abused, this may put the administration of justice and the outcome of arbitration proceedings at risk.[76] In ICSID disputes, the institution assigns one of its counsel as the secretary of the tribunal whose role is to deal with administrative and institutional issues including drafting and dispatching correspondence on behalf of the tribunal.

However, over the past years, the function of tribunal secretaries has been the subject of debates due to concerns about the potential risks of abuse of information accessible to them or their engagement in the arbitration process beyond assigned duties and acting as a 'fourth arbitrator'.[77]

[76] Though it was not accepted as an instance of 'abuse' by the three-member division of the LCIA, the *Vale v. BSGR* case can be seen as an indication of increasing engagement of tribunal secretaries in arbitration processes. In that case, the president of the Tribunal, Charles Brower, erroneously misdirected to the Respondent's counsel an email intended to be sent to the secretary of the Tribunal asking his 'reaction' to a correspondence by BSGR. BSGR challenged Brower on the ground that he breached his duty as arbitrator by delegating his decision-making function to the secretary. The three-member division of the LCIA hearing the challenge rejected the disqualification request stating that, though the said email was intended to start a debate between the chair and the secretary, it did not necessarily lead to the engagement of the secretary in the decision-making process. See *Vale S.A. v. BSG Resources Limited*, LCIA Case No. 142683, Decision on Challenge to Full Tribunal (4 August 2016).

[77] In his Additional Opinion in *Compañía de Aguas del Aconquija v. Argentina*, arbitrator Dalhuisen criticized the expansion of the role of secretaries beyond that of 'administration and support' since secretaries have "no original

A secretary may leave his or her secretary position for an arbitrator position or counsel opportunity, particularly when the arbitration proceedings he/she is assigned to as secretary are pending. While the hearing of the pleadings in *Universal Compression v. Venezuela* was in progress, the secretary of the tribunal, Janet Whittaker, departed ICSID for a law firm to act as partner and arbitrator, though at the time of her departure the law firm was not engaged in any ICSID dispute in which Whittaker had acted as secretary.[78]

xi) ***Subsequent assistant, counsel and arbitrator Services***: It is a common practice for presidents of arbitral tribunals to assign a junior lawyer, often from a law firm they are affiliated with, as the assistant of the tribunal. Over the recent years, disputing parties have raised concern over the duties and functions of assistants. These concerns include the arbitrator delegating his duties to the assistant and that the assistant may use the confidential information he or she is privy to for other purposes.

In *Hulley Enterprises v. Russia* and its two parallel proceedings (*Hully, and Veteran*), the presiding arbitrator, L. Yves Fortier appointed Martin Valasek as his assistant.[79] Valasek was at the time an

powers in the dispute resolution and decision taking process". Dalhuisen stated that a tribunal secretary should not be involved in drafting tribunal decisions. In his view, "[w]hat are the key facts and relevant arguments and how they should be presented in the final decision or award is for the Arbitrators or *ad hoc* Committee Members to select and decide…. For the Secretariat also to draft part or all of the decisions and reasoning would appear wholly inappropriate, even if following basic instructions of Arbitrators or ad hoc Committee Members whilst the final version would naturally still be left to them for approval. This would not appear to be sufficient to legitimise the text". See *Compañía de Aguas del Aconquija SA & Vivendi Universal SA v Argentine Republic*, ICSID Case No ARB/97/3 (Annulment Proceeding), Additional Opinion of Professor JH Dalhuisen under Art 48(4) of the ICSID Convention (30 July 2010) paras 4-7. See also Constantine Partasides, 'The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration' (2002) 18(2) Arb. Intl. 147–163; Kathleen Claussen, 'Gatekeeper Secretariats' in Freya Baetens (ed), *Legitimacy of Unseen Actors in International Adjudication* (CUP 2019) 139-163. Elsewhere, a recent study using text analysis tools concluded that the WTO Secretariat staff have exercised greater influence over the final text of rulings than the panelists themselves. See Joost Pauwelyn and Krzysztof Pelc, 'Who Guards the "Guardians of the System"? The Role of the Secretariat in WTO Dispute Settlement' (2022) 116(3) AJIL 534 - 566; Joost Pauwelyn and Krzysztof Pelc, 'WTO Rulings and the Veil of Anonymity' 2022 EJIL [*forthcoming*].

[78] See *Universal Compression International Holdings, S.L.U. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/9, Order of the Tribunal Suspending the Proceeding (16 September 2013) para 6. A more challenging instance is the case of Supervision y Control v. Costa Rica. In this case the claimant challenged all members of the tribunal on the ground that the entire arbitration proceedings were tainted because the former secretary of the tribunal accepted a new counsel position at a law firm that represented Costa Rica in the same dispute. Though the ICSID Chairman rejected the disqualification request on the basis that "the standard set forth in Article 57 of the ICSID Convention for the disqualification of an arbitrator" was not satisfied, the occasion raised questions about the integrity of the tribunal as well confidence in the arbitration. See *Supervision y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award (18 January 2017) paras 36-40.

[79] See *Yukos Universal Limited (Isle of Man) v. Russian Federation*, PCA Case No. AA 227, Final Award (18 July 2014); *Veteran Petroleum Limited (Cyprus) v. Russian Federation*, PCA Case No. AA 228, Final Award (18 July

associate (later a partner) at Fortier's then law firm in Montreal, i.e., Norton Rose Fulbright. As an experienced lawyer and international arbitrator, Valasek was the firm's head of international arbitration in Canada who would regularly sit at arbitration tribunals. While serving as the assistant to Fortier in *Hulley Enterprises* and its parallel proceedings, he was involved as counsel in other investment treaty disputes, e.g., *ADC v. Hungary*.[80] The issue under dispute in *ADC*, i.e., damages for unlawful expropriation, was the same or similar to that under the review before the *Yukos, Hully, and Veteran* Tribunals.

The respondent in *Yukos, Hully, and Veteran* challenged the awards and objected to Valasek's extensive involvement in these proceedings. Before Dutch courts, Russia stated that indications such as the total hours he worked and his fees for hours worked (EUR 970,562.50) raised reasonable doubts about the extent of involvement in the drafting of the awards.[81] While the logistical and administrative arrangements were done by the PCA secretariat, the number of hours Valasek worked and the fees he claimed were higher than those of individual members of the Tribunal. Before the Hague District Court, an expert in forensic linguistics who analyzed the authorship of the Final Awards testified that Valasek had a significant hand in the drafting of the Final Awards.[82] As a prominent arbitrator wrote, these circumstances raised concerns that the tribunals allowed the assistant to assume an extensive engagement in the substantive aspects of the arbitration proceedings.[83]

The Hague Court of Appeal agreed "that Valasek … indeed made significant contributions to the drafting of Chapters IX, X and XII of the Final Award by providing (draft) texts that the arbitrators

2014); *Hulley Enterprises Limited (Cyprus) v. Russian Federation*, PCA Case No. AA 226, Final Award (18 July 2014).

[80] See, e.g., *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal, October 2, 2006.

[81] See *Russian Federation v. Yukos Universal Limited, Veteran Petroleum Limited, Hulley Enterprises Limited*, the District Court of The Hague, Respondent Presentation for Hague District Court (9 February 2016) and Russia's Defense on Appeal before the Court of Appeal in The Hague (28 November 2017). See also *Hulley Enterprises Ltd and others, v. Russian Federation*, Respondent Motion to Deny Confirmation of Award filed with U.S. District Court of District of Columbia (20 October 2015).

[82] See *Hulley Enterprises Ltd and others v. Russian Federation*, Respondent's Motion to Deny Confirmation of Arbitration Awards Pursuant to New York Convention (20 October 2015).

[83] See *Hulley Enterprises Ltd and others v. Russian Federation*, U.S. District Court for the District of Columbia, Expert Opinion of Professor George A. Bermann (20 October 2015).

have incorporated, in whole or in part, in the arbitral awards".[84] In spite of this, the Court of Appeal concluded that it could not infer from the scientific expert evidence submitted that the assistant "participated in the decision-making process [in such a way] that falls within the domain of the arbitrators or that … [the assistant took] over tasks that fall within their domain".[85]

The above patterns of social behavior increase the risks of conflict of interests and perception of bias. Criticism about the conduct of arbitrators, particularly concerns over the relationships between arbitrators and other arbitration participants, has driven some arbitration practitioners to sever their connections with law firms leaving the 'counsel' job and pursuing a full-time arbitrator profession.[86] However, going 'solo' as an arbitrator, though it may reduce the likelihood of conflict of interests, does not address all the challenges arising from the conduct of arbitrators. While a small group of arbitration practitioners have chosen to shift their practice to a full-time arbitrator, the various patterns of interactions of arbitrators examined in this chapter remain common and widespread among arbitrators. This is further documented in Chapter 3.

III) Voting Behaviour of Investment Treaty Arbitrators

The decision-making behavior of arbitrators has been the subject of heated debates over the past recent years. In his 2009 empirical study, van den berg claimed that nearly all dissenting opinions issued in investor-State arbitrations supported the position of the dissenter's appointer.[87] Brower

[84] See *Russian Federation v. Yukos Universal Limited, Veteran Petroleum Limited, Hulley Enterprises Limited*, Judgment of the Hague Court of Appeal (Unofficial English Translation) (18 February 2020) paras 6.6.5 and 6.6.9.
[85] Ibid para 6.6.6. The Court of Appeal further reasoned that "the use by the Tribunal of draft texts from Valasek is therefore not tantamount to the "outright scrapping of the *intuitu personae* principle or the delegation prohibition applicable to arbitrators". What matters in the end is that the arbitrators have decided to assume responsibility for the draft versions of Valasek, whether in whole or in part and whether or not amended by them. The Russian Federation does not argue that the Tribunal has accepted these drafts without a second thought". [references omitted] Ibid para 6.6.11.
[86] See, e.g., Richard Woolley, *Mayer leaves Dechert to go solo*, Global Arbitration Review (23 March 2015); Douglas Thomson, *Alexandrov quits Sidley Austin to go solo*, Global Arbitration Review (2 August 2017); Cosmo Sanderson, *Tawil to go solo as an arbitrator*, Global Arbitration Review (9 November 2018).
[87] Albert Jan van den Berg, '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* (Brill 2010) 824.

and Rosenberg have rebutted van den Berg's conclusion and argued that party-appointed arbitrators are not biased.[88]

The 2009 study does not serve as an informed source for our understanding of today's voting behavior of arbitrators as the volume of arbitration decisions issued since then has significantly increased. Also, the scope of the 2009 study was limited to dissenting opinions. Accordingly, this section examines the voting behavior of investment treaty arbitrators when issuing opinions and declarations.[89] While it is a near to impossible task to read the arbitrator's mind, the black box of arbitral decision-making,[90] reviewing the behavior of arbitrators in time of disagreement with their peer arbitrators offers some insight into how arbitrators approach the submissions of their appointing party.

Further, this section reviews the attitude of party-appointed arbitrators toward both the claims of their appointing party and those of the non-appointing party. For this purpose, it scrutinizes the approach of arbitrators with high appointments from a disputing 'side' toward the positions of their appointing and non-appointing parties.

To examine the behavior of arbitrators for the above purposes, this research uses the method of content analysis. The content analysis method requires an author to employ his or her legal expertise to determine the presence of concepts, relationships, and themes in addition to the qualitative data.

This study does not intend to oversimplify the decision-making behavior of arbitrators. This is because various factors form the reasons behind a decision. Nonetheless, arbitrators' voting behavior should not be analyzed anecdotally, rather any such research should be based on empirical evidence.

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[88] See 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(1) Arbitr. Int.

[89] This review includes 250 opinions and declarations (including 175 dissenting opinions) on which the required data were available as of 30 June 2022. Slightly above 10 percent of all known opinions and declarations were excluded from this examination due to a lack of the required information. This study includes both ICSID disputes (treaty-based and non-treaty-based) and non-ICSID treaty-based arbitrations. The data for this purpose were extracted from the databases of the ICSID, UNCTAD, italaw, ISLG and Jus Mundi.

[90] Susan Franck and others, 'Inside the Arbitrator's Mind' (2017) 66 Emory Law J. 1115-1173.

A) Arbitrators' Opinions and Declarations

As a common practice among ITA arbitrators, panelists append their opinions to awards on jurisdiction, merits or quantum or provisional orders where there existed a significant concern over the assessment of factual and legal issues in an award or decision. Some arbitrators maintain that dissenting opinions are tools to be used only in situations where a serious disagreement exists among members of a panel over matters of principle.[91] The data collected on arbitrators' opinions in ITA demonstrate that the above practice has evolved over the recent years. Party-appointed arbitrators have increasingly rendered dissenting opinions to procedural orders (e.g., orders regarding examinations of witnesses or production of documents). One may argue that a lower threshold for issuing dissenting opinions is followed in this approach. However, as Garibaldi notes, dissenting opinions are designed for an arbitrator to voice his or her criticism on factual and legal points on which the arbitrator was not able to concur,[92] and a serious issue of concern may occur with respect to a procedural order.

The above emerging trend in the voting behavior of arbitrators demonstrates a concern on the part of some arbitrators over issues of fundamental importance in the conduct of the arbitration proceedings. Indeed, all of the dissenting opinions issued in such instances were rendered by respondent-appointed arbitrators.[93] Procedural orders are generally issued by the tribunal chair on behalf of the tribunal after consultation with the other members of the tribunal and/or the disputing

[91] See *Strabag SE v. Libya*, ICSID Case No. ARB(AF)/15/1, Partial Dissenting Opinion by Nassib G. Ziadé (22 June 2020) para 1; *Eurus Energy Holdings Corporation and Eurus Energy Europe B.V. v. Kingdom of Spain*, ICSID Case No. ARB/16/4, Partial Dissent by Oscar M. Garibaldi (17 March 2021) para 2.

[92] *Eurus Energy Holdings Corporation and Eurus Energy Europe B.V. v. Kingdom of Spain*, ICSID Case No. ARB/16/4, Partial Dissent by Oscar M. Garibaldi (17 March 2021) para 2.

[93] See, e.g., *Abaclat and others (formerly Giovanna A. Beccara and others) v. Argentine Republic,* ICSID Case No. ARB/07/5, Dissenting Opinion of Dr. Torres Bernárdez (Procedural Order No. 13) (25 September 2012) and Dissenting Opinion of Dr. Torres Bernárdez (Procedural Order No. 12) (20 November 2012); *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Assenting reasons of Gavan Griffith (13 August 2014) and Dissenting Opinion of Edward Nottingham (13 August 2014); *Rand Investments Ltd., William Archibald Rand, Kathleen Elizabeth Rand, Allison Ruth Rand, Robert Harry Leander Rand and Sembi Investment Limited v. Republic of Serbia*, ICSID Case No. ARB/18/8, Dissenting Opinion of Professor Marcelo G. Kohen (Procedural Order No. 5 on Transparency), (29 August 2019) and Declaration of Professor Marcelo G. Kohen (Procedural Order No. 6 on Transparency) (13 January 2020); *Canepa Green Energy Opportunities I, S.á r.l. and Canepa Green Energy Opportunities II, S.á r.l. v. Kingdom of Spain*, ICSID Case No. ARB/19/4, Partial Dissenting Opinion by Arbitrator Silvina González Napolitano (Procedural Order No. 3 on Bifurcation) (28 August 2020); *Angel Samuel Seda and others v. Republic of Colombia*, ICSID Case No. ARB/19/6, Dissenting Opinion of Hugo Perezcano Díaz (Procedural Order No. 4) (13 August 2021).

parties.[94] The tribunal chair exercises a decent degree of control over the direction of the proceedings through procedural orders. This privilege has been challenged by the voting behavior of party-appointed arbitrators. Where arbitrators have believed that a procedural order issued is not consistent with considerations of fairness or equality between the parties, they have used dissenting opinions to express their disagreements with such an order. Interestingly, arbitrators have issued dissenting opinions to procedural orders only in instances where the order issued declined the request of their appointing party or it was not favourable to the position of their appointer.

In general, the data show that party-appointed arbitrators have exclusively rendered dissenting opinions when the outcome of the underlying decision is not favourable or is less desirable to the dissenter's appointer. The examination reveals that there exists no known dissenting opinion by a party-appointed arbitrator who disagrees with a decision dismissing the claims of the non-appointing party. Indeed, wing arbitrators feel more compelled to append a dissenting opinion to express their discontent with an outcome that is unfavourable to, or less desirable for, their appointers. Nevertheless, to be precise, this does not mean that party-appointed arbitrators have not appended opinions - concurring or declarations - to substantiate their reasons for voting in favour of the non-appointing party. The situation with concurring opinions is different. Roughly one-third of all concurring opinions and declarations issued by party-appointed arbitrators have supported the vote in favour of the non-appointing party.

With respect to dissenting opinions, the data indicate that in instances where the underlying decision was fully or partially in favour of the investor, more than two-thirds of dissenters (roughly 70 percent) were State appointees. Further, roughly one-fifth of dissenters in the above scenario were claimant-appointed arbitrators, all of whom expressed their disagreement with respect to a portion of the decision that did not uphold certain other claimants' claims or did not award a greater amount of damages to the claimant. To sum up, no claimant-appointed arbitrator has ever dissented in disfavour of his or her appointer. They have issued dissenting opinions in support of their appointer's claim where their appointer has been partially successful.

[94] See, e.g., Rule 27 of the 2022 ICSID Arbitration Rules.

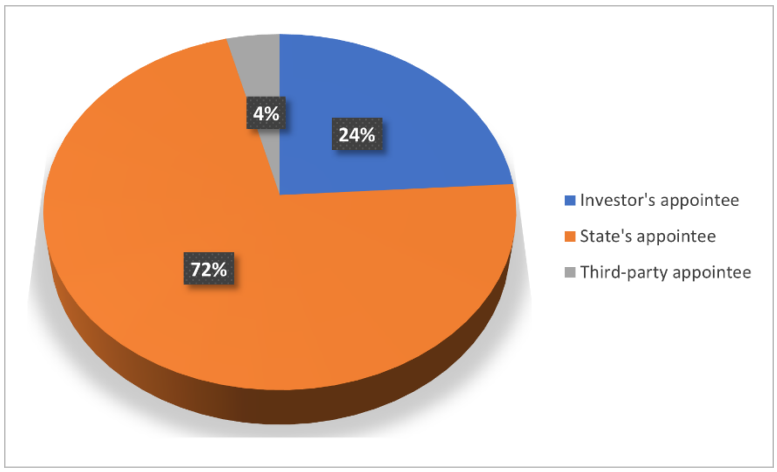

Figure 2.2.1 - Dissents to decisions rendered in favour of investors

A similar but augmented pattern of behavior was found with respect to situations where the underlying decision was issued in favour of the respondent. In such cases, claimant appointees formed the overwhelming majority of the dissenters (90 percent). While respondent appointee's represented roughly 5 percent of dissents in such cases, their dissents generally expressed a greater support for the respondent's position, e.g., regarding the costs of arbitration.

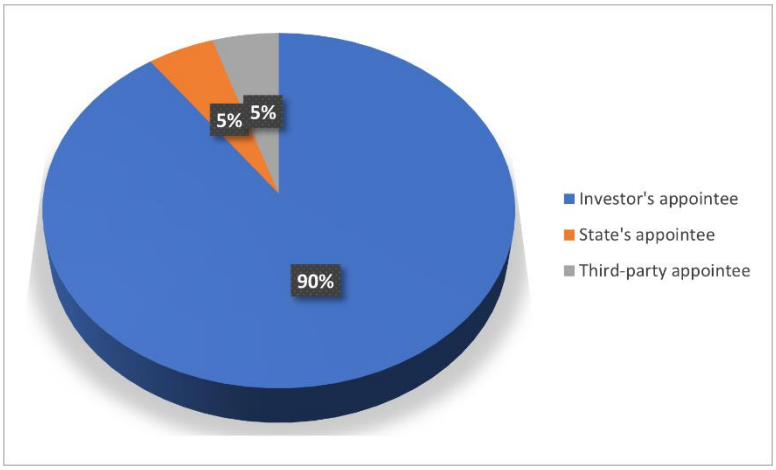

Figure 2.2.2 - Dissents to decisions rendered in favour of States

Unlike investor-appointees who issued a considerable number of dissenting opinions in instances where a decision was issued in favour of the investor but not all of the investor's claims (e.g., calculation of damages and interest rates) were upheld, where a decision is rendered in favour of

the State, State-appointees are less likely to issue a dissenting opinion to support a portion of the respondent's claims (e.g., claims on costs) that were not granted by the tribunal. From a behavioral perspective, the above data also signifies that, compared to respondent appointees, claimant-appointed arbitrators have shown a rather greater tendency to issue dissenting opinions in support of their appointer when their appointing party has received a partially favourable decision.

Consistent with van den Berg's conclusion on dissenting opinions, the above data support the dissents in ITA and confirm that there is a correlation between dissenting opinions and appointment by the losing party and that party-appointed arbitrators are prone to a perceived partiality. Indeed, dissenting opinions advocate for the party that appointed the dissenter. The examination depicts a behavioral pattern common among party-appointed arbitrators with respect to dissenting opinions - that is, party-appointed arbitrators used their right to render dissenting opinions exclusively in instances where their appointers received an unfavourable or less desirable decision. The results of this empirical study refute Brower and Rosenberg's argument that party-appointed arbitrators are indifferent and disinterested in decision-making.[95]

B) Elite insiders with high or exclusive appointments

As discussed above, there exist two particular groups of the most frequent party-appointed arbitrators. Each disputing 'side' (i.e., claimant or respondent) is highly or exclusively interested in one of these groups of elite insiders, but not both. Undoubtedly, for a disputing party, achieving the desired outcome is the single most important objective. One may argue that the cautious approach for the disputing parties is to appoint a person who has shown a voting record favourable to that party. It is reasonable for claimants and respondents to select those who have previously expressed their views on issues similar to those under dispute.

That said, the question is whether there exists a relationship between the voting records of these arbitrators and high or exclusive appointments from either claimants or respondents. It asks if there are any clues as to why the elite insiders in each particular group have received such high or exclusive appointments from one of the disputing sides, but not the other. For this purpose, the decision-making behavior of each individual arbitrator with high or exclusive appointments forms the basis for the assessment of the collective behavior of these arbitrators towards the positions of

[95] Brower and Rosenberg (n 88).

their appointers. Combined voting history of arbitrators from each of the two groups, i.e., if the voting backgrounds are considered collectively, allows us to reasonably arrive at a sociological pattern of behavior on the part of these arbitrators and determine if they show more sympathy towards the positions of their appointer.

However, for greater certainty, this study does not offer a conclusion on whether a particular arbitrator under examination is biased in his or her decision-making. Indeed, taking a fairly cautious approach, voting records of an arbitrator do not, without the existence of any solid evidence, substantiate the existence of bias. This is because, except for rare occasions such as parallel disputes where the facts and merits of disputes are the same or remarkably similar, the merits and factual premises of disputes often differ one from another. Further, due to differences between arbitrators' backgrounds, experiences, and viewpoints, an arbitrator may develop opinions on legal issues that are different from those of his or her co-arbitrators.[96] As one may argue, an arbitrator's reasoned argument - produced either separately or jointly as part of a majority or unanimous decision - in support of the position of his or her appointing party cannot be accused of bias simply because it is favourable to the appointer or because his or her views remain at odds with a well-established jurisprudence.

The scope of this examination is limited to the decision-making behavior of party-appointed arbitrators who fall within one of the two groups referred to above. It does not include those most-frequent arbitrators or members of ICSID annulment committees who do not meet this benchmark. The covered disputes include ICSID disputes (treaty-based and non-treaty-based) and non-ICSID treaty-based arbitrations. Also, it only covers disputes in which a final award in the original arbitration proceedings stage was available as of June 30, 2022.[97] Voting records of these arbitrators in any other decisions (e.g., decisions on provisional measures, procedural orders, etc.) have not been taken into account. Further, disputes discontinued or settled are excluded from the scope of the analysis. Additionally, disputes in which the arbitrator was replaced prior to the delivery of the final award are not included.

[96] For instance, an arbitrator who is a professor of PIL with extensive work and expertise in the field might approach the legal issue differently from an arbitrator practitioner who has a background in a private law and experience in ICA.

[97] For this purpose, the author relied on databases of the ICSID, UNCTAD, italaw, ISLG and Jus Mundi.

Applying the above limitations, 260 disputes fall within the scope of this review. The limitations narrow down the scope of the examination to the collective behaviour of these two groups of arbitrators from a very particular angle, i.e., where a party (appointing or non-appointing) loses or wins the dispute. The assessment documents the collective performance of these arbitrators in situations where a decision is issued in favour of, or against, their appointing party.

The data reveal that there exists a correlation between high or exclusive appointments from a disputing 'side' and the voting behavior of the arbitrator with respect to that disputing side. Arbitrators with high or exclusive appointments were significantly more included towards the positions of their appointing party than the claims of the non-disputing party. Four-fifth of the most frequent respondent arbitrators voted in a higher number of disputes in favour of the State compared to the number of cases in which they voted for the investor. With a slightly different ratio, the review of the decision-making records of the most frequent respondent arbitrators provided a similar result. Regardless of the 'side' that made the high or exclusive appointments, these influential arbitrators demonstrated a pattern of sympathetic decision-making when they approached the claims of the party from the 'side' from which they received their high or exclusive appointments.[98]

Indeed, the voting records of arbitrators with high or exclusive appointments from one disputing 'side', considered collectively, largely supported the position of the party from the 'side' that offered those appointments. The results reveal a general pattern of support in the decision-making of these arbitrators for the positions of their appointing party. These arbitrators largely supported the claim of their appointer, whether in the form of joining the tribunal decision or issuing a partial or full dissenting opinion.

The pie charts below summarize the data for arbitrators with high or exclusive appointments from each disputing 'side'.

[98] Against the above conclusion, at the individual arbitrator level, the voting behavior of one particular arbitrator, i.e., John Beechey, was significantly different from the above pattern. While receiving excessively high appointments from claimants, he voted in 75% of the disputes in favour of the respondent.

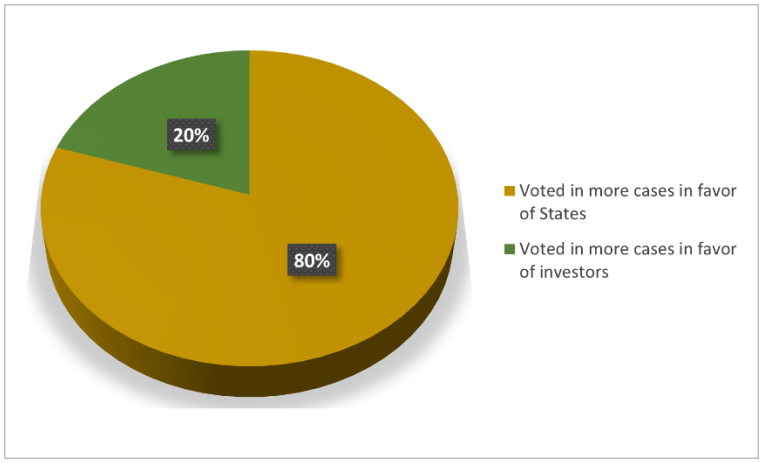

Figure 2.2.3 - Voting behavior of frequent respondent arbitrators

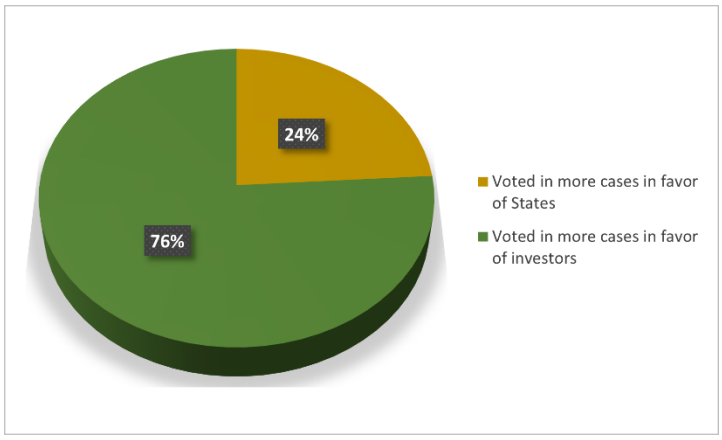

Figure 2.2.4 - Voting behavior of frequent claimant arbitrators

To sum up, the decision-making records of both groups of arbitrators with high or exclusive appointments demonstrate a strong relationship between these high appointments and votes favourable to the appointing party. It is likely that this above pattern of voting behavior is affected by factors such as educational background and professional experience of arbitrators, rather than the heartfelt sympathy of these arbitrators towards the appointing party. Further, given the fact that this study is limited in scope to two particular groups of party-appointed arbitrators, it does not support a widespread presumption about the partiality of party-appointed arbitrators. For such a purpose, a review of the voting behavior of a greater number of arbitrators is required.

IV) *Ad hoc* Party-Appointing Mechanism: Certain Legitimacy Concerns

A) Dissents in Investment Treaty Arbitrations

The party-appointing mechanism has been subject to considerable debates, particularly the voting behavior and dissenting opinions of party-appointed adjudicators.[99] Dissenting opinion means any individual statement of an adjudicator that deviates, in full or in part, from the reasoning of the majority of a tribunal or court.[100]

Since the 1872 *Alabama Claims* arbitration where the fifth arbitrator produced separate reasons for his opinions,[101] it has been a widespread practice of international adjudicators, including judges of the ICJ, to issue an individual opinion - concurring or dissenting - on matters they disagree with the majority of a tribunal or court.[102] Arbitration institutions have also taken a relaxed attitude and

[99] See R. P. Anand, 'The Role of Individual and Dissenting Opinions in International Adjudication' (1965) 14(3) Int'l & Comp. L. Q. 788-808; Detlev Vagts, 'The International Legal Profession: A Need for More Governance?' (1996) 90(2) AJIL 250-261; Albert Jan van den Berg, '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* (Brill 2010) 821-844; 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(1) Arbitr. Int. 7-44; Albert Jan van den Berg, 'Charles Brower's Problem with 100% - Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration' in David Caron and others (eds), *Practising Virtue: Inside International Arbitration* (OUP 2015) 504-514; Catharine Titi, 'Investment Arbitration and the Controverted Right of the Arbitrator to Issue a Separate or Dissenting Opinion' (2018) 17(1) Law Pract. Int. Courts Trib. 197-216; Peter J. Rees and Patrick Rohn, 'Dissenting Opinions: Can they Fulfil a Beneficial Role?' (2009) 25(3) Arb. Int. 329-346; Laurent Levy, 'Dissenting Opinions in International Arbitration in Switzerland' (1989) 5(1) Arb. Int. 35-42; Patricia Jimenez Kwast, 'Prohibitions on Dissenting Opinions in International Arbitration' in Cedric Ryngaert and others (eds), *What's Wrong with International Law? Liber Amicorum A.H.A. Soons* (Brill Nijhoff 2015) 128–153; Pedro J. Martinez-Fraga and Harout Jack Samra, 'A Defense of Dissents in Investment Arbitration' (2012) 43(3) Inter-American L. Rev. 445-479; Inan Uluc and Kristi R. Sutton, 'Without Silence, There Is No Golden Rule; Without Dissent, There Is No Progress' (2018) 20(1) Or. Rev. Int. L. 219-274; Ilhyung Lee, 'Introducing International Commercial Arbitration and Its Lawlessness, by Way of the Dissenting Opinion' (2011) 4(1) Contemp. Asia Arb. J. 19-35. For the voting behaviour of national judges appointed at international courts and tribunals see Norman L. Hill, 'National Judges in the Permanent Court of International Justice' (1931) 25(4) Am. J. Int'l L. 670-683; Il Ro Suh, 'Voting Behavior of National Judges in International Courts' (1969) 63(2) Am. J. Int'l L. 224-236; Stephen M. Schwebel, 'National judges and judges ad hoc of the International Court of Justice' in Stephen M. Schwebel, *Justice in International Law Further Selected Writings* (CUP 2011) 25-40; Charles N. Brower and Massimo Lando, 'Judges ad hoc of the International Court of Justice' (2020) 33(2) Leiden J. Int. L. 467-493; Martin Kuijer, 'Voting Behaviour and National Bias in the European Court of Human Rights and the International Court of Justice' (1997) 10(1) Leiden J. Int. L. 49-67.

[100] See also John P. Grant and J. Craig Barker, *Parry and Grant Encyclopaedic Dictionary of International Law* (OUP 2009) 162-163, and 553.

[101] See *Alabama Claims of the United States of America against Great Britain*, Award (14 September 1872) reprinted in United Nations, *Reports of International Arbitral Awards*, vol XXIX (United Nations Press 2012) 131.

[102] See e.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, ICJ Judgment, Separate opinion of President Tomka (3 February 2015); *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, ICJ Judgment, Declaration of President Abraham (5 October 2016); *Obligation to Negotiate*

a permissive approach -implicit or explicit- towards dissenting opinions.[103] Unlike UNCITRAL and PCA arbitration rules which are silent on individual opinions, the ICSID Convention and ICSID Arbitration Rules expressly recognize the right of arbitrators to append individual dissenting opinions.[104] The ICSID arbitration framework principally follows the idea adopted in the governing rules of some international courts and tribunals that were established before the ICSID.[105]

Investment treaty arbitrators frequently append dissenting opinions to arbitral decisions. Roughly one in five concluded investor-state dispute settlement (ISDS) cases result in a separate or dissenting opinion.[106] However, non-party-appointed arbitrators in ITA have rarely issued such opinions. As a tribunal chair dissenting to a majority award stated, it "is not a frequent occurrence"

Access to the Pacific Ocean (Bolivia v. Chile), ICJ Judgment, Declaration of President Yusuf (1 October 2018); *Immunities and Criminal Proceedings (Equatorial Guinea v. France), ICJ Judgment,* Separate opinion of President Yusuf (11 December 2020); *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates),* ICJ Judgment, Declaration of President Yusuf (4 February 2021); *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, ICJ Judgment, Separate opinion of President Donoghue (12 October 2021).

[103] See Alan Redfern, 'The 2003 Freshfields – Lecture Dissenting Opinions in International Commercial Arbitration: The Good, the Bad and the Ugly' (2004) 20(3) Arb. Int. 242. For a historical account of approaches towards dissenting opinions in international adjudication, see Edward Dumbauld, 'Dissenting Opinions in International Adjudication' (1942) 90(8) Univ. Pa. Law Rev. 929-945; Ijaz Hussain, *Dissenting and Separate Opinions at the World Court* (Nijhoff 1984) 13-71.

[104] See Article 48(4) of the ICSID Convention. It states that "[a]ny member of the Tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent". See also Rule 47 of the 2006 ICSID Arbitration Rules ("Any member of the Tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent"). Although the text of the Convention refers to dissenting statements, it should not be read as restricting the possibility of an ICSID arbitrator to issue a concurring opinion. See Christoph H. Schreuer and others, *The ICSID Convention: A Commentary* (2nd ed, Cambridge University Press 2009) 831-832.

[105] See, Article 52 of the Hague Conventions of 1899 for the Pacific Settlement of International Disputes ("Those members who are in the minority may record their dissent when signing"), Article 62 of the Rules of the PCIJ (adopted March 24 1922) ("The opinions of judges who dissent from the judgment, shall be attached thereto should they express a desire to that effect"), Article 95(2) of the Rules of the ICJ ("Any judge may, if he so desires, attach his individual opinion to the judgment, whether he dissents from the majority or not; a judge who wishes to record his concurrence or dissent without stating his reasons may do so in the form of a declaration. The same shall also apply to orders made by the Court"), Rule 74(2) of the Rules of the ECHR ("Any judge who has taken part in the consideration of the case by a Chamber or by the Grand Chamber shall be entitled to annex to the judgment either a separate opinion, concurring with or dissenting from that judgment, or a bare statement of dissent"). See also Article 66(2) of the ACHR provides that "[i]f the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to have his dissenting or separate opinion attached to the judgment" and Article 125(2) of the Rules of the ITLOS ("Any judge may attach a separate or dissenting opinion to the judgment; a judge may record concurrence or dissent without stating reasons in the form of a declaration. The same applies to orders").

[106] Catharine Titi, 'Investment Arbitration and the Controverted Right of the Arbitrator to Issue a Separate or Dissenting Opinion' (2016) 17(1) Law Pract. Int. Court. Trib. 198.

for "[t]he chairman of an arbitral tribunal dissenting from a decision drafted by his [or her] two colleagues".[107]

There are two approaches to dissenting opinions in ISDS. Proponents of the existing system state that a well-reasoned dissenting opinion contributes to the progress and evolution of international investment law.[108] As Lauterpacht wrote, only well-reasoned dissents are contributory as "a bare dissent, unaccompanied by reasons, is of no greater value than a decision without reasons".[109] In this view, "it is not formal authority but compelling reasoning and persuasiveness that will allow a dissent to contribute, or not, to the development of international investment law".[110] Indeed, well-reasoned dissents provide openness with which different views can be evaluated against one another

Supporters of the current appointment mechanism argue that dissents allow individual arbitrators to express their concerns about any procedural deficiencies that might occur in the conduct of arbitration and they serve as a tool for better understanding of the dynamics of the arbitration process.[111] Also, astute dissenting opinions help the disputing parties and third parties to better comprehend and assess the underlying reasoning of an award, particularly where the majority of a tribunal addresses the points raised in the dissenting opinion.[112] Further, one may argue that voting

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[107] *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Dissenting Opinion by Prosper Weil (29 April 2004) para 1.

[108] See Charles Brower and Charles 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(1) Arb. Int. 7-44; Ke Song and Xuechan Ma, 'Individual Opinions as an Agent of International Legal Development?' (2022) 13(1) J. Int. Disput. Settl. 54-78. See also Ijaz Hussain, *Dissenting and Separate Opinions at the World Court* (Nijhoff 1984) 73-205. See also Neha Jain, 'Radical Dissents in International Criminal Trials' (2017) 28(4) EJIL 1163–1186.

[109] Hersch Lauterpacht, *The Development of International Law by the International Court* (CUP 1958, reprinted in 1982) 67-68.

[110] Catharine Titi, 'Investment Arbitration and the Controverted Right of the Arbitrator to Issue a Separate or Dissenting Opinion' (2018) 17(1) Law Pract. Int. Courts Trib. 204.

[111] Daphna Kapeliuk, 'Dissents in Investment Arbitration: On Collegiality and Individualism' in Daniel Behn and others (eds), *The Legitimacy of Investment Arbitration: Empirical Perspectives* (CUP 2022) 159-160; Jonathan Sutcliffe, 'The Award' in Daniel M. Kolkey and others, *Practitioner's Handbook on International Arbitration and Mediation* (Juris Net 2002) 271. See also *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Dissenting opinion of the Arbitrator Jaroslav Hándl against the Partial Arbitration Award (13 September 2001); *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Dissenting Opinion to Procedural Order No. 15, (20 November 2012).

[112] See, e.g., *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Dissenting Opinion of Arbitrator Santiago Torres Bernárdez (20 June 2018); *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Decision on Jurisdiction (29 June 2018); *Casinos Austria International GmbH and Casinos Austria*

records of party arbitrators are an indication that they do not act as advocates of their appointees because it is not uncommon that awards are issued unanimously meaning that in such situations at least one party appointee has voted against the party that appointed that arbitrator. Additionally, the pool of ISDS adjudicators is ideologically polarized in two distinct directions: "either inclined in favor of investors or of host states".[113] Disputing parties generally tend to select those arbitrators whose views are more likely aligned with what they are seeking under dispute. Indeed, "[i]t is not illegitimate for parties to appoint arbitrators who they believe to be sympathetic to their arguments".[114]

The fundamental criticism against the current party-appointing mechanism is that the ability of the disputing parties to select an arbitrator goes against arbitrator impartiality.[115] In Crawford's words, in today's party-appointing mechanism, it is not a realistic proposition to suggest that new generations of arbitrators "could be considered independent and impartial by all observers in all fora".[116] The system is prone to conflict of interest and dissents are indications of this. ISDS arbitrators are not bound by the same conflict of interest rules that apply to domestic or international judges.

Critics state that unilateral appointment of arbitrators is against the idea of arbitration as the appointing party's priority is the selection of an arbitrator who helps the appointer win the dispute,

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Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/14/32, Award of the Tribunal and Dissenting Opinion of Arbitrator Santiago Torres Bernárdez (5 November 2021).

[113] Joost Pauwelyn, 'Who Decides Matters - The Legitimacy Capital of WTO Adjudicators versus ICSID Arbitrators' in Nienke Grossman and others (eds), *Legitimacy and International Courts* (CUP 2018) 221.

[114] See Schreuer and others (n 104) 513-514.

[115] See David Branson, 'Sympathetic Party-Appointed Arbitrators: Sophisticated Strangers and Governments Demand Them' (2010) 25(2) ICSID Rev. 367–392; V.V. Veeder, 'The Historical Keystone to International Arbitration: The Party-Appointed Arbitrator—From Miami to Geneva' (2017) 107 Proceedings of the ASIL Annual Meeting 387-405; Runar Hilleren Lie, 'The Influence of Law Firms in Investment Arbitration' in Daniel Behn and others, *The Legitimacy of Investment Arbitration* (CUP 2022) 100-132; Chiara Giorgetti, *The Selection and Removal of Arbitrators in Investor-State Dispute Settlement* (Brill 2019) 23-37; Natalie Y. Morris-Sharma, 'The T(h)reat of Party Autonomy in ISDS Arbitrator Selection: Any Options for Preservation?' in Jean Kalicki and others (eds), *Evolution and Adaptation: The Future of International Arbitration* (Kluwer 2020) 432-447; Sundaresh Menon, 'Adjudicator, Advocate, or Something in Between? Coming to Terms with the Role of the Party-Appointed Arbitrator' (2017) 34(3) J. Int. Arb.. 347-371; Elsa Sardinha, 'Party-Appointed Arbitrators No More: The EU-Led Investment Tribunal System as an (Imperfect) Response to Certain Legitimacy Concerns in Investor-State Arbitration' (2018) 17 Law Pract. Int. Courts Trib. 117-134; Szilárd Gáspár Szilágyi and Laura Létourneau-Tremblay, 'A Question of Impartiality: Who are the Dissenting Arbitrators in Investment Treaty Arbitration?' in Freya Baetens (ed), *Identity and Diversity on the Bench: Implications for the Legitimacy of International Adjudication* (OUP 2020) 280-329.

[116] James Crawford, 'The Ideal Arbitrator: Does One Size Fit All?' (2018) 32(5) Am. Univ. Int. L. Rev. 1011.

not ensuring an impartial arbitration process.[117] As one commentator with experience in both international commercial and ISDS arbitrations concedes, unilateral appointments are "in large part for the purpose of assuring [the appointer] that it will receive a *sympathetic*, or at least informed and objective, hearing".[118] (Emphasis added)

The system incentivizes party arbitrators for acting as advocates for the appointer, including through repeat appointments by the same party or counsel or the same disputing side.[119] Repeat appointments may lead to pre-appointment bias in favour of the same counsel (who recommended the appointment of the arbitrator in different cases), the same party, or the same disputing side, i.e., claimants or respondents.

Particularly, the party-appointing mechanism adds more confusion about the role arbitrators shall assume. As Alvarez puts it, [i]t is not clear that arbitrators charged with settling investor-State claims have a common view of their own role: that is, whether they see themselves principally as agents to the disputing parties before them or, more broadly, as agents of the international community".[120]

The critics of the party-appointing mechanism provide empirical data showing that dissents are used as a tool to support the party that appointed the dissenter. In his study surveying 150 ICSID awards, van den Berg concluded that nearly all of the dissenting opinions under review were

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[117] Jan Paulsson, 'Appointment of Arbitrators' in Federico Ortino and others (eds) *Oxford Handbook of International Arbitration* (OUP 2020) 106.

[118] Gary B. Born, *International Arbitration: Law and Practice* (Kluwer 2021) 264.

[119] See Daphna Kapeliuk, 'The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators' 96(1) Cornell L. Rev. (2010) 47-90; Houchi Kuo, 'The Issue of Repeat Arbitrators: Is it a Problem and How Should the Arbitration Institutions Respond?' (2011) 4(2) Contemp. Asia Arb. J. 247 -271; 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) 293–319; Alfonso Gómez-Acebo, *Party-Appointed Arbitrators in International Commercial Arbitration* (Kluwer 2016) paras 5.01-5.05; Will Sheng Wilson Koh, 'Think Quality Not Quantity: Repeat Appointments and Arbitrator Challenges' (2017) 34(4) J. Int. Arb. 711-740. See also *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Francisco Orrego Vicuña (13 December 2013) paras 75-80. This concern was also raised during the negotiations of the ICSID Convention when options for arbitrator appointment were being considered. It was stated that the party-appointing option is "the least desirable method because of the danger that each party will look upon the arbitrator to be appointed by it as an advocate". See 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*, vol II-2 (ICSID Publications 1968) 40.

[120] José E. Alvarez, *The Public International Law Regime Governing International Investment* (Brill 2011) 427-428.

"issued by arbitrators appointed by the party that lost the case in whole or in part".[121] In its comments on ISDS reforms, Bahrain also shared this concern.[122]

As discussed above, the data confirm that the state of affairs van den Berg uncovered has been a continuous phenomenon.[123] Indeed, dissents issued by a party-appointed arbitrator favourably supported the position of the party that appointed the issuer of the dissent. Similarly, panelists with high or exclusive appointments from one disputing side largely voted in favor of the side that appointed them. The data on dissenting opinions and on panelists with high or exclusive appointments from either investors or States indicate that there exists a correlation between appointments and voting behavior of party-appointed arbitrators.

Dissents have particularly jeopardized the trust in the party-appointing mechanism. Through their dissenting opinions, party-appointed arbitrators advocate the case of the grieving disputant that appointed the issuer of the dissent. The circumstances surrounding dissenting opinion in ISDS disputes show the inefficiencies of the current appointment mechanism. As Paulsson puts it, "unilaterally appointed arbitrators in all forms of arbitrations act as special advocates of their appointers, with access to the deliberation room".[124] Because of this, some commentators call for outright abandonment of the party-appointment mechanism.[125]

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[121] Albert Jan van den Berg, '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* (Brill 2011) 824.

[122] *Submission from the Government of Bahrain*, UNCITRAL Working Group III (29 August 2019) para 21.

[123] For the purpose of this review, the author relied on ICSID awards published on the databases of ICSID, italaw, Jus Mundi, and ISLG as of 1 February 2022.

[124] Jan Paulsson, 'Appointment of Arbitrators' in Federico Ortino and others (eds) *Oxford Handbook of International Arbitration* (OUP 2020) 106.

[125] Jan Paulsson, The Idea of Arbitration (OUP 2013) 161-162. See also Jan Paulsson, 'Moral Hazard in International Dispute Resolution' (2010) 25(2) ICSID Rev. 352 (concluding that "the only decent solution – heed this voice in the desert! – is thus that any arbitrator, no matter the size of the tribunal, should be chosen jointly or selected by a neutral body").

B) Private Law Practitioners: Controversial Tenants of Investment Treaty Tribunals

While, like other domains of PIL,[126] ITA has been influenced by domestic law and private international law, ITA is a domain of PIL.[127] The rationale supporting this view far outweighs any reasons to the contrary; a) ITA is based on an international treaty; b) ITA involves rights and obligations negotiated under a treaty concluded between two States, i.e., the primary persons of PIL; c) The underlying investment treaty is governed by the rules and principles of the law of treaties (e.g., rules regarding provisional application of treaties and interpretation of treaties, the role of subsequent agreements and subsequent practice, and Article 103 of the United Nations Charters); d) a significant number of investment treaties expressly include PIL as the governing law; and e) ITA engages other domains of PIL including the law of treaties, customary international law, responsibility of States, the international law of sanctions, international human rights law, the international law of occupation, international environment law, international trade law, etc.

For the same reasons, those with expertise in PIL are better suited to be appointed as panelists to ITA tribunal and adjudicate ITA disputes than those with expertise in private law and ICA. Yet, the elites of ICA have successfully obtained a strong foothold in the ISDS pool, with investor claimants and law firms representing them playing a key role in this regard.[128] This is partly

[126] One could refer to the principles governing States' claims over territories, the law of treaties, international criminal law, international human rights law, and international environmental law, among others. While these branches of PIL have borrowed certain rules from domestic legal systems, they remain a domain of PIL, rather than hybrid domains.

[127] See also José E. Alvarez, *The Public International Law Regime Governing International Investment* (Brill 2011); Eric De Brabandere, *Investment Treaty Arbitration as Public International Law: Procedural Aspects and Implications* (CUP 2014); Gus Van Harten, 'Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law' in Stephan W. Schill, *International Investment Law and Comparative Public Law* (OUP 2010) 631-633; Raymond Yang Gao, 'The Role of Public International Law in Integrating Human Rights Considerations in Investment Treaty Arbitration' (2021) 16(2) Asian J. WTO Int. Heal. (2021) 283-289. See also Susan D. Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73(4) Fordham L. Rev. 1521-1625; Caroline E. Foster, 'A New Stratosphere? Investment Treaty Arbitration as 'Internationalized Public Law'' (2015) 64(2) Int. Comp. Law Q. 461-485.

[128] See Florian Grisel, 'Marginas and Elites in International Arbitration' in Federico Ortino and others (eds) *Oxford Handbook of International Arbitration* (OUP 2020) 260-282; Nicholas J. Diamond and Kabir A.N. Duggal, 'Adding New Ingredients to an Old Recipe: Do ISDS Reforms and New Investment Treaties Support Human Rights?' (2021) 53(1) Case W. Res. J. Int'l L. 141-142.

because of the nature of the appointment mechanism in ITA. ITA has allowed for less control over ISDS arbitrators compared to judges of international courts and tribunals.[129]

As will be reviewed in Chapter 3, the data on the background of ICSID adjudicators between 1972 and 2019 show that practitioners who had private law background[130] had a considerable presence in ITA. While it is not disputed that adjudicators with extensive expertise in PIL may differently perceive issues under dispute, a lack of proper understanding of norms, functions, and structure of PIL rules can potentially contribute to a greater divergence among investment treaty arbitrators. As Stern states in her separate opinion in *Infinito Gold,* her co-arbitrator's "misunderstanding of the structure of public international law [was] at the root of [her] strong disagreement with [their] analysis".[131]

The alleged influence of private law practitioners and commercial arbitrators on the outcome and direction of ISDS disputes could be a concern for States. This concern was highlighted during the discussions of the UNCITRAL Working Group III on Investor-State Dispute Settlement Reform. In their comments on potential reform aspects of ISDS, the EU countries submitted that the *ad hoc* appointment mechanism has led "to a continued high concentration of persons who have gained their experience as arbitrators primarily in the field of commercial arbitration involving disputes of "private law" rather than public international law disputes. Such persons often are professionally less familiar with public international law".[132] China also pointed out that "'[a]s the existing investment arbitration system borrows from the practical experience of commercial arbitration, the

[129] See Anthea Roberts, 'Subsequent Agreements and Practice: The Battle over Interpretive Power' in Georg Nolte (ed), *Treaties and Subsequent Practice* (OUP 2013) 100-101. See also Mariano J Aznar-Gómez, 'Article 2' in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (2nd edn, OUP 2012) 385-392; Michael Bohlander, 'Article 36' in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd ed., C.H. Beck, Hart, Nomos 2016) 1219-1223; Chittharanjan F. Amerasinghe, 'Judges of the International Court of Justice – Election and Qualifications' (2001) 14(2) Leiden J. Int. L. 335-348; Sondre Torp Helmersen, 'Finding 'the Most Highly Qualified Publicists': Lessons from the International Court of Justice' (2019) 30(2) EJIL 509–535.

[130] It should be noted that this study mainly relied on arbitrators' resumes. Where there was no self-report found, it relied on arbitrators' publications, courses they taught at universities, involvement in inter-State disputes, and practice areas at law firms.

[131] *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Separate Opinion by Brigitte Stern (3 June 2021) para 99.

[132] *Submission from the European Union on Possible Reform of Investor-State Dispute Settlement (ISDS)*, Working Group III, Thirty-Fifth Session, UN Doc. A/CN.9/WG.III/WP.145 (12 December 2017) para 32.

appointment process for arbitrators fails to fully reflect the professional requirements of international public law required" for making decisions on investment treaty disputes.[133]

One can argue that the inflow of private law practitioners may also result in the import of concepts, procedures, and practices from ICA to ISDS including ITA. Pre-appointment interview of candidates for arbitrator positions, borrowed from ICA, serves as an example of the entrepreneurial nature of the contemporary ISDS appointment mechanism. Interviewing prospective arbitrators is an established practice in unilateral appointments of international commercial arbitrators.[134] With the involvement of elite law firms and private lawyers, an initial interview phase has also found its way into the selection process of prospective ISDS arbitrators.[135] With the exception of the recent developments in the Draft Code of Conduct for ISDS Adjudicators,[136] such a practice has attracted less attention and control from governing ISDS rules. There are no clear rules in regulations that regulate pre-appointment communications between a disputing party (and their counsel) and a prospective arbitrator. Pre-appointment communications are done in a secretive way, and, within the current system, the interviewer is not required to share the contents of their communications with the other disputing party or the arbitration tribunal. The practice of 'arbitrator shopping' has become a danger to ITA, particularly in disputes where arbitration records and decisions are not published.

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[133] *Recommendations of China regarding investor-State dispute settlement reform*, UNCITRAL Working Group III (19 July 2019) 3.

[134] See Doak Bishop and Lucy Reed, 'Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration' (1998) 14(4) Arb. Int. 395-429; A. A. de Fina, 'The Party Appointed Arbitrator in International Arbitrations – Role and Selection' (1999) 15(4) Arb. Int. 392; Niklas Elofsson, 'Ex Parte Interviews of Party-Appointed Arbitrator Candidates: A Study Based on the Views of Counsel and Arbitrators in Sweden and the United States' (2013) 30(4) J. Int. Arb. 381-405; Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) 253; Johan Tufte-Kristensen, 'The Unilateral Appointment of Co-arbitrators' (2016) 32(3) Arb. Int. 491-492, 499-503.

[135] Chiara Giorgetti, *The Selection and Removal of Arbitrators in Investor-State Dispute Settlement* (Brill 2019) 37.

[136] It should be that transparency in appointment of arbitrators and communications between prospective arbitrators and disputing parties are part of the ongoing ISDS reform process. Borrowing from the IBA Guidelines on Party Representation, the proposed subparagraphs (1) and (2) Article 7 of the Draft Code of Conduct (version three) imposes limitations on pre-appointment communications and places obligations on the disputing parties and the adjudicator to disclose the content of any such communications. The Draft prohibits any communications - oral or written - between the appointing party (and their representatives and any related person) and the candidate or adjudicator that involve jurisdictional, procedural, or substantive aspects of the dispute, without the presence or knowledge of the opposing disputing party. The proposed obligations apply to not only pre-appointment interviews, but also any pre-appointment contacts on selection of presiding Arbitrators.

However, ISDS and ITA, in particular, significantly differ from ICA, and not all concepts, procedures, and practices used in ICA positively serve ITA. ISDS arbitration has its own distinct culture. Particularly ITA involves interpretation of treaty provisions and consideration of public policy issues, and expectations from ISDS arbitrators are not the same as those anticipated from those deciding private disputes. ISDS arbitrators are required to fulfill expectations that go beyond simply settling disputes. ISDS arbitrators are not merely agents of the disputing party, but they are also guardians of the interests of the international community.[137] As Knhar notes, "[i]t is one of the particularities distinguishing investment arbitration from commercial arbitration that in most instances it is more than just the disputing parties' interest at stake in the disputes".[138]

The existence of two different professional communities of ISDS/ITA arbitrators has resulted in a "veritable culture clash".[139] Various studies suggest that the professional background of adjudicators instructs an arbitrator's approaches to legal issues.[140] Practitioners who have a private law background and experience in ICA are likely to have different approaches than arbitrators with expertise in PIL particularly because experts in ICA generally lack familiarity with interpretative approaches in PIL.[141]

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[137] Stephan W. Shill, 'Ordering Paradigms in International Investment Law: Bilateralism - Multilateralism - Multilateralization' in Zachary Douglas, Joost Pauwelyn and Jorge E. Viñuales (eds), *The Foundations of International Investment Law - Bringing Theory Into Practice* (OUP 2014) 137; Alec Stone Sweet, 'Investor-State Arbitration: Proportionality's New Frontier' (2010) 4(1) L. Ethics Hum. Rights 56-57.

[138] Christina Knahr, 'The new rules on participation of non-disputing parties in ICSID arbitration: Blessing or curse?' in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (CUP 2011) 337.

[139] Anthea Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' (2013) 107(1) AJIL 54. For a contrary view that repudiates the idea of the clash of cultures and finds benefits in the coexistence of the two branches of ISDS arbitrators, see James Crawford, 'The Ideal Arbitrator: Does One Size Fit All?' (2018) 32(5) Am. Univ. Int. L. Rev. 1003-1022.

[140] See Erik Voeten, 'The Impartiality of International Judges: Evidence from the European Court of Human Rights' (2008) 102(4) Am. Polit. Sci. Rev. 417-433; Erik Voeten, 'The Politics of International Judicial Appointments' (2009) 9(2) Chic. J. Int. L. 387-405; William W. Burke-White and Andreas von Staden, 'Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations' (2010) 35(2) Yale J. Int'l L. 283-346; Cosette Creamer and Zuzanna Godzimirska, 'The Job Market for Justice: Screening and Selecting Candidates for the International Court of Justice' (2017) 30(4) Leiden J. Int. L. 947-966. See also Rodrigo Polanco Lazo and Valentino Desilvestro, 'Does an Arbitrator's Background Influence the Outcome of an Investor-State Arbitration?' (2018) 17(1) Law Pract. Int. Court. Trib. 18–48 (Concluding that there does not exist a decisive correlation between the arbitrator's ISDS experience or personal background with the outcome of an ISDS arbitration).

[141] Anthea Roberts, 'Subsequent Agreements and Practice: The Battle over Interpretive Power' in Georg Nolte (ed), Treaties and Subsequent Practice (Oxford University Press 2013) 100-101.

The distinction between the commercial arbitration culture and that of ISDS is highlighted when matters under dispute involve consideration of public policy and international values. As Simma points out, reconciling conflicting obligations of States under PIL and investment treaties has been a difficult task possibly because of "investment arbitrators' genes", meaning that "the large majority of them has a private or commercial law rather than a public law or public international law background".[142] These arbitrators "arguably limit the resonance of public law and public policy considerations in arbitration proceedings".[143]

The crisis ISDS is currently experiencing is, at least in part, attributed to arbitrators and the appointment mechanism. As Pauwelyn argues, "ISDS is in a state of crisis in many parts of the world, and much of the criticism is focused precisely on who is deciding ISDS cases".[144]

To remedy the concern that a considerable proportion of ISDS arbitrators have limited expertise in the field, some countries advocate for additional restrictions on the qualifications of ISDS arbitrators. The EU group strongly supports the imposition of mandatory PIL qualifications.[145] China also stated that given the public law character of ISDS disputes, professional knowledge in the field of PIL is required.[146]

C) *Ad Hoc* Appointment Mechanism: Structural Deficiencies

The *ad hoc* nature of the appointment mechanism is the fundamental challenge. The structure of the appointment mechanism and the way it is designed contribute to the legitimacy criticism ISDS is experiencing. As a preliminary matter, unlike international judges, ISDS arbitrators are

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[142] Bruno Simma, 'Foreign Investment Arbitration: A Place for Human Rights?' (2011) 60 Int. Comp. Law Q. 576. See also Kathleen Cooper, 'Seeking a Regulatory Chill in Canada: The Dow Agrosciences NAFTA Chapter 11 Challenge to the Quebec Pesticides Management Code' (2014) 7(1) Golden Gate U. Envtl. L.J. 24; Joost Pauwelyn, 'Who Decides Matters - The Legitimacy Capital of WTO Adjudicators versus ICSID Arbitrators' in Nienke Grossman and others (eds), *Legitimacy and International Courts* (CUP 2018) 221, 222, 232; Ernst-Ulrich Petersmann, 'Can Invocation of Human Rights Enhance Justice and Social Legitimacy in Investment Adjudication?' (2020) 12(1) Indian J. Int. Econ. L. 64-65.

[143] J. Robert Basedow, 'The European Union's New International Investment Policy and the United Nation's Sustainable Development Goals: Integration as a Motor of Substantive Policy Change' in Cosimo Beverelli and others (eds), *International Trade, Investment, and the Sustainable Development Goals* (CUP 2020) 64.

[144] Joost Pauwelyn, 'The Rule of Law Without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators from Venus' (2015) 109(4) AJIL 764.

[145] *Submission from the European Union and its Member States on Possible reform of investor-State dispute settlement (ISDS),* UNCITRAL Working Group III (24 January 2019) para 49.

[146] *Submission from the Government of China on Possible reform of investor-State dispute settlement (ISDS),* UNCITRAL Working Group III (19 July 2019) para III:3.

appointed on an *ad hoc* basis, meaning that the arbitrator position ends once the arbitration proceedings are concluded. ISDS arbitration practitioners often work as practicing lawyers, scholars, and judges. Only a small number of them hold a full-time arbitrator position. There exists no permanent investment dispute settlement body that could decide ITA disputes in a consistent manner. Also, ICSID annulment committees do not function as an appeal remedy and the system lacks an appellate body that could review arbitral tribunal decisions coherently.[147] Further, it is not uncommon that members of annulment committees are selected from those who previously or currently act(ed) as arbitrators in other disputes.

The *ad hoc* appointment mechanism has opened a floodgate for hundreds of new arbitrators, massively expanding the pool of arbitrators. As of April 30, 2022, the pool of investment treaty adjudicators consisted of more than 600 practitioners.[148] The 2010s pool of ICSID arbitrators grew twenty-two-fold, compared to the 1970s pool of ICSID arbitrators. The number of ICSID committee members in the 2010s increased more than eighteen times greater than that of the 1980s pool of ICSID committee members. However, a sizable proportion of ICSID arbitrators and committee members between the 1970s and 2010s received only one appointment. Indeed, roughly 45 percent of the total pool of ICSID adjudicators in this period includes those who were appointed once, while those with two or three appointments at ICSID formed one-fifth of the pool.

The appointment mechanism and its disqualification review mechanism have eroded the disputing parties' trust in the ITA mechanism. This in particular includes considerable discretion and authority foreseen in the ICSID Convention for the ICSID Chairman in the *ad hoc* appointment mechanism.[149] Article 5 of the ICSID Convention provides that the President of the World Bank Group is the ICSID Chairman. Except for a brief period in 2019 when a national of Bulgaria served as the acting president of the World Bank, in practice a US national has continuously occupied this

[147] See Yenkong Ngangjoh-Hodu and Collins C. Ajibo, 'ICSID Annulment Procedure and the WTO Appellate System: The Case for an Appellate System for Investment Arbitration' (2015) 6(2) J. Int. Disput. Settl. 308-331; Gabriel Bottini, 'Present and Future of ICSID Annulment: The Path to an Appellate Body?' (2016) 31(3) ICSID Rev. 712-727; Nicholas Fletcher, 'Should ICSID have or not have a New Appellate Process, Including a Standing Body to Hear Annulment Applications?' in Arthur W. Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2015*, vol 9 (Brill 2017) 119-133.

[148] It should be noted that these data also include ICSID arbitrations that were based on contracts or domestic investment laws.

[149] See also David Collins, 'ICSID Annulment Committee Appointments: Too Much Discretion for the Chairman?' (2013) 30(4) J. Int. Arb. 333-343.

position. The president of the World Bank is not necessarily a lawyer, and the position is not a judicial tenure but rather a political occupation largely influenced by the United States.[150]

During the drafting of Article 5, some delegates voiced their concerns about the strong link between the position of the World Bank president and that of the ICSID Chairman. These concerns, in particular, included the issues of the nationality of the Chairman, the problem of double representation of a country in ICSID arbitration disputes, and the power of the Chairman to fill more than one vacancy at arbitration tribunals.[151] In *Supervision*, an arbitrator expressed his concern regarding the ICSID Chairman's ability to direct the composition of ICSID tribunals. In his view, two of the tribunal members had already received appointments from the Chairman in other cases and this created "an inherent conflict of interest".[152]

Indeed, the data collected on the engagement of the Chairman in ICSID disputes endorse that these concerns were justified as the Chairman has been significantly involved in arbitration proceedings between private investors with US nationality and other States. The data collected show that slightly less than 20 percent of all ICSID arbitration cases (168 out of 904 cases) involved US claimants, as of April 30, 2020. The data collected on these cases indicate that in more than a third of these cases (59 out of 168), the ICSID Chairman acted as the appointing authority in the selection of the presiding arbitrator (in 80 percent of the 59 cases), defendant's arbitrator (in 20 percent of the 59 cases) or members of annulment committees (in 80 percent of the 59 cases). Also, the data demonstrate that in 22 percent of these cases (13 cases out of 59 cases), the Chairman appointed more than one member of the arbitration tribunal evidencing the unparalleled influence of the Chairman in the conduct of the arbitration and outcome of these disputes. Further, in 25 percent of these cases (15 cases out of 59 cases) the Chairman was the appointing authority both in the arbitration and annulment stages. Additionally, the data shows that 20 percent of the

[150] See, e.g, Ngaire Woods, 'The Challenges of Multilateralism and Governance' in Christopher L. Gilbert and David Vines, *The World Bank: Structure and Policies* (CUP 2000) 133-135; David A. Phillips, *Reforming the World Bank: Twenty Years of Trial - and Error* (CUP 2009) 233-238; Ilene Grabel, *When Things Don't Fall Apart Global Financial Governance and Developmental Finance in an Age of Productive Incoherence* (MIT Press 2019) 111.
[151] See ICSID, *The History of the ICSID Convention* (n 119) 122-123, 294, 315-316, 530, 560; ICSID, *The History of the ICSID Convention*, vol II-2 (n 119) 983, 1002.
[152] *Supervision y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Dissenting Opinion of Joseph P. Klock (18 January 2017) para 41.

disqualification challenges reviewed by the ICSID Chairman as of April 30, 2022, involved disputes initiated by US claimants.

With respect to ISDS disqualification mechanisms, the data collected on disqualification challenges in ITA and ICSID arbitrations support the claim that confidence in investment treaty arbitrators is undermined. Despite the expectation of the drafters of the ICSID Convention that the disputing parties might be very reluctant to recourse to the disqualification of an arbitrator,[153] ITA has become the only domain of dispute resolution of PIL that is facing an unprecedented number of disqualification requests. The erosion of trust in arbitrator appointment has led to circumstances where it is no longer taboo to find a disputing party challenging its appointee[154] or all members of the tribunal including its own party-appointed arbitrator.[155]

The data collected on all known disqualification challenges (93 challenges) filed against ICSID arbitrators and committee members between January 13, 1972, and April 30, 2022[156] indicate that more than 90 percent of challenges occurred at the arbitration tribunal stage, while challenges

[153] See ICSID, *History of the ICSID Convention*, vol II-2 (n 119) 388.

[154] See, e.g., *Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, Decision on Respondent's Challenge to Judge Florentino Feliciano (24 February 2014) [not public]; *Transban Investments Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/24, Decision rejecting the proposals to disqualify Professor Caron and Dr. Torres Bernárdez, 13 May 2014 [not public]; *Fábrica v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/21, Decision on the Proposal to Disqualify a Majority of the Tribunal (16 June 2015).

[155] See, e.g., *Quiborax S.A., v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on the Disqualification Proposal of the Arbitration Tribunal Submitted by the Claimant (6 July 2010); *Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, Decision on e Respondent Proposal of Disqualification of All Three Members of the Tribunal (30 April 2014) [not public]; *BSG Resources v. Republic of Guinea*, ICSID Case No. ARB/14/22, Decision on the Proposal to Disqualify All Members of the Tribunal (28 December 2016); *Interocean Oil v. Federal Republic of Nigeria*, ICSID Case No. ARB/13/20, Decision on the Proposal to Disqualify all Members of the Arbitral Tribunal (3 October 2017); *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Proposal for Disqualification of Arbitrators Klaus Sachs, Stanimir Alexandrov and Leonard Hoffmann (5 February 2018) [not public]; *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the Proposal to Disqualify All Members of the Tribunal (6 March 2019); *Landesbank Baden-Württemberg and others v. Kingdom of Spain*, ICSID Case No. ARB/15/45, Decision on the Proposal for Disqualification of Christopher Greenwood, Charles Poncet and Rodrigo Oreamuno (8 October 2019); *Eugene Kazmin v. Republic of Latvia*, ICSID Case No. ARB/17/5, Decision on Proposal for Disqualification of Vera Van Houtte, Mark Kantor and Rolf Knieper (14 October 2020); *Landesbank Baden-Württemberg and others v. Kingdom of Spain*, ICSID Case No. ARB/15/45, Decision on the Proposal for Disqualification of Christopher Greenwood, Charles Poncet and Rodrigo Oreamuno (15 December 2020); *AS PNB Banka and others v. Republic of Latvia*, ICSID Case No. ARB/17/47, Decision on the Proposals to Disqualify James Spigelman, Peter Tomka and John M. Townsend (16 June 2020); *AES Corporation v Argentine Republic*, ICSID Case No. ARB/02/17, Decision on the Proposal to Disqualify All Members of the Tribunal (6 April 2022) [not public].

[156] The information on ICSID disqualification decisions was collected from the ICSID database, IA Reporter, italaw, ISLG and Jus Mundi.

against ICSID committee members formed roughly 7 percent of all challenges. Arbitrator disqualification requests accounted for slightly less than 10 percent of ICSID arbitration disputes.[157] On the contrary, ICSID annulment cases with challenge proposals represented less than 5 percent of annulment cases.

Except for one disqualification challenge decided in the early 1980s,[158] all other challenges were submitted between 2000 and 2022 with the period of January 2010 and April 2022 encompassing nearly 80 percent of all ICSID challenges. The increased number of challenges against arbitrators shows a growing concern on the part of disputing parties about ICSID adjudicators. However, the overwhelming majority of these challenge requests have been denied. In fact, only 5 percent of these challenges have been upheld.

Notably, the data shows that more than two-thirds of these challenges (including challenges against annulment committee members) have been initiated by respondents. This evidences a greater concern on the part of States about the impartiality and independence of ICSID adjudicators, compared to investor claimants. Roughly 70 percent of respondent challenges (45 out of 65 challenges) were against claimant appointees or included claimant appointees (in cases where more than one arbitrator was challenged).[159] By contrast, 80 percent of claimant challenges targeted respondent appointees (24 out of 28 challenges). The overwhelming majority of challenges (88 percent) involved party-appointed arbitrators. On the other hand, arbitrators appointed by the ICSID Chairman have been frequently challenged. Roughly 20 percent of all arbitrator challenges (including cases where more than one arbitrator was challenged) involved arbitrators appointed by the ICSID Chairman.

[157] It is also acknowledged that in some cases more than one disqualification request has been filed. However, this does not significantly affect the fact that ICSID arbitration disputes have seen unprecedented disqualification challenges, compared to any other form of disputes under international law.

[158] *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Proposal to Disqualify an Arbitrator (24 June 1982).

[159] It should be noted that due to lack of data on the challenger in two ICSID challenge decisions, these cases were excluded from the challenger analysis, although the absence of this information does not significantly affect the results of the data collected on challengers. These cases are *Philippe Gruslin v. Malaysia,* ICSID Case No. ARB/99/3, Decision on Disqualification Request (27 April 2000) [not public]; *Asset Recovery Trust S.A. v. Argentine Republic*, ICSID Case No. ARB/05/11, Decision on Disqualification Request (27 November 2006) [not public].

Indeed, the above data not only shows a lack of trust by a disputing party in the opposing party's appointee, but also the discontent of disputing parties with arbitrators appointed by the ICSID Chairman. These challenges involve concerns about the arbitrator's lack of impartiality and independence. Although the professional expertise and competencies of adjudicators have been subject of substantial debate over the past recent years, none of the challenges filed in ICSID cases relates to an arbitrator's moral character or her/his competence in a field specified in Article 14(1) of the Convention.

The same situation quite remains true when considering the circumstances of challenge requests filed in investment treaty disputes combined, including non-ICSID arbitrations.[160] As of April 30, 2022, ITA cases in which disqualification requests were filed represent about 10 percent of all disputes. The data shows that challenge requests have been upheld in less than 10 percent of these cases, compared to ICSID challenges where the chance of success for the challenging party is roughly 5 percent. The data also indicate that States initiated challenges in more than two-thirds of these challenges, again signaling a greater concern of States about the conduct of ISDS adjudicators. The high number of disqualification challenges particularly from respondent States translates into the discontent of States with the current appointment mechanism.

The disqualification procedure is an important means of safeguarding trust in ISDS. However, the structure of the review procedure itself raises questions about the confidence in the system. This in particular includes the involvement of arbitrators in the disqualification mechanism.

Unless the applicable rules prescribe otherwise, as a common practice in reviewing disqualification challenges against international adjudicators in a three-member tribunal, unchallenged adjudicators will make a decision on the disqualification request. This privileged position is maintained in the ICSID Convention.[161] In their review of the challenge, peer arbitrators are assumed to act as a reasonable third person and independent observer, while in the contemporary world of complex relationships they might have past or ongoing relationships and connections

[160] For the purpose of this data, the author relied on data available on the ISLG database.

[161] Within the ICSID framework, where the unchallenged majority of the tribunal or annulment committee are not able to reach on a decision or where the challenge relates to a sole arbitrator or the majority of the members is challenged, the Chairman of the ICSID Administrative Council decides the challenge proposal. See Article 58 of the ICSID Convention and Rule 9 of the 2006 ICSID Arbitration Rules. See also 'Article 58' (1999) 14(2) ICSID Rev. 530–534.

with the challenged arbitrator. This is exacerbated by the fact that the current *ad hoc* appointment mechanism allows arbitration practitioners to switch their hats. The practice of double-hatting potentially increases the risk of issue conflict in situations where a co-arbitrator is granted the authority to make a decision on a challenge proposal against his/her peer. Such relationships for example could be for the unchallenged arbitrators acting as counsel before a tribunal to which the challenged arbitrator is a member, or the challenged arbitrator presides over another dispute in which one or both of the unchallenged arbitrators are party appointees.

Peer arbitrators cannot assume the role of a reasonable third-party and independent observer as they likely have personal interest in the outcome of a challenge request. Repercussions of disqualifications challenges are not limited to the specific challenge at issue, rather they bear far-reaching consequences for the whole arbitration community. The unchallenged arbitrators who are bestowed to decide a challenge against their co-arbitrator have potential benefit in the outcome of a decision they make, simply because any such decision may influence their current or future appointments in other disputes.

Further, the ICSID Convention provides the ICSID Chairman with significant discretions not only in the appointment of ICSID adjudicators including members of annulment committees but also in deciding disqualification requests in certain circumstances.[162] The drafters of the Convention originally expected that the ICSID Chairman would be exceptionally involved in the disqualification challenges. However, the inability of unchallenged arbitrators to reach a decision on a challenge request and increased frequency of submissions of challenge against the majority or all members of the tribunal have led to increased intervention on the part of the Chairman.[163] More than a third of challenges reviewed by the ICSID Chairman were the result of the division between unchallenged arbitrators and this also accounts for roughly 20 percent of all ICSID challenges. The challenges against the majority or all members of the tribunal represented one-

[162] See ICSID Convention, Articles 5, 13, 14, 38, 40, 52, 56 and 58.

[163] It is worth noting that a sole arbitrator has been appointed in only a handful of ICSID arbitration disputes. Except for one sole arbitrator case where the challenge was decided by the ICSID Chairman, all other challenge decisions rendered by the ICSID Chairman (or decided on his/her behalf) have involved three-member tribunals and *ad hoc* committees. See *Philippe Gruslin v. Malaysia*, ICSID Case No. ARB/99/3, Decision on Proposal to Disqualify Arbitrator Gavan Griffith (27 April 2000) [not public]. Further, it should be noted that disqualification decisions made on behalf of the ICSID Chairman are also counted as those made by the ICSID Chairman. These for example include the challenge decisions made by the PCA Secretary General.

quarter of all challenges and formed less than two-thirds of all challenges reviewed by the Chairman. Three out of the five "uphled" challenge proposals were decided by the ICSID Chairman, while the majority of proposed challenges were reviewed by co-arbitrators including cases that initially were considered by co-arbitrators where they were not able to reach a decision.[164]

The proportion of challenge decisions rendered by the Chairman represents roughly 45 percent of all challenges decided as of April 30, 2020. This increased participation of the Chairman particularly where unchallenged arbitrators are unable to decide the challenge further highlights the crisis in the field. The increasing number of cases where disqualification challenges are deferred to the Chairman because of the division between unchallenged co-arbitrators can be seen as a sign of serious concerns amongst members of the ICSID arbitration community as to the impartiality and independence of the challenged arbitrator. Further, the growing instances of challenges against the majority or all members of an arbitration tribunal or annulment committee show the lack of confidence of a disputing party in the whole arbitration body that is reviewing the dispute. Such a phenomenon has been unprecedented in any other field of PIL.

To sum up, these structural deficiencies of the *ad hoc* appointment mechanism contribute to the diminishing trust in ISDS. The greater legitimacy crisis ISDS is currently facing is the logical outcome of the *ad hoc* character of the appointment mechanism and this further reinforces the need for a systemic reform in a structural reform. Indeed, the deficiencies in appointment control mechanisms in an expanded pool of arbitrators with a large portion of them coming from commercial arbitration combined and the lack of an appellate body that could review tribunal decisions have led to 'unacceptable' inconsistent decisions in the field,[165] excessive treaty

[164] See *Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision of the ICSID Chairman on the Disqualification of Prof. Lalive and Judge Bedjaoui (French) (21 February 2006); *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña (13 December 2013); *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB 12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal (12 November 2013); *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Bruno Boesch (20 March 2014); *Big Sky Energy Corporation v. Republic of Kazakhstan*, ICSID Case No. ARB/17/22, Proposal for Disqualification of Arbitrator Rolf Knieper (3 May 2018).

[165] See Susan D. Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73(4) Fordham L. Rev. 1521-1625; Oliver Jones and Justin D'Agostino, 'The Energy Charter Treaty: A Step towards Consistency in International Investment Arbitration?' (2007) 25(3) J. Energy Nat. Resour. Law 225-243; Sergio Puig and Anton Strezhnev, 'The David Effect and ISDS'

interpretations in favor of foreign investors including excessive damages awards,[166] and decisions that threaten regulatory powers and public policy discretions of sovereign States.[167] This situation undoubtedly affects the correctness and acceptableness of ICSID decisions in the eyes of the disputing parties and the general public.

Conclusion

Investment treaty arbitrators behave differently from judges of international courts and tribunals. This is particularly due to the existence of an *ad hoc* appointment mechanism, the high number of arbitration participants, and the provision of different services by arbitration practitioners. Widespread patterns of interactions between investment treaty arbitrators jeopardize confidence in the ITA mechanism. Some forms of engagements between arbitration practitioners or between arbitrators and other participants in arbitration proceedings involve an inherent risk of conflict of interests as they can influence an arbitrator's voting behavior.

The chapter reviewed two instances of decision-making behavior of party-appointed arbitrators, i.e., dissenting opinions and voting records of arbitrators with high or exclusive appointments from one disputing side. Both assessments resulted in the conclusion that there exists a correlation between appointment and decision-making choices of party-appointed arbitrators. The review of dissenting opinions strongly reinforces van den Berg's argument that dissenting opinions advocate for the party that appointed the dissenter. The investigation of 175 dissenting opinions found no dissent issued by a party-appointed arbitrator that supported the case of the non-appointing party.

(2017) 28(3) EJIL 731-761; Giovanni Zarra, 'The Issue of Incoherence in Investment Arbitration: Is There Need for a Systemic Reform?' (2018) 17(1) Chinese J. Int. L. 137-185; Julian Arato and others, 'Parsing and Managing Inconsistency in Investor-State Dispute Settlement' (2020) 21(2-3) J. World Invest. Trade 336-373; Anna De Luca and others, 'Responding to Incorrect Decision-Making in Investor-State Dispute Settlement: Policy Options' (2020) 21(2-3) J. World Invest. Trade 374-409.

[166] See Jonathan Bonnitcha and others, 'Damages and ISDS Reform: Between Procedure and Substance' (2021) J. Int. Disput. Settl. 1-34.

[167] See, e.g., Stuart G. Gross, 'Inordinate Chill: BITs, Non-NAFTA MITs, and Host-State Regulatory Freedom: An Indonesian Case Study' (2003) 24(3) Mich. J. Int. L. 893-960; Kyla Tienhaara, 'Regulatory Chill and the Threat of Arbitration: A View from Political Science' in Chester Brown, Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (CUP 2011) 616-617; Roberts (n 114); Julia Brown, 'International Investment Agreements: Regulatory Chill in the Face of Litigious Heat?' (2013) 3(1) UWO J. Leg Stud 1-28; Andreas Kulick, 'Investment Arbitration, Investment Treaty Interpretation, and Democracy' (2015) 4(2) Camb. Int. L. J. 441-460; Kyla Tienhaara, 'Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement' (2018) 7(2) Transnatl. Environ. Law 229-250.

Further, the examination of collective voting records of party-appointed arbitrators who received high or exclusive appointments from a disputing 'side' revealed a relationship between appointments and the voting behavior of these arbitrators. Both dissenting opinions of party-appointed arbitrators and collective voting records of elite insiders with high or exclusive appointments demonstrate a pattern of behaviour that contradicts Brower and Rosenberg's claim that party-appointed arbitrators are indifferent and disinterested in decision-making.

It is likely that arbitrators' personal background and professional experience contribute to the above behavior. The ensuing question that arises as the result of the above investigation into the social behavior of arbitrators is about their characteristics and qualifications. The question is in what features of party-appointed arbitrators claimants and respondents are interested. In other words, what are the personal and professional attributes of investment treaty arbitrators? And what are the shared and dividing features of claimant-appointed arbitrators and those of respondent-appointed arbitrators? To answer these questions, Chapter 3 will review the personal qualifications, background, and experience of ICSID arbitrators and members of ICSID annulment committees.

While ITA has borrowed certain standards and features from ICA, it is a domain of PIL. For this same reason, panelists with expertise in PIL are better equipped with the professional qualifications needed for the adjudication of ITA disputes. However, it is not disputed that a significant proportion of ITA arbitrators have private law background and hold experience in ICA. Indeed, the data collected in Chapter 3 confirms this proposition. There are concerns that the inflow of panelists having private law background and experience results in the misinterpretation and misapplication of PIL and creation of two distinct culture within the ITA community.

Further, the structure of the appointment mechanism and the way it is designed contribute to a reduced trust in ITA. The structural deficiencies in ITA introduce serious legitimacy challenges to ITA. This in particular includes the involvement of peer arbitrators in the disqualification review process and the engagement of the ICSID Chairman in various roles, i.e., acting as the appointing authority in certain situations and deciding challenge requests where the unchallenged arbitrators are not able to decide the challenge or where the majority of all or the members of the panel are challenged. As will be discussed in Chapter 5, recent developments at the UNCITRAL Working Group III and treaty practice of States endeavor to address these challenges.

Chapter 3

Who Sits at ICSID?

Exploring the Attributes of ICSID Panelists

I) Introduction

Between 1972 and 2019, the ICSID community members consisted of more than 400 arbitration practitioners who were appointed to arbitration tribunals and *ad hoc* committees. In some major respects, the community was (as still is) secretive with no thorough understanding of the attributes of its members. To borrow Schachter's famous description, the community of ICSID panelists is an 'invisible college',[1] as little is known about the background, qualifications, and engagements of these panelists. This lack of transparency makes the assessment of the qualifications of ICSID panelists and identification of a conflict of interests more difficult.

The *ICSID Caseload - Statistics* reports contain very brief information about ICSID arbitration practitioners, e.g., their nationalities, geographic origins, and gender diversity.[2] ICSID's coverage of panelists' profiles is not sufficiently detailed, nor extensive enough, and thus, these reports can not properly answer who the members of the ICSID arbitration community are. The reports do not help with the identification of panelists and 'decrypting' the attributes of the arbitration community. Further, the reports do not provide an insight into how the community of ICSID panelists evolved over the past few decades.

Some studies provide some degree of information about the characteristics of the larger community of international arbitrators as well as the community of investment treaty arbitrators.[3] Some

[1] See Oscar Schachter, 'Invisible College of International Lawyers' (1977) 72 Nw. U. L. Rev. 217-226.

[2] See the ICSID Caseload - Statistics available at <https://icsid.worldbank.org/resources/publications/icsid-caseload-statistics> (last visited July 2, 2022).

[3] See, e.g., Thomas Schultz and Robert Kovacs, 'The Rise of a Third Generation of Arbitrators? Fifteen Years after Dezalay and Garth' (2012) 2 Arbitr. Int. 161–172 (examining how things have changed since Dezalay and Garth's study and concluding that "managers" form a third generation of arbitrators); Lucy Greenwood and C. Mark Baker, 'Getting a Better Balance on International Arbitration Tribunals' (2012) 28 Arbitr. Int. 653–668 (reviewing gender diversity in international arbitration tribunals and suggesting that, to diversify and expand the pool of arbitral

commentators base their views about the ICSID community on personal observations and engagements in the community, but such opinions are not often tested by empirical evidence.[4] As a general matter, the existing literature does not properly answer who ICSID panelists are. The relevant studies such as those referred to above do not reflect the distinct attributes of ICSID arbitrators and members of annulment committees. Most studies discuss ICSID adjudicators in the context of the broader community of international arbitrators. These studies are often restricted in their scope when addressing ICSID adjudicators and do not offer a clear picture of the ICSID arbitration community as a whole.[5] Particularly, the literature lacks a thorough examination of ICSID panelists' education, field of expertise, prior adjudication experience, occupational backgrounds and double-hatting. Additionally, no study known to us has systematically investigated the evolution of the ICSID community over the past few decades. Present-day resources offer tools for a methodical evaluation and in-depth assessment of these panelists.

Further, some studies confirm the connection between increased diversity of arbitrators and the quality of the decision-making process,[6] or the relationship between enhanced diversity and a

candidates, States should implement new policies to this effect); Sergio Puig, 'Social Capital in the Arbitration Market' (2014) 25 EJIL 387–424 (Puig reviews the social structure of investor-State arbitrators and visualizes the connections between arbitration practitioners. He discusses the existence of a group of 'power-brokers' in investor-State arbitration and concludes that arbitrators who had frequent appointments are more likely to receive further appointments.); Susan D. Franck and others, 'The Diversity Challenge: Exploring the "Invisible College" of International Arbitration' (2015) 53 *Colum. J. Transnat'l L.* 429 - 506 (This study tests the diversity of international arbitrators including investor-State arbitrators based on various factors. These included gender, nationality, age, linguistic capacity, legal training, and professional experiences related to arbitration. It found that that the average arbitrator was a fifty-three year old man who was a national of a developed country with 10 appointments as arbitrator.); ICCA, *The ICCA Reports No. 8: Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceeding* (2020) (The cross-institutional task force on gender diversity analyzed the appointment of female arbitrators, including investor-State arbitrators, between 2015 and 2019 and concluded that data suggest improvements in the appointment of female arbitrators in many of the leading international arbitration institutions.); Monika Prusinowska, 'Analysing Appointments in International Arbitration: Nationality, Ethnicity, Race, and Legal Training of Arbitrators', in Freya Baetens (ed.), *Identity and Diversity on the International Bench: Who is the Judge?* (OUP 2020) 142-163 (discussing the contemporary pool of international arbitrators in terms of arbitrators nationality, race/ethnicity, and place of legal training and concluding that there exists a significant diversity deficit in international arbitration with respect to their nationality and their race/ethnicity).

[4] See, e.g., Bruno Simma, 'Foreign Investment Arbitration: A Place For Human Rights' (2011) 60 Int. Comp. Law Q. 576 (arguing that "the large majority of [investment treaty arbitrators] have a private or commercial law rather than a public law or public international law background").

[5] See e.g., Augusto Fontoura Costa, J. "Comparing WTO Panelists and ICSID Arbitrators: the Creation of International Legal Fields" 1(4) *Oñati Socio-Legal Series* (2011).

[6] See, e.g., Lucy Greenwood and C. Mark Baker, 'Is the balance getting better? An update on the issue of gender diversity in international arbitration" (2015) 31 Arbitr. Int. 413–423 (finding that a greater gender diversity in international arbitration results in enhanced quality of deliberations and awards).

reduced risk of bias in decision-making.[7] Empirical evidence suggests that the diversity deficit in ITA affects the real and perceived legitimacy of this mechanism.[8]

The primary question addressed in this chapter is who sits at ICSID arbitration tribunals and *ad hoc* committees. It provides a thorough picture of the ICSID arbitration community by examining the evolution of the community decade over decade. Demographic data reveal the diversity, qualifications, expertise, adjudication experience, and interactions of arbitration practitioners who decide ICSID disputes. The research uses verifiable data to identify ICSID panelists, review their qualifications and expertise, and uncover their engagements.

The present chapter assesses the evolution of the ICSID arbitration community between 1972 to 2019. The study provides empirical support for what can be described as a club of adjudicators dominated by male professionals from developed countries who are affiliated with law firms. Scrutinizing the attributes of the community, the chapter further highlights the deficits of the ICSID framework, and its findings suggest why there is a need for reform.

The chapter first outlines the methodology used as well as the scope and limitations of this study. It will then examine the geographic diversity of ICSID panelists and demonstrate long-standing challenges the institution has faced in this regard. The chapter next assesses gender diversity problems at ICSID and explores the practice of investors, States, and the ICSID Chairman in this respect. It also discusses the educational backgrounds of panelists including their level of legal education and expertise in PIL. Panelists' experience in private arbitrations or inter-State disputes will be examined next. Further, it examines the occupations of ICSID panelists. Finally, it explores the double-hatting practice in ICSID arbitrations. The annex to chapter three includes graphical representation of data.

[7] See, e.g., Nathalie Allen, and others, ''If Everyone Is Thinking Alike, Then No One Is Thinking': The Importance of Cognitive Diversity in Arbitral Tribunals to Enhance the Quality of Arbitral Decision Making' (2021) 38 J. Int. Arbitr. 601 – 628 (concluding that increased cognitive diversity reduces the risk of bias in arbitral decisions and improves the quality of arbitration awards).

[8] See Andrea K. Bjorklund and others, 'The Diversity Deficit in International Investment Arbitration' (2020) 21 J. World Invest. Trade 418-425.

II) Methodology, Scope and Limitations

This part outlines the data collection approach, scope, and limitations of the survey. It explains the boundaries of the investigation and sets out the method employed for obtaining, approaching, and utilizing the data collected. Identifying these boundaries averts the reader from drawing unintended conclusions or inferences from the data. This identification further helps future studies that will scrutinize the demographic of ICSID or map the broader community of investment treaty arbitrators.

The most significant challenge for conducting this study is the lack of a single and unified database that accurately encompasses the information needed to carry out a demographics analysis on ICSID panelists. Currently, the ICSID database contains limited information on this group of arbitrators. Nor is the ICSID database consistent in the data it offers. To properly supplement the information obtained from the ICSID database, a range of other resources are used.[9] Where there was an inconsistency in information between two or more resources, the information obtained from the individual arbitrator's resume or the ICSID database was used.

A very cautious approach is adopted both during the data collection phase and data analysis. The conclusions arrived at are based on the currently available public data. The limits posed by the fact that not all the information is publicly available may arguably affect the findings of this research. Thus, it is not claimed that the data exhaustively picture the ICSID community. The results generated may only represent the tip of an iceberg as it gives an account of the community based only on the information that is publicly available.

As a preliminary matter, the survey identifies panelist demographics. Given the evolving community of ICSID panelists, the time limit for the study is between January 13, 1972, and December 31, 2019. The covered demographics include data on 436 ICSID panelists who served as arbitrator(s) and/or member(s) of *ad hoc* committees during the review period. Roughly two

[9] These databases and resources include the individual arbitrator's resume, law firm profile, LinkedIn profile, university profile, publications, as well as the databases of UNCTAD Investment Policy Hub, Arbitration Institute of the Stockholm Chamber of Commerce (SCC), PCA, ICJ, WTO, World Intellectual Property Organization, Organization of American States, italaw, Global Arbitration Review, IA Reporter, ISLG, Jus Mundi, iaparis.com, whoswholegal.com, legal500.com, Law Institute of Victoria, Internet Archive, Transnational Dispute Management, latinlawyer.com, arbitrationlaw.com, iarbafrica.com, arbitration-ch.org, Latin American Arbitration Conference, Arbitration Place, Asian International Arbitration Centre, French Society for International Law, justia.com, national court portals and national branches the international chamber of commerce.

dozen panelists on whom the required information is not available are excluded from the scope of this investigation. The excluded panelists represent roughly 5 percent of the total pool of ICSID panelists. The investigation covers all disputes administered by ICSID, regardless of the basis for jurisdiction, i.e., treaties, contracts, or domestic laws.

In particular, this chapter examines how the ICSID pool has evolved over the past few decades starting in the 1970s.[10] It reviews the attributes that ICSID panelists in a given decade possessed and compares them to the features of ICSID panelists in other decades. The demographic attributes covered here include gender, nationality, regional distribution, country development status,[11] legal education, level of education, PIL expertise, legal regime, occupational background, involvement in private arbitration,[12] experience in inter-State disputes, frequency of appointment at ICSID, and double-hatting within ICSID.

The research evaluates diversity challenges at ICSID, and the developments made over the decade under review. The diversity study includes a review of ICSID panelists based on gender, regional distribution, and development status of the country of nationality of panelists. The data specify groups that are over-represented or under-represented in the community. As to diversity in terms of age, given the lack of empirical data on the age distribution of ICSID panelists, this issue is excluded from the scope of this study.

With respect to the occupational background of ICSID panelists, the professional classification includes lawyers, academic appointments, judges (international or domestic), and other occupations. Adjudicators at the Iran-US Claims Tribunal, the UN Compensation Commission, the World Bank tribunal and the UN administrative tribunal are all considered judges for the purpose of the study.

The chapter further scrutinizes the double-hatting phenomenon in the ICSID panelists' community. For the purpose of this chapter, the data on panelists who had multiple hats include

[10] It should be noted that he inclusion of those who sat in ICSID cases arising from contracts and investment laws in the data is to include the data from the 1970s and 1980s.

[11] The classification of country development level is based on the country classification of the United Nations. See United Nations, *World Economic Situation Prospects 2020*.

[12] The term private arbitration for our purpose includes ICA, sport arbitration, arbitrations of domestic nature, and other arbitrations between private persons.

both concurrent services and services provided within a self-determined short period of time, i.e., 2 years. Further, a broader meaning of double hatting is meant here. The assessment of panelists who provide different services is not limited to their appearance before arbitration tribunals or annulment committees, but also includes any other related proceedings such as set-aside and enforcement proceedings before a domestic court. As the information relied on for this purpose was mainly collected from the publicly available awards and decisions, the data include the minimum number of disputes in which an ICSID panelist were involved in double-hatting.

With respect to panelists' affiliation to law firms, law firms include any entity established and administered by lawyers to practice law. Given that law offices around the world are structured and operate in different ways, no distinction is made in this respect based on the type of administration, arrangements and structures. Thus, affiliation to law firms includes door tenants and members of barristers' chambers.

One critical question involves the adjudication experience of ICSID panelists in other disputes. This refers to the experience in private arbitrations (commercial, sports, and other arbitrations) and inter-state disputes. The survey reviews the frequency ICSID panelists assumed adjudicatory roles in these disputes. It also assesses the likelihood of an appointment at ICSID of a person with prior adjudication experience in each of the above dispute categories.

When reviewing the educational backgrounds of panelists, various law degree designations such as LLB, BA (Jurisprudence), JD, and degrees converted to LLB (as allowed in some jurisdictions) are considered equivalent for the purpose of this research. However, legal education for this purpose does not include a person who has not received an academic degree in law but has been admitted to practice law before a court.

The survey examines the legal expertise of ICSID panelists. Determining legal expertise of panelists and distinction between PIL and private law is challenging. There is no clear-cut line between them particularly when a panelist who has a private law background closely works on PIL matters, e.g., a private law expert who is employed at the foreign affairs department or a law firm that exclusively specializes in PIL. Likewise, the line is also blurred when a person is involved in arbitrations falling under various legal domains, e.g., a legal expert who acts as arbitrator in ICA, ISDS and inter-State disputes. Because of this, the categorization of panelists between PIL and non-PIL experts maybe be deemed arbitrary. To clarify the limitations and approach for this

classification, it should be noted that various factors are considered to determine an individual's expertise in PIL; however, the greater weight is given to panelists' self-reports, i.e., the person's statements on their curriculum vitae or profile.[13] This includes a large majority of panelists. In cases where no self-report was found, the person's studies at the graduate level (if any), publications (if any), courses taught at universities (if any) and practice areas at law firms or government departments have been considered for this purpose.

There is no universally agreed-upon classification for legal systems in the world, with some commentators questioning the merits of any such classification.[14] For this research, this makes any precise distinction between legal regimes difficult. The discussion about the merits of any classification of legal regimes across the globe is not within the ambit of this research. To avoid complexities surrounding the categorization of legal regimes, the research classifies world legal regimes into three major categories: common law, civil law, and mixed/other legal regimes.

Where a person is graduated and practices law within a legal regime that is different from the legal regime adopted by their country of nationality, the former is considered as the person's legal regime for our purpose. Further, a person with a nationality of both developed and developing countries is considered the national of the developed country for this purpose.

Finally, the frequency of appointments is determined based on the number of a panelist's appointments in arbitration or annulment proceedings, even if the person's participation in a given case did not continue throughout the arbitration or annulment proceedings, for example, due to challenge, resignation or death. Appointments in both original and revision/rectification proceedings of the same dispute are counted only once. Appointments in parallel disputes involving the same arbitrator(s), parties, and subject matter are considered separately.

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[13] It should be noted that arbitrators' self-reports are not tested, particularly in instances where an individual claims expertise in PIL and in a significant number of other branches of law (e.g., business law, company law, insolvency law, and contract law) that are generally domains of private law, not public law.

[14] See Mathias Siems, 'Varieties of Legal Systems: Towards a New Global Taxonomy' (2016) 12 J. Institutional Econ. 579 - 602; Mariana Pargendler, 'The Rise and Decline of Legal Families' 60(2012) 4 *Am. J. Comp. L.* 1043–1074; H Patrick Glenn, "Doin' the Transsystemic: Legal Systems and Legal Traditions' (2005) 50 McGill L. J. 863-898; Jaakko Husa, 'Classification of Legal Families Today. Is It Time for a Memorial Hymn?' (2004) 56 *R. int. de droit comp.* 11-38, René David and John E. C. Brierley, *Major Legal Systems in the World Today* (Stevens & Sons 1985)). Also see the JuriGlobe portal at the University of Ottawa Faculty of Law, available at <http://www.juriglobe.ca>. JuriGlobe classifies legal regimes of the world into f categories: common law, civil law, customary law, muslim law and mixed legal systems.

III) Geographical Distribution and Economic Development Status

During the review period, more than 140 member states out of 155 states that ratified the ICSID Convention[15] appeared before ICSID arbitration tribunals as respondents. The growing participation of member states in the ICSID arbitration mechanism should translate into greater diversity of panelists in terms of geographical distribution, various states of economic development and a host of viewpoints on the regulation of foreign investment. In spite of the above, the diversity of respondent states does not correspond with the diversity of ICSID panelists. This lack of diversity is a further challenge to the legitimacy of the ICSID dispute settlement mechanism.[16]

The data show that the ICSID community is represented by nationals of around eighty states with the majority of them from developed countries located in two specific regions. While there exist moderate differences between the ICSID arbitrators group and the group of annulment committee members, the overall pool of ICSID adjudicators does not fully reflect the geographical diversity of the ICSID member States. In particular, less economically developed countries are significantly under-represented.

A) Tribunal panelists

The overwhelming majority of ICSID arbitrators were from Europe or North America. Overall, the contribution of these two regions reflected roughly 80 percent of total ICSID arbitrators, though the ratio fluctuated over the decades under review. The lowest share (66 percent) of arbitrators who had European and North American nationalities was in the 1980s. The 1970s and 2010s pools of ICSID arbitrators included the highest proportion of arbitrators from these regions, representing roughly four-fifths of all ICSID arbitrators. (See annex, figure 3.1.1.)

Within these two regions, developed countries were highly over-represented. Indeed, the overwhelming majority of European and North American arbitrators were from developed countries meaning that panelists from Western Europe, Canada, and the United States outnumbered arbitrators from other countries in these regions. Arbitrators from developing

[15] This includes Ecuador's membership to the ICSID Convention prior to its denunciation of the Convention in 2009. In 2021, Ecuador re-signed the Convention and re-deposited its instrument of ratification.

[16] See also Jamal Seifi, 'Legitimacy of Investor-State Arbitration: Addressing Development Bias Among International Arbitrators' in Freya Baetens (ed.) *Identity and Diversity on the International Bench: Who is the Judge?* (OUP 2020) 164-178.

countries located in these two regions held no seats at ICSID tribunals during the 1970s and 1980s. Arbitrators from this group of developing countries reflected roughly 5 percent of total ICSID arbitrators over the last three decades, compared to the share of arbitrators from developed countries from Europe or North America in the said decades - that is more than 70 percent.

The proportion of arbitrators from developing countries from regions other than Europe and North America in the 1970s was less than 10 percent. No national of a developed country from a region other than Europe and North America was appointed at ICSID tribunals over this decade. In the 1980s the latter group of developing countries secured around 10 percent of the total arbitrator appointment, while the share of panelist appointments from developing countries from other regions doubled. In contrast, the contribution of arbitrators from least developed countries in this decade decreased to 3 percent.

In the 1990s, the proportion of arbitrators from developing countries from other regions in the pool of arbitrators increased, reflecting slightly more than 25 percent of the pool compared to their contribution in the 1980s pool. In contrast, the number of arbitrators from developed countries from a region other than Europe and North America and that of arbitrators from least developed countries significantly decreased to four and one percent, respectively. While the number of ICSID disputes significantly grew over the 2000s and 2010s with increasing involvement of developing countries in these disputes as respondents, the 2000s and 2010s pools of ICSID arbitrators experienced reduced participation of arbitrators from developing countries from regions other than Europe and North America.

Arbitrators from developing countries represented moderately less than 25 and 20 percent of the 200s and 2010s pools, respectively. The share of developed countries from a region other than Europe and North America remained less than 5 percent over these two decades. No national of a least developed country was appointed in the 2000s, while the contribution of arbitrators from this group of countries in the 2010s pool was less than one percent. On average, panelists from least developed countries constituted moderately above one percent of the total pool of ICSID arbitrators. (See annex, figure 3.1.2.)

The data further indicate that arbitrators from developing or least developed countries are less likely to be appointed by investor claimants. Claimants mainly prefer a national of a developed country as their appointee. Eighty-five percent of the total arbitrators appointed by claimants

during the review period were from developed countries. While arbitrators from developed countries are least preferred in the investor's eyes, nationals of least developed countries did not receive any appointments from investors during the review period. (See annex, figure 3.1.3.)

Although the ratio differs moderately, a similar pattern is seen when examining the group of the most frequent appointees by claimants, i.e., those who had more than 10 appointments from claimants. Roughly 85 percent of the top frequent claimant appointees were from developed countries. Further, claimants are unlikely to appoint an arbitrator from a region other than Europe and North America. Approximately 85 percent of the total arbitrators appointed by claimants concentrated in these two regions. (See annex, figure 3.1.4.)

Respondent States' preferences with respect to geographical diversity were to some extent different from those of claimant investors. Approximately 75 percent of those appointed by respondents were from developed countries, and slightly more than a quarter of the total respondent appointees were nationals of developing countries. Similar to claimant investors, States are unlikely to appoint arbitrators from least developed countries. Panelists from least developed countries represented one percent of the total respondent appointees. (See annex, figure 3.1.5.) Further, similar to claimant appointees, nationals of European and North American countries represented the majority of respondent-appointed arbitrators. States are roughly four times less likely to appoint an arbitrator from a region other than the above regions. (See annex, figure 3.1.6.)

When considering the reappointment of respondent-appointed arbitrators by States, arbitrators from developed countries are more likely to receive reappointment from the same or other respondents (nearly 75 percent). Further, examining the most frequent respondent appointees, i.e., those who held more than 10 appointments from claimants, the likelihood of reappointment of an arbitrator from a developed country was further increased. Roughly, 80 percent of the most frequent respondent appointees were from this group of countries, with no arbitrator from least developed countries within the group of the most frequent respondent appointees.

The data indicate that with the surge in ICSID arbitration since the early 2000s as well as the increase in the number of arbitrators, no significant change occurred in the regional diversity of ICSID arbitrators as arbitrators from developed countries in Europe and North America largely dominated the community. Indeed, the increasing popularity of ICSID arbitration and the growing

participation of developing countries in ICSID disputes did not significantly change the arbitrator selection pattern. (See annex, figures 3.1.7-8.)

The data further show that there is less chance for arbitrators from developing or least developed countries to enter the club of the most frequent arbitrators.[17] The overwhelming majority of those frequently appointed (roughly 80 percent) were from developed countries, largely from Western Europe and North America. Less than 15 percent of the most frequent arbitrators were from developing countries. (See annex, figure 3.1.9.)

The data reveal a similar pattern when considering the regional distribution of panelists presiding over ICSID arbitration tribunals. Depending on the rules governing the arbitration proceedings, tribunal chairs are selected by the disputing parties or non-party appointers. There existed a strong tendency for the selection of an arbitrator from a developed European or North American country as the tribunal chair. All presiding appointments in the 1970s were allocated to arbitrators from developed countries in Europe or North America. Between the 1990s and 2010s, the proportion of European or North American nationals presiding over ICSID tribunals was at least three times greater than the number of presidents who were nationals from developed countries. The 1980s is the only period when arbitrators from other regions reflected around 40 percent of the group of ICSID presiding arbitrators. (See annex, figure 3.1.10.)

Further, the likelihood of appointment of European or North American nationals who had experience at annulment committees as the presiding arbitrator was twice more than the likelihood of appointment of arbitrators from other regions but with the same experience as the tribunal chair.

B) Members of annulment committees

With respect to the regional distribution of ICSID annulment committees, the practice of the ICSID Chairman was moderately different from disputing parties. However, the Chairman followed the general pattern experienced with ICSID arbitrators. In none of the decades did nationalities from other regions of the world hold a share greater than that of European and North American nationalities. During the decades under review, panelists from Europe and North America represented at least half of the pool of committee members, with these panelists securing a greater

[17] For our purpose, top appointees are those who acted as arbitrators in 10 or more cases at ICSID and the number totalled 50 subjects at the cut-off date.

proportion in the pools of the 1990s (80 percent) and 2010s (62 percent). (See annex, figure 3.1.11.)

As to the development status of the country of nationality of ICSID committee members, the ICSID Chairman demonstrated preferences similar to those relating to geographical distribution. Indeed, as opposed to the preferences of disputing parties in appointing their arbitrators in the 2000s and 2010s, the dramatic increase in the use of the ICSID annulment mechanism these decades did not result in the increased participation of panelists from developed countries. In contrast to the 1990s pool when panelists from developed countries formed 80 percent of the total committee members, the proportion of this group of panelists decreased significantly in the 2000s (59 percent) and 2010s (63 percent). In the 1980s, panelists from developed countries formed half of the Chairman's appointees at ICSID committees. (See annex, figure 3.1.12.)

The contribution of panelists who held a nationality from least developed countries to the pool of committee members diminished over time. Only one panelist from this group of countries was appointed to annulment committees in a given decade. The pool of committee members in the 2010s was 15 times greater than the one in the 1980s. With the growing pool of committee members, the proportion of panelists from least developed countries reduced from 15 percent in the 1980s to roughly one percent in the 2010s. The larger the pool became, the lower share these panelists held.

Similarly, the majority of the annulment committees constituted during the review period were presided over by panelists who had European or North American nationality. The data show that the ICSID Chairman was generally inclined to select committee presidents from European or North American countries. Indeed, in all decades under review, the proportion of committee presidents from developed countries in Europe or North America was at least twice greater than the number of nationals of other regions of the world. Except for one annulment proceeding in the 2010s, no national of low-income countries was appointed as the presiding member of committees. (See annex, figure 3.1.13.)

Overall, panelists from developed countries were disproportionately over-represented in annulment committees, with roughly two-thirds of all appointments at annulment committees, while panelists from developing countries merely formed one-third of the total pool of committee

members. The proportion of panelists from least developed countries in the total pool of these panelists was minimal at 3 percent.

With some differences, the above state of disproportionate representation resurfaces when one reviews the status of reappointments at annulment committees. Panelists from developed countries secured roughly two-thirds of all reappointments at annulment committees, in contrast to panelists from developing countries who were reappointed in one-third of all reappointments. Further, more than half of those who received reappointments were nationals of a European or North American country. Only one percent of reappointments at annulment committees were panelists from least developed countries. (See annex, figure 3.1.14.)

With respect to the most frequent appointees at committees (top 20 appointees), panelists from developed countries represented two-thirds of this group, while slightly more than one-third of them were from developing countries. This ICSID Chairman did not add any national of a least developed country to this influential circle of ICSID panelists.

Considering the combined pool of both arbitrators and committee members appointed during the decades under review, the data indicate that panelists from developing or least developed countries were disproportionately under-represented at ICSID tribunals and annulment committees. On average, panelists from developing countries - the overwhelming majority of them located in a region other than Europe and North America - reflected less than one-quarter of all ICSID panelists. In contrast, panelists from developed countries, largely from Europe and North America, occupied roughly three-quarters of the total pool. Only 2 percent of the overall was allocated to panelists from least developed countries. (See annex, figure 3.1.15.)

IV) Gender Diversity at ICSID

The data highlight gender diversity challenges within the ICSID community with male panelists dominating the ICSID arbitration community. While two female panelists, i.e., Brigitte Stern and Gabrielle Kaufmann-Kohler, have received a high number of appointments at ICSID, women are not fairly represented in the pools of ICSID arbitrators and committee members. Similar to the

majority of other international courts and tribunals, the ICSID community suffers from a gender diversity deficit as it has maintained the masculine dominance it inherited from traditional PIL.[18]

A) Gender representation at ICSID tribunals

During the 1970s, the small group of ICSID arbitrators did not include female arbitrators. The breakthrough was not made until 1987 when three female arbitrators were appointed at ICSID tribunals.[19] Female panelists represented roughly 10 percent of the 1980s pool of arbitrators, with two of them from developed countries. The female panelists acted as respondent appointees or presiding arbitrators. No investor appointed a woman as its party-appointed arbitrator in the 1980s.

While the pool of ICSID arbitrators in the 1990s and 2000s became roughly twice and five times greater than the 1980s pool respectively, no female arbitrator was appointed to ICSID tribunals in the 1990s and female panelists in the 2000s pool represented slightly above 2 percent of that pool. In the 2000s pool, the majority of female panelists (60 percent) were from developed countries in West Europe or North America. Female panelists from South America formed one-third of all female arbitrators in the 2000s. During this decade, one-third of female arbitrators acted as presiding arbitrators. However, female panelists held a small proportion (roughly 5 percent) in the 2000s group of presiding arbitrators.

In the 2010s pool, the proportion of female arbitrators increased to approximately 15 percent. Given that the 2010s pool was 40 percent larger than the 2000s pool, this also means a greater increase in the number of female panelists. However, these developments cannot sufficiently

[18] From a historical point of view, PIL as a discipline was/has been a male-dominated field. This is in particular evidenced byPIL publications in the early centuries. Historically, the governing instruments of international courts and tribunals do not include provisions mandating a fair gender representation at panels. In practice, the scarcity of female international jurists influenced the composition of international courts and tribunals. This has resulted in the creation of a general pattern in the selection of international adjudicators that has continued as of today. A review of inter-State arbitration commissions in the 19th century as well as those administered by the PCA in the early 20 century indicates that no woman received an appointment to these panels. Similarly, no female judge was appointed to the Permanent Court of International Justice (PCIJ) (1922-1946), the predecessor of the ICJ. The first female international judge appears to be Helga Pedersen (a national of Denmark) who was selected as a judge of the ECtHR in 1971. The ICJ has experienced a similar challenge. No woman was appointed to the ICJ until Rosalyn Higgins, a British national, was selected as a judge of the Court in the mid-1990s, and the Court has not yet addressed the gender diversity challenges at the bench. As an exception to the above practice, the Rome Statute of the International Criminal Court offers major developments with respect to gender diversity. Article 36(8) of the Court's Statute provides that the membership of the Court shall include "[a] fair representation of female and male judges".

[19] These include Rosalyn Higgins who was selected by the parties as the chair of the *Amco v. Indonesia* tribunal, and Maureen Brunt (an Australian national) and Marie-Madeleine Mborantsuo (a Gabonese national) who were appointed by the respondents in *Mobil Oil v. New Zealand* and *Société d'Études v. Gabon*, respectively.

address the gender diversity deficit at ICSID tribunals. Because this is merely a 5 percent difference in the composition of the 2010s pool in comparison to that of the 1980s pool. (See annex, figure 3.2.1.)

Similar to the general pattern experienced with respect to the geographical distribution and economic development status of the overall pool of ICSID arbitrators, the overwhelming majority of female panelists (more than 80 percent) in the 2010s pool were from developed countries, while above 90 percent of them were nationals of a European or North American countries. No woman from a least developed country was appointed at ICSID tribunals during the past decade. (See annex, figure 3.2.2.)

More than one-third of female panelists in the 2010s were appointed as the tribunal chair. However, compared to the share of their male counterparts, female presiding arbitrators reflecting 10 percent of the group of presiding arbitrators were disproportionately under-represented in that group.

During the 2010s, respondents (with 18 female arbitrators) and claimants (with 17 female arbitrators) demonstrated a corresponding practice of appointing female panelists. That said, the data on the 2010s pool show that investors' practice was to exclusively appoint female panelists from developed countries in Europe and North America. While respondents appointed female arbitrators from developing countries and countries other than European and North American countries, respondents were eight times more likely to appoint a woman arbitrator from a developed country than a female panelist from a developing country. They were also three times more likely to appoint a female from a country in Europe or North America than to appoint a woman from other regions. (See annex, figure 3.2.3.)

Further, examining the most frequent ICSID arbitrators who had at least 10 appointments at ICSID tribunals over the review period, the data indicate that the proportion of female panelists in this influential circle was less than 10 percent (four panelists). All female arbitrators in this group are nationals of a European or North American developed country. While all of these four panelists received appointments from States, investors were only in two of them. Three of these panelists acted as the tribunal chair.

Additionally, the narrower the circle of the top appointees gets, the more difficult it becomes for women to get included. When considering arbitrators who received 20 or more appointments to ICSID tribunals, the share of female panelists decreased to roughly 5 percent.

B) Gender representation at annulment committees

The data indicate that appointments of panelists at annulment committees experienced a slightly greater gender diversity as compared to appointments of arbitrators. However, while there exists differences between the situation of gender diversity at ICSID committees and that of ICSID tribunals, the ICSID Chairman's appointment choices did not result in a major change in the composition of the pool of community members in terms of gender diversity. Overall, female panelists were highly under-represented in the pool of committee members.

Article 52(3) of the ICSID Convention provides the ICSID Chairman with the authority to appoint members of annulment committees. The authority granted to the Chairman provides considerable discretion in the selection of committee members. However, Article 52(3) of the ICSID Convention limits the preferences of the Chairman to the list of the panel of arbitrators that consists of designees of the ICSID Contracting States and of the Chairman. The list is largely controlled by the States, and the Chairman is only allowed to designate 10 individuals to the list.[20] Therefore, in practice, the Chairman's options are widely guided by the designations of the Contracting States. One may argue that, although the Chairman faced limitations in his appointing options, he did not take full advantage of the opportunity offered to him.

Within the very small pool of committee members in the 1980s, there existed one female panelist from a Western European country who represented 15 percent of the pool. The two female panelists reflected the same proportion in the pool of committee members in the 1990s. Both of these panelists were nationals of developed European countries.

While the number of ICSID annulment cases in the 2000s increased six times greater than that of the 1990s, the proportion of female panelists in the 2000s pool of committee members reduced to 10 percent. The majority of female panelists (four out of six individuals) in this decade were

[20] Article 13 of the Convention provides that: "(1) Each Contracting State may designate to each Panel four persons who may but need not be its nationals. (2) The Chairman may designate ten persons to each Panel. The persons so designated to a Panel shall each have a different nationality".

nationals of developed European countries. No female panelist from the least developed countries was appointed in this period.

The contribution of women to the 2010s pool of committee members increased twice more than that of the 2000s, representing roughly one-fifth of the pool. However, this was a 5 percent increase compared to the share of female panelists in the pools of the 1980s and 1990s. Similar to their male counterparts, slightly more than two-thirds of female committee members in the 2010s were from developing countries. Likewise, roughly one-third of them were from a region other than Europe or North America. The data show that the likelihood of the appointment of a female panelist from a developed country was twice greater than that of a woman from a developing country. (See annex, figure 3.2.4.)

The first female presiding members were appointed in the 2000s, reflecting 7 percent of the presiding members' group. The proportion of female panelists within the presiding members group slightly increased in the 2010s (10 percent).

Examining the most frequent appointees at annulment committees (i.e., those who held five or more appointments during the review period), three female panelists represented roughly 15 percent of this influential ring of panelists. Similar to the share of their male counterparts from developing countries, female panelists from these countries formed one-third of all female panelists within this group.

During the review period, the ICSID Chairman did not introduce any female panelist from low-income countries to the pool of committee members, though he appointed a few male panelists to annulment committees from this group of countries. Similar to the preferences of States and investors, it is not likely for the Chairman to appoint a woman from a least developed country.

Considering the total pool of ICSID arbitrators and committee members over the period under review, less than 15 percent of all ICSID adjudicators were women. Overall, female panelists from developed countries represented roughly 75 percent of the group of all female panelists, while female panelists from developing countries represented the rest of this group.

V) Educational Background

Article 14(1) of the ICSID Convention states persons designated to the list of panelists shall have "recognized competence in the fields of law, commerce, industry or finance". Under Articles 41(1) and 52(3), when the ICSID Chairman acts as the appointing authority, his or her choices for appointment are limited to those included in the list. Although disputing parties have the freedom to appoint their arbitrators from outside the list, Article 41(2) requires that such panelists should have the above qualifications. Therefore, all ICSID panelists, regardless of the appointer, shall have a recognized competency in one of these fields.

In practice, panelists from a field other than law have rarely been appointed to ICSID panels. This is in particular because investor-State disputes require substantive legal proficiency. However, as will be discussed in Chapter 5, the recent treaty practice of States imposes further restrictions on the expertise qualifications of panelists. It requires that arbitrators should have competency in PIL. This practice bears significant implications for the qualifications of ICSID panelists under Article 41(1) of the Convention.

In brief, the ICSID community of panelists has demonstrated a greater diversity in terms of legal education compared to diversity in terms of gender, geographical distribution, and development status of the country of nationality of panelists. This section reviews the level of education of panelists. It also investigates the representation of the two major legal systems in the community. Further, it explores the diversity of ICSID panelists in terms of legal expertise. The objective is to evaluate the extent of engagement of panelists who had private law expertise in the community against the contribution of panelists who were experts in PIL.

A) Level of education

This section reviews the preferences of claimants, respondents, and the ICSID Chairman with respect to the education of ICSID panelists. Disputing parties and the Chairman generally favored panelists who conducted research and studies beyond the bachelor's degree, particularly because higher education is often tied up with deep knowledge in a particular field of study. However, the higher education completed may not necessarily be in the field of PIL or one of its branches.

1) ICSID Arbitrators

All of the arbitrators in the 1970s pool of arbitrators were lawyers with a large majority of arbitrators (75 percent) holding Ph.D. degrees. Those who had bachelor's and master's studies represented 10 and 15 percent of the 1970s pool, respectively. Over subsequent decades, the contribution of those who had the highest level of education declined, while the engagement of panelists who had other levels of education increased.

Except for one arbitrator, all those within the 1980s pool of arbitrators were lawyers with Ph.D. degree holders' share experiencing a 10 percent decrease compared to that of panelists in the 1970s pool, while the proportion of panelists who held a bachelor's degree rose to 25 percent. All three female panelists whose appointments in the 1980s facilitated gender diversity developments at ICSID tribunals had the highest level of education.

The contribution of panelists who held a PhD. degree decreased to half or less between the 1990s and 2010s, while the shares of those who had each of the other two levels of education were between one-fourth to one-third of the respective pool. Except for two arbitrators within each pool of the 2000s and 2010s, all other panelists obtained a formal law degree.

That said, more than half of female arbitrators in the 2000s and 2010s pools had the highest level of education, while roughly one-fifth of them had a bachelor's degree. This means that female panelists who held a Ph.D. degree were more likely to receive appointments compared to women with a bachelor one. The data reveal comparable results with respect to the practice of disputing parties with regard to the education of male arbitrators. (See annex, figures 3.3.1 and 3.3.2.)

The data on the 2010s pool of arbitrators indicate that respondents' practice favored the appointment of those who had the highest level of education, followed by those who held a master's degree. Indeed, persons with a Ph.D. degree are twice or four times more likely to be appointed by respondents compared to those having master's or bachelor's education. Claimants' preferences in this respect are to some degree similar to those of respondents. (See annex, figure 3.3.3.)

With respect to the group of the most frequent ICSID arbitrators, a greater majority of them (two-thirds) had the highest level of education. Ph.D. degree holders are three or four times more likely

to receive high appointments and enter this influential circle than master's or bachelor's degree holders, respectively.

In summary, nearly all (i.e., 99 percent) of those appointed at ICSID tribunals had a formal law degree. The data indicate that the level of education in fact guided claimants and respondents in their selection of panelists. While the proportion of panelists who held a Ph.D. degree decreased over the decades under review, those who had the highest level of education were still more likely to receive appointments at ICSID tribunals compared to panelists who had lower levels of education.

2) Committee members

The level of education of members of annulment committees was moderately different from those of ICSID arbitrators. Within the small pool of the 1980s of annulment committee members, the overwhelming majority (85 percent) had the highest level of education with one member representing 15 percent of the pool holding a bachelor's degree.

In the 1990s, the proportion of panelists who had the highest level of education reflected half of the pool. While the share of those who had a bachelor's level of education reflected 40 percent of the pool, no female committee member who held a bachelor's degree was appointed. The share of panelists who had the highest level of education in the 2000s and 2010s pools remained almost the same as that of the 1990s.

All female panelists within the 2000s pool had completed their Ph.D. studies. This changed in the 2010s pool with those female panelists who had master's studies representing roughly half of all female appointees. The data indicate that the ICSID chairman was more likely to appoint women with the highest level of education or a master's education as members of annulment committees than those who held a bachelor level of education. (See annex, figure 3.3.4.)

To sum up, the data show that on average the Chairman was more likely to appoint panelists who had the highest level of education as members of committees than those who held a bachelor's or master's degree. A comparable situation was experienced with the most frequent appointees at annulment committees. (See annex, figure 3.3.5.)

B) Legal systems

Panelists from one major legal system in the world, i.e., civil law systems, established dominance over the ICSID community of arbitrators and members of annulment committees during the decades under review, while panelists from common law and mixed/other legal systems holding a smaller proportion of the combined pool of ICSID panelists. However, there existed some differences between the two groups of arbitrators and members of annulment committees.

1) Tribunal panelists

ICSID panelists who had a civil law background formed the overwhelming majority (roughly 80 percent) of the small pool of arbitrators in the 1970s, while those from common law and mixed/other legal systems were under-represented (5 and 15 percent respectively). Over the 1980s to 2000s, the proportion of panelists from common law backgrounds increased to more than one-third, in contrast to the contribution of those from mixed/other legal systems that did not see a significant improvement. Over these decades, those from countries with civil law legal systems secured roughly half of all appointments. The composition of the 2010s pool was similar to the one experienced between the 1980s and 2000s, except with a marginal increase in the engagement of those from common law and mixed/other legal systems. (See annex, figure 3.3.6.)

With respect to claimants' arbitrators, the data indicate that claimants demonstrated a similar practice in appointing panelists from both civil law and common law systems, while those from mixed/other legal systems were not attractive to claimants (10 percent). In contrast to claimants, respondents greatly favored panelists from countries with civil law systems with more than half of respondent appointees from this group of panelists. Compared to claimants, respondents are less likely to appoint panelists who had a common law background. Respondents' arbitrators who had common law backgrounds represented more than a quarter of all respondent appointees. Compared to claimants' practice, respondents' practice was slightly more favourable to panelists from countries with mixed/other legal systems. (See annex, figure 3.3.7.)

Female panelists from countries with civil law systems were more likely to receive appointments to ICSID tribunals compared to those from countries with common law or mixed/other legal systems in place. Two-thirds of female panelists appointed during the review period were from countries with a civil law system, compared to a low contribution of female panelists from common

law systems (20 percent) and mixed/other legal systems (15 percent). In comparison, the selection of male panelists demonstrated a greater diversity in terms of legal systems than their female counterparts. (See annex, figure 3.3.8.)

Within the group of ICSID presiding arbitrators, the contribution of those from civil law countries was greater than panelists from other legal systems. Other than the 1970s when the overwhelming majority of the tribunal chair positions were occupied by panelists who had a civil law background, these panelists reflected at least half of all presiding arbitrators between the 1980s and 2010s. While between this latter period the contribution of those from common law countries increased to one this, panelists from countries with a mixed/other legal system were disproportionately under-represented with no appointments as tribunal chair in the 1990s and minor contribution in the other decades (10 percent or less). (See annex, figure 3.3.9)

As to the most frequent arbitrators, a similar pattern was experienced. Roughly two-thirds of them had a civil law background, while approximately one-third of them were from countries with common law systems. Panelists from countries with mixed/other legal systems were poorly represented in this group.

To conclude, arbitrators from civil law legal systems had a greater presence in the pool of ICSID arbitrators compared to those from common law and mixed/other legal systems. The diversity situation of the combined pools also reflects the situation of diversity amongst male panelists. On average panelists who had civil law backgrounds accounted for at least half of the pool of ICSID arbitrators.

2) Members of annulment committees

Panelists from countries with civil law systems maintained their dominance over the pool of annulment committee members over the review period. During the first decade of annulment committees, two-thirds of them were from civil law countries and those from countries with mixed/other legal systems backgrounds represented one-third of the pool. In this decade, no committee member from a country with a common law background was appointed. Compared to the small pool of the 1980s, the 1990s pool experienced a less diverse composition as the proportion of panelists who had a civil law background increased to more than two-thirds of the pool, while those from countries with common law systems and mixed/other legal systems formed

less than one-third of the pool (20 and 10 percent, respectively). The 2000s and 2010s pools demonstrated a moderately greater diversity as these decades saw a relatively increased engagement of those from countries with common law systems (25 percent) and mixed/other legal systems (25 percent). (See annex, figure 3.3.10.)

The ICSID Chairman was more likely to appoint women from civil law countries than those from common law countries. Also, the Chairman favored female panelists from mixed/other legal systems over those from a common law country. The ICSID Chairman did not introduce any female committee member from common law and mixed/other legal systems to annulment committees to the small pools of the 1980s and 1990s. All women appointed in these decades were from countries with a civil law system. Also, in 2000 the ICSID Chairman appointed no women representing common law systems. In this decade, female panelists from countries with civil law or mixed/other legal systems formed two-thirds and one-third of this group, respectively. In the 2010s, the ICSID Chairman introduced a slightly greater diversity to the group of female committee members in terms of legal systems, although female members from civil law countries maintained their greater presence. In this decade, women from countries with common law traditions represented moderately above 20 percent of the female panelists group and those from mixed/other legal systems reflected roughly one-third of that group. (See annex, figure 3.3.11.)

Although common law or mixed/other legal systems were not represented in the small rings of committee chairs in the 1980s and 1990s, there was greater diversity among presiding committee members in this respect over the past two decades. With the increasing number of annulment cases in the 2000s, the ICSID Chairman introduced some degree of diversity to this group by appointing a considerable number of presiding members from countries with common law (45 percent); however, those from mixed/other legal systems were poorly considered in the Chairman's appointment choices (5 percent). In the 2010s, the share of presiding members from countries with mixed/other legal systems increased to a quarter. However, the contributions of presiding members from common law countries were disproportionately reduced in the 2010s (15 percent) compared to that of the 2000s, while more than half of chair appointments were allocated to members who had a civil law background. (See annex, figure 3.3.12.)

Likewise, the group of the most frequent appointees at ICSID annulment committees suffered from less diversity in terms of legal systems. The data show that it was more likely for panelists from

civil law countries than other panelists to enter the most frequent arbitrators group. Similar to the most frequent arbitrators group, roughly two-thirds of these influential panelists had a civil law background. Members from countries with common law or mixed/other legal systems formed less than one-third of this group (10 and 25 percent, respectively). (See annex, figure 3.3.13.)

To sum up, the data show that the ICSID Chairman was at least twice more likely to appoint panelists from civil law backgrounds than panelists from a country with common law or mixed/other legal systems. Further, panelists who had common law backgrounds were less likely to be appointed to annulment committees compared to those from countries with mixed/other legal systems.

C) Expertise of ICSID panelists

Originally, the ICSID Convention was drafted with investment contracts or domestic laws in mind as a basis of consent to establish jurisdiction of arbitration panels.[21] In contrast to this intention, the overwhelming majority (roughly 80 percent) of cases registered with ICSID were based on inter-State treaties as of June 30, 2022.[22] As discussed earlier, investor-State arbitration proceedings initiated under inter-State treaties a mechanism of PIL, not international private law. This change in the nature of disputes requires an expertise that was not intended by the drafters of the Convention.

1) Tribunal members

Generally, PIL lawyers were more likely to receive appointments at ICSID tribunals than professionals with proficiency in a different field. Except for the 1980s pool of ICSID arbitrators where the majority of panelists had expertise in a field other than PIL (56 percent), panelists who had PIL background dominated the pool of arbitrators in any given decade. These panelists established their highest dominance in the 1970s representing roughly 80 percent of the pool, while their contribution to the pools of 1990s to 2010s was roughly 60 percent. (See annex, figure 3.3.14.)

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[21] 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*, vol II-1 (ICSID Publications 1968) 666, 703, 710, 830, and 841.
[22] ICSID, *The ICSID Caseload - Statistics*, Issue 2022-2 (June 30, 2022) 11.

While there were slight differences between investors and states preferences with respect to the expertise of party-appointed arbitrators, disputing parties were more likely to select those panelists who had a background in PIL. Investors and States were more likely to appoint a panelist who was an expert in PIL than a professional with a high degree of competence in another field. Panelists who had PIL background represented roughly two-thirds of both investors and States' appointees. (See annex, figure 3.3.15.)

Male and female panelists demonstrated similar competencies, though there existed some differences between them. PIL experts represented more than half of both groups. (See annex, figure 3.3.16.)

Similarly, panelists who were PIL experts were more likely to be appointed as the tribunal chair. PIL lawyers represented less than two-thirds of the presiding arbitrators group. (See annex, figure 3.3.17.)

However, panelists who had a background in PIL established a greater dominance in the most frequent arbitrators group compared to the degree of contribution of these experts in the overall pool of arbitrators. Panelists who possessed such competency were more likely to receive a high number of appointments compared to panelists who had a background in another field of law. PIL lawyers reflected roughly 70 percent of this group. (See annex, figure 3.3.18.)

To sum up, while panelists who were experts in a field other than PIL reflected a sizable proportion of the pool of ICSID arbitrators (roughly 40 percent), disputing parties were more likely to appoint PIL experts as their arbitrators. Similarly, PIL lawyers were more likely to preside over ICSID tribunals. These experts had a greater presence within the most frequent arbitrators group compared to the contribution of panelists who had a background in PIL in the total pool of arbitrators.

2) Members of annulment committees

The ICSID Chairman's practice in appointing panelists who had a background in PIL was similar to the appointment preferences of investors and States with regard to the expertise of party-appointed arbitrators. Nevertheless, those who had expertise in another field of law reflected a considerable proportion of the pool of annulment committee members. Except for the first decade of annulment committees when PIL lawyers formed the overwhelming majority of the pool (85

percent), these experts maintained roughly less than two-thirds of the pool between the 1990s and 2010s. The increasing growth in the number of committee members over the 2000s and 2010s did not change this pattern. (See annex, figure 3.3.19.)

Panelists who were PIL experts and those having expertise in other fields were allocated equal proportions in the small group of female committee members in the 2000s. However, in the 2010s, the ICSID Chairman's practice was more favourable to panelists who had a background in PIL. These panelists maintained a majority of the 2010s group of female panelists. (See annex, figure 3.3.20.)

Likewise, the presiding members group witnessed a greater presence from panelists who had a background in PIL. That the ICSID Chairman was twice less likely to appoint a presiding member from a field other than PIL. As the composition of this group in the 2000s and 2010s show, these experts maintained a significant majority in this group with three-quarters of the 2000s group encompassing PIL lawyers. (See annex, figure 3.3.21.)

Further, it was less likely for panelists who had a background in private law to enter the ring of the most frequent committee members. These panelists formed less than 30 percent of this group. (See annex, figure 3.3.22.)

In conclusion, the ICSID Chairman's appointment preferences show that, while specialists from a field other than PIL accounted for a considerable proportion of the pool of annulment committee members, he generally favored PIL experts. This likelihood is further increased with respect to the selection of presiding committee members. Similarly, in contrast to those who had a background in private law, it was more likely for panelists who had a background in PIL to receive numerous re-appointments and enter the most frequent committee members circle.

VI) Private and Inter-State Adjudication Experience

Generally, adjudicating private arbitrations and resolving investment treaty disputes require different skill sets. In contrast, there are more similarities between investment treaty dispute settlement and inter-State dispute resolution than differences. This section reviews the involvement of ICSID panelists who had a background in private law or inter-State adjudications and examines how the contributions of these groups of panelists to the pool of the ICSID arbitration community evolved during the decades under study.

A) ICSID arbitrators

The data finds a correlation between the increase in the number of ICSID disputes and the growing participation of panelists who had private law arbitration in ICSID disputes. Historically, arbitrators selected to sit at ICSID tribunals did not have experience in private dispute adjudication. This perspective dramatically changed over time. The more the number of ICSID cases increased, the more panelists from this group were appointed at ICSID tribunals. While only a small proportion (15 percent) of the 1970s pool of ICSID arbitrators were engaged as adjudicators in private disputes, these panelists maintained a strong dominance in the 2000s and 2010s pools of arbitrators as they secured more than half and roughly two-thirds of these pools, respectively. This situation was likely the result of the abrupt surge in ICSID arbitrations in the 2000s and 2010s while the ITA community was facing a shortage of panelists who had actual experience in investment treaty or inter-State adjudication. (See annex, figure 3.4.1.)

This was in contrast to the contribution of panelists who were involved in inter-State disputes. While panelists who were engaged in disputes between States held a proportion corresponding to that of those who had a private arbitration experience from the 1970s to 1990s, their contribution significantly decreased over later decades. The expansion of the ICSID community of arbitrators and the increase in ICSID cases over the 2000s and 2010s resulted in a lower share of panelists who had experience in inter-State disputes in these decades. There existed a correlation between the growth of the ICSID pool and cases and a decline in the share of those who were involved in disputes between States. (See annex, figures 3.4.2-3.)

There existed more similarities between investors and States with respect to adjudication experiences of their party-appointed arbitrators than differences. A large majority of party-appointed arbitrators (more than 70 percent) had experience in either private or inter-State disputes. Both claimants and respondents were three times more likely to appoint a panelist who had a background in private adjudication than a panelist who was involved in disputes between States. (See annex, figure 3.4.4.)

Likewise, female panelists who had a background in either private arbitrations or inter-State disputes were more likely to receive appointments compared to those who lacked such experience. However, compared to the overall pool of arbitrators where the proportion of panelists who had private adjudication backgrounds were twice or three times greater than the share of those who

adjudicated inter-State disputes, women who participate in inter-State disputes as adjudicators were 6 times less likely to receive appointments at ICSID tribunals than female panelists who had a private adjudication background. This was in particular due to the low participation of females as adjudicators in inter-State disputes. (See annex, figure 3.4.5.)

The majority of ICSID tribunal chairs were practitioners who adjudicated private disputes. Panelists who had a background in inter-State disputes were twice less likely to be appointed as tribunal chairs compared to those who had experience in private arbitrations. Panelists who had no experience in either secured a small proportion of the presiding arbitrators group (15 percent). (See annex, figure 3.4.6.)

The situation with the most frequent arbitrators was to some degree different from the overall pool of arbitrators. All panelists within this circle of the elite were either involved in private arbitrations or inter-State disputes or both. Nevertheless, a panelist who was involved in private arbitrations was twice more likely to receive high appointments and enter this influential circle. (See annex, figure 3.4.7.)

In short, investors and States' practices were particularly favorable to panelists who had adjudicatory experience in either private or inter-State disputes. Disputing parties showed similar preferences with respect to each of these two groups. Panelists who had such a background formed a large majority of the ICSID pool of arbitrators compared to those who lacked such experience. Further, it was more likely for a panelist who had a background in private arbitration to receive an appointment at ICSID tribunals than a panelist who was involved in inter-State disputes.

B) Committee Members

Like claimants and respondents, the ICSID Chairman was more likely to appoint ICSID committee members from those who had private arbitration experience or involvement in inter-State disputes. Between the 1980s and 2010s, members who had a background in private arbitrations maintained at least half a proportion of the pool in a given decade. However, the contribution of those who had adjudication experience in inter-State disputes gradually declined over these decades, forming 15 percent of the pool in the 2010s. Indeed, in the 2010s it was much less likely for the Chairman to appoint a panelist who had no adjudicatory experience at annulment committees than those who were engaged as arbitrator or judge in inter-State disputes. (See annex, figure 3.4.8.)

With a moderate degree of difference, the above circumstances also reflected the adjudication background of female panelists within the pool of committee members. It was highly likely for those who were involved in private arbitration to receive appointments compared to those who had experience in inter-State disputes. Also, the Chairman was more likely to appoint female panelists who had no experience in either of these adjudications than to appoint panelists who acted as arbitrator or judge in disputes between States. (See annex, figure 3.4.9.)

A somewhat similar pattern was experienced within the group of presiding committee members. Roughly 80 percent of committee chairs acted as adjudicators in either private arbitrations or disputes between States. The only difference was that the likelihood for the appointment of panelists who had experience in inter-State disputes was the same as that of those who had no experience in either of these two groups of adjudication. (See annex, figure 3.4.10.)

Also, the most frequent committee members group demonstrated attributes precisely similar to those of presiding committee members in terms of their adjudication experience. Nevertheless, there existed some differences between the groups of the most frequent committee members and the most-frequent arbitrators. While roughly 80 percent of the committee members who held frequent appointments had experience in either private or inter-State disputes, all arbitrators who held high appointments shared such a characteristic. (See annex, figure 3.4.11.)

To sum up, panelists who had a background in private adjudication had a greater presence within the pool of committee members. It was less likely for the ICSID Chairman to appoint or reappoint panelists who had adjudication experience in disputes between States or those who had no adjudication background at all.

VII) Professions of ICSID Panelists

ICSID arbitrators and committee members come from different occupational backgrounds.[23] The prevailing occupational features of ICSID panelists evolved between the 1970s and 2010s. The average ICSID panelist in the 1970s possessed occupations that were different from those in later decades. This section examines the occupation of ICSID panelists over different decades.

[23] It should be noted that some ICSID panelists possess overlapping occupations such as university appointments and counsel jobs.

Particularly, the analysis focuses on the occupational qualities ICSID panelists possessed and which occupational qualities were favored by the disputing sides and the ICSID Chairman.

A) Tribunal members

The majority of ICSID arbitrators in the 1970s were panelists who held academic appointments (more than 60 percent), with judges representing more than one-third of the pool. Partners at law firms held a small proportion of this pool (less than 20 percent). The arbitrators pool in subsequent decades saw growing appointments of panelists who held a counsel job at law firms compared to a decrease in the participation of panelists who held non-counsel occupations. Between the 1980s and 2010s, panelists who held academic appointments maintained roughly half of the pool of arbitrators in a given decade, while the contribution of judges experienced a substantial decline over these decades reflecting 10 percent of the 2010s pool. This was in contrast to the increasing engagement of panelists who had affiliations to law firms over this period culminating in a record high number in the 2010s pool (more than 80 percent). (See annex, figure 3.5.1.)

While investors' and States' appointment preferences in terms of the occupational background of party-appointed arbitrators were generally similar, there existed moderate differences between them. Respondents were more likely to appoint panelists who held university appointments as their arbitrators (60 percent) compared to claimants (50 percent). Claimants and respondents demonstrated fairly similar preferences with respect to the appointment of those who held counsel positions. Both sides strongly favoured panelists who had academic positions or counsel jobs over those who had judicial appointments. This was likely due to the scarcity of international judges. (See annex, figures 3.5.2-3.)

The constitution of the female arbitrators group closely reflected the composition of the overall pool of arbitrators in terms of their occupational backgrounds. This means that appointing parties favored women who were partners at law firms over those who held university appointments. Similarly, it was very much less likely for respondents and claimants to appoint a female panelist who had a judicial position. (See annex, figure 3.5.4.)

The constitution of the group of tribunal chairs and that of the most frequent arbitrators closely corresponded to that of the 2010s pool in terms of panelists' occupational backgrounds. The likelihood for those affiliated with law firms to become the tribunal chair or receive a high number

of appointments was significantly greater than those holding academic positions. Nevertheless, there were modest differences including the slightly greater presence of panelists who were partners at law firms within the most frequent arbitrators group (86 percent) compared to the contribution of these panelists to the 2010s pool (81 percent). (See annex, figures 3.5.5-6.)

To conclude, while the 1970s pool of tribunal arbitrators overwhelmingly consisted of panelists who held academic and judicial appointments, the constitution of the arbitrators pool changed over later decades with those who had counsel positions forming a large majority of the pool in any given decade. Investors and States were more likely to appoint a partner at a law firm as their arbitrator than a person who held academic or judicial appointments, though States were still more likely to appoint panelists who held university appointments as their arbitrators than claimants. Further, the likelihood for panelists who had academic professions to be appointed as the tribunal chair or to become a member of the most frequent arbitrators group was lower than that of those who had counsel jobs at law firms.

B) Committee members

With respect to the occupational qualities of panelists at annulment committees, the ICSID Chairman's practice resembled that of the disputing sides as discussed above. Notably, the constitution of the members pool changed over the decades. While in the 1980s the pool was dominated by panelists who had university appointments, partners at law firms largely dominated the pool over later decades. Over subsequent decades, the ICSID Chairman was more likely to favor partners at law firms over those who held academic appointments, although the latter maintained a fairly strong presence during these decades (at least 50 percent) compared to the greater dominance of the former in the pool (at least 60 percent). Further, panelists who had judicial positions were the least likely group to be appointed to annulment committees. (See annex, figure 3.5.7.)

This practice was also reflected in the appointment of female panelists at annulment committees, though there existed modest differences. In particular, a smaller proportion of female panelists held university appointments (45 percent) compared to the proportion of academics in the pool of committee members in any given decade (i.e., at least 50 percent). (See annex, figure 3.5.8.)

While the group of presiding members largely shared the occupational qualities of the average pool of committee members, it experienced lower contribution from those who held university appointments. The ICSID Chairman was twice more likely to appoint partners at law firms compared to panelists who had academic positions. (See annex, figure 3.5.9.)

With respect to the occupational qualities of panelists within the most frequent members group, the proportions of panelists who held academic and judicial appointments reflected the degree of engagement of university professors and judges in the average pool of committee members (roughly 50 and 20 percent, respectively). However, the contribution of the most frequent panelists who were affiliated to the most frequent panelists group (65 percent) was considerably lower than the share of partners at law firms in the average pool of committee members (roughly 80 percent). (See annex, figures 3.5.10-11.)

In summary, the constitution of the member pool evolved over the decades with panelists who were affiliated to law firms maintaining a strong majority in the pool. The practice of the ICSID Chairman broadly corresponded to that of disputing sides with respect to the occupational background of ICSID panelists. However, there existed differences in occupational qualities that were favored by the disputing sides and the ICSID Chairman.

VIII) Double-hatting at ICSID

This section reviews how the double-hatting phenomenon evolved within the ICSID framework. It finds that double-hatting became widespread practice within the ICSID arbitration community during the 2000s and 2010s. It further examines the practice of investors, States as well as the ICSID Chairman with respect to the appointment of panelists who were engaged in double-hatting in ICSID disputes. It concludes that the disputing sides and the Chairman favourably contributed to the growth of the double-hatting phenomenon. This trend is particularly noticeable within the group of tribunal chairs and the group of most frequent panelists, which is the group of panelists who received a high number of appointments from disputing sides and the Chairman.

A) Tribunal panelists

The small pool of panelists in the 1970s did not include an arbitrator who offered counsel or expert services at ICSID. This outlook changed in the 1980s when two ICSID panelists within the 32-member pool in that decade appeared as counsel in other ICSID disputes. This found traction in

the 1990s pool where roughly 10 percent of the pool members acted as counsel at ICSID. The practice became widespread within the 2000s and 2010s pools of ICSID panelists. In these decades, more than a quarter of the pool acted as counsel or experts in ICSID arbitrations. (See annex, figure 3.6.1.)

The data show that claimants were slightly more likely than respondents to appoint their arbitrators from the group of arbitration practitioners who were engaged in other disputes in dissimilar roles. That said, a number of these practitioners received appointments as party-appointed arbitrators from both claimants and respondents. (See annex, figure 3.6.2.)

Except for one female panelist who played dissimilar roles at ICSID in the 2000s representing 2 percent of all double hatters in this decade, no other women wore multiple hats in ICSID disputes between the 1980s and 2000s. Indeed, it was a rare occupation for a female panelist in these decades to wear more than one hat. This was in contrast to the modest engagement of female arbitrators in the 2010s reflecting roughly 15 percent of all panelists who assumed different positions at ICSID. (See annex, figure 3.6.3.)

In particular, the practice became remarkably widespread among ICSID tribunal chairs. Roughly half of all those who appeared as expert or counsel in ICSID arbitrations also acted as presiding panelists at ICSID tribunals. Further, double hatters maintained a significant presence within the group of ICSID tribunal chairs. Those who had multiple hats in ICSID arbitrations accounted for more than one-third (36 percent) of all presiding arbitrators at ICSID. (See annex, figure 3.6.4.)

Likewise, a sizable proportion of the most frequent ICSID arbitrators provided different services in ICSID disputes. The data show that more than two-fifth of these elite arbitration practitioners appeared as arbitrators, counsel or experts in ICSID arbitrations. This means that the likelihood for those within this group to act as counsel or experts in ICSID cases was considerably greater than that of panelists in any other group examined above. (See annex, figure 3.6.5.)

In conclusion, the practice of tribunal members evolved during the decades under review with respect to double-hatting. In particular, the phenomenon was more noticeable in the 2000s and 2010s when more than a quarter of tribunal arbitrators held distinct positions in ICSID disputes. This practice became more widespread amongst the two influential groups at ICSID, i.e., tribunal

chairs and frequent arbitrators, such that the likelihood for tribunal chairs or frequent arbitrators to wear more than one hat in ICSID arbitrations was more than that of any regular panelist at ICSID.

B) Committee Members

Similarly, the practice of double-hatting was commonplace among panelists at ICSID annulment committees, though there existed some differences between the practice of these panelists and that of ICSID tribunal members. It was moderately more likely for ICSID tribunal members to act as counsel or experts in other ICSID disputes than panelists at annulment committees. While more than a quarter of tribunal arbitrators in the 2000s and 2010s wore multiple hats in ICSID arbitrations, the proportion of committee panelists who appeared as counsel or experts in ICSID cases was roughly one-fifth of all committee members in these two decades. Further, the contribution of committee members who held distinct positions at ICSID experienced a decline in the 2010s. (See annex, figure 3.6.6.)

The data show that it was very less likely for female panelists at annulment committees to engage in the double-hatting practice. In contrast, the overwhelming majority of panelists who acted as counsel or experts in ICSID cases were male (roughly 90 percent). (See annex, figure 3.6.7.)

Those who played separate roles in ICSID arbitrations had a greater presence among presiding members of annulment committees. Notably, more than half (55 percent) of all committee chairs also acted as counsel or expert in ICSID arbitrations. Presiding members who wore multiple hats at ICSID reflected one-third of all annulment committee chairs. Indeed, the proportion of committee chairs who were involved in double-hatting at ICSID corresponded to that of tribunal chairs who wore different hats. (See annex, figure 3.6.8.)

However, those engaged in double-hatting had a moderate presence within the group of frequent panelists at annulment committees compared to their strong engagement in the committee chairs group. Those who wore more than one hat formed roughly a quarter of all frequent committee members. The data show that those within the committee chair group were twice more likely to provide different services in ICSID cases than those who received high appointments at annulment committees. (See annex, figure 3.6.9.)

To sum up, while double-hatting practice was common among panelists at annulment committees, a smaller proportion of committee panelists acted as counsel or experts in ICSID arbitrations.

Female members of committees were less likely to hold distinct positions at ICSID compared to their male counterparts. However, double hatters had a greater presence as presiding members of annulment committees. Similar to tribunal presidents, more than half of committee presidents were engaged in the double-hatting practice. Committee panelists who received frequent appointments were moderately less likely to wore multiple hats than tribunal panelists who had frequent appointments.

Conclusion

Uncovering the ICSID arbitration community is a complex process. The data analyzed for the purpose of this chapter helped us understand the core demographic attributes of ICSID panelists. It offered answers to the questions of 'who are ICSID panelists?' and 'what characteristics do they have?'. It also assessed the appointment practice of disputing sides and the ICSID Chairman.

The average ICSID panelist was a male adjudicator who had the nationality of a Western country. Certain groups are significantly under-represented at ICSID. These include females, panelists who hold the nationality of countries located outside Europe or North America and nationals of developing or least developed countries. The appointment practice of disputing sides and the ICSID Chairman contributed to the diversity challenge at ICSID, although there existed some differences in their practice.

Panelists who had expertise in private law maintained a considerable presence in the pool of ICSID panelists, though PIL experts dominated the pool. The practice of disputing sides and that of the ICSID Chairman largely favored the appointment of PIL experts. In particular, panelists who had a background in PIL were more likely to receive a high number of appointments or be selected as the chair of the panel.

While there existed differences in the practice of investors, States, and the Chairman, they generally side with the appointment of panelists who had adjudicatory experience. However, panelists who had a background in private arbitration were more likely to receive appointments at ICSID panels than those who had involvement in inter-State disputes. The data found a correlation between the increase in the number of ICSID disputes and the growing participation of panelists who had in private arbitration at ICSID. The more the number of ICSID disputes grew, the more

panelists who had experience in private arbitration were appointed at ICSID. This was likely due to the scarcity of panelists who had first-hand experience in ITA or disputes with PIL elements.

The average ICSID panelist in the 1970s possessed occupational qualities that were different from those of the average panelist in later decades. The average ICSID panelist evolved from a university professor to a partner at a law firm. Disputing sides and the Chairman strongly favored partners at law firms over academics and judges. These attributes found further manifestation within certain groups of panelists such as the most frequent panelists at ICSID.

The practice of ICSID panelists evolved over decades with respect to the double-hatting practice. While it was not common in the early decades of ICSID's operation for tribunal panelists to provide counsel or expert services in ICSID arbitrations, this practice found traction in later decades and became commonplace. In the 2000s and 2010s, more than a quarter of tribunal members appeared as counsel or experts in ICSID arbitrations. The practice was more widespread amongst the two influential groups of tribunal members, i.e., tribunal chairs and frequent tribunal members. Indeed, the likelihood for tribunal chairs and frequent arbitrators to wear more than one hat in ICSID arbitrations was more than that of any regular panelist at ICSID.

Likewise, the double-hatting practice was common among panelists at annulment committees, though a smaller proportion of them adopted this exercise compared to tribunal panelists. Nevertheless, this practice maintained a strong dominance among presiding members of annulment committees. Similar to tribunal chairs, more than half of the committee presidents were engaged in the double-hatting practice in different ICSID arbitrations.

The above situation in the ICSID arbitration community, along with the behavioral attitudes discussed in Chapter 2, highlights the need for fundamental reforms in ITA. To remedy these deficits, a joint contribution of the arbitration community and States is required. The ongoing reforms both at the institutional level (i.e., ICSID and UNCITRAL) and at the investment treaty level aim to address some of the challenges uncovered in Chapters 2 and 3. Chapters 4 and 5 will assess the developments at ICSID and treaty practice of States with respect to the qualifications and conduct of investment treaty arbitrators.

Chapter 4

A Code of Conduct for ICSID Adjudicators:

Analysis of the Current Framework and Reform Proposals

I) Introduction

Confidence in the ethical behaviour of adjudicators is "the Alpha and Omega of the legitimacy of the process".[1] Such a confidence is reinforced by the existence of a clear and enforceable code of conduct. In spite of the complexity of ISDS mechanism and intertwined relationships of adjudicators, neither the ICSID Convention nor the ICSID Arbitration Rules contain detailed provisions on the conduct of ICSID adjudicators. ICSID adjudicators are expected to behave professionally and ethically, but the specific requirements of this broad expectation are not elaborated. Indeed, the circumstances surrounding the very first ICSID disqualification challenge highlighted the necessity for a binding code of professional conduct for ICSID adjudicators.[2]

The enforcement of the disqualification review mechanism under the ICSID Convention and Arbitration Rules added more complexity to the system than clarity. The ICSID Convention and Arbitration Rules do not create a centralized and common enforcement mechanism. Enforcement occurs through peer adjudicators - who are different from case to case - or the ICSID Chairman in

[1] Jan Paulsson, *The Idea of Arbitration* (OUP 2013) 147.

[2] *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Proposal to Disqualify an Arbitrator (24 June 1982) [not public] cited in Sam Luttrell, *Bias Challenges in International Commercial Arbitration: The Need for a "Real Danger" Test* (Kluwer Law 2009) 225-226; W. Michael Tupman, 'Challenge and Disqualification of Arbitrators in International Commercial Arbitration' (1989) 38(1) Int. Comp. Law Q. 45. In this case, Indonesia requested the disqualification of the claimant appointed arbitrator on the grounds that he provided tax advice to the controlling shareholders of the claimant prior to his appointment; the arbitrator's law firm shared office space and administrative services with the claimant's counsel well into the arbitration proceedings; and the arbitrator's law firm and the claimant's counsel held a long-standing profit-sharing agreement which was discontinued before the commencement of the arbitration. The co-arbitrators dismissed the disqualification request on the basis they required the facts indicating absence of independence of the arbitrator, and also an actual lack of independence that is "manifest" and evident, not mere justified doubts. See Christoph H. Schreuer and others, *The ICSID Convention: A Commentary* (2nd edn, CUP 2009) 1203; Sam Luttrell, 'Vivendi v Argentina (1997-2010)' in Eirik Bjorge and Cameron A. Miles (eds), *Landmark Cases in Public International Law* (Bloomsbury Publishing 2017) 465.

specific circumstances. In practice, the decision-making authority has heavily relied on the International Bar Association Guidelines on Conflict of Interest in International Arbitration (IBA Guidelines) to determine if a conflict of interest exists. The IBA Guidelines are not distinctively tailored for ISDS adjudicators as they were developed to apply to all forms of international arbitration in which commercial arbitrations between two commercial entities predominate. Further, the IBA Guidelines are non-binding and are not legally enforceable standards of conduct for ISDS adjudicators.

The reform of provisions governing the conduct of ISDS adjudicators has been the subject of heated debates over the past few years. At the institutional level, in 2015 and 2016, UNCITRAL received proposals for ISDS reform including adding further regulatory requirements for the conduct of adjudicators in investor-State arbitration.[3] The UNCITRAL Working Group III on Investor-State Dispute Settlement Reform was entrusted with an open-ended mandate to initiate the reform process and in 2018 broad agreement was expressed on the importance of codes of conduct for ISDS adjudicators.[4] In 2019, the Secretariats of ICSID and UNCITRAL jointly commenced drafting a code of conduct for adjudicators in international investment disputes (IIDs).

In May 2020, ICSID and UNCITRAL jointly published the first version of the draft Code of Conduct for ISDS Adjudicators (the Code).[5] The draft received extensive input from States and other stakeholders including legal scholars. The second and third versions of the draft Code were published in April and September 2021 based on the comments received.[6]

In September 2022, the Working Group III considered the distinctions between arbitrators in ISDS and judges who would be appointed at a future multilateral investment court and requested the

[3] *Proposal by the Government of Algeria: possible future work in the area of international arbitration between States and investors — code of ethics for arbitrators*, United Nations Commission on International Trade Law, forty-eighth session, Vienna, 29 June-16 July 2015 (27 May 2015); *Settlement of commercial disputes: Possible future work on ethics in international arbitration*, United Nations Commission on International Trade Law, forty-ninth session New York, 27 June-15 July 2016 (29 April 2016).

[4] *Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session* (New York, 23–27 April 2018), UN Doc. A/CN.9/935 (14 May 2018) para 64; *Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session* (Vienna, 29 October–2 November 2018), UN Doc. A/CN.9/964 (6 November 2018) paras 74-83. See also Note by the UNCITRAL Secretariat, *Possible future work in the field of dispute settlement: Ethics in international arbitration*, UN Doc. A/CN.9/916 (13 April 2017).

[5] *Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement*, Version One (May 2020).

[6] *Draft Code of Conduct for Adjudicators in International Investment Disputes*, Version Two (April 2021) and *Draft Code of Conduct for Adjudicators in International Investment Disputes*, Version Three (September 2021).

UNCITRAL Secretariat to prepare two separate draft Codes of conduct for each of these two classes of ISDS adjudicators. This request was mainly due to doubts "about the extent to which the Code could address the conduct of judges, when it was not clear how the standing mechanism would operate, the functions and types of services to be provided by judges as well as their terms of service".[7] In November 2022, the secretariats of ICSID and UNCITRAL jointly prepared the revised versions for both draft Codes (which jointly comprise the fifth version of the Code), accompanied with commentaries. Apart from certain adjustments, the commentary to the Code of Judges overwhelmingly follows that for Arbitrators, and they remain extremely similar.[8]

The Code regulates the conduct of both arbitrators and judges in situations where controversial instances of conflict of interest as well as issue conflict occurs. In the context of the ICSID framework, the Code introduces more stringent rules on impartiality of adjudicators than the existing requirements that apply to adjudicators. Principles of independence and impartiality, issues of integrity, confidentiality, and double-hatting, and disclosure obligations form the key pillars of the Code.

The Code applies to both arbitrators and judges in investor-State disputes. Its scope includes arbitrators, *ad hoc* committee members, candidates for arbitral appointments, and judges of future permanent arbitration or appeal boards. The draft ensures that the Code applies to current and future ISDS adjudication bodies that may possibly be established as a result of reform processes. The Code also applies to all candidates and affiliates of adjudicators such as personal secretaries and assistants. However, it does not apply to the conduct of other participants in ISDS such as counsel and experts.[9]

While the first three versions of the Code were limited in scope to treaty-based disputes, the fourth and fifth versions of the Code apply to all ISDS disputes regardless of whether they are based on

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[7] *Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its forty-third session,* A/CN.9/1124 (Vienna, 5–16 September 2022), paras 203-204, 279.

[8] UNCITRAL Secretariat, *Possible reform of investor-State dispute settlement (ISDS): Draft Codes of Conduct and Commentary*, A/CN.9/WG.III/WP.223 (23 November 2022).

[9] The IBA Guidelines on Party Representation in International Arbitration are inspired by the principle that party representatives should act with integrity and honesty and should not engage in activities designed to produce unnecessary delay or expense, including tactics aimed at obstructing the arbitration proceedings. As these guidelines are not binding, they are not legally enforceable standards of conduct for counsel in investor-State disputes.

treaties, foreign investment laws or contracts.[10] Further, Article 2 of the fifth draft Code leaves open the possibility for applying the Code to inter-State arbitrations involving foreign investment.[11]

Some core provisions of the Code follow the innovations found in the newer generation of investment chapters in comprehensive trade agreements such as the Canada-European Union Comprehensive Economic and Trade Agreement (CETA) and Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).[12] These include the principles of impartiality and independence and disclosure obligations. The inclusion of these key provisions and standards in the Code is not controversial as they are already the common rules and standards in international adjudication. However, the contents and scope of these provisions are subject to considerable controversy and need methodical elaboration. States and other stakeholders differ as to how to elaborate and enforce these standards and principles.

Further, the draft Code specifically addresses the issue of double hatting. Currently, no agreement exists on what this term conveys, and how to regulate adjudicators taking on dissimilar roles within the ISDS process. This issue has highlighted differences among State delegates and other stakeholders in the context of ISDS reform.

To this end, this chapter first reviews the principles of impartiality and independence of adjudicators from the perspective of the current ICSID framework, ICSID jurisprudence, and the draft Code. It then analyzes the double hatting practice in the context of the ICSID Convention. The chapter also examines the approach to double hatting in ICSID decisions and the draft Code. Finally, it investigates controversies surrounding the duty to disclose and the innovative approach adopted in the draft Code.

This chapter concludes that, while challenges against ICSID adjudicators have significantly increased over the past two decades, the existing ICSID framework lacks clarity on what is

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[10] *Draft Code of Conduct for Adjudicators in International Investment Disputes*, Version Four (July 2022), Article 1(1) and UNCITRAL Secretariat, *Possible reform of investor-State dispute settlement (ISDS): Draft Codes of Conduct and Commentary*, A/CN.9/WG.III/WP.223 (23 November 2022), draft Articles A1(a) and J1(a).

[11] Article 2 of the fifth draft Code provides that "[t]he Code may be applied in any other dispute resolution proceeding by agreement of the disputing parties."

[12] See also Jeffrey L. Dunoff and Chiara Giorgetti 'Introduction to the Symposium: A Focus on Ethics in International Courts and Tribunals' (2019) 113 AJIL Unbound 279-283.

expected from adjudicators in terms of impartiality and independence, and it does not provide for an effective review mechanism to sufficiently enforce these requirements. The Code would add more clarity as to the scope and contents of these standards and how they should be interpreted and enforced in the contemporary world. It demands more commitments from adjudicators and imposes heavy obligations on them to ensure their compliance with these core obligations.

II) Impartiality and Independence of Adjudicators

A) Article 14(1) of the ICSID Convention: Understanding the ICSID Framework

ICSID arbitrators are required to be independent and impartial. The purpose of these requirements is that "they protect parties against arbitrators being influenced by factors other than those related to the merits of the case".[13] The requirement that ICSID arbitrators shall be independent is included in Article 14(1) of the ICSID Convention. Article 14(1) provides that arbitrators

> "shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment".

1) The Requirement of "High Moral Character"

The requirement of "high moral character" is one of the basic qualities of an ICSID adjudicator. This wording was borrowed from Article 2 of the Statute of the ICJ.[14] The quality of high moral character is the basic requirement for any international judicial tenure,[15] and the cornerstone of confidence in an international adjudication system. The same attribute or similar concepts are also

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[13] *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify Arbitrator L. Yves Fortier (27 February 2012) para 55.

[14] 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*, vol II-2, (ICSID Publication 1968) 969. Article 2 of the ICJ Statute states: "The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law". The ICJ Statute in turn imported this expression from the Hague Conventions of 1899 and 1907 for the Pacific Settlement of International Disputes. Article 23 of the 1899 Hague Convention states that: "Within the three months following its ratification of the present Act, each Signatory Power shall select four persons at the most, of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of Arbitrators". Article 44 of the 1907 Hague Convention provides that: "Each Contracting Power selects four persons at the most, of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of Arbitrator".

[15] Daniel Terris and others, *The International Judge: An Introduction to the Men and Women who Decide the World's Cases* (Brandeis University Press 2007) 26.

used in the governing rules of other international courts and tribunals.[16] As some commentators point out, this standard has gained the status of a customary norm of PIL.[17]

The "high moral character" expression is both vague in meaning and broad in coverage. The word "moral" is defined as having a good conscience in conformity with recognized rules of correct conduct and the concept encompasses other terms such as ethical, righteous, and noble.[18] For Hume, virtue or moral character means "a quality of the mind agreeable to or approved by everyone who considers or contemplates it".[19] The wording used in Article 14(1) can be understood as referring to a character showing a high level of conviction that the individual will

[16] See Article 21 of the European Convention on Human Rights (ECHR) ("1. The 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"), Article 28 of the International Covenant on Civil and Political Rights ("The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience"), Article 4 of the Statutes of the Inter-American Court of Human Rights ("1. The Court shall consist of seven judges, nationals of the member states of the OAS, elected in an individual capacity 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 under the law of the State of which they are nationals or of the State that proposes them as candidates"), Article 2 of the Statute of the International Tribunal of the Law of the Sea (ITLOS) ("The Tribunal shall be composed of a body of 21 independent members, elected from among persons enjoying the highest reputation for fairness and integrity and of recognized competence in the field of the law of the sea"), Article 4 of the Statute of the African Court of Justice and Human Rights (ACJHR) ("The Court shall be composed of impartial and independent Judges elected from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence and experience in international law and /or, human rights law"), Protocol A/P.l/7/91 on the Community Court of Justice (CCJ) ("The Court shall be composed of independent judges selected and appointed by the Authority from nationals of the Member States who are persons of high moral character, and possess the qualification required in their respective countries for appointment to the highest judicial officers, or are jurisconsults of recognised competence in international law"), Article 36 of the Rome Statute of the International Criminal Court (ICC) ("3. (a) The judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices") and Article 13 of the Statute of the Special Court for Sierra Leone ("The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices").

[17] Mariano J. Aznar Gómez, 'Article 2' in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (2nd edn, OUP 2013) 285; Ruth Mackenzie and others, *Manual on International Courts and Tribunals* (OUP 2010) 280; Morten Bergsmo, 'Institutional History, Behaviour and Development' in Morten Bergsmo and others (eds), *Historical Origins of International Criminal Law*, vol 5 (Torkel Opsahl Academic EPublisher 2017) 30.

[18] See Bryan A. Garner, *Black's Law Dictionary* (9th edn, West Group 2009) 1100; Amy Blackwell, *The Essential Law Dictionary* (Sphinx Publishing 2008) 322; Daniel Oran, *Oran's Dictionary of the Law* (3rd edn, Delmar Cengage Learning 1999) 317; *Merriam-Webster's Dictionary of Synonyms* (Merriam-Webster 1984) 547.

[19] David Hume, *An Enquiry Concerning the Principles of Morals* (Open court Publishing Company 1907) 98.

act in the conduct of the arbitration process and in his or her decision-making in accordance with the recognized rules of conduct for ISDS practitioners.

Despite the above definition, the wording is completely puzzling and having a full comprehension of this concept is challenging, notably because its contents and scope vary in respect to different times and places with distinct cultures and different perceptions.[20] In particular, a large pool of diverse adjudicators complicates any methodical assessment and identification tools chosen to confirm the existence of a high moral character. Further, the ICSID Convention does not specify how to identify the existence of this quality and who must recognize this attribute. Some of these concerns were also shared during the drafting of Article 14(1) of the Convention.[21] Particularly, India viewed the expression purposeless and suggested its removal for the obvious reason that States are expected "to designate persons of integrity and honesty".[22] However, the majority of the delegates supported the inclusion of this requirement in the text.

On the contrary, due to the controversies surrounding this notion, the drafters of the Statute of the ITLOS used the wording "highest reputation for fairness and integrity" that is more precise than the expression of "high moral character".[23] The UN Convention on the Law of the Sea (UNCLOS) employed the same language for the qualifications of arbitrators who decide inter-States disputes.[24] The UNCLOS borrowed the phrase from the 1940 Convention between the United States of America and Norway for the Claims of Norway and the 1948 American Treaty on Pacific Settlement (Pact of Bogota).[25]

The WTO Dispute Settlement Understanding uses a phrase that is distinct from the expressions used in the ICSID Convention or UNCLOS. It provides that persons appointed to the Appellate

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[20] See *Handyside v. United Kingdom,* Application no. 5493/72, [1976] ECHR 5, Judgment (7 December 1976) para 49 (stating "it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals").

[21] *History of the ICSID Convention* vol II-2 (n 14) 728 and 970.

[22] Ibid 728.

[23] Shigeru Oda, *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea: A Drafting History and a Commentary* (Martinus Nijhoff 1987) 212.

[24] UNCLOS, Annex VII, Article 2.

[25] See Article X of the Convention between the United States of America and Norway for the Claims of Norway (1940) states that "[t]he Arbitrator, who shall be agreed upon by the two Governments, shall be a jurist of high reputation, well versed in international law, and shall be a national of neither Norway nor the United States of America". Article XVIII of the 1948 American Treaty on Pacific Settlement (Pact of Bogota) states that members of the panel of conciliators shall "enjoy the highest reputation for fairness, competence and integrity".

Body shall be "of recognized authority".[26] Some scholars understand this phrase to refer to persons possessing "professional ethics and responsibility, and a sense of what is proper and fair in appellate proceedings".[27] However, compared to the ICSID Convention and statutes of some other international courts and tribunals that include high standards of “high moral character” and “highest reputation for fairness and integrity”, the WTO Dispute Settlement Understanding imposes lower requirements for WTO adjudicators.[28] As Steger commented, "[t]he judicial features of the Appellate Body were not carefully thought out by the Uruguay Round negotiators, because they did not anticipate that the WTO dispute settlement system would be used as much as it has been by WTO members".[29]

Some commentators state that the term “high moral character” implies that adjudicators with such a character overcome any kind of strong pressure and temptation as they link their personal ethics and values with their tenure as adjudicators.[30] A former judge of the ICJ also commented that international adjudicators “must stand on their own merit as professional men of the law, and not as Englishmen, Frenchmen” and the high moral character requirement is “probably the equivalent of an unimpeachable conduct as a public figure”.[31]

In practice, the standard of “high moral character” in the ICSID Convention is neglected, particularly, as a delegate stated during the drafting of Article 14(1), this requirement is not realistic for the selection of a high number of adjudicators.[32] Claimant investors and respondent States offer little weight to the consideration of this standard when considering the appointment of

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[26] Article 17(3) of the WTO Dispute Settlement Understanding states: “The Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government”.

[27] Thomas Cottier and Petros Constantinos Mavroidis, *The Role of the Judge in International Trade Regulation: Experience and Lessons for the WTO* (University of Michigan Press 2009) 39.

[28] See also Rufus Yerxa and Bruce Wilson, *Key Issues in WTO Dispute Settlement: The First Ten Years* (CUP 2005) 65-66; Leïla Choukroune, *Judging the State in International Trade and Investment Law: Sovereignty Modern, the Law and the Economics* (Springer Singapore 2016) 14-20.

[29] Debra P. Steger, ‘The Founding of the Appellate Body’ in Gabrielle Marceau, *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System* (CUP 2015) 463.

[30] Mariano J. Aznar Gómez, ‘Article 2’ in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (2nd edn, Oxford University Press 2013) 284.

[31] Taslim Olawale Elias, ‘Does the International Court of Justice, as it is presently shaped, correspond to the requirements which follow from its functions as the central judicial body of the international community?’ in Max-Planck-Institut, *Judicial Settlement of International Disputes: International Court of Justice Other Courts and Tribunals Arbitration and Conciliation* (Springer 1974) 21-22.

[32] *History of the ICSID Convention*, vol II-2 (n 14) 970.

an ICSID adjudicator. This is mainly due to the higher economic and other interests involved in the appointment of an adjudicator. Further, given the complexities surrounding this expression, disputing parties will face serious challenges if they decide to methodically assess and verify this attribute. Additionally, the applicability of this standard is further challenged by the changing nature of the arbitrator occupation over the past few decades with a considerable proportion of the ISDS practitioners coming from private law practice where double-hatting is more common.

2) Standards of Impartiality and Independence

Article 14(1) also includes the standards of independence and impartiality. The requirement that arbitrators shall be impartial is not explicitly set forth in the English or French versions of the Convention. However, the Spanish version of subparagraph 1 explicitly states that arbitrators shall be impartial.[33] As all versions of the Convention are equally authentic and binding, it is widely agreed that the standard of impartiality is a mandatory requirement under the Convention.[34] Also, impartiality is an indistinguishable pair of independence and is considered an implicit requirement of independence.[35] Further, the concept of impartiality is embedded in the broader term "high moral character". These requirements apply to all ICSID arbitrators, whether appointed by disputing parties or the ICSID Chairman.

The enforcement of the independence and impartiality requirements under the ICSID arbitration framework can be triggered at the appointment stage, during the proceeding, or after the conclusion of the arbitration proceedings. As a primary tool to enforce their right to fair and impartial proceedings, a disputing party can challenge the independence or impartiality of an arbitrator as early as when a person is appointed or during the arbitration process.[36]

The terms independence and impartiality are two key words under the ICSID disqualification mechanism. These principles work jointly as a guarantee against an adjudicator's inability to decide the merits of the dispute in a fair, rational, and objective manner without the existence of

[33] The Spanish text states: "Las personas designadas para figurar en las Listas deberán gozar de amplia consideración moral, tener reconocida competencia en el campo del Derecho, del comercio, de la industria o de las finanzas e inspirar plena confianza en su imparcialidad de juicio."

[34] See *KS Invest GmbH and TLS Invest GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/25, Decision on Proposal to Disqualify Kaj Hober (15 May 2020) para 75, and the references cited therein.

[35] See Schreuer and others (n 2) 49.

[36] See Maria Nicole Cleis, *The Independence and Impartiality of ICSID Arbitrators: Current Case Law, Alternative Approaches, and Improvement Suggestions* (Brill Nijhoff 2017) 15.

extraneous forces.[37] Yet their precise meanings are a mystery surrounded by controversy,[38] and the notions have created more confusion than clarity.[39] However, most commentators agree that the term independence has an objective definition and generally refers to the freedom from external influences and lack of an actual relationship with one of the disputing parties or with a person who is closely connected or affiliated to one of the parties.[40]

The existence of an actual and identifiable relationship between an adjudicator and one of the parties or someone closely connected to a party may put the adjudicator's independence quality into question. However, it is difficult to answer what types of relationships between an adjudicator and a party or its counsel causes doubt as to the adjudicator's independence. Some commentators argue that the point at which an insignificant tie becomes significant is a definitive threshold. Connections between the adjudicator and a party's counsel only call the adjudicator's independence in question if the relationship meets a certain minimum threshold such as if there exist significant financial ties or their personal or professional relationship is more than a remote acquaintance or casual encounter.[41]

On the other hand, impartiality is a subjective notion and a state of mind that does not necessitate tangible relationships between the adjudicator and a disputing party.[42] Impartiality generally refers

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[37] See Gary B. Born, *International Arbitration: Law and Practice* (2nd edn, Wolters Kluswer 2012) 129; 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 2015) 51.

[38] Noah Rubins and Bernhard Lauterburg, 'Independence, Impartiality and Duty of Disclosure in Investment Arbitration' in Christina Knahr and others (eds), *Investment and Commercial Arbitration – Similarities and Divergences* (Eleven International Publishing 2010) 153.

[39] Aldo Berlinguer, 'Impartiality and Independence of Arbitrators in International Practice' (1995) 6(4) Am. Rev. Int'l Arb. 343.

[40] See David D. Caron and Lee M. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (OUP 2013) 213; August Reinisch and Christina Knahr, 'Conflict of Interest in International Investment Arbitration' in Anne Peters and Lukas Handschin (eds), *Conflict of Interest in Global, Public and Corporate Governance* (CUP 2012) 106; Christopher Kee, 'Judicial Approaches to Arbitrator Independence and Impartiality in International Commercial Arbitration' in Christina Knahr and others (eds), *Investment and Commercial Arbitration: Similarities and Divergences* (Eleven International Publishing 2010) 183; Berlinguer (n 39) 346; Lars Markert, 'Challenging Arbitrators in Investment Arbitration: The Challenging Search for Relevant Standards and Ethical Guidelines' (2010) 3 Contemp. Asia Arbitr. J. 243.

[41] See Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) para 4.77; Kee (n 40) 183–184; Schreuer and others (n 2) 512.

[42] See Caron and Caplan (n 40) 213; Clyde Croft and others, *A Guide to the UNCITRAL Arbitration Rules* (CUP 2013) 131.

to the absence of internal tendency and predisposition towards one disputing party.[43] As this concept is abstract and relates to a state of mind, it is difficult to assess and quantify.[44] In practice, the quality of impartiality is evaluated based on objective and tangible factors including factors that are used to assess the independence of an adjudicator.[45] These two concepts are often used interchangeably[46] and "and their true meaning is determined more in their application than in their phraseology".[47] As Cleis states, whether a relationship with a party infringes upon the impartiality quality of an adjudicator depends on how likely that relationship affects the adjudicator's free decision-making.[48] As a consequence, the concepts of independence and impartiality are somewhat interconnected.

Article 57 of the Convention sets forth the prerequisite for a challenge to an arbitrator. It states that:

> A party may propose to a … Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14.

Unlike the UNCITRAL Arbitration Rules, which consider an appearance of bias or justifiable doubts as to an adjudicator's impartiality as sufficient grounds for disqualification,[49] the Convention sets forth a higher bar for disqualification of ICSID adjudicators.[50] Although the Convention does not expressly limit the scope of the requirement of independence and impartiality, a successful disqualification is subject to a manifest lack of these qualities. In other words, the Convention requires proof of an actual bias for a disqualification request to be granted. Further, the Convention fails to clarify the meaning of these requirements and what qualifies a manifest dependence and partiality. The drafting history indicates that the meaning of this precondition was

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[43] See Blackaby and others (n 41) para 40.78.
[44] Cleis (n 36) 21.
[45] Croft and others (n 38) 131; Kee (n 40) 184.
[46] Tupman (n 2) 29.
[47] Catherine Rogers, *Ethics in International Arbitration* (OUP 2014) para 2.53.
[48] See Cleis (n 36) 21-22.
[49] See Caron and Caplan (n 36) 207-228; Fernando A. Tupa, 'Arbitrator Challenges in Investment Arbitration: Is an Overhaul Needed?' in Ian A. Laird and others (eds) *Investment Treaty Arbitration and International Law* (Juris 2012) 34-35.
[50] See Reinisch and Knahr (n 36) 123; Lucy Reed and others, *Guide to ICSID Arbitration* (2nd edn, Kluwer Law 2011) 115.

not discussed by the delegates, nor was an appropriate threshold for a disqualification challenge ever specified.[51]

Rule 9 of the Arbitration Rules requires that for a disqualification challenge to be admissible, it shall be made "promptly".[52] Disqualification challenges are decided by the arbitrators who are not challenged or by the ICSID Chairman if the unchallenged co-arbitrators are divided or the majority of arbitrators are subject to a disqualification request. The main criticism against this challenge mechanism is that it motivates ICSID adjudicators to raise the threshold for a successful challenge.[53] As Schefer argues, "in the small world of international arbitrators, disqualifying a fellow arbitrator on 'mere appearances' may not be well-regarded".[54]

In practice, ICSID tribunals and *ad hoc* committees have understood the term manifest as referring to exceptional circumstances. A well-established jurisprudence defines the term manifest in Article 57 of the ICSID Convention as "obvious" and "self-evident",[55] meaning that from the viewpoint of a reasonable and informed third person, the adjudicator evidently and obviously lacks these qualities. The term is interpreted as imposing a "relatively heavy burden of proof on the party

[51] See Cleis (n 36) 17.

[52] See Schreuer and others (n 2) 1200.

[53] Markert (n 40) 248–250; James D. Fry & Juan Ignacio Stampalija, 'Forged Independence and Impartiality: Conflicts of Interest of International Arbitrators in Investment Dispute' (2014) 30 Arb. Intl. 257–258.

[54] Krista Nadakavukaren Schefer, 'Judicial ethics in international economic law: what standards of independence and impartiality apply to arbitrators and panelists?' in Joanna Jemielniak and others (eds), *Establishing Judicial Authority in International Economic Law* (CUP 2016) 233.

[55] *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/23, Decision on Annulment (18 December 2018) para 74. See also *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Recommendation on the Proposal to Disqualify the Tribunal (4 March 2019) para 48 and Recommendation on the Second Proposal to Disqualify the Tribunal (6 July 2020) para 94; *Elitech B.V. and Razvoj Golf D.O.O. v. Republic of Croatia*, ICSID Case No. ARB/17/32, Decision on the Proposal to Disqualify Professor Brigitte Stern (23 April 2018) para 22; *Raiffeisen Bank International AG and Raiffeisenbank Austria d.d. v. Republic of Croatia*, ICSID Case No. ARB/17/34, Decision on the Proposal to Disqualify Stanimir Alexandrov (17 May 2018) para 79; *BSG Resources Limited, BSG Resources (Guinea) Limited and BSG Resources (Guinea) SÀRL v. Republic of Guinea*, ICSID Case No. ARB/14/22, Decision on the Proposal to Disqualify All Members of the Arbitral Tribunal (28 December 2016) para 53; *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña (13 December 2013) para 68; *Abaclat and others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on the Proposal to Disqualify a Majority of the Tribunal (4 February 2014) para 71; *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decision on the Proposal to Disqualify José Maria Alonso (12 November 2013) para 61; *Repsol, S.A. and Repsol Butano, S.A. v. Argentine Republic*, ICSID Case No. ARB/12/38, Decision on the Proposal for Disqualification of Arbitrators Francisco Orrego Vicuña and Claus von Wobeser, (13 December 2013) para 73; *UUniversal Compression International Holdings, S.L.U. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/9, Decision on the Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Santiago Tawil (20 May 2011) para 71.

making the proposal".[56] In this interpretation, the party making the disqualification request is required to prove by objective evidence that the adjudicator lacks these qualities, such that a simple appearance of bias is not sufficient to disqualify an adjudicator. Therefore, under the ICSID Convention, a mere appearance of partiality or dependence such as a prior connection between an arbitrator and a disputing party as a result of prior appointment as arbitrator or counsel is not considered a manifest lack of these qualities.[57]

Under article 52(1)(d) of the Convention, lack of independence or impartiality can be invoked to challenge an award.[58] Any sign of dependence or partiality constitutes a "serious departure from a fundamental rule of procedure" leading to the annulment of an award.[59] However, the enforcement of the requirement of independence and impartiality under article 52(1)(d) is a last resort and is subject to strict requirements.[60]

B) ICSID Jurisprudence on the Applicable Standard

The ICSID jurisprudence has provided inconsistent interpretations of the disqualification threshold.[61] In the first disqualification request, *Amco Asia* (from 1982), the unchallenged arbitrators required that Indonesia provide strict proof of actual bias for its challenge to succeed. In view of the unchallenged arbitrators in that case, Article 57 of the Convention required both proof of the facts indicating lack of these qualities, and also proof of the arbitrator's actual lack of

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[56] Schreuer and others (n 2) 1201.

[57] See Pablo Agustin Alonso, 'Impartiality and Independence of Arbitrators in International Arbitration: Issue Conflicts as Grounds for Disqualification with Special Regard to ICSID Arbitrations' (2016) 20(1) Max Planck Yearbook of United Nations Law 535-601.

[58] See Gary B. Born, *International Arbitration: Law and Practice* (2nd edn, Wolters Kluswer 2012) 129; 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 2015) 51.

[59] Berlinguer (n 39) 343.

[60] See David D. Caron and Lee M. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (OUP 2013) 213; August Reinisch and Christina Knahr, 'Conflict of Interest in International Investment Arbitration' in Anne Peters and Lukas Handschin (eds), *Conflict of Interest in Global, Public and Corporate Governance* (CUP 2012) 106; Christopher Kee, 'Judicial Approaches to Arbitrator Independence and Impartiality in International Commercial Arbitration' in Christina Knahr and others (eds), *Investment and Commercial Arbitration: Similarities and Divergences* (Eleven International Publishing 2010) 183; Berlinguer (n 39) 346; Lars Markert, 'Challenging Arbitrators in Investment Arbitration: The Challenging Search for Relevant Standards and Ethical Guidelines' (2010) 3 Contemp. Asia Arbitr. J. 243.

[61] See James Crawford, 'Challenges to Arbitrators in ICSID Arbitration' in David D. Caron and others (eds), *Practising Virtue: Inside International Arbitration* (OUP 2015) 597-603.

independence in a 'manifest' or 'highly probable' manner.[62] They found that the arbitrator's relationships with the claimant and its counsel, regardless of their nature and extent, were not a basis for disqualification as such relationships were generally presumed in a party-appointment mechanism.[63]

In the second disqualification request in the *Suez* case, the unchallenged arbitrators held that the language of Article 57 requires the challenging party to prove a manifest lack of these qualities, not a mere appearance of them. The *Suez* tribunal held that for a challenge request to succeed, it is required "to establish facts that make it obvious and highly probable, not just possible, that [the arbitrator] is a person who may not be relied upon to exercise independent and impartial judgment".[64] Similarly, the unchallenged arbitrators in *Electrabel* concluded that "the test is high for a complainant to establish under Article 57 an arbitrator's "manifest lack" in the quality required to exercise independent judgment" and a disqualification challenge should be "self-evident, clear, plain on its face, [and] certain".[65]

In *PIP*, the ICSID Chairman followed the *Amco Asia* standard requiring the challenging party to establish the facts that underlaid the challenge and to prove a manifest lack of impartiality of the claimant's appointee based on these facts.[66] In *Tidewater*, the unchallenged arbitrators stated that the standard under Article 57 "differs from the 'justifiable doubts' test".[67]

In *OPIC*, the unchallenged arbitrators stated that there:

> "exists a relatively high burden for those seeking to challenge ICSID arbitrators. The Convention's requirement that the lack of independence be "manifest" necessitates that this

[62] Tupman (n 2) 45; Luttrell (n 2) 225.
[63] Tupman (n 2) 45.
[64] *Suez, Sociedad General de Aguas de Barcelona S.A. v Argentina*, ICSID Cases Nos ARB/03/17 and ARB/03/19, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal (12 May 2008) para 29.
[65] *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on the Claimant's Proposal to Disqualify a Member of the Tribunal (25 February 2008) paras 35 and 42.
[66] *Participaciones Inversiones Portuarias SARL v. Gabonese Republic*, ICSID Case No. ARB/08/17, Decision on the Proposal to Disqualify an Arbitrator (12 November 2009) paras 22-23.
[67] *Tidewater Investment srl and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Claimants' Proposal to Disqualify Professor Brigitte Stern (23 December 2010) para 43.

> lack is clearly and objectively established. Accordingly, it is not sufficient to show an appearance of a lack of impartiality and independence".[68]

The disqualification decision in *Vivendi* was the first to depart from *Amco Asia* by applying a more lenient threshold towards adjudicator challenges. In *Vivendi*, the unchallenged members of the *ad hoc* committee strongly criticized the requirement of strict proof adopted in *Amco Asia*.[69] The unchallenged committee members applied the reasonable doubts test. In their view, for a challenge to be accepted, the circumstances of the case must raise reasonable doubts about the impartiality quality.[70] The reasonable doubts test required the challenging party to initially prove serious circumstances that are enough to put the independence and impartiality of a challenged adjudicator into question. In this approach, an inference of manifest bias is sufficient for a challenge to be upheld.[71] Under this test, the challenging party is not required to establish actual bias.[72] If the challenging party establishes the factual basis of its challenge, then reasonable deductions based on these facts are allowed. In other words, similar to the reasonable test adopted in the UNCITRAL Arbitration Rules, if the established circumstances of the challenge raise reasonable doubts about the independence and impartiality of the adjudicator or a real risk of bias, then allowing the disqualification request is justified.[73]

In *Interocean*, the ICSID Chairman concluded that

> 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.
>
> The legal standard applied to a proposal to disqualify an arbitrator is an "objective standard based on a reasonable evaluation of the evidence by a third party". As a consequence, the

[68] *OPIC Karimum Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/14, Decision on the Proposal to Disqualify Professor Philippe Sands (5 May 2011) para 45.
[69] *Compañia de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (Vivendi)*, ICSID Case No. ARB/97/3, Decision on Challenge to the President of the Committee (24 September 2001) para 22.
[70] Ibid para 25.
[71] See *Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Claimant's Proposal to Disqualify Arbitrator (19 December 2002) para 21.
[72] See Cleis (n 36) 40-41.
[73] See Schreuer and others (n 2) 1204-1205.

subjective belief of the party requesting the disqualification is not enough to satisfy the requirements of the Convention.[74]

In *Elitech*, the Chairman following the interpretation provided in *Interocean*, elaborated that to uphold a disqualification request "the challenging party must establish the presence of common issues sufficient to give rise, objectively, to the appearance of dependence or bias".[75] In *Raiffeisen*, the Chairman concluded that to establish the appearance of dependence or bias, all the relevant facts of the case shall be considered.[76] Analyzing the *Vivendi*, *SGS*, and *Tidewater* disqualification decisions, the Chairman agreed with the disputing parties that the test requires a reasonable evaluation of evidence by a third party.[77]

The authority that decides the issue of independence and impartiality assumes the role of a third-party observer. In disqualification challenges in ICSID, the unchallenged adjudicators are bestowed with the authority to assess the challenge. If the unchallenged members are not able to decide the matter or the majority or all members are challenged, then the ICSID Chairman reviews the challenge from a perspective of a reasonable and informed third party. In situations where the independence and impartiality of an arbitrator are raised as a ground for annulment, "[t]he role of a third-party observer...is performed by annulment committees".[78]

C) Independence and Impartiality in the Draft Code of Conduct

Article 2 of the draft Code states that the Code would apply to both adjudicators and candidates for arbitral appointments "from the date they are first contacted concerning a possible appointment." Article 3 of the draft Code sets out the requirements for independence and impartiality. Article 3(1) of the version two of the draft Code required that adjudicators should be

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[74] *Interocean Oil Development Company and Interocean Oil Exploration Company v. Federal Republic of Nigeria*, ICSID Case No. ARB/13/20, Decision on the Proposal to Disqualify All Members of the Tribunal (3 October 2017) paras 68-69.

[75] *Elitech B.V. and Razvoj Golf D.O.O. v. Republic of Croatia*, ICSID Case No. ARB/17/32, Decision on the Proposal to Disqualify Prof. Brigitte Stern (23 March 2018) paras 45 and 52. See also *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Recommendation on the Proposal to Disqualify the Tribunal (4 March 2019) para 45.

[76] *Raiffeisen Bank International AG and Raiffeisenbank Austria d.d. v. Republic of Croatia*, ICSID Case No. ARB/17/34, Decision on the Proposal to Disqualify Stanimir Alexandrov (17 May 2018) para 83.

[77] Ibid paras 37, 84, 88-89, 92, 94-95.

[78] *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Decision on annulment (11 June 2020) para 219.

"be independent and impartial". It further required that adjudicators shall "take reasonable steps to avoid bias, conflict of interest, impropriety, or apprehension of bias". However, the latter part of this provision was removed from Article 3(1) of the version three of the draft Code to make it clear that there is only one core requirement.[79]

To ensure adjudicators' independence and impartiality, paragraph 2 of Article 3 enumerates specific behaviours that violate the impartiality and independence requirement.[80] Paragraph 2 follows the language adopted in codes of conduct under recent treaties[81] and contains any relations that may impair an adjudicator's independence and impartiality. The list includes financial, professional, familial, and social relations. Some comments raised concerns that the broad language of paragraph 2 may open the floodgate of vexatious challenges and therefore, it should be clarified that paragraph two does not intend to broaden the requirements for independence and impartiality under paragraph 1.[82]

The Code clarifies that the criteria listed in Article 3(2) are not intended to be independent or stand-alone obligations, as this paragraph simply illustrates what might be a violation of this one core obligation.[83] Pursuant to Article 11 of the draft Code, a party is allowed to challenge an adjudicator for violating the requirements of Article 3.

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[79] *Draft Code of Conduct for Adjudicators in International Investment Disputes, Version Three* (n 6), Comments by State/Commenter as of 3 November 2021, paras 44-45.

[80] Draft Article 3(2) provides that this requirement "encompasses the obligation not to:

(a) [be influenced by self-interest, fear of criticism, outside pressure, political considerations, or public clamor;]
(b) be influenced by loyalty, or by loyalty to a disputing party, a non-disputing party, or a non-disputing Treaty Party in the IID;
(c) take instruction from any organization, government or individual regarding the matters addressed in the IID;
(d) allow any past or present financial, business, professional or personal relationship to influence their conduct or judgement;
(e) use their position to advance any personal or private interest; or
(f) assume an obligation or accept a benefit that could interfere with the performance of their duties".

[81] See for example, CETA, Code of Conduct, Articles 11-15.

[82] *Draft Code of Conduct for Adjudicators in International Investment Disputes, Version Three* (n 6), Comments by State/Commenter as of 3 November 2021, para 8.

[83] Ibid, para 44. See also *Draft Code of Conduct for Adjudicators in International Investment Disputes, Version Three* (n 6) Comments by Article/Topic as of 3 November 2021, 5-6.

The draft Article proposes "one core obligation of independence and impartiality".[84] However, this does not mean that the relationship between these two concepts is not discernible under the draft Code. Agreeing with the widespread understanding of these qualities as illustrated in the *Suez* disqualification decision,[85] the draft Code sees these two terms "as distinct, but closely related, concepts".[86]

In their comments on the current draft Article 3 (draft Article 4 in the second version of the draft Code), the EU and its member States suggested that the requirements apply to both candidates for appointments and adjudicators. Further, they suggested the addition of the standard of "appearance" to draft Article 3; not only shall candidates and adjudicators be independent and impartial, they also "shall appear" to possess these qualities.[87] In its comments on version two of the draft Code, India suggested that the Code include the "appearance" standard to be used to test the independence and impartiality of adjudicators, particularly in light of the different tests adopted under ICSID and UNCITRAL disqualification mechanisms.[88] Canada and Switzerland recommended that Article 3(1) incorporate the "appearance of bias" test.[89] The US commented that the provision should include "the appearance of bias, impropriety, or a lack of independence or impartiality".[90]

On the contrary, in his comments on the draft Article 3, Georges Affaki argued that the term "appearance of bias" should be removed as it is too subjective and may cause potential abusive

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[84] *Draft Code of Conduct for Adjudicators in International Investment Disputes, Version Three* (n 6) Article 3, para 45. See also *Canepa Green Energy Opportunities I, S.á r.l. and Canepa Green Energy Opportunities II, S.á r.l. v. Kingdom of Spain*, ICSID Case No. ARB/19/4, Decision on the Proposal for Disqualification of Arbitrator Peter Rees (19 November 2019) para 51

[85] *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on the Proposal for the Disqualification of Gabrielle Kaufmann-Kohler (22 October 2007) para 29 (The concepts of independence and impartiality, though related, are often seen as distinct, although the precise nature of the distinction is not always easy to grasp).

[86] *Draft Code of Conduct for Adjudicators in International Investment Disputes, Version Three* (n 6) Article 3, para 46.

[87] *Comments by the European Union and its Member States on version two of the draft Code of Conduct for Adjudicators in International Investment Disputes prepared by the Secretariats of ICSID and UNCITRAL, Version Two of the Draft Code* (4 July 2021) para 10.

[88] *Draft Code of Conduct for Adjudicators in International Investment Disputes, Version Two* (n 6) Comments by Article/Topic as of 3 September 2021, 66-67.

[89] Ibid 57.

[90] Ibid 70-71.

challenges.[91] Affaki also cautioned that the Code should not impose broad, vague, and disproportionate obligations on adjudicators as this makes the arbitration mechanism excessively lengthy and expensive and may amount to manipulative challenges.[92]

Draft Article 3 of the third version of the Code did not apply assistants to adjudicators. Draft Article 1 of the version three defined assistant as "a person working under the direction and control of an Adjudicator to assist with case-specific tasks, as agreed with the disputing parties". Some comments proposed that the obligations in draft Article 3 should also be applicable to assistants. However, it was also suggested that a decision on the application of any provision to assistants should wait until the code is finalized.[93] This is due to the differences between adjudicators and their assistants; assistants are not decision-makers; are not authorized to perform core duties of adjudicators; are not appointed to a dispute; act under the instructions from adjudicators; are not directly challenged under ISDS challenge mechanisms, and their involvement can be terminated by adjudicators.[94]

While the duties and obligations of arbitrator assistants were not fully clear in the previous versions of the Code, the fifth draft Code for Arbitrators includes a new article (i.e., Article 10) addressing the obligations of arbitrator assistants. Under this Article, the arbitrator is required to ensure that their assistants are aware of, and comply with, their duties under the Code. No such provision is introduced for assistants to judges likely because this latter group would be employees of the multilateral investment court.[95]

III) Double-Hatting: The Most Problematic Issue

ICSID adjudicators have increasingly been challenged due to appearance or actual conflict of interest. The likelihood of conflict of interests in ISDS cases is greater than the possibility of issue conflict in any other international dispute settlement mechanism given the complex relationships

[91] Ibid 72-73.
[92] Ibid 73.
[93] Ibid Article 2, para 28.
[94] Ibid Article 2, para 30.

[95] UNCITRAL Secretariat, *Possible reform of investor-State dispute settlement (ISDS): Draft Codes of Conduct and Commentary*, A/CN.9/WG.III/WP.223 (23 November 2022), para 105.

between lawyers and scholars and other participants in ISDS,[96] the growing number of ISDS disputes and the limited number of ISDS standards and principles that are often subject to interpretation. Further, governing regulations are not comprehensive, and no consensus exists on how to address challenges arising from issue conflict.

The most problematic issue that gives rise to the potential conflict of interests is double-hatting. This part will assess the challenges surrounding this practice. It outlines the applicable standards in determining potential conflict of interest, reviews ICSID jurisprudence on this issue, and examines proposed reforms within the ICSID framework.

A) Overlapping Roles in ICSID

Double hatting is a widespread practice in ISDS, particularly in ICSID cases. This practice and its effects on ISDS procedures and the outcome of disputes have been the subject of heated discussions among commentators and State delegates over the past few years. Currently, there is no agreement on the definition of this concept. However, in the context of investment arbitrations, it can be said that the term refers to a situation where an individual assumes two or more dissimilar roles in different ISDS cases at the same time or within a short period of time.[97] Switching roles often include acting as arbitrator, counsel, and legal expert in different ISDS proceedings.

The main issue of concern is that switching roles in different ISDS proceedings may create potential or actual conflict of interests,[98] or what some scholars call "'forged' independence and impartiality".[99] This criticism is particularly due to the fact that in ISDS disputes the same or similar legal issues are often subject of dispute and interpretation and such a practice incentivizes adjudicators to rely on factors having no relation to the merits of the case. As stated by the tribunal in *Mabco Constructions*, a double-hatting adjudicator "may be tempted to take positions in his or

[96] As the *ad hoc* committee in *Eiser* stated, "it is obvious and it is to be expected that the more "connections" there are between them, across cases and, particularly, in different roles, the more chances there are that these may give rise to conflicts". *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Decision on annulment (11 June 2020) para 217.

[97] See ICSID Secretariat, *Code of Conduct – Background Papers: Double Hatting* [date unspecified], para 1.

[98] UNCITRAL Secretariat, *Possible reform of investor-State dispute settlement (ISDS): Ensuring independence and impartiality on the part of arbitrators and decision makers in ISDS*, UN Doc. A/CN.9/WG.III/WP.151 (30 August 2018) para 25. See also 'Interview with Brigitte Stern, Emeritus Professor of International Law at the University of Paris I, Panthéon-Sorbonne' (2017) Intl Com. Arb. Rev. 1(14) 96.

[99] Fry and Stampalija (n 53) 191.

her capacity as arbitrator that are designed to advance his or her case as advocate".[100] Further, double-hatting may grant an adjudicator access to some information, including confidential documents, that their co-adjudicators or other participants in the disputes they are involved in do not ordinarily have.

Addressing double-hatting is a complex issue, particularly in view of divergent opinions as to how to regulate this practice and if a complete ban is proportionate. Some support a complete ban on double-hatting.[101] However, others believe that imposing a total ban causes challenges in terms of diversity.[102] Serving as counsel through connections to a small selection of "super-elite law firms"[103] is often the first step for would-be arbitrators as acting as counsel allows them to gain experience, credibility, and reputation that is necessary for arbitral appointments.[104] As Lie states, "law firms have gained a central position in the ISDS network".[105] Double hatting allows for new entrants to be added to the pool of arbitrators. Additionally, it is argued that economic reasons are another driving factor for this practice; except for some arbitrators, arbitration tenure is not a full-time position and individuals cannot cease their practice as counsel without guaranteed future arbitral appointments. [106]

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[100] *Mabco Constructions v. Republic of Kosovo*, ICSID Case No. ARB/17/25, Decision on Jurisdiction (30 October 2020) para 492. See also Philippe Sands, 'Conflict and Conflicts in Investment Treaty Arbitration: Ethical Standards for Counsel' in Chester Brown (ed), *Evolution in Investment Treaty Law and Arbitration* (2011) 23 (Speaking from his personal experience, Sands stated that "it is possible to recognise the difficulty that may arise if a lawyer spends a morning drafting an arbitral award that addresses a contentious legal issue, and then in the afternoon as counsel in a different case drafts a pleading making arguments on the same legal issue. Can that lawyer, while acting as arbitrator, cut herself off entirely from her simultaneous role as counsel? The issue is not whether she thinks it can be done, but whether a reasonable observer would so conclude. Speaking for myself, I find it difficult to imagine that I could do so without, in some way, potentially being seen to run the risk of allowing myself to be influenced, however subconsciously. That said, a number of my closest colleagues and friends take a different view").

[101] See Céline Lévesque, 'Canada's Pro-Ban Stance on Double-Hatting: Playing the Long Game in ISDS Reform?' (2021) 58 Can.Y.B.I.L. 382-407.

[102] See John Crook, 'Dual Hats and Arbitrator Diversity: Goals in Tension' (2019) 113 AJIL Unbound 284-289.

[103] See also Susan Segal-Horn and Alison Dean, 'The rise of super-elite law firms: towards global strategies' (2011) 31(2) Serv. Ind. J. 195-213.

[104] See also Thomas Schultz and Robert Kovacs, 'The Rise of a Third Generation of Arbitrators? Fifteen Years after Dezalay and Garth' (2012) 28(2) Arb. Intl. 161-171 (The study showed that a lawyer's association with law firms is one of the strong criteria for nomination as arbitrator and becoming successful arbitrator).

[105] Runar Hilleren Lie, 'The Influence of Law Firms in Investment Arbitration' in Daniel Behn and others, *The Legitimacy of Investment Arbitration* (CUP 2022) 125.

[106] See Malcolm Langford and Daniel Behn, *ESIL Reflection: The Ethics and Empirics of Double Hatting* 6 ESIL Reflections (2017); *Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session* (New York, 23–27 April 2018), UN Doc. A/CN.9/935 (14 May 2018) para 81. See also Sands (n

Double-hatting in ICSD cases (either simultaneously or consecutively) has been a prevalent practice among ICSID adjudicators. The empirical data reviewed in Chapter 3 indicate that more than 70 percent of all ICSID adjudicators examined (i.e., 314 out of 435) were associated with law firms. During the 1970s and 2010s, roughly one-third of all ICSID adjudicators appeared, concurrently or not, as counsel before ICSID arbitration tribunals or *ad hoc* committees. This practice is even more prevalent amongst those who are the most-frequent arbitrators (that is, those who sat at 10 or more ICSID tribunals). Indeed, roughly half of the most frequent arbitrators (i.e., 24 out of 50) worked as counsel, simultaneously or not, in ICSID arbitration disputes. Similarly, the prevalence of this practice amongst those who are frequently appointed to *ad hoc* committees (that is, those who participated in five or more annulment cases at ICSID) was higher than the average practice of the total ICSID adjudicators. The data show that approximately two-fifths of the most frequent ICSID committee members (i.e., eight out of 21) acted as counsel in ICSID disputes.[107]

The ICSID Convention and Arbitration Rules do not expressly allow or prohibit double hatting. However, as discussed before, both the Convention and Arbitration Rules require independence and impartiality from adjudicators. Thus, within the ICSID framework, controversies arising from double-hatting activities are primarily assessed through disqualification or annulment mechanisms.

B) Double-hatting in ICSID Jurisprudence

ICSID decisions limit the definition of double hatting to a situation where the assumption of two or more roles is simultaneous. The tribunal in *Mabco Constructions* stated that "[t]he term "double-hatting" is customarily used to denote the situation in which an individual sitting as arbitrator in one case is acting at the same time as advocate in another case".[108]

In practice, ICSID decisions have generally adopted a favourable attitude towards double hatting. ICSID jurisprudence has rejected challenges that are based on the fact that the challenged

100) 40 (stating that this argument is not persuasive, "in the sense that it might be seen by some as giving greater weight to economic interests than to an issue of principle").

[107] It should be noted that the above data exclude acting as counsel in other ISDS disputes.

[108] See *Mabco Constructions v. Republic of Kosovo*, ICSID Case No. ARB/17/25, Decision on Jurisdiction (30 October 2020) para 492.

adjudicator performed different services in concurrent, but unrelated ISDS cases unless there exist specific facts that show that the challenged adjudicator is influenced by their non-arbitrator position.

In *Suez,* the co-arbitrators opined that ISDS adjudicators live on the same planet and some interactions between adjudicators and other participants in ISDS disputes are inevitable.[109] In *SGS*, the unchallenged arbitrators stated that a suggestion that the mere performance of service in different roles in the ISDS case gives rise to lack of the qualities required under Article 14(1) of the ICSID Convention "is simply a supposition, a speculation merely" and "[it] is widely accepted that [an overlap between the arbitrator and litigator/advisor roles] is not, by itself, sufficient ground for disqualifying an arbitrator. *Something more* must be shown if a challenge is to succeed".[110] (Emphasis added)

In *Saint-Gobain*, an arbitrator was challenged primarily because he was an employee and advocate for a third-party government and the challenged arbitrator had an interest that certain issues were decided in a way that is favorable to his employer. The unchallenged arbitrators held that, absent any specific facts that indicate that the challenged arbitrator cannot professionally distance himself from the cases in which he acted as counsel, the assumption of non-political employment did not give rise to issue conflict.[111] They stated that "[i]t is at the core of the job description of legal counsel—whether acting in private practice, in-house for a company, or in government—that they present the views which are favorable to their instructor and highlight the advantageous facts of their instructor's case. The fact that a lawyer has taken a certain stance in the past does not necessarily mean that he will take the same stance in a future case".[112]

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[109] *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. The Argentine Republic,* ICSID Case No. ARB/03/17, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal (12 May 2008) para 32 (In their view, "the fact of an alleged connection between a party and an arbitrator in and of itself is not sufficient to establish a fact that would establish a manifest lack of that arbitrator's impartiality and independence. Arbitrators are not disembodied spirits dwelling on Mars, who descend to earth to arbitrate a case and then immediately return to their Martian retreat to await inertly the call to arbitrate another. Like other professionals living and working in the world, arbitrators have a variety of complex connections with all sorts of persons and institutions").

[110] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Claimant's Proposal to Disqualify Arbitrator J. Christopher Thomas (19 December 2002) para 25.

[111] *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/12/13, Decision on Claimant's Proposal to Disqualify Mr. Bottini from the Tribunal under Article 57 of the ICSID Convention (27 February 2013) paras 77-78 and 81.

[112] Ibid paras 80.

Additionally, in view of ICSID decisions, the fact that a limited number of legal standards and principles are often subject of interpretation in concurrent but unrelated arbitrations does not create issue conflict. In *KS Invest*, the challenging party argued that, although the two arbitrations in which the challenged arbitrator assumed dissimilar roles were unrelated, the assumption of different roles gave rise to a conflict of interest as the same treaty provisions that required interpretation were subject to controversy in both disputes. The ICSID Chairman held that working as arbitrator and counsel in unrelated cases with different parties and different disputed measures is not sufficient evidence that there exists conflict of interests.[113]

In spite of the above jurisprudence, the *ad hoc* committee in *Eiser* has recently advised caution to adjudicators who accept different services in ISDS disputes. The *ad hoc* committee stated that ICSID provisions governing the conduct of adjudicators "cannot be construed narrowly in favor of the arbitrator" and warned that wearing different hats in different ISDS cases, albeit between different parties, *inherently* includes the risk of issue conflict.[114]

However, it is difficult to reconcile the reasoning of the *ad hoc* committee in *Eiser* with that of the PCA's Secretary General, who acted in *Tethyan Copper* as the advisory authority for disqualification purposes.[115] The *Eiser* and *Tethyan Copper* decisions reached different conclusions while reviewing challenges against the same adjudicator with almost similar factual circumstances at controversy.

The challenged adjudicator in *Eiser*, while sitting as arbitrator in that case, was concurrently acting as counsel in another ISDS case with close cooperation with a specified quantum firm and damages expert.[116] The *ad hoc* committee highlighted the simultaneous nature of the challenged arbitrator's service and cooperation with the quantum firm as evidence of conflicts.[117] The *Eiser* committee relied on the concurrent nature of double hatting to support the conclusion that a conflict existed.

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[113] *KS Invest GmbH and TLS Invest GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/25, Decision on Proposal to Disqualify Kaj Hober (15 May 2020) paras 25-28 and 81-84.

[114] *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Decision on annulment (11 June 2020) para 223 (Stating that "the risks and possibilities of conflict of interest, inherent in double-hatting, dictate caution").

[115] The factual matrix common between the *Eiser* and *Tethyan Copper* disputes are explained in the second part of the chapter two under "vi) Relationships between the arbitrator and/or his or her law firm and quantum experts".

[116] *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Decision on annulment (11 June 2020) para 216.

[117] Ibid.

The committee differentiated between the challenged arbitrator's relationships with the quantum firm in *Eiser* and the engagement of the same arbitrator with the quantum expert group in *Tethyan Copper*.[118] The committee stated that, unlike the circumstances in *Eiser*, the arbitrator's relationship with the quantum firm in *Tethyan Copper* was not concurrent.[119]

As the description of the reasoning of PCA's Secretary General as cited in the *Eiser* annulment decision indicates, it appears that the *Eiser* annulment committee misunderstood that the challenged arbitrator's services in *Tethyan Copper* and another ISDS case were also concurrent.[120]

Contrary to the view adopted in *Eiser*, the PCA's Secretary General in *Tethyan Copper* reasoned favourably that "concurrent service as an arbitrator and as counsel in an unrelated matter in which the same expert has been engaged does not automatically result in a conflict of interest warranting disqualification under the ICSID Convention".[121] He added that the challenging party "has not shown that the relationship between [the challenged arbitrator] and [the quantum firm] goes beyond a normal working relationship as is common between counsel and valuation experts involved in international arbitration cases" and that "such a working relationship would [not] lead to a lack of the required qualities of an arbitrator".[122]

However, the PCA's Secretary General's analysis of the circumstances in *Tethyan Copper* adds to more confusion to our understanding of ICSID jurisprudence on double-hatting since, although recommending dismissal of the disqualification challenge, he admitted that the circumstances in that case "may, in principle, give rise to an issue conflict. As a general matter, it cannot be ruled out that the concurrent service of an arbitrator as counsel in another pending arbitration, in which

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[118] *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/01, Opinion Pursuant to the Request by ICSID dated July 28, 2017 on the Respondent's Proposal for the Disqualification of Dr. Stanimir Alexandrov dated July 7, 2017 (31 August 2017) [not public].

[119] *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Decision on annulment (11 June 2020) paras 213 and 216.

[120] Ibid paras 213-214, 216, 218. See also *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Application Pursuant to Article 49(2) of the ICSID Convention (26 July 2020).

[121] *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/01, Opinion Pursuant to the Request by ICSID dated July 28, 2017 on the Respondent's Proposal for the Disqualification of Dr. Stanimir Alexandrov dated July 7, 2017 (31 August 2017) [not public] para 120, cited in *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Decision on annulment (11 June 2020) para 80.

[122] Ibid para 100 cited in Eiser *Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Decision on annulment (11 June 2020) para 210.

the damages expert of the party that he represents has submitted a similar and "innovative" damage valuation method, may prevent that arbitrator from evaluating this method with an open mind".[123]

C) Limits on Double-hatting: A Review of Proposed Reforms

For reform purposes, "double hatting is probably the most complex issue presently discussed in the Code, and delegates have yet to agree on a consistent policy to address it".[124] Imposing restrictions on double-hatting in ICSID and ISDS proceedings has both advantages and disadvantages. Because of divergent views, the third version of Article 4 of the draft Code was not able to incorporate a collective approach of delegates on restrictions on double-hatting.

Version two of Article 4 of the version three of draft Code (the same Article in the version five of the draft Code) suggested that adjudicators shall not act concurrently as counsel or witness in another ISDS case unless the disputing parties agree otherwise. Draft version two also suggested the possibility that the prohibition of double hatting be limited to a situation where "the same factual background and at least one of the same parties or their subsidiary, affiliate or parent entity" are involved.

Version three of this provision offered three main approaches for future drafts of the Code:

a) Complete prohibition: This option supports an absolute prohibition on double-hatting such that no adjudicator shall concurrently act as counsel or expert witness in another ISDS case unless the disputing parties agree otherwise. Version three of the provision also includes the possibility of a greater extension of the full prohibition such that adjudicators are prohibited to act as counsel or expert witness in both ISDS and non-ISDS related cases, the subject of which is the application or interpretation of an investment treaty or the same investment treaty.

b) Prohibition of acting in related arbitrations: The draft provision also suggests a modified prohibition, on the basis of which, unless it is agreed otherwise, no adjudicator is permitted to act simultaneously as counsel or expert witness in another ISDS that involves: i) the

[123] Ibid para 141 cited in *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Decision on annulment (11 June 2020) para 213.
[124] Chiara Giorgett, 'The Draft Code of Conduct for Adjudicators in Investor–State Dispute Settlement: A Lowhanging Fruit in the ISDS Reform Process' (2021) J. Int. Dispute Settl. 14.

same disputed measures; ii) the same legal issues; iii) the disputing parties or any of their related or affiliated entities; and iv) the same treaty. The draft provision also includes the possibility of extended modified restrictions that also covers the prohibition against acting in any non-ISDS proceedings that meet the above requirements.

c) Full disclosure requirement: The draft also proposes the full disclosure alternative with the option for disputing parties to challenge the adjudicator. In this alternative, adjudicators shall fully disclose their concurrent engagement as counsel, expert witness, or in any other role in a dispute that involves the same or related parties, the same measures, or the same legal issues.

Comments received on versions two and three of the draft provision on double-hatting indicate that the majority of State delegates suggest some form of complete or restricted ban on double-hatting as opposed to most other stakeholders (e.g., arbitration institutions), who support a restricted prohibition or full disclosure obligation. In other words, States tend to take a strong stand against double-hatting, while institutional actors prefer a more lenient approach.[125]

Under the first alternative, the total ban is the general rule and the parties' consent to waive the limitation is an exception.[126] The intent behind the outright ban option is to eliminate the most common situations of the potential conflict of interest. Contrary to the full disclosure obligation and limited prohibition approaches, an outright prohibition provides clarity and creates a higher standard for the impartiality of adjudicators.

The complete ban approach corresponds more with the view of the *ad hoc* committee in *Eiser* stating that double-hatting includes *inherent* risks and possibilities of conflict of interest,[127] and the premise stating that there is a systemic bias in the current party-appointment mechanism.[128] This view is also consistent with the 2018 decision of the ICJ prohibiting the external activities of judges. In his 2018 address to the UN General Assembly, Judge Abdulqawi Yusuf, President of

[125] *Draft Code of Conduct for Adjudicators in International Investment Disputes, Version Two* (19 April 2021), Comments by Article/Topic as of 3 September 2021, 81; Draft Code of Conduct - Comments by Article/Topic as of 14 January 2021, 113-135.
[126] Ibid 87.
[127] *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Decision on annulment (11 June 2020) para 223.
[128] William Park, 'Arbitrator Integrity and Investor-State Disputes' in Arthur Rovine (ed) *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2009* (2010) 102.

the ICJ, stated ICJ judges would decline appointments in ICA and ISDS arbitrations unless prior authorization is granted in exceptional cases.[129]

Some delegates, supporting the full prohibition option, expressed that the ban should be absolute and unqualified. In their view, the prohibition should extend to engagement as counsel or expert witness in another ISDS case, regardless of the factual matters or disputing parties.[130] Delegates from Korea, Morocco, and Chile supported the removal of the consent ("[u]nless the disputing parties agree otherwise") from option one in the draft provision to eliminate the room for potential double-hatting.[131]

Canada supports an absolute prohibition on double-hatting and suggests that the full prohibition should not include qualifications such as limiting the restrictions to the "same treaty".[132] On the contrary, the US, while agreeing with a complete prohibition provision, suggests that reference to "the same treaty" be included in option one as questions about the impartiality or independence of an adjudicator arise in such a scenario because this term "could indicate that the adjudicator has a predisposed view as to similar legal questions or the interpretation of the same provisions".[133]

Australia states that if an involvement in ISDS-related domestic court proceedings could lead to issue conflict, then the prohibition should be expanded to non-ISDS proceedings the subject of which are the interpretation and application of investment treaties.[134]

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[129] *Speech by H.E. Mr. Abdulqawi A. Yusuf, President of the International Court of Justice, on the Occasion of the Seventy-Third Session of the United Nations General Assembly* (25 October 2018) 11-12.
[130] *Draft Code of Conduct for Adjudicators in International Investment Disputes, Version Two* (19 April 2021) Comments by Article/Topic as of 3 September 2021, 80 and 83.
[131] Ibid 81 and 83.
[132] *Draft Code of Conduct for Adjudicators in International Investment Disputes, Version Two* (19 April 2021) Comments by Article/Topic as of 3 September 2021, 81; Draft Code of Conduct - Comments by Article/Topic as of 14 January 2021, 117-118.
[133] *Draft Code of Conduct for Adjudicators in International Investment Disputes, Version Two* (19 April 2021), Comments by Article/Topic as of 3 September 2021, 85-86.
[134] *Draft Code of Conduct for Adjudicators in International Investment Disputes, Version Two* (19 April 2021), Comments by Article/Topic as of 3 September 2021, 80-81.

In the EU's view, a total ban on double-hatting reduces the concern of disputing parties on issue conflict, however, the EU raises concerns that this approach might hinder the entrance of new adjudicators into the field.[135]

Critics of this alternative argue that a broad ban on double-hatting creates a risk of application across many investment treaties with different treaty provisions and in the absence of any related experience.[136] The IBA, opposing the full prohibition approach, argues that a general ban creates an entry barrier for young arbitrators and is a detriment to, rather than the promotion of, diversity.[137]

In the view of the critics, an outright ban is not practical as it leads to a smaller pool of qualified adjudicators. The full prohibition approach specifically targets those who enter the arbitration field based on their counsel experience and training, but it does not restrict individuals who may start their arbitration career from academia. This approach would lead to the exclusion of a large number of qualified potential individuals from the pool of adjudicators because the number of academics with prior practical experience is fairly limited.[138]

Some delegates and commentators suggested a provision that restricts the number of positions adjudicators can assume although not an outright ban on double-hatting. The modified approach is a targeted ban that is a middle ground approach. The rationale for this approach is that it meets ethical requirements while mitigating its adverse consequences on diversity and the freedom of parties in the selection of adjudicators.[139]

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[135] *Draft Code of Conduct for Adjudicators in International Investment Disputes, Version Two* (19 April 2021), Comments by Article/Topic s of 3 September 2021, 81, and Draft Code of Conduct - Comments by Article & Topic as of 14 January 2021, 119.

[136] *Draft Code of Conduct for Adjudicators in International Investment Disputes, Version Two* (19 April 2021), Comments by Article/Topic s of 3 September 2021, 86-87.

[137] *Draft Code of Conduct for Adjudicators in International Investment Disputes, Version Two* (19 April 2021), Comments by Article/Topic as of 3 September 2021, 87-89, and *Draft Code of Conduct for Adjudicators in International Investment Disputes, Version Three* (22 September 2021) Comments by Article/Topic as of 3 November 2021, 8.

[138] *Draft Code of Conduct for Adjudicators in International Investment Disputes, Version Three* (22 September 2021), Comments by Article/Topic as of 3 November 2021, 8.

[139] *Draft Code of Conduct for Adjudicators in International Investment Disputes, Version Two* (19 April 2021), Comments by Article/Topic as of 3 September 2021, 85.

In the third option, full disclosure is mandated. Rather than a complete ban on double-hatting, the decision-making authority that reviews disqualification challenges will assess if wearing more than one hat impairs independence and impartiality.

Israel supported the full disclosure approach as it reduces the risks of potential unintended consequences.[140]

Supporters of this approach state that, given Article 10 of the Code on disclosure obligations, any double-hatting ban is unnecessary and there is no evidence (such as bias in individual cases resulting from double-hatting) that justifies a broad ban on double-hatting.[141] Proponents of this alternative state that the full disclosure option provides more freedom to parties, targets those appointments that cause actual issue conflict, and allows the assessment of circumstances that may give rise to conflict of interest.[142]

It is also argued that the full disclosure approach reduces the risk of abusive tactics, compared to the full prohibition and limited prohibition approaches (that include the option to consent) that may "motivate parties to withhold their consent for tactical reasons, rather than due to legitimate fears that an Adjudicator or Candidate's double-hatting practice would affect that person's impartiality or independence".[143]

The full disclosure approach requires the disputing parties to make further efforts to challenge an adjudicator based on their double-hatting practice and may add procedural delays and additional expenses to the parties. Further, in response to the argument of the proponents of the full disclosure approach that there exists no evidence to support that double-hatting resulted in bias, the *Eiser* annulment decision demonstrates that the challenged adjudicator's double-hatting practice gave

[140] *Draft Code of Conduct for Adjudicators in International Investment Disputes, Version Two* (19 April 2021), Comments by Article/Topic as of 3 September 2021, 82.
[141] *Draft Code of Conduct for Adjudicators in International Investment Disputes, Version Two* (19 April 2021), Comments by Article/Topic as of 3 September 2021, 86.
[142] *Draft Code of Conduct for Adjudicators in International Investment Disputes, Version Two* (19 April 2021) Comments by Article/Topic as of 3 September 2021, 84 and 86; *Draft Code of Conduct for Adjudicators in International Investment Disputes, Version Three* (22 September 2021) Comments by Article/Topic as of 3 November 2021, 6-7.
[143] *Draft Code of Conduct for Adjudicators in International Investment Disputes, Version Three* (22 September 2021) Comments by Article/Topic as of 3 November 2021, 6.

rise to bias resulting in the annulment of the underlying award.[144] The *Eiser* annulment decision shows that wearing multiple hats in ITA disputes jeopardizes the efficiency and legitimacy of the system and this practice may result in the annulment of an award. If there is a risk of annulment on this basis, then there is a compelling argument to prohibit the practice to preserve the integrity of the system.

Critics of the full disclosure alternative also state that it overlaps with, and addresses issues that are already dealt with in, other provisions of the Code, and under such an option there is no need for a separate provision on double-hatting. As one comment explains, this option only addresses the most obvious circumstances of issue conflict (i.e., acting as counsel or witness expert in a different case that involves the disputing parties and the same measures). These circumstances are already addressed by Article 10 of the Code. They would require disclosure in any event and are likely contrary to the Code's requirements since they likely give rise to justifiable doubts about the adjudicator's impartiality.[145]

It should be added that contrary to the first version of this provision - then draft Article 6 - that included a broader list of incompatible roles such as witness, judge, and agent, versions two and three of Article 4 of the draft Code are only limited to counsel and expert witness. The limitation of double hatting to these two positions is based on the assumption that these roles are more common than other positions.[146] Further, the removal of judges from the list of incompatible roles found extra justification as the existing international courts often include provisions that prohibit them from wearing multiple hats.[147]

Also, the draft provision is restricted to situations where an arbitrator assumes concurrent services. As the Canadian delegate explained, the Code "addresses the scenario where the most glaring conflict of interests can arise i.e., when an individual is "concurrently" acting as party appointed

[144] *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Decision on annulment (11 June 2020).
[145] *Draft Code of Conduct for Adjudicators in International Investment Disputes, Version Three* (22 September 2021) Comments by Article/Topic as of 3 November 2021, 8-9.
[146] *Draft Code of Conduct for Adjudicators in International Investment Disputes, Version Three* (22 September 2021) para 66.
[147] *Draft Code of Conduct for Adjudicators in International Investment Disputes, Version Two* (19 April 2021) Comments by Article/Topic as of 3 September 2021, 80-81.

expert or counsel and as arbitrator".[148] However, one can criticize this restriction on the basis that switching hats in a short period of time, e.g., in a one-year period, may involve the risk of conflict of interests.

That said, the regulation of double-hatting experienced some developments in the fifth draft Code. Article 4 of this draft Code for Arbitrators imposes a prohibition on double-hatting provided that the other dispute(s) involves the same measures, the same or related party/parties and the same treaty provisions. Further subparagraph 2 of this Article aims to introduce a cooling-off period within which the arbitrator shall not act as representative or expert in another ITA dispute if there exists substantial similarity between the two disputes in terms of legal issues and such an activity is deemed incompatible with the requirements for impartiality and independence.

Although Article 4 of the fifth draft Code for Arbitrators imposes a general prohibition on double-hatting and contains a suggestion on a cooling-off period, the full scopes of the prohibition and the precise duration of the cooling off-period are uncertain. This is mainly due to disagreement amongst States over these issues. Thus, these issues remain to be decided in the Code.

With respect to professional activities and functions of judges of the proposed investment court system, the fifth draft Code follows the well-established practice adopted by statutes of international courts and tribunal. Indeed, similar to the requirements imposed on judges of other international courts and tribunals,[149] Article 4 of the draft Code for Judges prohibits judges from exercising any political or administrative functions and from engaging in any other professional occupation which is not compatible with the requirements of independence and impartiality or the requirements of the terms of office including acting as a legal representative or expert witness in other ISDS disputes. Therefore, judges of the future multilateral court system are subject to the same general prohibition that applies to other international judges.

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[148] *Draft Code of Conduct for Adjudicators in International Investment Disputes, Version Two* (19 April 2021) Comments by Article/Topic as of 3 September 2021, 81 and 84.

[149] See, e.g., Article 16(1) of the Statute of the International Court of Justice, Article 7(1) of the Statute of the International Tribunal of the Law of the Sea and Article 40(2) and (3) of the Rome Statute of the International Criminal Court.

IV) Disclosure Obligations of ICSID Adjudicators

The disclosure obligation requires adjudicators to share certain facts about their personal and professional background with parties to a dispute, including their ongoing roles in cases that may give rise to concerns about impartiality and independence. As the unchallenged arbitrators in *Orazul* noted, "[i]t is rather a question of open-mindedly addressing the circumstances of an arbitrator's background and relationships and determining whether any such circumstance might cause a party to question the arbitrator's independent judgment."[150] This obligation is designed to reinforce the legitimacy of the ICSID dispute settlement mechanism and enable disputing parties to exercise their right to have independent and impartial adjudicators. Disclosure allows parties to assess whether a potential adjudicator is impartial and independent and whether any further information is needed as part of the disclosure compliance.

Under the ICSID Arbitration Rules, disclosing past and present relationships with a disputing party and any other circumstances that could impair the independence and impartiality qualities was a condition for acceptance of an appointment as adjudicator. The current ICSID Rules of Arbitration, in effect since July 2022, address some of the shortcomings of the 2006 Rules of Arbitration with respect to the disclosure obligation and remove ambiguities as to what information is expected to be provided by ICSID adjudicators.

A) The Scope and Contents of the Duty to Disclosure

The 2006 Arbitration Rules did not offer any clear guidance on the scope and content of the disclosure obligation, let alone a systemic methodology for evaluating any potential conflict of interest.[151] Under Rule 6(2) of the 006 Arbitration Rules, adjudicators were required to attach a statement disclosing (a) their "past and present professional, business and other relationships (if any) with the parties and (b) any other circumstance that might cause their reliability for independent judgment to be questioned by a party."

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[150] *Orazul International España Holdings S.L. v. Argentine Republic*, ICSID Case No. ARB/19/25, Decision on Disqualification of Dr. Inka Hanefeld (September 11, 2022), para. 43.

[151] *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal (May 12, 2008) para 34.

The contents of Rule 6(2) of the 2006 Rules were ambiguous. The scope of the information that was required to be provided under prongs (a) and (b) of this Rule was limited in some respects, but unbounded in other respects. Prong (a) was limited in scope to relationships with one of the disputing parties and did not expressly include engagements with other participants in arbitration proceedings such as co-arbitrators, counsel, experts or third-party funders. With respect to past relationships, prong (a) did not specify a time frame. Thus, it was not clear how far back adjudicators had to trace their relationships with the disputing parties.

Prong (b) of Rule 6(2) of the 2006 Rules included broad language that required a declaration pertaining to circumstances that may impair the independence of the adjudicator from the viewpoint of a disputing party. While this prong narrowed the extent of the obligation to only facts that were likely to impair the independent judgement of the adjudicator,[152] it potentially covered all facts, relationships, and other circumstances that, in a party's opinion, were likely to impair the independent judgment of the adjudicator.[153] However, it did not set forth any specific degree of likelihood for compliance purposes. From a logical perspective, the likelihood does include insignificant degrees of probability.

In *Alpha*, the unchallenged arbitrators further elaborated the differences between prongs (a) and (b) of Rule 6(2):

> 6(2)(a) by its plain verbiage only addresses relationships with parties whereas 6(2)(b) is not similarly or unambiguously constricted in its reach. Further, 6(2)(b) is broader than 6(2)(a) in another significant feature through its use of the word "circumstance" rather than of the word "relationship".[154]

Further, the statement set out under the 2006 Rules did not include a model template indicating what relationships and circumstances should be disclosed to the disputing parties. The "attached statement" offered considerable freedom to adjudicators in drafting the contents of their

[152] *Suez, Sociedad General de Aguas de Barcelona S.A. v Argentina*, ICSID Cases Nos ARB/03/17 and ARB/03/19, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal (12 May 2008) para 46.
[153] *Alpha Projektholding GmbH v. Ukraine,* ICSID Case No. ARB/07/16, Decision on Respondent's Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz (19 March 2010) para 54.
[154] Ibid para 53.

statements.[155] These shortcomings had sometimes resulted in confusion on the part of adjudicators,[156] or unexpected procedural delays and additional expenses for parties as a result of the initiation of disqualification procedures. The practice of ICSID tribunals and *ad hoc* committees on Rule 6(2) indicated that any doubts as to whether certain information was required to be disclosed should be resolved in favour of disclosure.[157]

The 2022 Arbitration Rules addresses these uncertainties in a methodological manner. The new Arbirator Declaration form requires a substantial extent of information from adjudicators and targets those circumstances and facts that help the disputing parties to evaluate the qualifications of adjudicators and assess the existence of any conflict of interest.

Rule 19(3)(b) of the 2022 Arbitration Rules states that an appointee shall submit a signed declaration in the form prepared by the ICSID and provide the information requested. In contrast

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[155] Katia Fach Gómez, *Key Duties of International Investment Arbitrators: A Transnational Study of Legal and Ethical Dilemmas* (Springer 2018) 31.

[156] For instance, in *Alpha*, the challenged arbitrator stated that he had not attached the statement required under Arbitration Rule 6 "because he deemed that the relationships to which Arbitration Rule 6 (2) refers, did not "exist" in this case and that, consequently, no statement was warranted". *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Decision on Proposal for Disqualification of an Arbitrator (19 March 2010) para 15.
In *Tidewater*, the challenged arbitrator had deleted two sentences from her Rule 6 declaration. When requested to provide explanation, she stated:

> "First I consider that there is no circumstance that could cause my reliability for independent judgment to be questioned, which explains that I deleted that (b) in order to indicate that I will not attach a document containing such information, as there was none. Moreover, I deleted also (a), as I always thought that there was a necessity to disclose only unknown facts, not facts in the public domain that can be seen by anyone on the ICSID webpage".

Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/5, Decision on Claimants' Proposal to Disqualify Professor Brigitte Stern, 23 December 2010, para 8.

[157] See *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on the Proposal to Disqualify Teresa Cheng (26 August 2015) paras 132-143 (Concluding that the duty of disclosure under Rule 6 of the 2006 Rules of Arbitration requires the report of details of any professional relationships with legal representative of a disputing party, and, out of an abundance of caution, any information that is publicly known); *Tidewater Investment srl and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Claimants' Proposal to Disqualify Professor Brigitte Stern (23 December 2010) para 54 ("[A]n arbitrator's disclosure statement ought to include even publicly available arbitral appointments, in the case of ICSID appointments, this must be out of an abundance of caution, given the ready accessibility of this information in the records of the very Centre with which the parties are dealing"); *Universal Compression International Holdings, S.L.U. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/9, Decision on the Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Santiago Tawil (20 May 2011) paras 10, 47, 89, 103 and 104 ("In order to ensure that parties have complete information available to them, an arbitrator's Arbitration Rule 6(2) declaration should include details of prior appointments by an appointing party, including, out of an abundance of caution, information about publicly available cases". See also *Petroceltic Holdings Limited and Petroceltic Resources Limited v. Arab Republic of Egypt*, ICSID No. ARB/19/7, Professor Stern's Comments on Challenge (8 January 2020) ("For the avoidance of doubt, I indicate that I have never acted as an expert or legal advisor for Egypt, and that I systematically refuse to act as an expert – although sometimes approached by parties – in arbitration cases").

Rule 6(2) of the 2006 Rules, the 2022 Arbitrator Declaration Form expressly requires arbitrators to disclose any professional, business and other significant relationships that involve the disputing parties, their counsel, co-arbitrators and any third-party funder. The Form does not include an explicit reference to experts. Nevertheless, the list merely serves as an illustration meaning that the general obligation of disclosure captures any relationships that are not included in the list but may pose questions about their independence and impartiality.

The 2022 Arbitrator Declaration Form provides that the disclosure requirement covers relationships that have occurred within the past five years. However, this time limit only applies to the relationships with any of the disputing parties, parties' counsel, co-arbitrators and third-party funders. The form does not provide guidance on a time limit with respect to relationships with other persons such as experts.

The 2022 Rules state that adjudicators are required to disclose certain services they have provided or are currently providing in other ISDS disputes. The list of engagements on which disclosure is required is sufficiently extensive. These include acting as 'counsel, conciliator, arbitrator, ad hoc Committee member, Fact-Finding Committee member, mediator or expert'.

Like Rule 6(2) of the 2006 Rules, Rule 19(6) of the 2022 Rules and the 2022 Arbitrator Declaration Form expressly state that the disclosure obligation continues throughout the arbitration proceedings. This means that in case any changes occur in circumstances that may give rise to questions about adjudicators' independence or impartiality, they shall 'promptly' inform the ICSID of any such circumstances.

Fulfilling such an onerous responsibility is not an easy task. It requires adjudicators to continuously make a special effort to scrutinize any potential circumstances that might cause doubts as to their independence and impartiality qualities. The duty to investigate such circumstances is also implied in the obligation to disclose. As the unchallenged arbitrators in *Suez* stated, the duty to disclose requires adjudicators to proactively and affirmatively investigate any facts that could come to their knowledge and notify the parties throughout the arbitration proceedings.[158]

[158] See *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Decision on annulment (11 June 2020) para 223; *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for Annulment of the Award (10 August 2010) para 222.

However, the ICSID jurisprudence differs on whether the performance of the duty to investigate can be delegated to third parties. In *Suez,* the unchallenged arbitrators stated that the adjudicator's reliance on the examination of conflict of interest by the UBS Group - a swiss banking group that included the challenged arbitrator as a member of its board of directors - was reasonable as the UBS Group had a strong incentive to assess the adjudicator's independence and, under Arbitration Rule 6(2) the adjudicator had no duty to inquire further.[159] On the contrary, the *ad hoc* committee in *Vivendi* expressed that, to comply with the duty to investigate, adjudicators should "personally" scrutinize any possible conflicts of interest and they cannot rely on investigations conducted by third parties.[160]

Neither the 2006 Rules, nor the 2022 Rules specify the meaning of "promptly". The word means "as soon as possible". This conveys that a disclosure statement should be made in the earliest time possible, and this should be determined on a case-by-case basis. Timewise, the disclosure obligation commences from the acceptance of the appointment until the completion of the arbitration proceedings or the departure of the adjudicator from the proceedings. Under the 2022 Rules prospective adjudicators are not required to disclose any information prior to their acceptance of the appointment. Some commentators have criticized this approach because any objection to an adjudicator resulting from his or her disclosure needs to be reviewed through the disqualification mechanism.[161]

A further issue is whether the disclosure obligation under the 2022 Rules extends to opinions or comments expressed in academic publications or lectures. Under the 2022 Arbitrator Declaration Form, adjudicators are required to disclose any "circumstances that might reasonably cause [their] independence or impartiality to be questioned." The Form further requires adjudicators to provide their current curriculum vitae. A curriculum vitae includes details of a person's career including academic writings and lectures. This requirement extends the evaluation of adjudicators'

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[159] *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal (12 May 2008) para 48.

[160] See *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for Annulment of the Award rendered on 20 August 2007 (10 August 2010) paras 217 and 229. See also *Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Annulment (5 May 2017) para 206.

[161] Karel Daele, *Challenge and Disqualification of Arbitrators in International Arbitration* (Wolters Kluwer 2012) 39–41.

impartiality and independence to their scholarly works and opinions they express in venues such as academia and conferences.

ICSID jurisprudence indicates that scholarly opinions do not cause bout about adjudicators' qualifications unless there exists something more. The co-arbitrators in *Urbaser* held that in the eyes of a reasonable and informed third party, opinions expressed in scholarly writings and speeches do not by themselves raise doubts as to the impartiality of adjudicators since they are rendered in the context of academic discussions, not as legal advice or in the context of a specific dispute between the disputing parties.[162] However, if a person, through their publications or speeches, holds a strong view on a matter under dispute such that they are not able to assess the merits of the dispute without relying on factors having no relation to the merits of the case, they should decline the appointment in the first place. Acceptance of appointment in such an instance will be inconsistent with the adjudicator's attestation in the 2022 Form that "[t]o the best of my knowledge, there is no reason why I should not serve on the Tribunal".

Another question is whether the information available in the public domain should be specifically disclosed to the disputing parties. The concept of public domain, in the context of the disclosure obligation, appears to extend beyond the information available on the ICSID website and includes websites of other dispute resolution institutions, online publication platforms, press reports, etc. The letter and spirit of the 2022 Arbitrator Declaration Form suggest that there should be disclosure. The 2022 Form contains an absolute and unconditional obligation requiring the adjudicator to disclose any facts and circumstances that are likely to pose questions about the adjudicator's qualification, no matter if they are publicly known or otherwise. In other words, any facts and circumstances that fall under the broad obligation to disclose should be disclosed, regardless of whether they are public information or not. This also applies to the contents of the curriculum vitae that the arbitrator should provide.

The unchallenged arbitrators in *Tidewater* held that "Arbitration Rule 6(2) does not limit the disclosure to circumstances which would not be known in the public domain. The wording of this rule is all-encompassing without distinguishing among categories of circumstances to be

[162] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan, Arbitrator (12 August 2010) para 44 – 47 and 52-54.

disclosed".[163] The arbitrators added that "arbitrators will always be in the best position to gather, evaluate, and disclose accurate information relevant to their potential conflicts". In their view, limiting the contents of the disclosure duty to information that is not public, forces the parties "to conduct intrusive investigations and rely on indirect and not always reliable sources".[164]

Requiring adjudicators to disclose known circumstances potentially puts a greater burden on them, but they are in a better position to provide accurate and reliable information on any circumstances in which they have been involved. Further, limiting the contents of the disclosure obligation to unknown circumstances unduly transfers the duty to investigate and disclose from the adjudicator to the challenging party. Additionally, in today's world, access to some information on public domains is restricted due to data protection, subscriptions and other restrictions.

Another difficulty with the contents of Rule 6(2)(b) is that it does not specifically indicate what raises doubt in the eyes of the disputing parties. Rule 6(2)(b) lacks clarity on how to assess potential circumstances from the viewpoint of a disputing party and what approach to adopt in case of uncertainty. Some ICSID decisions suggest a reasonable third-party test. The test for determining what circumstances to disclose is 'the eyes of a reasonable and informed third party'. According to this test, "an arbitrator is required to disclose a fact only if he or she reasonably believes that such fact would reasonably cause his or her reliability for independent judgment to be questioned by a reasonable person".[165] Application of the "reasonable person" test precludes the disclosure of trivial or superficial facts that are burdensome to adjudicators to produce and also discourages frivolous challenges.[166]

Rule (6)(2) of the 2006 Rules required adjudicators to disclose any circumstances that could cause their impartiality and independence "to be questioned by a party." However, Rule 6(2) did not specifically identify what could raise doubt in the eyes of the disputing parties. In contrast, while

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[163] *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Claimants' Proposal to Disqualify Professor Brigitte Stern (23 December 2010) para 46.
[164] Ibid para 17.
[165] *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal (12 May 2008) para 46. See also *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/13, Decision on Claimant's Proposal to Disqualify Mr. Bottini from the Tribunal under Article 57 of the ICSID Convention (27 February 2013) para 60.
[166] See *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Decision on Respondent's Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz, March 19, 2010, para 66.

the 2022 Arbitrator Declaration Form partially set out what should be disclosed (such as any relationships with some participants in arbitration proceedings), it is silent about the 'eyes' that assess whether a circumstance gives rise to doubt about adjudicators' impartiality and independence. ICSID jurisprudence on Rule (6)(2) supports that the test for determining what circumstances to disclose is the eyes of a reasonable observer.[167]

B) Consequences of Failure to Disclose

What are the consequences of the violation of the disclosure obligation under the ICSID framework? Like Rule 6(2) of the 2006 Arbitration Rules, Rule 19(3)(b) of the 2022 Arbitration Rules lack any specific guidance on the consequences of the arbitrator's failure to disclose relevant relationships or circumstances that may trigger the grounds for disqualification or annulment of an award.[168]

Rule 19(3)(b) of the 2022 Rules and the 2022 Arbitrator Declaration Form are designed to be comprehensive with respect to the disclosure obligation. Not all failures to disclose justify a disqualification of a panelist or annulment of an award. Unlike Articles 14(1) and 57 of the ICSID Convention which aim to remove biased adjudicators from the proceedings, the 2022 Rules and Form are broader in scope and are designed to eliminate bias.[169] As Slaoui argues, "[t]he tests for disclosure and the test for challenges are purposely designed not to match". [170]

Disqualification of an adjudicator or annulment of the award are potential, but not inevitable, consequences of non-disclosure. The disclosure standard under the 2022 Rules and the disqualification and annulment provisions set forth in Articles 52(1) and 57 of the ICSID Convention are distinct, but related provisions. An increasing number of disqualification challenges or annulment requests at ICSID have involved or resulted from adjudicators' failure to

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[167] *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal (12 May 2008) para 46. See also *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/13, Decision on Claimant's Proposal to Disqualify Mr. Bottini from the Tribunal under Article 57 of the ICSID Convention (27 February 2013) para 60.

[168] See also *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal (12 May 2008) para 44.

[169] See also Cleis (n 36) 19-20.

[170] See Fatima-Zahra Slaoui, 'The Rising Issue of "Repeat Arbitrators": A Call for Clarification' (2009) 25(1) Arb. Intl. 118.

disclose or properly investigate relationships or circumstances that should have been disclosed to the parties.

For disqualification or annulment requests to succeed, the grounds for disqualification or annulment must be proven. Indeed, depending on the nature of the facts not disclosed, non-disclosure of important circumstances may constitute a threat to the fundamental integrity of ICSID arbitration proceedings. Aggravating factors such as the seriousness of the circumstances not being disclosed play a crucial role in assessing whether non-compliance with Rule 19(3)(b) of the 2022 Rules gives rise to the disqualification of adjudicators or the annulment of awards.

The following cases provide some guidance on the consequences of failure to disclose:

- The *ad hoc* committee in *Suez* stated that "[t]here may even be circumstances in which a failure of the challenged arbitrator to disclose substantial circumstances to the Parties could render the decision of the remaining arbitrators 'plainly unreasonable'".[171]
- In *ConocoPhillips*, it was held that non-disclosures do not automatically result in disqualification. However, if the non-disclosure of the particular facts and circumstances of the case gives rise to a reasonable suspicion of bias - no matter conscious or unconscious - then disqualification is justified.[172]
- The unchallenged arbitrators in *Fabrica* stated that "if an arbitrator, when facing an application for disqualification, were found to have *deliberately* concealed or misrepresented a fact in a declaration to the parties, then such conduct would provide a conclusive justification for the disqualification of the arbitrator".[173](Emphasis added)
- In *Tidewater*, the co-arbitrators concluded that "non-disclosure would itself indicate manifest lack of impartiality only if the facts or circumstances surrounding such non-

[171] *Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Annulment (May 5, 2017) para 189.
[172] *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify Arbitrator L. Yves Fortier (27 February 2012) para 60. See also Stewart Baker and Mark Davis, *The UNCITRAL Arbitration Rules in Practice: The Experience of the Iran-United States Claims Tribunal* (Springer Netherlands 1992) 50.
[173] *Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/21, Reasoned Decision on the Proposal for Disqualification of Arbitrator L. Yves Fortier (28 March 2016) para 57 and Decision on the Third Proposal to Disqualify Arbitrator L. Yves Fortier (12 September 2016) para 53.

disclosure are of such gravity (whether alone or in combination with other factors) as to call into question the ability of the arbitrator to exercise independent and impartial judgment".[174]

- In *Raiffeisen*, the ICSID Chairman concluded that without "something more", the mere fact that the adjudicator failed to disclose "cross-appointments" between him and the claimant's counsel does not give rise to a manifest lack of the qualities required under Article 14(1) of the ICSID Convention.[175]
- In *KS Invest*, the ICSID Chairman opined that if an adjudicator does not abide by their duty under Rule 6(2) of the 2006 ICSID Arbitration to disclose concurrent but unrelated arbitrations where their merely provided service as arbitrator and counsel with different parties and different disputed measures and such circumstances do not evidence a lack of the qualities required under Article 14(1).[176]

Objections to arbitrators' impartiality and independence based on their failure to disclose information have exponentially increased, but no disqualification request on this basis has succeeded. None of the few disqualification decisions that upheld the challenge request were based on the adjudicator's failure to meet their disclosure obligation, although the challenging party in two of these disputes specifically raised this failure, among other issues, as a standalone ground for disqualification.[177] However, as discussed in the previous section, in *Eiser*, the challenged arbitrator's failure to disclose his long-standing relationships with a quantum expert resulted in the annulment of the award. The *ad hoc* committee stated that the arbitrator's failure to disclose his relationships prevented the challenging party from using its right to challenge the arbitrator during

[174] *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Claimants' Proposal to Disqualify Professor Brigitte Stern (23 December 2010) paras 40 and 43. See also, *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Decision on Respondent's Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz (19 March 2010) para 69; See also *Canepa Green Energy Opportunities I, S.á r.l. and Canepa Green Energy Opportunities II, S.á r.l. v. Kingdom of Spain*, ICSID Case No. ARB/19/4, Decision on the Proposal for Disqualification of Arbitrator Peter Rees (19 November 2019) para 53.

[175] *Raiffeisen Bank International AG and Raiffeisenbank Austria d.d. v. Republic of Croatia*, ICSID Case No. ARB/17/34, Decision on the Proposal to Disqualify Stanimir Alexandrov (17 May 2018) para 95.

[176] *KS Invest GmbH and TLS Invest GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/25, Decision on Proposal to Disqualify Kaj Hober (15 May 2020) para 84.

[177] See *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña (13 December 2013) paras 70-80; *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Bruno Boesch (20 March 2014) paras 100-110.

the original arbitration proceedings and to seek the benefit and protection of a panel that is independent and impartial.[178] In view of the committee, the arbitrator's "failure cannot be regarded as a mere inconsequential error or omission or something insignificant having no bearing on the outcome of the proceedings before the Tribunal."[179]

ICSID jurisprudence reviewing the consequences of non-disclosures is not consistent in its approach towards non-disclosure. Some decisions adopt favourable assumptions and presume good faith on the part of adjudicators until proven otherwise. Others strongly criticize arbitrators for not adequately investigating and disclosing the relevant circumstances to the disputing parties.

The *ad hoc* committee in *Vivendi* strongly criticized the adjudicator's conduct for her failure to disclose her appointment on the board of a shareholder of the claimant company and for not personally investigating any potential conflict of interest resulting from her indirect links to one of the parties. The committee stated that non-disclosure of critical circumstances may affect the proper constitution of the tribunal and may be considered a serious departure from a fundamental rule of procedure.[180] However, despite finding the serious shortcomings on the part of the adjudicator, the *ad hoc* committee concluded that the circumstances of the case did not preclude her from exercising independent judgment and did not consider that the adjudicator's failure to disclose constituted a ground for the annulment of the award.[181]

On the contrary, the unchallenged arbitrators in *EDF* and *Suez* took an approach inconsistent with the one expressed by the *ad hoc* committee in *Vivendi*.[182] In these cases, the disqualification requests involved the same adjudicator based on the same factual circumstances reviewed by the *ad hoc* committee in *Vivendi*. In *Suez*, it was asserted that in practice "nondisclosure [may be] an

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[178] *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Decision on annulment (11 June 2020) para 241.
[179] Ibid.
[180] *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for Annulment of the Award rendered on 20 August 2007 (10 August 2010) paras 217-236.
[181] Ibid paras 237-238.
[182] *Suez, Sociedad General de Aguas de Barcelona S.A. v Argentina*, ICSID Cases Nos ARB/03/17 and ARB/03/19, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal (12 May 2008) paras 31-33; *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Challenge Decision Regarding Professor Gabrielle Kaufmann-Kohler (25 June 2008) paras 97-106.

aberration on the part of the conscientious arbitrator".[183] The unchallenged arbitrators in *EDF* stated that "[n]othing inherently suspect can be found in the adjudicator's participation in the board of directors of that particular shareholder" and the ICSID standard of disclosure does not impose such a disclosure.[184] The *ad hoc* committees in *EDF* and *Suez* supported the view that favourable assumptions and good faith should be taken into account when adjudicators fail to disclose the potential conflict of interest.[185]

In *Eiser*, the *ad hoc* committee, dismissing the claimant's suggestion that the failure to disclose was a mere "honest exercise of discretion", held that "[t]he ongoing obligation to disclose cannot be construed *narrowly* in favor of the arbitrator".[186] (Emphasis added) The *ad hoc* committee stated that ICSID annulment committees "*must set the bar high*, with regard to disclosure obligations, in particular, and, in general, with respect to addressing conflict of interest of arbitrators who also choose to act as counsel in investment disputes".[187] (emphasis added)

In view of the *ad hoc* committee in *Eiser*, a disclosure by another participant in the dispute or third party does not absolve adjudicators from their disclosure obligations as an adjudicator.[188] The *ad hoc* committee, criticizing the challenged adjudicator, stated that the persistent relationships between the adjudicator, as counsel and as member of a specific law firm, on the one hand, and a particular quantum firm and damages expert, on the other hand, should have alerted the adjudicator of the likelihood that his independence and impartiality qualities may be questioned by one of the disputing parties.[189] Founding that the adjudicator's failure to disclose was not an isolated occurrence, the *ad hoc* committee held that the annulment of the underlying award was inevitable

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[183] *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal (12 May 2008) para 44.

[184] *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Challenge Decision Regarding Professor Gabrielle Kaufmann-Kohler (25 June 2008) para 99.

[185] *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Decision on Annulment (5 February 2016) paras 147-163; *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Annulment (14 December 2018) paras 152-172.

[186] *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Decision on annulment (11 June 2020) paras 86-87, 204, and 223.

[187] Ibid para 255.

[188] Ibid para 228.

[189] Ibid paras 241, and 225.

as the undisclosed relationship between the adjudicator and the quantum firm and damages expert impaired his independence and impartiality and resulted in the improper constitution of the Tribunal and a serious departure from a fundamental rule of procedure.[190]

In *Universal Compression*, the ICSID Chairman factored in the good faith criterion and concluded that the failure of the adjudicator to disclose his prior relationships with the claimant's counsel, as required under Rule 6 of the 2006 Rules of Arbitration, did not give rise to a manifest lack of independence or impartiality as his relationship was discontinued before the commencement of the arbitration proceeding and the adjudicator's decision not to disclose information about his involvement in another case was due to his "honest exercise of discretion".[191]

In *Total*, the majority of the *ad hoc* committee stated that the challenged committee member's non-disclosure, or the subsequent disclosure of her relationship with a party was made "in the exercise of an honest exercise of discretion". In view of the unchallenged members, the mere fact that the challenged member failed to disclose the relevant information did not in itself necessarily imply that she lacked independence or impartiality.[192]

Some commentators argue that the presumption of "an honest exercise of judgment" on the part of adjudicators goes against the requirements of Rule 6(2)(b) of the 2006 Rules of Arbitration as such a presumption replaces an adjudicator's opinion on what circumstances to disclose with a party's perspective.[193] Further, the presumption of "an honest exercise of judgment" and prioritizing the arbitrator's subjective criterion over parties' perspectives incentivize adjudicators not to properly investigate any specific circumstance that may fall under the realm of Rule 6(2)(b).

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[190] Ibid paras 218, 253-255 ("When one of the most basic requirements of justice, such as the right to an independent and impartial tribunal, is disregarded, an award cannot stand and must be annulled in its entirety. In a case such as this, it is neither possible nor would it be proper to parse the Award and hold that the conduct affected only a certain part of the Award and had no impact on other parts. The curtailment of the right to an independent and impartial tribunal permeates the Award. The doctrine of severability has no application to a case such as this").

[191] *Universal Compression International Holdings, S.L.U. v. The Bolivarian Republic of Venezuela*, ICSID Case No. Arb/10/9, Decision on the Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Santiago Tawil (20 May 2011) paras 97-104. See also *Suez, Sociedad General de Aguas de Barcelona S.A. v Argentina*, ICSID Cases Nos ARB/03/17 and ARB/03/19, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal (12 May 2008) para 48; *Nations Energy Corporation, Electric Machinery Enterprises Inc., and Jamie Jurado v. The Republic of Panama*, ICSID Case No. ARB/06/19, Decision on the Proposal for Disqualification of Arbitrator Stanimir A. Alexandrov (7 September 2011) para 76.

[192] *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on the Proposal to Disqualify Teresa Cheng (26 August 2015) para 141.

[193] See also Fach Gómez (n 155) 41.

C) Proposed Disclosure Obligations

Article 10 of version three of the draft Code (renumbered as Article 11 of the fifth draft Code) addresses disclosure obligations. This Article intentionally retains broad language that enhances transparency in a world of complex relationships and provides opportunities for disputing parties to assess any conflict of interests as early as when a candidate is introduced. Unlike the disclosure obligations under the current ICSID Arbitration Rules, the provisions of Article 10 apply to both candidates and adjudicators.

Article 10(1) provides that:

> Candidates and Adjudicators shall disclose any interest, relationship, or matter that may, in the eyes of the disputing parties, give rise to doubts as to their independence or impartiality. To this end, they shall make reasonable efforts to become aware of such interest, relationship, or matter.

Similar to Arbitration Rule 6(2) of the 2006 Rules of Arbitration, Article 10(1) requires candidates and adjudicators to make disclosures considering the likelihood of conflict of interest from the perspective of the disputing parties. However, Article 10 does not follow the view of some ICSID decisions that apply a "reasonable and informed third party" test when deciding if certain information should be disclosed.[194]

Hanotiau and Stern criticize the wording of the disclosure standard in Article 10(1). They argue that the test adopted by the IBA Guidelines, which refers to any doubts from the viewpoints of a reasonable third party, should be adopted in place of "the eyes of the disputing parties". They also state that Article 10(1) should incorporate the word "reasonable" (in "reasonable doubts") as the lack of this term causes confusion and speculation as to the viewpoint of a reasonable and informed third party.[195]

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[194] See *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal (12 May 2008) para 46; *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Decision on Respondent's Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz (19 March 2010) para 66.

[195] *Draft Code of Conduct for Adjudicators in International Investment Disputes, Version Three* (22 September 2021) Comments by Article/Topic as of 3 November 2021, 18-19.

Article 10(1) expressly includes the duty to investigate. It states adjudicators "shall make reasonable efforts to become aware of such interest, relationship, or matter". Although the text does not expressly prohibit adjudicators from relying on investigations conducted by third parties, the wording "shall make reasonable efforts" appears to follow the view of the *ad hoc* committee in *Vivendi* that required adjudicators to personally investigate any potential circumstances that might cause conflict of interests.[196]

Similar to IBA Guidelines on Conflicts of Interest in International Arbitration,[197] Article 10(2) of the Code includes a list of certain matters that possibly raise doubts as to the independence and impartiality of adjudicators and should be disclosed.

The list only contains minimum requirements of information to be disclosed and is not exhaustive. Any other matters that are not captured by the list but raise doubts about the independence and impartiality of adjudicators should be disclosed as they fall under the broad language of Article 10(1). To summarize, the list requires adjudicators to disclose the following:

> a) any financial, business, professional, or personal relationship with i) the parties or any of their related or affiliated entities; ii) parties' legal representatives; iii) other adjudicators and expert witnesses who are involved in the same dispute; and iv) any third-party funder, identified by the parties, with a financial interest in the outcome of the dispute;
>
> b) any financial or personal interest in i) the dispute or its outcome; ii) any other disputes (IID - or otherwise) involving the same measures that are under the controversy in the present case; iii) any other proceedings (IID or otherwise) that involve at least one of the disputing parties or any of their related or affiliated entities;
>
> c) all IIDs and all related proceedings (such as parallel proceedings and related enforcement proceedings before domestic courts) in which the candidate or adjudicator has been or is involved as legal representative, expert, or adjudicator;

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[196] See *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for Annulment of the Award rendered on 20 August 2007, (10 August 2010) paras 217 and 229.

[197] *IBA Guidelines on Conflicts of Interest in International Arbitration,* Adopted by the resolution of the IBA Council on 23 October 2014. See also Anne Hoffmann, 'Duty of Disclosure and Challenge of Arbitrators: The Standard Applicable Under the New IBA Guidelines on Conflicts of Interest and the German Approach' (2005) 21(3) Arbitr. Int. 427–436.

d) appointments as legal representative, expert, or adjudicator by either disputing parties or their counsel.

Article 10(2) requires disclosure of all IIDs and non-IIDs in which candidates or adjudicators are involved. The inclusion of non-IIDs is because the subject of the disclosure is transparency about financial dependency and any circumstances related to that dependency.

Under the draft Code, adjudicators are required to make their disclosures prior to or upon accepting the appointment through a declaration form that is annexed to the Code.

Similar to Rule 6(2) of the 2006 Rules of Arbitration, Article 10(4) states that the duty of disclosure continues throughout the proceedings and in case any newly discovered information comes to their knowledge adjudicators shall promptly make further disclosures.

The draft Code follows the cautious approach adopted by some ICSID decisions[198] and codes of conduct of other arbitration institutions,[199] and requires candidates and adjudicators to be proactive and err in favour of disclosure where there is any doubt as to whether a disclosure should be made.

Delegates have yet to agree on the temporal limitation relating to the disclosure of past matters specified in the list. The proposed limitation periods are put in square brackets. Some commentators support a five-year limitation period starting from the end of a relationship,[200] while others indicate that a ten-year timeframe is preferred.[201]

Article 10(2) of version two of the draft Code also included the requirements to disclose a list of all publications of candidates and adjudicators. Delegates and commentators did not reach an agreement on the inclusion of this requirement in the third version of the draft Code. Some

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[198] See *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on the Proposal to Disqualify Teresa Cheng (26 August 2015) paras 9, 132-143; *Tidewater Investment srl and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Claimants' Proposal to Disqualify Professor Brigitte Stern (23 December 2010) para 54; *Universal Compression International Holdings, S.L.U. v. The Bolivarian Republic of Venezuela*, ICSID Case No. Arb/10/9, Decision on the Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Santiago Tawil (20 May 2011) paras 10, 47, 89, 103 and 104.

[199] International Chamber of Commerce, *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration 2021*, para 25 ("Any doubt must be resolved in favour of disclosure"); American Arbitration Association, *The Code of Ethics for Arbitrators in Commercial Disputes* (2004), Canon II (D) ("Any doubt as to whether or not disclosure is to be made should be resolved in favour of disclosure").

[200] *Draft Code of Conduct for Adjudicators in International Investment Disputes, Version Three* (22 September 2021) Comments by Article/Topic as of 3 November 2021, 17-18.

[201] *Draft Code of Conduct for Adjudicators in International Investment Disputes, Version Three* (22 September 2021) para 110.

delegates supported the addition of publications to the list as such information helps the disputing parties to learn about the adjudicator's qualifications and any potential predisposition that may put the adjudicator's impartiality and independence into question.[202] Other delegates and commentators suggested the deletion of this requirement because such a requirement is excessively burdensome for adjudicators, a person's scholarly writings are readily accessible, and academic publications do not affect an adjudicator's independence and impartiality.[203] This requirement was omitted from version three of the Code. However, the commentary on Article 10 still explores the possibility of the requirement that candidates and adjudicators submit a list of their publications and make reasonable efforts to update such a list.[204]

Draft three of Article 10 does not specifically address a potential conflict between the confidentiality obligations of candidates or adjudicators and their obligation to disclose. Under the current version, unless the disputing parties waive any potential conflict of interest, the provision imposes a strict obligation on candidates or adjudicators to "disclose any interest, relationship or matter that may, in the eyes of the disputing parties, give rise to doubts as to their independence or impartiality", regardless of whether that information is confidential or not. The disclosure obligation, as it currently stands, puts candidates and adjudicators in a difficult situation. Thus, in situations where, due to mandatory rules or contractual obligations, candidates or adjudicators are not able to disclose information about confidential matters, they may request the parties for a waiver or decline the appointment.

As to the consequences of disclosure or failure to comply with the disclosure obligation, Article 10(5) provides that neither the fact that a matter is disclosed, nor a failure thereof does by itself establish a breach of the obligations under the Code. As discussed above, the ICSID jurisprudence supports this view.

During its September 2022 session in Vienna, while there existed a broad support for the inclusion of the disclosure obligation in the draft Code, the Working Group III was not able to

[202] *Draft Code of Conduct for Adjudicators in International Investment Disputes Version Two* (19 April 2021) Comments by Article/Topic as of 3 September 2021, 136 and 143.
[203] *Draft Code of Conduct for Adjudicators in International Investment Disputes Version Two* (19 April 2021) Comments by Article/Topic as of 3 September 2021, 41, 146, 147 and 151.
[204] *Draft Code of Conduct for Adjudicators in International Investment Disputes, Version Three* (22 September 2021) para 120.

specify the scope of the disclosure obligation. Accordingly, the uncertainties surrounding the extent of this obligation remain in Article 11 of the fifth version of the draft Code.[205]

Conclusion

The existing ICSID framework does not provide clarity on adjudicators' required independence and impartiality. Further, ICSID jurisprudence sets forth a high bar for the disqualification of adjudicators. Despite the increasing number of challenges against ICSID adjudicators, disqualification of an adjudicator as a result of conflict of interest or issue conflict is a rare occurrence. As a result, the ICSID arbitration community has not been able to adequately address the criticisms raised against it.

The Code adds more clarity to what is expected from ICSID adjudicators. It demands more commitments from adjudicators in terms of independence and impartiality. To ensure compliance with this one core obligation, the Code encompasses specific behaviours that violate the impartiality and independence requirement.

The ICSID framework is silent on double-hatting. In practice, controversies arising from double-hatting activities have been primarily assessed through the disqualification and annulment review mechanisms with ICSID decisions generally adopting a favourable attitude towards wearing different hats in different disputes. However, the *ad hoc* committee in *Eiser* has recently followed a distinct approach cautioning double-hatting adjudicators that their behaviour incorporates an inherent risk of issue conflict.

Draft Article 4 addresses double-hatting. Regulating double-hatting is the most challenging issue in the draft Code. The proposed alternatives in this provision include square brackets so as to give State delegates policy options and the final outcome of the proposed reforms remains to be seen. However, the alternatives proposed indicate that, regardless of the approach that will be taken in the provision, double hatting will be made harder under the Code and adjudicators will need to make special efforts to comply with the contents of this provision. Further, the full prohibition and modified restriction approaches in the draft Code view certain instances of double hatting as embodying an inherent, rather than potential, risk of conflict of interest.

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[205] *Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its forty-third session,* A/CN.9/1124 (Vienna, 5–16 September 2022), paras 135-139.

The 2022 ICSID Arbitration Rules remedy some of the shortcomings that arose under the 2006 ICSID Arbitration Rules with respect to the disclosure obligation. The new Rules clarifies the scope and contents of the duty to disclose information that may give rise to doubt about the adjudicator's independence and impartiality. It demands extensive information from adjudicators. The clarifications provided in the new Rules reduce uncertainties over what information is expected from adjudicators to disclose, on the one hand, and reinforce the rights of the disputing parties to adjudicators with the required qualities of independence and impartiality, on the other.

Draft Article 10 of the Code changes the outlook in favour of the disputing parties. This provision provides more clarity on what is required to be disclosed by candidates and adjudicators while extending the scope and contents of the disclosure obligations. The draft Article introduces increased transparency as to the qualities of candidates and adjudicators and gives opportunities to disputing parties to assess any conflict of interests as early as when a candidate is introduced.

Further, the Code not only controls the behavior of arbitrators, but also controls the conduct of the parties to the dispute and appointing authorities. The imposition of significant requirements on the behavior of panelists limits the freedom of both disputing parties and discretion of appointing authorities in the selection and appointment of panelists.

Finally, there exists broad support for the Code generally. The key to the success of the Code is how its provisions are implemented.

Chapter 5

Appointment of Arbitrators:

Scrutiny into Treaty-Making Practice of States

I) Introduction

The selection and appointment of adjudicators are key components of ISDS,[1] The questions of how to select arbitrators and whom to appoint are the most important steps in arbitration proceedings. Apart from the neutral nationality requirement for presiding arbitrators,[2] these questions have traditionally attracted little attention in conventional investment treaties. Also, little has been said on the evolution of the treaty practice on the selection and qualifications of ISDS arbitrators.

Historically, treaty-making practice in drafting provisions on the selection and appointment of arbitrators differs widely. Some BITs generally lack arrangements for the selection of arbitrators and the composition of arbitral tribunals.[3] These treaties follow the common practice adopted since

[1] Yves Dezalay and Bryant G. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnnational Legal Order* (UCP 1996) 8.

[2] See, e.g., Egypt - Finland BIT (1980), Article 7, Japan - Sri Lanka BIT (1982), Article 13, Bulgaria - Finland BIT (1984), Article 5, Egypt - United States BIT (1986), Article VIII, China - Japan BIT (1988), Article II, and Korea - Turkey BIT (1991), Article 11, and China - Korea (1992), Article 9.

[3] See, e.g., Germany - Sri Lanka BIT (2000), Article 11, France - Iran BIT (2003), Article 8, Burkina Faso - Korea, Republic of BIT (2004), Article 8, Guinea - South Africa BIT (2007), Article 8, Germany - Pakistan BIT (2009), Lebanon - Slovakia BIT (2009), Article 8, Bahrain - Uzbekistan BIT (2009), Article 8, Czech Republic - Saudi Arabia BIT (2009), Article 11, Israel - Ukraine BIT (2010), Article 8, Azerbaijan - Czech Republic BIT (2011), Article 10, China - Uzbekistan BIT (2011), Article 12, Czech Republic - Sri Lanka BIT (2011), Article 8, Oman - Tanzania BIT (2012), Article 7, Kazakhstan - Macedonia BIT (2012), Article 8, China - Tanzania BIT (2013), Article 13, Iran - Russian Federation BIT (2015), Article 9, Belarus - Georgia BIT (2017), Article 8, Turkey - State of Palestine BIT (2018), Article 10, Kazakhstan - United Arab Emirates BIT (2018), Article 10, Hong Kong - United Arab Emirates BIT (2019), Article 8, Article 10, Iran - Nicaragua BIT (2019), Article 12, and Burkina Faso - Turkey BIT (2019), Article 10.

the early generations of investment treaties.[4] Negotiators of these conventionally drafted treaties are primarily concerned with the rights and obligations of foreign investors and those of host States, rather than the behaviour and qualifications required from arbitrators. The preference for this approach over the early decades of ISDS can be justified due to the existence of a small pool of "grand old men",[5] limited number of ISDS disputes and infrequency of the circumstances that could give rise to disqualification challenges.

Another group of conventional treaties are treaties with provisions determining the methods for the selection of arbitrators, while they remain silent on the conduct and professional competencies of arbitrators in ISDS disputes.[6] These treaties follow an alternative approach preferred in a smaller number of early investment treaties.[7]

This group of treaties include clauses on "how" to select arbitrators and determine the number of arbitrators. As a long-standing common method for the selection of arbitrators in investment treaties, arbitration clauses generally provide for a three-member tribunal. Each disputing party to an ISDS dispute appoints an arbitrator, and the presiding arbitrator is selected by the agreement of the disputing parties. If a party fails to nominate an arbitrator or the disputing parties are not able to agree on the selection of the presiding arbitrator, then a third-party steps in as the appointing authority to select an arbitrator for the vacant seat.[8]

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[4] See, e.g., Belgium-Luxembourg Economic Union - Malaysia BIT (1979), Article 10, and Sri Lanka - United Kingdom BIT (1980), Article 10, Singapore - Sri Lanka BIT (1980), Article 10, Belgium-Luxembourg Economic Union - Cameroon BIT (1980), Article 10, Korea, Republic of - Sri Lanka BIT (1980), Article 10, Senegal - United Kingdom BIT (1980), Article 8, Romania - Sri Lanka BIT (1981), Article 7, Pakistan - Sweden BIT (1981), Article 7, Bangladesh - Belgium-Luxembourg Economic Union BIT (1981), Article 6, Paraguay - United Kingdom BIT (1981), Article 8, Japan - Sri Lanka BIT (1982), Article 11, Panama - United States of America BIT (1982), Article VII, Sweden - Yemen BIT (1983), Article 7, Senegal - United States of America BIT (1983), Article VII, Netherlands - Sri Lanka BIT (1984), Article 8, Belgium-Luxembourg Economic Union - China BIT (1984), Article 10, Malaysia - Norway BIT (1984), Article 9, and Netherlands - Philippines BIT (1985), Article 9.

[5] Dezalay and Garth (n 1) 34.

[6] See, e.g., Iran - Kazakhstan BIT (1996), Article 11, Iran - Sri Lanka BIT (2000), Article 11, Djibouti - Iran BIT (2010), Article 12, India - Lithuania BIT (2011), Article 9, Armenia - Iraq BIT (2012), Article 8, Malaysia - San Marino BIT (2012), Article 10, Japan - Saudi Arabia BIT (2013), Article 14, India - United Arab Emirates BIT (2013), Article 10, Burkina Faso - Singapore BIT (2014), Japan - Ukraine BIT (2015), Article 18, Iran - Iraq BIT (2015), Article 12, Article 12, Argentina - Qatar BIT (2016), Article 14, Iran - Japan BIT (2016), Article 18, and Ukraine - Qatar BIT (2018), Article 9.

[7] For early treaties that included provisions on the selection of arbitrators, see Egypt - Finland BIT (1980), Article 7, AIA (1980), Annex - Article 2, OIC Investment Agreement (1981), Article 17, and China - Italy BIT (1985), Protocol - (4) Ad Article 5.

[8] See also Article 87 of the Hague Conventions of 1907 for the Pacific Settlement of International Disputes.

These treaties are silent on "who" to be appointed as arbitrator. This significant matter is left unregulated in conventional treaties.[9] The governing rules of ICSID play a complementary role and remedy the shortcomings in arbitration clauses of investment treaties.

The conventional way of drafting ISDS provisions in investment treaties and the complementary tools in the ICSID framework do not properly respond to serious challenges in the contemporary world arising out of the appointment of arbitrators. Currently, the selection of adjudicators has become a subject of the ongoing efforts to reshape ISDS at the treaty-making level.

As a response to growing challenges surrounding the appointment of arbitrators, ISDS provisions in the new generation of investment treaties undergo a drastic transformation and address key aspects of arbitrator reforms.[10] These are personal qualities, professional qualifications, and structural improvements. From a historical perspective, the Arab Investment Agreement (AIA) and North American Free Trade Agreement (NAFTA) are early pioneers in triggering this transformation by imposing personal and technical qualifications on judges of the Arab Investment Court (AIC) or on arbitrators presiding arbitration tribunals under NAFTA's investment chapter.[11] This idea was significantly developed by subsequent BITs and FTAs with investment provisions, including the recent generations of treaties, introducing far-reaching changes in this treaty-making practice.

This transformation not only reinforces the impartiality and independence qualities of arbitrators but also imposes specific requirements as to the professional competencies of arbitrators. These new developments significantly affect the personal and professional qualities required under the ICSID framework. Particularly, arbitrator selection provisions of new investment treaties further restrict the professional qualifications of arbitrators. Further, these requirements potentially reduce the dangers that ISDS arbitrators, particularly party arbitrators, pose to ISDS as well as to sovereign rights.

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[9] See Article 14(1) of the ICSID Convention. It states: "Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators".

[10] For a critical view on the ongoing reforms at the UNCITRAL Working Group III on reshaping the way adjudicators are selected and appointed, see Fernando Dias Simões, 'Investment Arbitration and the Chimera of an Ideal Adjudicative Community' (2021) 22(5-6) JWIT 687-704.

[11] See AIA (1980), Article 28 and NAFTA (1992), Article 1124(4).

In the same direction, new treaties restrict the decision-making power of arbitrators. The new generations of treaties express the right of the contracting parties to produce binding interpretative statements and establish mechanisms in this respect. This latter addition to investment treaties limits the interpretation authority of ISDS adjudicators. Further, new treaties strip unchallenged co- arbitrators from the authority over reviewing disqualification challenges against their peer-arbitrator, while traditionally a tribunal majority who is not challenged is bestowed with this power.

In another development, new treaties contemplate the replacement of the current ISDS mechanisms with a permanent investment court system. With the creation of such a permanent system, the current party-appointing mechanism is radically transformed. Notably, contracting States, as potential respondents in ISDS disputes exercise a greater control over those who are eligible for appointment on the bench.

In spite of these developments, the practice of States towards regulating the conduct and competencies of arbitrators lacks consistency. Particularly, the wordings of these new investment treaties vary significantly. Treaties are too varied as to the professional qualifications of those who should be selected to act as arbitrators.

To examine the above issues, this chapter discusses the ongoing shift in the treaty-making practice. It reviews the inclusion of certain qualification requirements for arbitrators in the new generation of investment treaties and explores the evolution of investment treaties in removing bias from arbitrators. Further, it examines the prospects of the creation of a permanent investment court and the implications of the ongoing structural reforms on adjudicators.

II) Qualifications of Adjudicators in Investment Treaty Practice

Arbitrators are the crux of States' concerns about ITA. To response to the challenges relating to the conduct and qualifications of adjudicators, the inclusion of new requirements for arbitrator's qualification and conduct has become a widespread practice over the past decade. States have initiated a series of treaty reforms that dramatically influence the eligibility and behaviour of arbitration practitioners. The reform at the treaty level is another indication of the failure of arbitration practitioners and arbitration institutions to become sufficiently self-regulated.

From a historical perspective, the AIA is one of the investment protection treaties that mandates certain qualifications for judges appointed to the AIC. The Court is a permanent judicial institution established by a multilateral treaty with jurisdiction to settle investment disputes.[12] The origin of the contemporary practice in investment treaties is also found in Article 1124(4) of NAFTA imposing professional qualifications on presiding arbitrators of arbitration tribunals. Further, this provision required that individuals nominated to the roster of presiding arbitrators should meet the qualifications set out under the ICSID Convention and these include the standards of independence and impartiality.[13]

Subsequent treaties including recent BITs and FTAs have developed this transformation and expanded the scope of requirements imposed on adjudicators. Treaty provisions set the ground for a proactive role of the State. They particularly address the issues of personal qualifications and professional expertise of adjudicators and regulate the appointment of adjudicators. The developments in some treaties also include detailed provisions on the conduct of adjudicators, structural reforms, and limitations on the decision-making power of arbitrators. Indeed, imposing a series of restrictions on the conduct, appointment, and authority of arbitrators is one of the stone pillars of the new course in the ISDS reform. Treaty provisions further restrict qualifications and other requirements imposed on adjudicators in the governing rules of arbitration institutions such as the ICSID Convention.

The new shift in the treaty-making practice introduces a systemic, top-down shakeout to ITA. Some commentators call the phenomenon “the return of the State”.[14]

This treaty practice can be criticized in that it is one-sided and grants potential respondent States a greater influence over the conduct of arbitration proceedings. This transformation does not offer claimant investors the same degree of contribution to the arbitration process that respondent States enjoy and minimizes claimants' influence over the selection of arbitrators and the appointment mechanism. This criticism does not bear weight if one considers a greater purpose that the recent

[12] See also Walid Ben Hamida, ‘The First Arab Investment Court Decision’ (2006) 7(5) J. World Invest. Trade 699-721.

[13] NAFTA (1992), Article 1124(4) (Stating that the roster of presiding arbitrators should meet "the qualifications of the Convention and rules referred to in Article 1120 and experienced in international law and investment matters. The roster members shall be appointed by consensus and without regard to nationality").

[14] See Jose Alvarez, ‘The Return of the State’ (2011) 20(2) Minn. J. Int. L. 223-264; Charles Brower, ‘Investor-State Disputes under NAFTA: The Empire Strikes Back’ (2001) 40 Columbia J. Transnatl. L. (2001) 43-88.

treaty practice aims to serve, i.e., removing bias from arbitration practitioners, minimizing inconsistent treaty interpretations as well as striking a proper balance between sovereign powers of States in pursuing their development goals, on the one hand, and securing rights and guarantees accorded to foreign investors, on the other. Further, in treaties where the creation of a roster of arbitrators is mandated, contracting states are likely to consider both the interests of their national investors and their sovereign interests when nominating a qualified individual to the roster.

The treaty reform is also criticized on the basis that investment treaties are not consistent in their approach toward arbitrators and the appointment mechanism. Indeed, treaty provisions addressing these issues differ widely and these new developments are fragmented such that one cannot identify uniform drafting on the qualifications of arbitrators and the appointment mechanism. Against this criticism, it is evident that the treaty practice is entirely united in its purpose, i.e., a greater control over adjudicators and proactive engagement of States in the ISDS appointment mechanism.

A) Technical Competencies

The AIA requires that the judges of the AIC shall have "the academic and moral qualifications to assume high-ranking legal positions".[15] The phrase “the academic ... qualifications to assume high-ranking legal positions” shows that judges of the Court are required to have formal legal education and they should be highly-qualified legal experts. The Agreement requires legal expertise in law, and this expertise is not limited to a specific field of law. This requirement explicitly excludes non-lawyers and those who obtained their legal knowledge through informal training and practical experience.

NAFTA is also a pioneer treaty using specific professional qualifications that are borrowed by contemporary investment treaties. It provided that the contracting parties shall establish a roster of presiding arbitrators who must be "experienced in international law and investment matters".[16] This requirement was only limited to presiding arbitrators and party-appointed arbitrators were not required to meet these professional qualifications.[17] Through its ISDS provisions under the

[15] AIA (1980), Article 28.

[16] NAFTA, Article 1124(4).

[17] For a similar approach see also Canada - Chile FTA (1996), Article G-25, Chile-Korea FTA (2003), Article 10.28 and Japan-Mexico EPA (2004), Article 82.

investment chapter, NAFTA incorporated substantially detailed provisions on the number and methods for the appointments of arbitrators and procedural matters, compared to conventional investment treaties concluded before this treaty. The US did not follow this approach in its other FTAs including an investment chapter that was negotiated before the Trans-Pacific Partnership (TPP) in 2016.[18] A few other FTAs with investment provisions including Canada's FTA with Chile used the same wording to regulate the technical requirements of presiding arbitrators.[19]

The Canada - Ukraine BIT is the first BIT that required specific technical expertise from all members of an arbitration tribunal. It provides that "[p]anels for disputes on prudential issues and other financial matters shall have the necessary expertise relevant to the specific financial service in dispute".[20] The required professional qualifications only included expertise in the specific financial service that is subject to arbitration and were limited to disputes involving a specific economic sector. No requirement of legal knowledge or experience in PIL was mandated. This development was due to Canada's initiation and Canada maintained this idea in its subsequent BITs throughout the 1990s.[21]

The idea originally initiated by NAFTA Article 1124(4) was further developed in some subsequent BITs. Since the mid 1990s, Mexico has emerged as a dedicated supporter of the inclusion of the expertise requirements in drafting treaties' ISDS provisions. It was the Mexico - Spain BIT that extended the required expertise in PIL to all arbitrators regardless of the economic sector that is subject of the dispute. The BIT provides that arbitrators "must be experienced in the areas of international law and investments".[22] The circumstances show that the inclusion of this requirement in the BIT was Mexico's preference as the same requirement was consistently

[18] See US - Vietnam Trade Relations Agreement (2000), Chapter IV, Singapore-US FTA (2003), Chapter 15, Chile-US FTA (2003), Chapter 10, Australia-United States FTA (2004), Chapter 11, Morocco - United States FTA (2004), Chapter 10, CAFTA - DR (2004), Chapter 10, Oman-US FTA (2006), Chapter 10, Peru - United States FTA (2006), Oman-US FTA (2006), Chapter 10, Colombia - United States TPA (2006), Chapter 10, Panama - United States FTA (2007), Chapter 10, and TPP (2016), Article 9.22.

[19] See Canada - Chile FTA (1996), Article G-25, Chile-Korea FTA (2003), Article 10.28 and Japan-Mexico EPA (2004), Article 82.

[20] Canada - Ukraine BIT (1994), Article XI (4).

[21] See, e.g., Canada - Latvia BIT (1995), Article XI(4) and Canada - Trinidad and Tobago BIT (1995), Article XI(4), Canada - Philippines BIT (1995), Annex, Section 5, Canada - South Africa BIT (1995), Article XI(4), Canada - Romania BIT (1996), Article XI(4), Barbados - Canada BIT (1996), Article XI(4), Canada - Thailand BIT (1997), Article XI(4), Canada - Croatia BIT (1997), ANNEX II(I), Canada - Lebanon BIT (1997), ANNEX II(I), and Canada - Costa Rica BIT (1998), ANNEX II(I).

[22] Mexico - Spain BIT (1995), Article XIII.

incorporated into the subsequent BITs to which Mexico was a party.[23] On the contrary, no consistent approach was found in Spain's BITs. Except for Spain's 2006 BITs with Mexico[24] and the 2021 BIT with Columbia, other Spanish BITs did not include this requirement.[25]

The US-Uruguay BIT (2005) follows the approach of the Canada-Ukraine BIT limiting the technical qualifications only to arbitrators reviewing disputes related to a specific economic sector.[26] However, unlike the Canada-Ukraine BIT, the BIT specifically includes legal expertise in financial services as part of the professional qualifications required. The BIT borrowed this additional technical requirement from the wordings of inter-State dispute provisions of international trade agreements such as the EFTA-Mexico FTA (2000) and of the Chile-EC Association Agreement (2002).[27] The BIT states that arbitration tribunals constituted to decide disputes relating to financial services shall be composed of arbitrators with "expertise or experience in financial services law or practice" and the presiding arbitrator shall have "expertise … with respect to financial services". The phrase "expertise or experience" is sufficiently broad and includes academic, professional, and working knowledge. Under this provision, the requirement "expertise or experience in financial services law or practice" applies to party appointed arbitrators only. Stricter technical qualities are imposed on presiding arbitrators as the BIT uses the expression "expertise … with respect to financial services", and the term "expertise" refers to proficiency and an advanced level of technical knowledge. Thus, the presiding arbitrator should be a "master" who possesses high-level and proprietary knowledge of financial services and, as a consequence, general practical knowledge is not sufficient.

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[23] See, e.g., Mexico - Switzerland BIT (1995), Annexed Schedule, Article 5(2), Argentina - Mexico BIT (1996), Annex Article Three, Mexico - Netherlands BIT (1998), Article Six, Austria - Mexico BIT (1998), Article 13, Germany - Mexico BIT (1998), Article 14, Belgium-Luxembourg Economic Union - Mexico BIT (1998), Article 13, France - Mexico BIT (1998), Article 9, Mexico - Uruguay BIT (1999), Article 8.4, Mexico - Portugal BIT (1999), Article 12, Korea, Republic of - Mexico BIT (2000), Article 10, Mexico - Sweden BIT (2000), Article 13, Cuba - Mexico BIT (2001), Annex, Article 5, Czech Republic - Mexico BIT (2002), Mexico - Panama BIT (2005), Article 15, Article 11, China - Mexico BIT (2008), Article 15, Australia - Mexico BIT (2005), Article 14, Iceland - Mexico BIT (2005), Article 12, and India - Mexico BIT (2007), Article 14.

[24] Mexico - Spain BIT (2006), Article XIII.

[25] See Colombia - Spain (2021), Article 25(1).

[26] United States - Uruguay BIT (2005), Article 20.

[27] Article 42 of the EFTA-Mexico FTA (2000), and Article 129 of the Chile-EC Association Agreement (2002).

The wording used in Mexico's investment treaties gradually received greater adoption by other BITs or FTAs with investment provisions.[28] The Canada-Peru BIT in 2006 was the first treaty to follow the approach of Mexican BITs in imposing the requirement of expertise or experience in PIL on all ISDS arbitrators.[29] Although Canada was not consistent in this practice in the immediate years after the conclusion of the Canada-Peru BIT,[30] it has emerged as a strong supporter of this requirement since 2011 such that "Arbitrator" represents the subject of a distinct article of its investment treaties.[31] Other than Canada's treaties, only a very few treaties concluded between 2000 and 2009 incorporated this same requirement.[32]

Since 2010, this requirement has found an increasing presence, though not prevailing, in the contemporary treaty-making practice. Currently, a substantial number of the recent generations of BITs or FTAs with an investment chapter include a specific provision on the professional qualifications of arbitrators. These treaties generally included the requirement for experience or expertise in PIL.

The wordings in these treaties often include the expression of "expertise or experience in public international law" or similar terms. The wording was first used in Canada's BIT with Peru in 2006.[33] The qualifications under the BIT also include expertise or experience in "international trade or international investment rules, or the resolution of disputes arising under international trade or international investment agreements". There exists a considerable difference between the

[28] It should be noted that the above argument is only meant in relation to treaties drafted in English or were translated in English. This conclusion does not include treaties in a language other than English.
[29] See Canada - Peru BIT (2006), Article 29. See also Canada - Peru FTA (2008), Article 826, Canada - Colombia FTA (2008), Article 824, Canada - Jordan BIT (2009), Article 29, and Canada-Panama FTA (2010), Article 9.25.
[30] For treaties with no reference to these requirements see Canada - Latvia BIT (2009), Article XIII, Canada - Czech Republic BIT (2009), Article X, Canada - Romania BIT (2009), Article XIII, and Canada - Slovakia BIT (2010), Article X and Annex B.
[31] See Canada - Kuwait BIT (2011), Article 25, Canada - China BIT (2012), Article 24, Benin - Canada BIT (2013), Article 28, Canada - United Republic of Tanzania BIT (2013), Article 25, Cameroon - Canada BIT (2014), Article 25, Canada - Nigeria BIT (2014), Article 26, Canada - Serbia BIT (2014), Article 26, Canada - Senegal BIT (2014), Article 26, Canada - Mali BIT (2014), Article 25, Canada - Côte d'Ivoire BIT (2014), Article 25, Burkina Faso - Canada BIT (2015), Article 27, Canada - Guinea BIT (2015), Article 26, Canada - Hong Kong BIT (2016), Article 25, Canada - Mongolia BIT (2016), Article 25, Canada - Moldova BIT (2018), Article 25.
[32] See Australia-Chile FTA (2008), Article 10.19, ASEAN Comprehensive Investment Agreement (2009), Article 35, and AANZFTA (2009), Article 23.
[33] Canada - Peru BIT (2006), Article 29 (providing that "[a]rbitrators shall: (a) have expertise or experience in public international law, international trade or international investment rules, or the resolution of disputes arising under international trade or international investment agreements").

notions of "expertise" and "experience". The term “expertise” can be understood as speciality and having an advanced level of technical knowledge. Expertise is generally gained through studies and/or training in a particular field such as being a lawyer. The word "experience" is broader in the meaning and generally refers to knowledge gained through practical exposure to facts and events. The inclusion of the word “experience” shows that the drafters of the BIT do not require that arbitrators must gain their knowledge of PIL or its specified subfields through formal legal education or training programs at law schools or bar associations. As Canada clarified its position during the discussions of the Working Group III, "imposing too many mandatory qualifications could significantly limit the pool of candidates for selection. Rather, there should be flexibility as to how these different factors are considered as criteria in the selection or appointment of arbitrators".[34]

While the majority of treaties that impose technical qualification requirements either include the same wording as the one used in the Canada - Peru BIT[35] or use phrases that are slightly different from this expression,[36] others employ terms that differ significantly such that the contents and scopes of the technical competency requirement are either further limited or broadened depending on the wording used.

The Argentina - UAE BIT demands “adequate experience” in PIL and related subfields.[37] The expression “adequate experience” can be understood to mean that an arbitrator is able to fulfill his or her arbitrator’s duties in a satisfactory or acceptable manner. The question revolves around the level of experience that is viewed as sufficiently acceptable from an ISDS arbitrator. On its face,

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[34] *Canada's Observations on Selection and appointment of ISDS tribunal members*, UNCITRAL Working Group III, UN Doc. A/CN.9/WG.III/WP. [undated], para 11.

[35] See Belarus - India BIT (2018), Article 18, and India - Kyrgyzstan BIT (2019), Article 18.

[36] See Canada - Peru FTA (2008), Article 826, Canada - Colombia FTA (2008), Article 824, Canada-Panama FTA (2010), Canada - China BIT (2012), Article 24, Article 9.25, Canada - Honduras FTA (2013), Article 10.26, Canada - Korea, Republic of FTA (2014), Article 8.25, Burkina Faso - Singapore BIT (2014), Article 12, Canada - Serbia BIT (2014), Article 26, Burkina Faso - Canada BIT (2015), Article 27, Canada - Mongolia BIT (2016), Article 25, Iran-Slovakia BIT (2016), Article 18(2), Canada - Hong Kong BIT (2016), Article 25, Central America - Republic of Korea FTA (2018), Article 9.20, Indonesia - Singapore BIT (2018), Article 19, Singapore - Rwanda BIT (2018), Article 12, Canada - Moldova BIT (2018), Article 25, Myanmar - Singapore BIT (2019), Article 13, Israel - United Arab Emirates BIT (2020), Article 21, and Armenia - Singapore Agreement on Trade in Services and Investment (2019), Article 3.16.

[37] Argentina - United Arab Emirates BIT (2018), Article 25 (stating that "[t]he arbitrators shall have adequate experience in public international law and international investment rules, or in the settlement of disputes arising from international investment agreements").

practical knowledge of PIL and related subfields meets this requirement. However, given the fact that ISDS disputes often involve complex procedural issues and complicated legal matters, only a high degree of knowledge may satisfactorily be able to assist an arbitrator to fulfil his or her duties.

The EU - Singapore investment treaty requires that adjudicators have “specialised knowledge of, or experience in, public international law” or its specified subfields.[38] The wording “specialised knowledge of, or experience” imposes a higher threshold, compared to the phrase “expertise or experience” and “adequate experience”. This wording can be understood to refer to expertise and proficiency meaning that a greater level of competency is demanded, and a mere practical experience in PIL does not meet this requirement.

CETA and the EU's FTA with Vietnam use the phrase "demonstrated expertise in public international law”.[39] The wording "demonstrated expertise” imposes even stricter qualifications, compared to the expressions reviewed above. First, mere practical knowledge and experience is not sufficient, and it requires advanced skill and proficiency in the field. Second, the term "demonstrated" refers to ‘identifiable’ evidence meaning that advanced skill and proficiency should be evidenced.

Following a different approach, CPTPP and a few other treaties do not specifically set technical requirements for adjudicators but require the appointing parties to "take into account the expertise or relevant experience of particular candidates with respect to the relevant governing law”, while the relevant governing law consists of treaty provisions and applicable rules of PIL.[40] Considering these provisions together, this expression is understood as imposing the requirement of expertise or experience in PIL and international investment law. However, the expression “expertise or

[38] EU - Singapore Investment Protection Agreement (ESIPA) (2018), Article 3.9, 3.10 and 3.44 (Stating that "[a]rbitrators shall have specialised knowledge of or experience in law and international trade or investment, or in the settlement of disputes arising under international trade agreements"

[39] CETA, Article 8.27 (Stating that adjudicators "shall have demonstrated expertise in public international law. It is desirable that they have expertise in particular, in international investment law, in international trade law and the resolution of disputes arising under international investment or international trade agreements"). See also EU - Viet Nam Investment Protection Agreement (2019), 3.38 and 3.39

[40] Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (2018), Article 9.22 (stating that "each disputing party shall take into account the expertise or relevant experience of particular candidates with respect to the relevant governing law under Article 9.25.2 (Governing Law)”). See also Trans-Pacific Partnership (TPP) (2016), Articles 9.22 and 9.25.2 and Argentina - Japan BIT (2018), Articles 26,

relevant experience" imposes less strict qualifications on adjudicators, compared to phrases such as "specialised knowledge of, or experience" and "demonstrated expertise".

Using a different wording, the Argentina - Qatar BIT states that arbitrators "shall have knowledge of or experience in the relevant law".[41] The degree and quality of "knowledge of or experience" required under the BIT is not specified. Similar to the term "experience", the phrase "knowledge" is fairly broad, and it can be gained through both education and practical involvement in a particular field. Thus, compared to some other expressions, it requires a lower degree of professional qualifications. Relevant law is the governing law of the treaty and includes "the provisions of this Treaty and the principles of international law, and the laws of the Contracting Parties".[42] Considering these provisions together, the expression "knowledge of or experience in the relevant law" not only include knowledge of or experience in PIL but also encompass familiarity with and experience in the domestic law of the respondent State.

Finally, some treaties only impose the requirement for professional qualifications on presiding arbitrators. The ASEAN - India Investment Agreement provides that presiding members shall "have expertise or experience in public international law, international investment rules".[43] The Agreement does not impose any technical qualifications on party-appointed arbitrators and in this respect follows the approach adopted in convention investment treaties.

Although the above treaties employ different wordings, they evidence the preference of States regarding the technical qualifications of ISDS adjudicators. Despite inconsistency in their wordings, recent treaties generally support the view that sees ISDS as a field of PIL and promise a greater participation of PIL experts in ISDS. This practice to a great extent goes against the circumstances of the current ISDS arbitrator community as a considerable proportion of the pool is composed of practitioners who have a background in private law.

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[41] Argentina - Qatar BIT (2016), Article 16 (stating that "[a]he arbitrators in an Arbitral Tribunal shall have knowledge of or experience in the relevant law".)

[42] Argentina - Qatar BIT (2016), Article 14(5).

[43] ASEAN - India Investment Agreement (2014), Article 11. See also China - Mauritius FTA (2019), Article 8.27 (stating that the presiding arbitrator appointed by the appointed authority "should be a recognized expert in public international law, and should be experienced in investor-State dispute settlement").

B) Addressing Bias in Treaties: From Neutral Nationality to Codes of Conduct

Arrangements addressing bias or appearance of bias in ISDS arbitrations have a longer presence in investment treaties compared to the requirements of the technical qualifications. Also, compared to the number of treaties with provisions on the professional qualifications of adjudicators, there exist a larger number of treaties incorporating personal qualifications requirements. This shows a greater interest on the part of States in provisions that prevent actual or appearance of bias in ISDS disputes. The discussions of the UNCITRAL Working Group III also show that States largely support a framework that "not only ensure[s] actual impartiality and independence of arbitrators but also the appearance of those qualities".[44] Further, considering investment treaties collectively, this practice goes beyond merely guaranteeing the independence and impartiality of arbitrators, as it also fosters the legitimacy of ISDS disputes.

From a historical point of view, it has been a long-standing treaty practice that treaty ISDS clauses impose the neutral nationality requirement on tribunal presidents. Borrowed from inter-State dispute settlement provisions of BITs of the 1960s and 1970s,[45] early treaties with ISDS provisions as emerging in the 1980s required that the presiding arbitrator should not be national of either disputing party.[46] This requirement of neutral nationality is intended to prevent any appearance of bias and serve a purpose greater than merely guaranteeing the impartiality and independence of tribunal presidents.[47] This practice has evolved over the past few decades and treaties have adopted two different attitudes. While a number of treaties follow the early 1980s BIT in imposing the neutral nationality requirement on presiding arbitrators regardless of whether or not they are appointed by the agreement of the disputing parties,[48] a significant proportion of treaties only

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[44] *Report of UNCITRAL Working Group III on the work of its thirty-fifth session New York, 23–27 April 2018* (14 May 2018) para 53.

[45] See, e.g., See BLEU (Belgium-Luxembourg Economic Union) - Tunisia BIT (1964), Article 4, Iraq - Kuwait BIT (1964), Article 7, Indonesia - Netherlands BIT (1968), Article 22, Belgium - Indonesia BIT (1970), Article 11, Kenya - Netherlands BIT (1970), Article 16, Korea - Netherlands BIT (1974), Article 11, BLEU (Belgium-Luxembourg Economic Union) - Korea BIT (1974), Article 9, and Egypt - Netherlands BIT (1976), Article XI.

[46] See, e.g., Egypt - Finland BIT (1980), Article 7, Finland - Russian Federation BIT (1989), Article 8, China - Kuwait BIT (1985), Article 8, China - Italy BIT (1985), Protocol, (4) Ad Article 5, China - Malaysia BIT (1988), Article 7, and China - Japan BIT (1988), Article II.

[47] Doak Bishop and Lucy Reed, "Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration", (1998) 14(4) Arbitr. Int. 401.

[48] See Japan-Malaysia EPA (2005), Article 85.10, Cambodia - Japan BIT (2007), Article 17.11, Brunei-Japan EPA (2007), Article 67.13., Indonesia-Japan EPA (2007), Article 69.11, Japan - Lao People's Democratic Republic BIT (2008), Article 17.11, Japan - Peru BIT (2008), Article 18.12, India - Malaysia FTA (2011), Article 10.14.13,

impose such a requirement if the tribunal president is appointed by a third party.[49] This later group of treaties do not prohibit the appointment of a co-national as presiding arbitrator if he or she is appointed by the parties' agreement. In the recent treaty practice, the nationality restriction only applies in situations where a third-party appointing authority is involved in the appointment of the president.

Article 28 of the AIA states that judges of the AIC shall have the "moral qualifications to assume high-ranking legal positions". Although the Agreement did not expressly refer to the standards of independence and impartiality, the expression has a broad meaning and includes these two requirements. The expression bears a meaning similar to that of "high moral character" character" used in Article 14(1) of the ICSID Convention. The term is understood to refer to a character showing an elevated level of conviction that the individual will act in the conduct of the dispute settlement process in accordance with the recognized rules of conduct for adjudicators.

Like the 1980s BITs with ISDS provisions, NAFTA drafters showed a greater interest in the qualifications of presiding arbitrators than party-appointed arbitrators. Article 1124 of NAFTA specifically imposed the requirements of high moral character, independence, and impartiality as set out under the ICSID Convention on those appointed to the roster of presiding arbitrators.[50] However, this does not mean that co-arbitrators are not required to meet these standards as they have gained the status of a customary norm of PIL and apply to all international adjudicators, regardless of the party that appointed the arbitrator. Further, Article 1115 of NAFTA discussing the purpose of the ISDS mechanism stated that its purpose is to establish an "impartial tribunal", implying the position of the NAFTA parties that all arbitrators shall remain impartial.

Malaysia - San Marino BIT (2012), Article 10.7, Japan - Saudi Arabia BIT (2013), Article 14.11, Japan - Kazakhstan BIT (2014), Article 17.12, ASEAN - India Investment Agreement (2014), Article 11, Japan - Uruguay BIT (2015), Article 21.13, Iran - Slovakia BIT (2016), Article 18, and Slovakia - United Arab Emirates (2016), Article 19, Japan - United Arab Emirates BIT (2018), Article 17.12, and Georgia - Japan BIT (2021), 9.28.

[49] See Slovakia - Switzerland BIT (1990), Article 9, NAFTA (1992), Article 1124, India - Tajikistan BIT (1995), Article 9, Canada - Chile FTA (1996), Article G-25, Macedonia - Sweden BIT (1998), Article 7, Mexico - Sweden BIT (2000), Article 13, India - Sudan BIT (2003), Article 9, Mexico - Spain BIT (2006), Article XIII, Kenya - Slovakia BIT (2011), Article 10, Mexico - Turkey BIT (2013), Article 17., Canada - Korea, Republic of FTA (2014), Article 8.26, Australia - China FTA (2015), Article 9.15, Canada - Mongolia BIT (2016), Article 25, TPP (2016), Article 9.22, Australia - Peru FTA (2018), Article 8.23, CUSMA (2018), Article 14.D.6, Australia - Uruguay BIT (2019), 14.15, and Israel - Republic of Korea FTA (2021), Articles 9.22 and 9.28.

[50] This approach was also followed by a few FTA treaties with investment provisions. See Canada - Chile FTA (1996), Article G-25, and Chile-Korea FTA (2003), Article 10.28.

Canada's BIT with Peru triggered the ongoing reform and transformation in investment treaties towards removing bias, or appearance thereof, from ISDS adjudicators and addressing conflicts arising out of the conduct of adjudicators. The BIT requires that arbitrators should "be independent of, and not be affiliated with or take instructions from, either Party" and "comply with any Code of Conduct for Dispute Settlement" that will be agreed upon by the contracting States.[51] These expressions were originally borrowed from inter-State arbitration provisions of international trade agreements.[52]

The idea employed in the Canada - Peru BIT has found increasing support in subsequent treaties. These developments have reached the extent where a considerable proportion of arbitration rules of arbitration institutions currently overlap with treaty provisions that regulate the conduct of arbitrators and the conduct of the arbitration. In instances of inconsistency between the provisions of the underlying treaty and arbitration rules of the arbitration institution the former prevails.

In spite of significant developments in treaty practice, treaties have not been consistent in their wordings and approaches. A few treaties simply include the standards of independence of adjudicators, with no prospect of a code of conduct.[53] Some go further to impose both the independence requirement and other obligations incorporated in a code of conduct that will be agreed upon by the contracting States.[54] A number of treaties specify an existing code of conduct, i.e., the IABA on Conflicts of Interest in International Arbitration, as applicable and binding rules that govern the behavior of adjudicators.[55] And others create a specifically-tailored code of conduct

[51] Canada - Peru BIT (2006), Article 29.

[52] See, e.g., Australia-Thailand FTA (2004), Article 1805, Bahrain-US FTA (2004), Article 19.7, and Chile-China FTA (2005), Article 85.

[53] See, e.g., Burkina Faso - Singapore BIT (2014), Article 12, Singapore - Rwanda BIT (2018), Article 12, Armenia - Singapore Agreement on Trade in Services and Investment (2019), Article 3.16, and Myanmar - Singapore BIT (2019), Article 13.

[54] See, e.g., See also Canada - Peru FTA (2008), Article 826, Australia-Chile FTA, Article 10.19, Canada - Jordan BIT (2009), Article 29, Canada - Honduras FTA (2013), Article 10.26, Burkina Faso - Canada BIT (2015), Article 27, Slovakia - United Arab Emirates (2016), Article 19, Canada - Moldova BIT (2018), Article 25, Lithuania - Turkey BIT (2018), Article 12, Belarus - India BIT (2018), Articles 18 and 19, India - Kyrgyzstan BIT (2019), Articles 18 and 19.

[55] See, e.g., CETA (2016), Article 8.30, Rwanda - United Arab Emirates BIT (2017), Article 18, CUSMA (2018), Article 14.D.6, Belarus - Hungary BIT (2019), Article 9, Cabo Verde - Hungary BIT (2019), Article 9, Hungary - Kyrgyzstan BIT (2020), Article 9, and Colombia - Spain BIT (2021), Article 25.

placing heavy responsibilities on adjudicators.[56] As a result of these distinct approaches, the requirements imposed on adjudicators under different treaties vary significantly.

i) Requirements of independence and impartiality: The impartiality standard has recently attracted the attention of the drafters of the recent generations of investment treaties,[57] compared to a larger number of BITs and FTAs with investment chapters expressly imposing the requirement of independence on arbitrators such that this has become a widespread practice. Currently, a sizable proportion of recent treaties incorporate the standard of independence as part of detailed arrangements designed for the personal qualifications and conduct of arbitrators. On the contrary, a smaller number of treaties only include references to the general standard of independence without imposing any detailed obligation on the arbitrator. These later treaties not only require the independence of arbitrators from the disputing parties but also, they are required to be independent from the States parties to the investment treaty.[58]

A few treaties have extended the requirement of independence to persons affiliated with the arbitrators. The Iran - Slovakia BIT states that an arbitrator's "staff and assistants shall be independent of, and not be affiliated with or take instructions from the claimant or the respondent or the government of a Contracting Party with regard to investment matters".[59] Some other BITs limit the scope of this expanded standard to the legal secretary of arbitrators, not all of their staff.[60] The above treaties limit this expanded requirement only to investment matters, meaning that affiliations of staff, assistants, and legal secretaries to the parties to the BIT or to the disputing parties with regard to other matters are not subject to this requirement. This expanded requirement

[56] See, e.g., ESIPA (2018), Annex 7, Argentina - Japan BIT (2018), Article 26, Australia - Indonesia CEPA (2019), Annex 14-A, Australia - Uruguay BIT (2019), Annex C, and EU - Vietnam Investment Protection Agreement (EVIPA) (2019), Annex 8.

[57] See Australia - China FTA (2015), Annex 9-A, Articles 1-2, 11 and 16, Burkina Faso - Canada BIT (2015), Article 27, CETA (2016), Article 8.44, Argentina - Qatar BIT (2016), Article 16, , Rwanda - United Arab Emirates BIT (2017), Article 18, Argentina - United Arab Emirates BIT (2018), Article 25, Belarus - India BIT (2018), Article 19, ESIPA (2018), Annex 7, Article 10 and 14, Australia - Indonesia CEPA (2019), Annex 14-A, Article 1-2, 11 and 16, EVIPA (2019), Annex 8, Article 2, 3, 14, Australia - Uruguay BIT (2019), Annex C(1), and India - Kyrgyzstan BIT (2019), Article 19, Israel - United Arab Emirates BIT (2020), Article 21.

[58] See, e.g., Burkina Faso - Singapore BIT (2014), Article 12, Singapore - Rwanda BIT (2018), Article 12, Armenia - Singapore Agreement on Trade in Services and Investment (2019), Article 3.16, and Myanmar - Singapore BIT (2019), Article 13.

[59] Iran - Slovakia BIT (2016), Article 18(5). See also Lithuania - Turkey BIT (2018), Article 12(8).

[60] See Slovakia - United Arab Emirates (2016), Article 19(8).

also does not include affliction of arbitrators' family members to the disputing parties or the contracting States.

ii) Distinct requirements for presiding arbitrators. As discussed above, presiding arbitrators have traditionally been subject to an additional restriction, i.e., the neutral nationality requirement, in investment treaties compared to party-appointed arbitrators. Since the early 2000s, some treaties have included a distinct clause that set out additional qualifications for presiding arbitrators. This practice can be considered as a development of the neutrality requirement of the chairperson that was first included in ISDS provisions of the 1980s BITs. The idea has been borrowed from inter-State dispute provisions in international trade agreements.[61]

Some treaties require that the chairperson shall not be a national of a State which has no diplomatic relationships with the respondent State and non-disputing members of the treaty.[62] However, this restriction in some treaties is limited to situations where a third party appoints the tribunal president.[63] The imposition of this restriction on presiding arbitrators in inter-State disputes under investment treaties has been a long-standing practice.[64] This requirement aligns with the neutral nationality requirement of the presiding arbitrator.

Some treaties impose the neutral residency requirement meaning that the tribunal president should not have his or her usual place of residence in the territory of either Contracting States.[65] The ASEAN - India Investment Agreement also adds that the chairperson shall not be a permanent

[61] See Chile-EFTA FTA (2003), Article 92, Australia-Thailand FTA (2004), Article 1805, Chile-China FTA (2005), Article 85, and China-Pakistan FTA (2006), Article 63.

[62] See Cambodia - China BIT (1996), Article 9, Iran, Islamic Republic of - Switzerland BIT (1998), Article 9, ASEAN Comprehensive Investment Agreement (2009), Belarus - India BIT (2018), Article 18, Article 35 and Australia - Indonesia CEPA (2019), Article 14.27, and Hong Kong - Mexico BIT (2020), Article 20.

[63] Colombia - United Arab Emirates BIT (2017), Article 17.

[64] See, e.g., Hong Kong - Netherlands BIT (1992), Article 11, Hong Kong - Sweden BIT (1994), Article 10, Hong Kong - Italy BIT (1995), Article 11, Hong Kong - United Kingdom BIT (1998), Article 9, Hong Kong - Thailand BIT (2005), Article 9, Hong Kong - Kuwait BIT (2010), Article 9, Canada - Hong Kong BIT (2016), Article 35, Rwanda - United Arab Emirates BIT (2017), Article 21, Colombia - United Arab Emirates BIT (2017), Article 22, Kazakhstan - United Arab Emirates BIT (2018), Article 11, Hong Kong - United Arab Emirates BIT (2019), Article 9. See also Israel - United Arab Emirates BIT (2020), Article 26 (imposing the neutral nationality requirement on all appointed arbitrators).

[65] See Japan-Malaysia EPA (2005), Article 85.10, Cambodia - Japan BIT (2007), Article 17.11, Brunei-Japan EPA (2007), Article 67.13., Indonesia-Japan EPA (2007), Article 69.11, Japan - Lao People's Democratic Republic BIT (2008), Article 17.11, India - Malaysia FTA (2011), Article 10.14.13, Malaysia - San Marino BIT (2012), Article 10.7, Japan - Saudi Arabia BIT (2013), Article 14.11, Japan - Kazakhstan BIT (2014), Article 17.12, Japan - Uruguay BIT (2015), Article 21.13.

resident of a territory of a non-disputing party.[66] Some BITs only require the residency requirement if an appointing authority appoints the tribunal president.[67]

These treaties also require that the presiding arbitrator should not have dealt with the investment dispute in any capacity.[68] Although these treaties only highlight this requirement as to the tribunal president, previous involvement in the matters under dispute generally gives rise to justifiable doubt about the independence and impartiality of any adjudicator, regardless of whether he or she is a party-appointed arbitrator or tribunal chairperson.

iii) Disclosure obligations: A small number of recent investment treaties expressly include detailed disclosure obligations. The disclosure obligation under these treaties is granted a greater scope and content compared to disclosure obligations under the existing institutional arbitration rules such as the ICSID Arbitration Rules of 2006 and UNCITRAL Arbitration Rules. Generally, these treaty provisions are sufficiently broad enough that place a heavy responsibility on adjudicators to disclose any facts and circumstances that are likely to affect their independence or impartiality or give rise to a conflict.

These treaties generally extend the scope of the disclosure obligation to candidates and require that any disclosure should be made prior to the confirmation of the appointment of an arbitrator.[69] Rwanda - United Arab Emirates BIT even further expands the scope of this obligation and includes assistants to arbitrators.[70] The word "assistant" is not defined in the BIT. It can be understood to mean any person who conducts research or provides support for the adjudicator, regardless of whether he or she is a member of the adjudicator's regular staff or not.

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[66] See ASEAN - India Investment Agreement (2014), Article 20(11). See also ASEAN Comprehensive Investment Agreement (2009), Article 35 and Australia - Indonesia CEPA (2019), Article 14.27.

[67] See Chile - Hong Kong BIT (2016), Article 25.

[68] See Japan-Malaysia EPA (2005), Article 85.10, Cambodia - Japan BIT (2007), Article 17.11, Brunei-Japan EPA (2007), Article 67.13., Indonesia-Japan EPA (2007), Article 69.11, Japan - Lao People's Democratic Republic BIT (2008), Article 17.11, India - Malaysia FTA (2011), Article 10.14.13, Malaysia - San Marino BIT (2012), Article 10.7, Japan - Saudi Arabia BIT (2013), Article 14.11, ASEAN - India Investment Agreement (2014), Article 20(11), Japan - Kazakhstan BIT (2014), Article 17.12, Japan - Uruguay BIT (2015), Article 21.13

[69] See Australia - China FTA (2015), Annex 9-A, Article 2, ESIPA (2018), Annex 7, Article 3-5, Belarus - India BIT (2018), Article 19.2. India - Kyrgyzstan BIT (2019), Article 19.2, Australia - Indonesia CEPA (2019), Annex 14-A, Articles 2-3, Australia - Uruguay BIT (2019), Annex C, and Articles 2-3, EU - Viet Nam Investment Protection Agreement (2019), Annex 8, Articles 3-5. See also Brazil - India BIT (2020), Annex II, Article 2 (imposing similar disclosure obligations on arbitrators in inter-State disputes.)

[70] Rwanda - United Arab Emirates BIT (2017), Article 18.

The Code of Conduct of the Canada-United States-Mexico Agreement (CUSMA) significantly extends the scope of the disclosure requirement to the candidate's employer, business partner, business associate, or family member.[71] In particular, it provides a broad definition of the term "family member".[72] While CUSMA's Code of Conduct includes major developments with respect to disclosure obligations, Article 1 of this Code limits its application to panels established under Chapters 10 and 31 on trade remedies and inter-State dispute Settlement respectively, and does not cover panels created under Chapter 14 on investment.

With respect to the contents of this obligation, treaty provisions are generally sufficiently broad to include any relationship or circumstances that may give rise to doubts about the independence and impartiality qualities of the adjudicator. India's BITs with Belarus and Kyrgyzstan further extend the covered circumstances and facts to not only an arbitrator's relationships with a party's counsel, representatives, or witnesses but also to his or her relationships with the co-arbitrators.[73] This obligation under India's BIT not only encompasses participants in the arbitration proceedings who are affiliated with a disputing party but also includes other members of the arbitration tribunal. Further, the treaties impose a proactive duty on adjudicators meaning that they shall make all reasonable efforts at any stage of the arbitration proceedings to become aware of any interest, relationship, or matter that may give rise to issue conflict.[74]

As to the criteria adopted in these treaties, States' preferred standard is justifiable doubts and appearance of bias.[75] These treaties generally follow the approach of the UNCITRAL Arbitration Rules that includes a lower bar compared to that of the ICSID Convention. However, although the

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[71] CUSMA Free Trade Commission Decision No. 1, Annex III: Rules of Procedure and Code of Conduct, Article 4.

[72] Article 2 of the CUSMA's Code of Conduct defines the term "family member" to mean "the spouse of a candidate or member; or a parent, child, grandparent, grandchild, sister, brother, aunt, uncle, niece, or nephew of the candidate or member or spouse of the candidate or member, including whole and half blood relatives and step relatives; or the spouse of such an individual. A family member also includes any resident of a candidate's or member's household whom the candidate or member treats as a member of their family".

[73] See Belarus - India BIT (2018), Article 19(2) and India - Kyrgyzstan BIT (2019), Article 19(2).

[74] See, e.g., Australia - China FTA (2015), Annex 9-A, ESIPA (2018), Annex 7, Article 3, Australia - Indonesia CEPA (2019), Annex 14-A, Article 2, Australia - Uruguay BIT (2019), Annex C, Article 2, Article 2, and EVIPA (2019), Annex 11, Article 3.

[75] See Australia - China FTA (2015), Annex 9-A, Article 2, Argentina - United Arab Emirates BIT (2018), Article 40, Rwanda - United Arab Emirates BIT (2017), Article 18, ESIPA (2018), Annex 7, Article 3-5, Australia - Indonesia CEPA (2019), Annex 14-A, Articles 2-3, Australia - Uruguay BIT (2019), Annex C, Articles 2-3, EVIPA (2019), Annex 8, Articles 3-5, Belarus - India BIT (2018), Article 19.2, and India - Kyrgyzstan BIT (2019), Article 19.2.

majority of these treaties implicitly state that justifiable doubts should be viewed in the eye of a reasonable third party, i.e., the appointing authority who reviews disqualification challenges, India's BITs with Belarus and Kyrgyzstan provide that the standard is "the eyes of the disputing parties".[76] This is a stricter standard compared to the reasonable double standard under the UNCITRAL Rules.

Further, recent treaties also include provisions on arbitrator challenge that impose a lower bar for disqualification compared to that of the ICSID Convention. These provisions generally prevail over disqualification provisions in the existing arbitration rules such as those of ICSID and UNCITRAL.[77]

The standard for disqualifying an arbitrator is the "justifiable doubts" test.[78] Indeed, recent treaties support the standard used in Article 11 of UNCITRAL Arbitration Rules rather than the standard of "manifest lack" of the qualifications as used in the ICSID Convention. India's BITs specifically provide that the appointing authority shall disqualify the challenged arbitrator if there are circumstances that would give rise to justifiable doubts as to the arbitrator's lack of the required qualifications, "even in the absence of actual bias".[79]

Another development in the treaty practice is that treaties also disengage co-arbitrators from the challenge mechanism. The Colombia - Korea FTA (2013) is a pioneer in this respect.[80] Decisions on challenges are made by a neutral third party who also acts as the appointing authority.[81]

iv) Restrictions on double-hatting: To further control the behaviour of adjudicators, a number of treaties expressly prevented adjudicators from wearing multiple hats in certain circumstances. Under these treaties, when appointed as adjudicators, they "shall refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment dispute".[82] While some of

[76] See Belarus - India BIT (2018), Article 19.2, and India - Kyrgyzstan BIT (2019), Article 19.2.
[77] See, e.g., Lithuania - Turkey BIT (2018), Article 12(11), Belarus - India BIT (2018), Article 16, Australia - Uruguay BIT (2019), Article 14, India - Kyrgyzstan BIT (2019), Article 16.
[78] See, e.g., Argentina - Qatar BIT (2016), Article 16, Argentina - United Arab Emirates BIT (2018) and Article 41, Argentina - Japan BIT (2018), Article 26.
[79] See Belarus - India BIT (2018), Article 19.3, and India - Kyrgyzstan BIT (2019), Article 19.7.
[80] Colombia - Korea FTA (2013), Article 8.21.
[81] See, e.g., Colombia - Korea FTA (2013), Article 8.21, Argentina - United Arab Emirates BIT (2018), Article 41, Argentina - Japan BIT (2018), Article 26, and Lithuania - Turkey BIT (2018), Article 12(9).
[82] See, e.g., Iran - Slovakia BIT (2016), Article 18(5), Slovakia - United Arab Emirates (2016), Article 19(8), CETA (2016), Article 8.30, Argentina - United Arab Emirates BIT (2018), Article 25, ESIPA (2018), Article 3.11, Belarus

these treaties limited the prohibition to investment disputes arising under the underlying treaty and any other agreement,[83] others extend the scope of the prohibition to acting in the above roles in investment disputes under domestic laws of the Contracting parties.[84]

As a common feature among these treaties, they also limit the scope of the disallowed double-hatting to concurrent disputes, i.e., pending and new ISDS disputes. In this approach, the prohibition does not apply to involvement as counsel, witness, or expert in previous investment disputes. Further, this prohibition does not include acting as secretary of the tribunal.

Additionally, most of the treaties that prohibit double hatting also ban the participation of adjudicators in "any disputes that would create a direct or indirect conflict of interest".[85] This provision is broad in the coverage and includes any role adjudicators may assume in both ISDS and non-ISDS disputes that may amount to a conflict. Thus, although these treaties do not expressly address the issue of repeat appointments in ISDS disputes, this commonly used provision also disallows repeat appointments if such appointments create conflict of interest.

III) Structural Reforms in Treaty Practice

As part of a border ISDS reform, recent treaty practice supports structural reforms of the traditional structure of ISDS tribunals that significantly redesign the organization of investment treaty disputes. This structural transformation has its roots, at least in part, in the concerns over the *ad hoc* appointment mechanism as well as over the conduct and qualifications of ISDS adjudicators. The establishment of joint interpretation committees and the incorporation of a proposed multilateral court system in investment treaties are two developments that highlight this reorganization. Although the idea of the formation of joint interpretation committees has a long-

- Hungary BIT (2019), Article 9(9), Cabo Verde - Hungary BIT (2019), Article 9(9), EVIPA (2019), Article 3.40, Hungary - Kyrgyzstan BIT (2020), Article 9(9).

[83] See, e.g., CETA (2016), Article 8.30, Argentina - United Arab Emirates BIT (2018), Article 25, Belarus - Hungary BIT (2019), Article 9(9), Cabo Verde - Hungary BIT (2019), Article 9(9), and Hungary - Kyrgyzstan BIT (2020), Article 9(9).

[84] See, e.g., ESIPA (2018), Article 3.11, and Iran - Slovakia BIT (2016), Article 18(5), and Slovakia - United Arab Emirates (2016), Article 19(8).

[85] See CETA (2016), Article 8.30, Iran - Slovakia BIT (2016), Article 18(5), Slovakia - United Arab Emirates (2016), Article 19(8), Lithuania - Turkey BIT (2018), Article 12, Lithuania - Turkey BIT (2018), Article 12(8), ESIPA (2018), Article 3.11, EVIPA (2019), Article 3.40, Belarus - Hungary BIT (2019), Article 9(9), Cabo Verde - Hungary BIT (2019), Article 9(9), and Hungary - Kyrgyzstan BIT (2020), Article 9(9).

standing history,[86] it has gained reinforced traction in the recent investment treaties. The creation of joint interpretation commissions as a superior interpretive authority is a safeguard against unintended or adventurous interpretations of adjudicators. Also, the idea of a permanent court system addresses some of the challenges and deficiencies of the *ad hoc* appointment mechanism. The international community has had a more positive experience with regard to international courts compared to ISDS adjudicators, particularly third-party requests for disqualification of judges of international courts and tribunals are rare.[87] The purpose of establishing a permanent investment court is to repair the broken control system of ISDS. The underlying implication of this reconstruction is that a greater control is exercised over adjudicators, both in terms of their qualifications and their decision-making behavior.

A) Joint Commissions: A Superior Interpretive Authority

ISDS adjudicators have been criticized for not accommodating, in their decisions, international obligations of the host State arising out of non-investment treaties or customary international law.[88]

[86] See, e.g., NAFTA (1992), Article 1131, Canada - Chile FTA (1996), Article G-32, Chile-Korea FTA (2003), Article 10.35, Panama - Taiwan FTA (2003), Article 10.32, Singapore-US FTA (2003), Article 15.21, Morocco - United States FTA (2004), Article 10.21, Japan-Mexico EPA (2004), Article 84, Canada - Peru BIT (2006), Article 40, Canada - Peru FTA (2008), Article 837, and Canada - Jordan BIT (2009), Article 40.

[87] See Hirad Abtahi and others, 'The Composition of Judicial Benches, Disqualification and Excusal of Judges at the International Criminal Court: A Survey' (2013) 11(2) J. Int. Crim. Justice 379-398; Milan Markovic, 'International Criminal Trials and the Disqualification of Judges on the Basis of Nationality' (2014) 13(1) Wash. U. Global Stud. L. Rev. 1-48; Chiara Giorgetti, 'The Challenge and Recusal of Judges of the International Court of Justice' in Chiara Giorgetti (ed), *Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals* (Brill 2015) 3-33; Makane Moïse 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 2015) 183-226.

[88] See, e.g., Moshe Hirsch, 'Investment Tribunals and Human Rights Treaties - A Sociological Perspective' in Freya Baetens (ed), *Investment Law within International Law: Integrationist Perspectives* (CUP 2013) 85-105; Judith Levine, 'The Interaction of International Investment Arbitration and the Rights of Indigenous Peoples' in Freya Baetens (ed), *Investment Law within International Law: Integrationist Perspectives* (CUP 2013) 106-128; Vivian Kube and E.U. Petersmann, 'Chapter 11 Human Rights Law in International Investment Arbitration' in Andrea Gattini and others (eds), *General Principles of Law and International Investment Arbitration* (Brill Nijhoff 2018) 221–268; Kabir A. N. Duggal and Nicholas J. Diamond, 'Human Rights and Investor–State Dispute Settlement Reform: Fitting a Square Peg into a Round Hole? Get access Arrow' (2021) 12(2) J. Int. Disput. Settl. 291-321; Chao Wang and others, 'International Investment and Indigenous Peoples' Environment: A Survey of ISDS Cases from 2000 to 2020' (2021) 18(15) Int. J. Environ. Res. Public Health 2-13.

Critics accuse ISDS adjudicators of "law-making" venture,[89] "expansive" attitude[90] and "incorrect" decisions.[91] Scholars further disapprove of the prevalence of conflicting interpretations of investment treaties.[92] In the words of some commentators, the field suffers from "systemic inconsistency" and "systemic uncertainty".[93] The backlash against adjudicators is further intensified for not factoring in the unintended consequences of their decisions on the regulatory autonomy of sovereign States.[94]

The above concerns are intertwined and systemic,[95] and addressing them requires a systemic response. These concerns are, in part, due to adjudicators; namely their personal and professional qualifications and their commercial arbitration culture.[96] During the negotiations of the

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[89] See, e.g., Catharine Titi, 'The Arbitrator as a Lawmaker: Jurisgenerative Processes in Investment Arbitration' (2013) 14(5) J. World Invest. Trade 829-851; Rahim Moloo and Brian King, 'International Arbitrators as Lawmakers' (2014) 46(3) N.Y.U. J. Int'l L. & Pol. 875-910; Dolores Bentolila, *Arbitrators as Lawmakers* (Kluwer 2017).

[90] See,e.g., Gus Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration' (2012) 50(1) Osgoode Hall L.J. 211-268; Gus Van Harten, 'Leaders in the Expansive and Restrictive Interpretation of Investment Treaties: A Descriptive Study of ISDS Awards to 2010' (2018) 29(2) EJIL 507-549.

[91] See, e.g., Wolfgang Alschner, 'Correctness of Investment Awards: Why Wrong Decisions Don't Die' (2020) 18(3) Law Pract. Int. Courts Trib. 345-368; Anna De Luca and others, 'Responding to Incorrect Decision-Making in Investor-State Dispute Settlement: Policy Options' (2020) 21(2-3) J. World Invest. Trade 374-409; Wolfgang Alschner, 'Ensuring Correctness or Promoting Consistency? Tracking Policy Priorities in Investment Arbitration through Large-Scale Citation Analysis' in Daniel Behn and others (eds), *The Legitimacy of Investment Arbitration: Empirical Perspectives* (CUP 2022) 230-255.

[92] See, e.g., Susan D. Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73(4) Fordham L. Rev. 1521-1625; Oscar Englesson and Anders Nilsson, 'Inconsistent Awards in Investment Treaty Arbitration: Is an Appeals Court Needed?' (2013) 30(5) J. Int. Arb. 561-579; Giovanni Zarra, 'The Issue of Incoherence in Investment Arbitration: Is There Need for a Systemic Reform?' (2018) 17(1) Chinese J. Int. L. 137-185. See also Irene Ten Cate, 'The Costs of Consistency: Precedent in Investment Treaty Arbitration' (2013) 51 Columbia J. Transnatl. Law 418-478.

[93] See Julian Arato and others, 'Parsing and Managing Inconsistency in Investor-State Dispute Settlement' (2020) 21(2-3) J. World Invest. Trade 336-373.

[94] See, e.g., Stuart G. Gross, 'Inordinate Chill: BITs, Non-NAFTA MITs, and Host-State Regulatory Freedom: An Indonesian Case Study' (2003) 24(3) Mich. J. Int. L. 893-960; Kyla Tienhaara, 'Regulatory Chill and the Threat of Arbitration: A View from Political Science' in Chester Brown, Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press 2011) 616-617; Kyla Tienhaara, 'Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement' (2018) 7(2) Transnatl. Environ. Law 229-250. For the opposing view see Stephan W. Schill, 'Do Investment Treaties Chill Unilateral State Regulation to Mitigate Climate Change?' (2007) 24(5) J. Int. Arb. 469-477; Oleksandra Vytiaganets, 'Smoking Chills? Tobacco Regulatory Chill, Foreign Investment, and the NCD Crisis in the Post-Soviet Space: A Case Study from Ukraine' (2020) 21(5) J. World Invest. Trade 753-780.

[95] *Submission from the European Union and its Member States, UNCITRAL Working Group III* (24 January 2019) para 10.

[96] See Bruno Simma, 'Foreign Investment Arbitration: A Place For Human Rights' (2011) 60 Int. Comp. Law Q. 576; Anthea Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' (2013)

UNCITRAL Working Group III, it was argued that concerns over other issues under consideration including incoherent and inconsistent decisions are closely linked to the adjudicator's lack of qualifications, e.g., independence and impartiality and "sufficient knowledge of public policy considerations in ISDS cases or of public international law".[97]

NAFTA created the Free Trade Commission as the central institution of the Agreement. The Commission consisted of ministerial-level representatives of the State parties supervising the implementation of the Agreement and further providing authoritative interpretations of its provisions to resolve disputes. The Commission's interpretations formed part of the governing law of the agreement.[98]

Initially, a NAFTA tribunal showed resistance towards a superior interpretative authority of the NAFTA Commission. During the arbitration proceedings in *Pope & Talbot*, after the tribunal rendered its partial award on the merits finding Canada in breach of its fair and equitable treatment obligation under Article 1105 of NAFTA,[99] the NAFTA Free Trade Commission rebutted the tribunal's interpretation of Article 1105. In its Note, the Commission confirmed that the standard under this Article is limited to standards under customary international law.[100]

A controversy was created on whether the interpretation provided to the tribunal during the arbitration process and after the tribunal had made a conclusion under Article 1105 was a valid exercise of the Commission's powers and whether the Commission's action was an interpretation or an amendment of Article 1105.[101] Particularly, Canada stated that the Tribunal had no power under NAFTA's ISDS provisions to challenge the interpretation issued by the Commission.[102]

107(1) Am. J. Int. Law 54; Anthea Roberts, 'Subsequent Agreements and Practice: The Battle over Interpretive Power' in Georg Nolte (ed), *Treaties and Subsequent Practice* (Oxford University Press 2013) 100-101; Joost Pauwelyn, 'The Rule of Law Without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators from Venus' (2015) 109(4) Am. J. Int. Law 764.

97 *Report of UNCITRAL Working Group III on the work of its thirty-sixth session, Vienna, 29 October–2 November 2018* (6 November 2018) para 104.

98 NAFTA (1992), Articles 1131 (stating that "[a]n interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section") and 2001.

99 *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Award on the Merits of Phase 2 (1 April 2001) para 195.

100 NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions (31 July 2001).

101 *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award in Respect of Damages (31 May 2002) paras 16-24, 47.

102 Ibid para 22.

Rejecting Canada's position, the tribunal concluded that an arbitral tribunal has a duty "not simply to accept that whatever the Commission has stated to be an interpretation is one for the purposes of Article 1131(2)".[103] In other words, the tribunal found the institutional powers of the Commission were not superior to its authority, but rather they are confined by customary international law and thus that it was within its power to challenge an interpretation issued by the Commission.[104]

The *Pope & Talbot* tribunal's suggestion received strong criticism from all NAFTA parties disagreeing with its determination that it had the authority to assess the validity of the Commission's interpretations.[105] No other NAFTA tribunal followed the approach of the *Pope & Talbot* tribunal. All subsequent NAFTA tribunals unquestionably accommodated the authority of the Commission,[106] with some characterizing NAFTA Article 1131 as *lex specialis*.[107]

NAFTA tribunals have considered the Commission's statements on NAFTA provisions as interpretations of the treaty, rather than an amendment, and regardless of if they are issued while the arbitration proceeding is pending. Particularly, the Tribunal in *ADF* stated that "[n]othing in NAFTA suggests that a Chapter 11 tribunal may determine for itself whether a document

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[103] Ibid para 23.

[104] See also Charles H. Brower II, 'Why the FTC Notes of Interpretation Constitute a Partial Amendment of NAFTA Article 1105' (2006) 46(2) Va. J. Int'l L. 347-363; Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP 2008) 579-582.

[105] See *ADF Group Inc. v. United States of America*, ICSID Case No. ARB (AF)/00/1, Mexico's Second Article 1128 Submission (22 April 2002); *ADF Group Inc. v. United States of America*, ICSID Case No. ARB (AF)/00/1, Post-Hearing Submission of Respondent United States of America on Article 1105(1) and Pope & Talbot (27 June 2002); *ADF Group Inc. v. United States of America*, ICSID Case No. ARB (AF)/00/1, Canada's Second Article 1128 Submission (19 July 2002).

[106] See, e.g., *Mondev Int'l Ltd. v. United States*, NAFTA/ICSID Case No. ARB(AF)/99/2, Award (11 October 2002) para 121; *The Canadian Cattlemen for Fair Trade v. United States of America*, UNCITRAL, Award on Jurisdiction (28 January 2008) paras 32, 184; *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (18 September 2009) [Redacted], paras 135, 268; *Eli Lilly and Company v. The Government of Canada*, UNCITRAL, ICSID Case No. UNCT/14/2, Final Award (16 March 2017) paras 105-106; *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum (9 September 2021) para 212. See also *William Ralph Clayton and others v. Government of Canada*, PCA Case No. 2009-04, Judgment of the Federal Court of Canada (2 May 2018) para 32; *B-Mex, LLC and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Judgment of Ontario Superior Court (20 July 2020) para 159.

[107] See *William Ralph Clayton and others v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability (17 March 2015) para 430. See also *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award (24 March 2016) para 480. *Lex specialis* means special law as opposed to *lex generalis, namely customary international law.* For more discussion on this issue see International Law Commission, *Report of the Study Group of the International Law Commission on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (2006), paras 46-122.

submitted to it as an interpretation by the Parties acting through the FTC is in fact an 'amendment' which presumably may be disregarded until ratified by all the Parties under their respective internal law".[108] The *Mesa Power* Tribunal, rejecting the claimant's argument that the Note of the NAFTA Free Trade Commission is not binding because the procedure for the amendment was not met, stated that "[i]t is not for this Tribunal to determine whether – as the Claimant alleges – the FTC Note amounts to an amendment of the NAFTA or not. Rather, faced with an interpretation given by the Contracting States through the FTC, the Tribunal must simply apply it".[109] The *Eco Oro* tribunal held that the fact that the Commission issued its interpretation "after the commencement of this arbitration is irrelevant; it merely confirms the meaning of the FTA as it existed upon entering into force".[110]

Following NAFTA Article 1131, subsequent investment treaties by and large incorporated provisions that establish joint institutions with an interpretative prerogative whose interpretations of treaty provisions form part of the governing law of the treaty in question. This mechanism has in particular gained momentum in the recent generations of investment treaties. Canada has been a long-standing supporter of this arrangement,[111] particularly with the NAFTA Commission appearing as a successful experience.

However, the treaty practice on this mechanism has faced serious limitations. The majority of investment treaties incorporating such a mechanism do not arrange for the tribunal to directly request an interpretation, thus the tribunal is limited to the interpretations issued by the commission on its own initiation, including interpretations issued when the arbitration proceeding is ongoing.[112] A few recent treaties remedy this shortcoming, and the practice has evolved over the

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[108] *ADF Group Inc. v. United States*, ICSID Case No. ARB (AF)/00/1, Award (9 January 2003) para 177.

[109] *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award (24 March 2016) paras 477-479.

[110] *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum (9 September 2021) para 730.

[111] See, e.g., Canada - Chile FTA (1996), Article G-32, Canada - Peru BIT (2006), Article 40 Canada - Colombia FTA (2008), Article 832, Canada - Peru FTA (2008), Article 837, Canada - Jordan BIT (2009), Article 40, Canada - China BIT (2012), Article 30, Canada - Korea FTA (2014), Article 8.37, CETA (2016), Article 8.31, and CUSMA (2018), Article 14.D.10.

[112] See, e.g., Chile-Korea FTA (2003),Article 10.35, Chile-US FTA (2003), Article 10.21, CAFTA - DR (2004), Article 10.22, Nicaragua - Taiwan Province of China FTA (2006), Article 10.22, Canada - Peru BIT (2006), Article 40, Korea - US FTA (2007), Article 11.22, Canada - Colombia FTA (2008), Article 832, Canada - Peru FTA (2008), Article 837, AANZFTA (2009), Article 27, Canada - Korea FTA (2014), Article 8.37, Australia - Korea, Republic of FTA (2014), Article 11.22, Thailand - United Arab Emirates BIT (2015), Article 14, CETA (2016), Article 8.31,

past decade. Some treaties require the tribunal to request interpretations from the joint commission if certain defences are raised by the respondent State.[113] A few others recognize an even greater involvement for arbitration tribunals. These treaties authorize the tribunal to request an interpretation of any provision of the treaty that is subject to a dispute either on its own account or at the request of the defendant State.[114]

In practice, ISDS proceedings other than NAFTA cases have not involved the use of this mechanism. This might be due to the low involvement of these treaties as a basis for ISDS disputes or absence of complex issues for a joint committee to render interpretative statements. Further, with the exception of a small number of treaties, the majority of investment treaties incorporating such a mechanism are limited in scope to interpretations initiated by the parties to the treaties and do not include arrangements for arbitration tribunals to request interpretations on their own account.

B) A Standing Court System: A Break from the *ad hoc* Appointment Mechanism

1) Arab Investment Court

The idea of judicialization of ISDS and the shift from an ad hoc appointment mechanism to a standing court is not new. Such a forum has existed since 1980, albeit in a regional framework, but has attracted very little attention from commentators. This negligence has largely prevented academia from evaluating the experience learned and how challenges may be addressed.

The 1980 AIA of the Arab League regulating inter-Arab investment activities established theAIC for the settlement of disputes between Arab investors and a contracting State.[115] The Court has

Rwanda - United Arab Emirates BIT (2017), Article 19, Central America - Republic of Korea FTA (2018), Article 9.23, Armenia - Korea BIT (2018), Article 15, ESIPA (2018), CPTPP (2018), Article 9.25, Article 3.13, Korea - Uzbekistan BIT (2019) Article 15, and Israel - Republic of Korea FTA (2021), Article 9.25.

[113] See, e.g., Canada - China BIT (2012), Article 30 (providing that "[w]here a disputing Contracting Party asserts as a defence that the measure alleged to be a breach is within the scope of the reservations and exceptions set out in Article 8(1), (2) and (3), on request of the disputing Contracting Party, the Tribunal shall request the interpretation of the Contracting Parties on the issue"). See also Chile - Hong Kong BIT (2016), Article 29, and CUSMA (2018), Article 14.D.10.

[114] See, e.g., Belarus - India BIT (2018), Article 24 (providing that "[t]he Tribunal may, on its own account or at the request of a Defending Party, request the joint interpretation of any provision of this Treaty that is subject of a dispute". See also India - Kyrgyzstan BIT (2019), Article 24.

[115] Unified Agreement for the Investment of Arab Capital in the Arab States (1980), Articles 25 and 28. See also Amendments to the Unified Agreement for the Investment of Arab Capital in the Arab States (2013), Article 23, and Annex, Article 3. See also Ben Hamida (n 12); Walid Ben Hamida, 'The Development of the Arab Investment

jurisdiction to provide advisory opinions on any legal issue that relates to inter-Arab investment activities.[116]

Originally, the jurisdiction of the AIC was limited to disputes arising out of the 1980 Agreement which included a very narrow definition of the term "investor" leaving investors not meeting this specified qualification outside of the jurisdiction of the Court.[117] The 2013 amendments of the Agreement expanded the definition of investor.[118] Also, the Amended Statute of the Court extends the jurisdiction of the Court to include disputes under investment treaties concluded between the member States of the Arab League.[119] These amendments are in line with a significant number of inter-Arab investment treaties. These treaties include the option of dispute settlement before this Court,[120] and adopt a broader definition of the word "investor". These developments also deserve more attention from non-Arab investors operating in the Arab League countries.

The Court was quiescent until the early 2000s when it issued its first decision in a dispute between a Saudi investor and Tunisia.[121] Despite this dormancy, the Court has settled roughly two dozen disputes between investors and host States as of April 30, 2022, with the overwhelming majority of these judgments having been rendered over the past decade. This also shows a growing interest of claimant investors in this mechanism.

The imposition of rigorous qualifications and burdensome obligations on judges is the defining attribute of this Court. Indeed, the Statute of the AIC demands higher requirements from, and places heavier responsibilities on, judges compared to the governing rules of other international

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Court's Case Law: New Decisions Rendered by the Arab Investment Court' (2014) 6(1) Int'l J. Arab Arb. 3-14; See also Girgis Abd-El Shahid, 'The Unified Agreement for Investment of Arab Capital in the Arab States in Practice: A double facette?' (2019) 11(1) Int'l J. Arab Arb. 27-68.

[116] Statute of the AIC, Article 53. See also Amended Statute of the AIC, Article 3.

[117] Article 1(7) of the Agreement defines "investor" as "an Arab citizen who owns Arab capital which he invests in the territory of a State Party of which he is not a national".

[118] Under Article 1(8) of the Amended Agreement, "Arab investor" means "[t]he natural or juridical person who/which owns Arab capital which it invests in the territory of a State Party of which it is not a national, provided that the Arab investor holds directly at least (51%) of the share capital of the relevant juridical person".

[119] Amended Statute of the AIC, Article 21.

[120] See, e.g., Syrian Arab Republic - United Arab Emirates BIT (1997), Article 7, Lebanon - Yemen BIT (1999), Article 7, Algeria - United Arab Emirates BIT (2001), Article 9, Jordan - Kuwait BIT (2001), Article 9, Algeria - Sudan BIT (2001), Article 9, Egypt - Kuwait BIT (2001), Article 10, Lebanon - Sudan BIT (2004), Article 7, Lebanon - Oman BIT (2006), Article 9, Jordan - Oman BIT (2007), Article 6, Lebanon - Syrian Arab Republic BIT (2010), Article 8, and Jordan - Saudi Arabia BIT (2017), Article 15.

[121] *Adel Saleh Al-Maddah v. The Tunisian State and the Mediterranean Games Organizing Committee Tunis*, AICt, Case No. 1, Judgment, 10/12/2004.

courts and tribunals such as the statutes of the ICJ and ITLOS.[122] Intriguingly, the Amended Statute of the AIC further tightens the restrictions on judges of the Court in comparison to the original Statute such that any potential traces of bias from judges is eliminated. The qualifications and behaviour currently required from judges of the Court resemble the requirements imposed on domestic judges rather than what is traditionally required from international adjudicators.

Judges of the Courts are appointed for a 3-year term, with the possibility of renewal. The Statute of the Court does not determine the maximum number of standing judges but rather sets out the minimum number of members required for its operation. It states that the Court shall be no less than five standing judges. The Statute also arranges for the appointment of alternate judges.[123] These arrangements are intended to give the court system the flexibility needed to manage its caseload and prevent any potential disruption in the operation of the court due to the inability of a standing judge to continue his or her duty including due to disqualification.

The Statute of the Court provides that the Economic and Social Council of the Arab League selects judges from the list of nominees proposed by the States Parties.[124] The amendments to the Statute state that the State Parties should elect judges by secret ballot from a list prepared by the Secretariat alphabetically.[125] The involvement of the State Parties is based on their membership to the Arab Investment Agreement, not as a party to a dispute.

The Statute states judges shall possess the moral characters, academic qualities, and professional experience in this field that qualify them to be appointed to a high judicial office. The Amended Statute further requires that judges have the required experience and practical experience of no less than fifteen years.[126] These requirements are consistent with those required for the appointment of national judges to high judicial offices.

The Statute of the Court expressly prohibits judges from practicing any occupation that contradicts the requirements of the position.[127] The obligation is sufficiently broad and includes involvement in any work that not only may impair the judge's duty of impartiality and independence, but his or

[122] See Articles 2 and 20 of the Statute of the ICJ and Articles 2 and 11 of the Statute of the ITLOS.
[123] Statute of the AIC, Articles 1 and 7, and Amended Statute of the AIC, Article 9.
[124] Statute of the AIC, Article 1.
[125] Amended Statute of the AIC, Article 3.
[126] Statute of the AIC, Article 1, Amended Statute of the AIC, Article 3.
[127] Statute of the AIC, Article 12, and Amended Statute of the AIC, Article 12.

her other responsibilities such as the duty to make him/herself available. Also, judges are prohibited from participating in the consideration of any dispute in which they have previously participated as a representative, advisor, or attorney for any of the parties to the dispute, or if they have previously expressed an opinion on the dispute in any capacity.[128] The Amended Statute significantly expands the scope of a judge's previous engagements that are considered conflict of interest.[129] Further, the Amended Statute restricts the engagement of judges within a specific period immediately after their terms of appointment end. During two years after the termination of their judicial tenure, judges shall refrain from working for a party to a dispute in which the judge participated, regardless of whether the party was a disputing party or intervening party.[130] Additionally, under the Amended Statute, judges with the nationality of either disputing party are barred from participating in the case.[131]

The Statute of the Court specifically requires judges to respect their duty of integrity and they should avoid doubts about their independence and impartiality.[132] As a new development in the ISDS field, the Amended Statute imposes certain obligations on the member States that strengthen judges' qualities of impartiality and independence. It requires the State Parties to respect the impartiality and independence of judges, and not to hold them accountable for their acts related to their judicial functions, including their judicial opinions.[133]

The Statute of the Court outlines detailed grounds for disqualification. Article 16 of the Statute provides that a judge may be qualified for one of the following reasons: a) if he, his wife, or one of his relatives up to the fourth degree has a connection to the case he is considering; b) if there is a litigation between the judge and one of the disputing parties unless the litigation was fabricated with the intention of dissuading the judge from participating in the case; c) if there is enmity or affection between the judge and one of the parties such that it is likely that the judge is not able to

[128] Statute of the AIC, Article 14 and 15.

[129] Amended Statute of the AIC, Article 12 (stating that the judge shall refrain from "participating in the consideration of any dispute in which he has previously participated as a representative, advisor, counsel, or expert with one of the parties to the dispute, or has previously been presented to him in his capacity as a member of a national or international court, an arbitral tribunal, an investigation or a mediator or expressing an opinion on it, or in any other capacity").

[130] Amended Statute of the AIC, Article 12.

[131] Amended Statute of the AIC, Article 5.

[132] Statute of the AIC, Article 13, and Amended Statute of the AIC, Article 12.

[133] Amended Statute of the AIC, Article 19.

adjudicate the dispute impartially; and d) if the judge expresses his opinion on the case before it is decided on. Additionally, the new amendments to the Statute require the challenging party to deposit a surety and it is multiplied by the number of judges challenged. The surety is not refunded regardless of the outcome of the challenge. [134]

The Statute does not arrange for the review of disqualification challenges by an independent third person, rather challenges are decided by peer judges, i.e., the Court's General Assembly. Under the original draft of the Statue, disqualification decisions were made unanimously.[135] However, the Amended Statute lowering the bar states that challenge decisions disqualifying a judge from hearing a case are made by a majority vote.[136] The peer review arrangement is prone to issue conflict. It faces the same criticism expressed against the review of challenges by peer arbitrators, i.e., consideration of self-interest. Further, the Statute requires that any decision of the Court's General Assembly upholding the removal of a judge from the judicial position should be approved by the Economic and Social Council of the Arab League.[137] Indeed, contrary to most instances of international courts and tribunals where judges are removed by a unanimous decision or a majority decision of remaining judges,[138] the State Parties to the League control the removal process and can override a removal decision made by a majority of judges. This additional step opens the challenge process to diplomatic considerations and may politicize this mechanism.

2) The Proposed Multilateral Investment Tribunal: A Forum of Stringent Requirements

The prospect for creating such a mechanism has been the subject of heated debates over the past few years and questions have been raised about its structure and capabilities to address the existing

[134] Amended Statute of the AIC, Article 14.

[135] Statute of the AIC, Article 20.

[136] Amended Statute of the AIC, Article 18.

[137] Statute of the AIC, Article 17, and Amended Statute of the AIC, Article 15.

[138] See, e.g., Article 18 of the Statute of the ICJ, Article 6 of the Statute of the European Court of Justice (ECJ), Article 23 of the ECHR, Article 19 of the Protocol to the African Charter on Human And Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Article 21 of the Statute of the IACHR, Article 9 of the Statute of the ITLOS, and Agreement Establishing the Caribbean Court of Justice, Articles IV and IX. See also Article 46 of the Statute of the ICC providing that decisions on the removal from office of a judge are made by the Assembly of State Parties to the Rome Statute.

challenges.[139] In particular, some commentators have developed concept papers on different structural options for ISDS reform and reviewed advantages and disadvantages for each option.[140]

A standing investment court is a break from the party-appointment mechanism. As a key element of such a mechanism, the right to appoint adjudicators is taken away from the disputing parties and is placed in the hands of the State Parties to the underlying treaty. Under such a mechanism, the impartiality and independence of panelists are highlighted, meaning that the neutrality and legitimacy of panelists takes precedence over the representative feature of panelists, which is the traditional characteristic of international arbitration.

The extension of the ongoing ISDS reform to structural transformation is largely due to the EU's initiative in its recent treaties with Canada, Vietnam, and Singapore and its observations during the negotiations of the UNCITRAL Working Group III on Investor-State Dispute Settlement Reform. These BITS create a first-tier tribunal and an appellate tribunal and set out detailed provisions on their constitution and operations.[141] Particularly, the qualifications and conduct of adjudicators of these tribunals are subject to robust requirements as reflected in the recent practice of States.[142] These treaties further require the parties to cooperate with other trading partners in

[139] See, e.g., Rob Howse, 'Designing a Multilateral Investment Court: Issues and Options' (2017) 36 Yearb. Eur. Law 209-236; David M. Howard, 'Creating Consistency Through a World Investment Court' (2017) 41(1) Fordham Int. L. J. 1-52; Colin Brown, 'A Multilateral Mechanism for the Settlement of Investment Disputes: Some Preliminary Sketches' (2017) 32(3) ICSID Rev. 673-690; Gabrielle Kaufmann-Kohle and Michele Potestà, *The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards*, CIDS Supplemental Report (15 November 2017); Charles N. Brower and Jawad Ahmad, 'From the Two-Headed Nightingale to the Fifteen-Headed Hydra: The Many Follies of the Proposed International Investment Court' (2018) 41(4) Fordham Int. L. J. 791-820; Hongling Ning and Tong Qi, 'Multilateral Investment Court: The Gap Between the EU and China' (2018) 4(2) CJGG 154-175; Kyle D. Dickson-Smith, 'An Investment Court that Judges the Judges: A Case of Natural Selection?' (2018) 44(2) Univ. West. Aust. Law Rev. 71-119; Marc Bungenberg and August Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court* (2nd edn, Springer 2020); Hannes Lenk, 'The EU Investment Court System and Its Resemblance to the WTO Appellate Body' in Szilárd Gáspár-Szilágyi and others (eds), *Adjudicating Trade and Investment Disputes: Convergence or Divergence?* (CUP 2020) 62-91; Andrea K. Bjorklund, 'Arbitration, the World Trade Organization, and the Creation of a Multilateral Investment Court' (2021) 37(2) Arb. Int. 433-447; José R. Mata Dona and Nikos Lavranos (eds), *International Arbitration and EU Law* (Elgar 2021) 449-468; Agata Zwolankiewicz, 'Multilateral Investment Court – a Cure for Investor-State Disputes Under Extra-EU International Investment Agreements?' (2021) 9(1) GroJIL 195-211.

[140] See, e.g., Andrea K. Bjorklund and others, 'Selection and Appointment of International Adjudicators: Structural Options for ISDS Reform' *Academic Forum on ISDS Concept Paper 2019/11* (24 September 2019).

[141] See CETA (2016), Articles 8.27 and 8.28, ESIPA (2018), Articles 3.9 and 3.10, and EVIPA (2019), Articles 3.38 and 3.39.

[142] See CETA (2016), Article 8.30, ESIPA (2018), Article 3.11, and EVIPA (2019), Article 3.40.

establishing a multilateral permanent court system replacing bilateral systems for the settlement of investor-State disputes.[143]

The establishment of a multilateral court system is the subject of ongoing inter-State negotiations under the auspices of the UNCITRAL Working Group III. When initially considering the qualifications of ISDS decision-makers in a November 2018 report, the Working Group suggested its desirability for further review of structural reforms of the existing ISDS mechanism.[144] In December 2021, based on the proposals received from States, the UNCITRAL Secretariat prepared initial draft provisions on a two-tier multilateral mechanism composed of a first instance and an appellate level.[145] The idea of the creation of an appellate mechanism has received support in various comments submitted by governments.[146] Currently, many aspects of the mechanism have yet to be decided, e.g. the employment term (i.e., full-time or part-time tenure), the term of office, nominations, renewability of appointments, and the number of members of the tribunal. The draft in particular provides options on the qualifications of tribunal members and also proposes the establishment of a governance framework that conducts the screening and appointment of

[143] See CETA (2016), Article 8.29, ESIPA (2018), Article 3.12, and EVIPA (2019), Article 3.41. See also Slovakia - United Arab Emirates (2016), Article 26, and Joint Interpretative Instrument on the Agreement on Trade Continuity between the United Kingdom of Great Britain and Northern Ireland and Canada (December 6, 2020), para 6.

[144] See *Report of UNCITRAL Working Group III on the work of its thirty-sixth session (Vienna, 29 October–2 November 2018)*, UNCITRAL Working Group III (6 November 2018) paras 99-108.

[145] See UNCITRAL Secretariat, *Standing multilateral mechanism: Selection and appointment of ISDS tribunal members and related matters*, UNCITRAL Working Group III (8 December 2021) paras 8, 10, 15, 19, 25, 33, 40, 44, 50, 57, and 61. See also *Report of UNCITRAL Working Group III on the work of its resumed thirty-eighth session*, UNCITRAL Working Group III (28 January 2020) paras 114-130.

[146] See, e.g., Submission from the European Union and its Member States, UNCITRAL Working Group III (24 January 2019); *Submission from the Government of Morocco,* UNCITRAL Working Group III (4 March 2019); *Submission from the Government of Ecuador*, UNCITRAL Working Group III (17 July 2019); *Submission from the Government of China*, UNCITRAL Working Group III (19 July 2019*); Submission of the Government of Canada on the Initial draft on Standing multilateral mechanism* (November 2021*); Submission of the Government of Colombia on the Initial draft on Standing multilateral mechanism* (15 November 2021); *Comments submitted by Switzerland on the Initial draft on Standing multilateral mechanism* (19 November 2021); *Submission of comments from the Government of Uganda on the Initial draft on Standing multilateral mechanism* [undated]; *Comments by the United Kingdom on Draft Working Paper on the Appellate Mechanism and Enforcement issues* [undated]; *Comments from the Government of the Republic of Korea on appellate mechanism and selection and appointment of arbitrators* [undated]; *Comments of the Russian Federation on the drafts of the Working Papers on appellate mechanism and on selection and appointment of the tribunal members in investor-state dispute settlement developed by the UNCITRAL Secretariat* [undated].

adjudicators. In May 2022, the UNCITRAL Secretariat further submitted initial draft options on the functioning and possible models of the appellate mechanism.[147]

The proposed initial draft on the standing multilateral mechanism not only follows the recent treaty practice in terms of requirements for the conduct and qualifications of adjudicators but also promises a transparent appointment process and sets out a solid control and oversight structure compared to the court system envisioned under the EU treaties with Canada, Singapore, and Vietnam. The proposed text on the standing multilateral mechanism is expected to be finalized in 2025.

i) Conduct and qualifications of tribunal members

The conduct and qualifications of members of the tribunal are subject to stringent cumulative requirements. The draft supports the imposition of comparable qualifications required from adjudicators in the statutes of other international courts and tribunals as well as the recent generations of investment treaties.

In addition to the broad and puzzling expression "of high moral character" borrowed from the ICSID Convention and statutes of some other international courts and tribunals,[148] the draft provisions include the more precise phrase of "enjoying the highest reputation for fairness and integrity" that is used in the Statute of the ITLOS.[149] By referring to both these terms, the draft reflects more detailed ethical qualities that are demanded from members of the tribunal.

The draft provision states that members of the tribunal shall be persons "with recognised competence in the fields of public international law, including international investment law and international dispute settlement".[150] This requirement is "to address the criticisms of the perceived unfamiliarity of adjudicators with issues of public policy".[151] The draft provision expressly

[147] UNCITRAL Secretariat, *Initial draft on appellate mechanism with comments until 15 May 2022* [undated].

[148] See, e.g., Article 2 of the Statute of the ICJ, Article 21 of the ECHR, Article 28 of the International Covenant on Civil and Political Rights, Article 4 of the Statute of the African Court of Justice and Human Rights, Protocol A/P.l/7/91 on the CCJ, Article 36 of the Statute of the ICC, and Article 13 of the Statute of the Special Court for Sierra Leone.

[149] See UNCITRAL Secretariat, *Standing multilateral mechanism: Selection and appointment of ISDS tribunal members and related matters* (n 219) para 19. See also Article 2 of the Statute of the ITLOS.

[150] See ibid.

[151] See ibid para 22. See also *Submission from the Government of Morocco*, UNCITRAL Working Group III (11 February 2020) 3.

excludes the class of professionals who lack established competency in the field of PIL. As a consequence, potential candidates who have a private law background are not qualified for the selection as a member of the tribunal.

Using the term “recognised competence”, the draft echoes the wordings of Article 14(1) of the ICSID Convention and statutes of some international courts and tribunals.[152] Some of the recent generations of investment treaties include wordings such as "demonstrated expertise in public international law” that convey the same notion.[153] The phrase “recognised competence” refers to a person who is a reputable expert in PIL.[154] The word “recognized” indicates that a person’s self-report, for example on his or her resume, claiming competency in PIL does not satisfy the requirements for the appointment, rather such a competency should be widely known and acknowledged.

Further, the draft departs from the statutes of most international courts and tribunals that require candidates to be qualified for appointment to the highest judicial offices in their national countries.[155] Following the ITLOS statute,[156] the draft only highlights the adjudicator’s competence in PIL, and no qualification under domestic law is imposed.

The draft differentiates between members of the first tier and second tier tribunals in terms of the practical experience required and places a higher bar on individuals to be recommended by the Selection Panel for the proposed appellate tribunal. It requires that members of the appellate body should have “extensive adjudicatory experience”.[157] The meaning of the word “extensive” is not fully clear. Further, the phrase “adjudicatory experience” is not limited to experience in ISDS mechanisms and includes involvement as a decision-maker in other disputes. This provision can

[152] See Statute of the ICJ, Article 2, Statute of the ITLOS, Article 2, ECHR, Article 21, Statute of IACHR, Article 4. See also the Rome Statute of the ICC, Article 36 (using the word "established competence").
[153] See CETA (2016), Articles 8.27 and 8.28, ESIPA (2018), Articles 3.9 and 3.10, and EVIPA (2019), Articles 3.38 and 3.39.
[154] See Carl Baudenbacher, ‘The EFTA Court: Structure and Tasks’ in Carl Baudenbacher (ed), *The Handbook of EEA Law* (Springer 2016) 141; Jerry Ukaigwe, *ECOWAS Law* (Springer 2016) 71; Katia Fach Gómez, *Private Actors in International Investment Law* (Springer Nature 2021) 11.
[155] See Statute of the ICJ, Article 2, ECHR, Article 21, Statute IACHR, Article 4, TFEU, Article 254, and Amended Statute of the AIC, Article 3.
[156] See Statute of the ITLOS, Article 2. See also the Rome Statute of the ICC, Article 36.
[157] See UNCITRAL Secretariat, *Standing multilateral mechanism: Selection and appointment of ISDS tribunal members and related matter* (n 219) para 44.

be understood to require that the adjudicator at the appellate level should have been involved in a considerable number of disputes prior to his or her appointment. Generally, the most frequent adjudicators within the contemporary pool meet this qualification.

Under draft Article 10, members of the tribunal are subject to the Code of Conduct for Adjudicators in International Investment Disputes that is currently being negotiated.[158] As previously discussed, the draft Code places significant restrictions and heavy responsibility on adjudicators, particularly in terms of conflict issues, non-compatible activities, and disclosure obligations.

As to the removal of a member of the tribunal from the office due to failure to perform his or her duties or non-compliance with the Code of Conduct, the draft provision states that the removal decision should be made by the remaining members with one of the following options to be selected: either by a unanimous decision excluding the challenged member or a decision by a qualified majority of two-thirds.[159] The grounds and method for removal follow the drafting of most statutes of international courts and tribunals, though they differ in if such a decision should be made by a unanimous decision or a majority vote.[160] As discussed previously, removal decisions by peer adjudicators face the criticism that self-interest may influence the mechanism. Due to this criticism, the commentary to the draft also proposes the option that an independent person/body is designated for reviewing contested challenges of a tribunal member.[161]

Under the removal mechanism, the adjudicator's non-compliance with the extensive obligations under the Code of Conduct is grounds for removal. The disqualification test under the draft Code is not yet decided upon and the Working Group III negotiations are ongoing as of this writing. However, given the general direction of States' treaty practice and the ongoing negotiations of the Working Group III, it can be reasonably expected that the disqualification standard under the Code deviates from that of the ICSID Convention in that it does not require "a manifest lack of" qualities.

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[158] See ibid para 57.

[159] See ibid para 50.

[160] See, e.g., Article 18 of the Statute of the ICJ, Article 6 of the Statute of the ECJ, Article 23 of the ECHR, Article 19 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Article 21 of the Statute of the IACHR, Article 9 of the Statute of the ITLOS, and Agreement Establishing the Caribbean Court of Justice, Articles IV and IX. See also Article 46 of the Rome Statute of the ICC providing that decisions on the removal from office of a judge are made by the Assembly of State Parties to the Rome Statute.

[161] See UNCITRAL Secretariat, *Standing multilateral mechanism: Selection and appointment of ISDS tribunal members and related matters* (n 219) para 55.

Further, the draft provisions on the functions of the appellate mechanism also provide that the lack of impartiality or independence of members of the first-tier tribunal is a ground for appeal and a decision of the first-tier tribunal may be annulled on this basis.[162] This provision does not require that "lack of" of these qualities should be "manifest". Indeed, there are strong indications that the disqualification test under the Code of Conduct will be an appearance of bias or justifiable doubts as to the adjudicator's independence or impartiality.

ii) A thorough selection process

The draft transforms ISDS from a secretive party-appointment mechanism towards a transparent, multi-layered, and multilateral appointment process. The draft revolutionizes the ISDS appointment process by setting up different layers of check and balance where a variety of actors are engaged in the nomination and screening of candidates and the appointment of adjudicators.

Some aspects of the appointment process have yet to be developed based on upcoming observations from States.[163] These issues in particular include the nomination of candidates. The draft provides two options for nominations. The first option is that nominations of candidates are made by parties to the Agreement founding the tribunal, and the nominating party should attach a statement explaining how the candidate meets the required qualifications. Under this option, the nominating party should consult with other stakeholders such as civil society, bar associations, academic institutions, and business associations in the process of selection of nominees.[164] This later requirement is to depoliticize the nomination process and enhance transparency as to how candidates are identified.

The second option provides for an open call method where candidates are not nominated directly by the State parties. Under this course of action, a qualified person may apply to the selection process. The relevant stakeholders such as civil society, bar associations, academic institutions,

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[162] UNCITRAL Secretariat, *Initial draft on appellate mechanism with comments until 15 May 2022* [undated], paras 12 and 39.

[163] See UNCITRAL Secretariat, *Standing multilateral mechanism: Selection and appointment of ISDS tribunal members and related matters* (n 219) paras 19, 50, 55. See also *Submission from the European Union and its Member States*, UNCITRAL Working Group III (24 January 2019) paras 16-17, 19; *Submission from the Government of the Russian Federation*, UNCITRAL Working Group III (31 December 2019) para 7; *Submission from the Government of Morocco*, UNCITRAL Working Group III (11 February 2020) 3.

[164] See UNCITRAL Secretariat, *Standing multilateral mechanism: Selection and appointment of ISDS tribunal members and related matters* (n 219) para 33.

and business associations may also propose a person they view as a qualified candidate.[165] This alternative would take nominations away from the hands of States. It may also open the floodgates to a large number of nominations.

The draft also reminds the nominating party of the need to ensure equal representation of genders.[166] As the empirical assessment of the ICSID community of adjudicators showed, the community does not reflect a fair and democratic representation in terms of equitable geographical distribution, gender equality, and levels of development. The ICSID pool consisting of both tribunal arbitrators and members of annulment committees is overwhelmingly dominated by male adjudicators from developed European and North American countries who are affiliated with law firms. During the negotiations of the Working Group III, States widely raised concerns about ensuring diversity in the membership of the tribunal.[167] To remedy this criticism, the draft proposes that members of the tribunal as a whole should reflect a selected representation on issues of geography, gender, levels of development, and legal systems.[168] To ensure gender balance in the nominations, it is suggested that each Party may propose two candidates.[169]

The draft further establishes a sophisticated screening mechanism as seen in the governing instruments of some international courts and tribunals.[170] By establishing the screening mechanism, an independent body is mandated to check the fulfillment of the eligibility requirements before an appointment is made. The process is designed in a way that, even if the

[165] See ibid para 33.

[166] See ibid para 19.

[167] See, e.g., *Submission from the Government of South Africa*, UNCITRAL Working Group III (17 July 2019) para 92; *Submission from the Republic of Korea*, UNCITRAL Working Group III (31 July 2019) 7; *Submission from the Government of Bahrain*, UNCITRAL Working Group III (29 August 2019) paras 11-15; *Submission from the European Union and its Member States*, UNCITRAL Working Group III (24 January 2019) para 21; *Submission from the Government of Morocco*, UNCITRAL Working Group III (11 February 2020) 3.

[168] See UNCITRAL Secretariat, *Standing multilateral mechanism: Selection and appointment of ISDS tribunal members and related matters* (n 219) paras 18, 44.

[169] See ibid paras 36-37.

[170] See Article 255 of the Treaty on the Functioning of the European Union (TFEU); *Resolution CM/Res(2010)26 on the establishment of an Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights adopted by the Committee of Ministers* (10 November 2010); *Resolution on Strengthening the International Criminal Court and the Assembly of States Parties adopted by the Assembly of States Parties, ICC-ASP/13/Res.5* (17 December 2014). See also James Devaney, 'An Independent Panel for the Scrutiny of Investment Arbitrators: an Idea Whose Time Has Come?' (2020) 18(3) Law Pract. Int. Courts Trib. 369-388.

Contracting States maintain an ultimate control over appointments, the highest qualified individuals are recommended to them for appointment.[171]

Draft provision seven limits the mandate of the Selection Panel to whether or not the candidates meet the eligibility criteria. The purpose is to screen candidates for the avoidance of political consideration and to ensure they are selected based on their professional expertise and moral qualifications.[172] In its submission on the tribunal mechanism, it was suggested that to address the concerns over the adventurous decision-making behavior of adjudicators, the screening function should also include filtering out those with a history of excessive interpretations.[173] This idea did not receive the support of the majority of States.

Members of the Selection Panel are appointed by the Committee of the Parties for a yet-unspecified non-renewable period. Draft provision seven states that members of the panel are "chosen from among former members of the Tribunal, current or former members of international or national supreme courts and lawyers or academics".[174] Further, members of the panel are subject to strict qualifications including independence standards, disclosure obligations, freedom from conflict of interest, and acting in their personal capacity. To prevent any abuse of the process and self-interest, members of the selection panel are not qualified for the appointment to the tribunal during their term of office and during a yet-unspecified period after the termination of their term. The draft also requires that the composition of the panel should be diverse including in terms of geographical diversity and gender equality.[175]

Under the draft, States acting as a collective authority retain control over appointments.[176] To ensure a demographic representation of the principal legal systems of the world and equitable geographical distribution, draft provision 8 classifies members of the tribunal into yet-unspecified regional groups and provides an option to the effect that each regional group in the Committee of

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[171] See UNCITRAL Secretariat, *Standing multilateral mechanism: Selection and appointment of ISDS tribunal members and related matters* (n 219) para 42.
[172] See ibid para 30.
[173] See *Submission from the Government of South Africa*, UNCITRAL Working Group III (17 July 2019) para 89.
[174] See UNCITRAL Secretariat, *Standing multilateral mechanism: Selection and appointment of ISDS tribunal members and related matters* (n 219) para 40.
[175] See UNCITRAL Secretariat, *Standing multilateral mechanism: Selection and appointment of ISDS tribunal members and related matters* (n 219) para 40.
[176] See ibid paras 40, 44.

the Parties select the eligible individuals from their regional group. Regional groups shall also be mindful of the equal gender representation of members of the tribunal as a whole.[177]

The concern over the involvement of States in the appointment process is that the process is prone to political influences. This criticism is in particular highlighted in light of the experiences in the appointment of members of the existing international courts and tribunals. The ICJ election process has been widely criticized for the intrusion of politics in the election of its judges.[178] Some commentators claim that even in the ECtHR appointment process, as one of the most advanced international judicial systems where States no longer have full control over appointments, political considerations are evident.[179] This criticism is further reinforced in view of the ongoing WTO Appellate Body crisis with the US blocking the appointment process.[180]

In its submission on possible reform of ISDS, Bahrain stated that the exclusive involvement of States in the appointment of judges bears the risk of politicization of appointments.[181] Referring to the experience of the WTO Appellate Body and dominance of power-politics in the new appointment mechanism, South Africa maintained that it supports "an appointments process that cannot be dominated or manipulated by a State or States determined to politicise it".[182] Another State, distinguishing between the two tiers of the proposed tribunal mechanism, suggested that members of the appellate tribunal be appointed by an independent third-party, rather than States.[183] To avoid blocking the selection process as seen in the selection process of members of the WTO Appellate Body, the draft provision proposes election through majority votes, rather than

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[177] See ibid para 44.

[178] See, e.g., Davis R. Robinson, 'The Role of Politics in the Election and the Work of Judges of the International Court of Justice' (2003) 97 Proceedings of the ASIL Annual Meeting 277-282; Ruth MacKenzie and others, *Selecting International Judges: Principle, Process, and Politics* (OUP 2010) 100-136; Mariano J Aznar-Gómez, 'Article 2' in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (2nd edn, OUP 2012) 391-392; Ksenia Polonskaya, 'Selecting candidates to the bench of the World Court: (Inevitable) politicization and its consequences' (2020) 33(2) Leiden J. Int. L. 409-428.

[179] See Erik Voeten, 'The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights' (2007) 61(4) Int. Organ. 669-701.

[180] See Geraldo Vidigal, 'Living Without the Appellate Body: Multilateral, Bilateral and Plurilateral Solutions to the WTO Dispute Settlement Crisis' (2019) 20(6) J. World Invest. Trade 862-890; Chang-fa Lo and others (eds), *The Appellate Body of the WTO and Its Reform* (Springer 2019); Henry Gao, 'Finding a Rule-Based Solution to the Appellate Body Crisis: Looking Beyond the Multiparty Interim Appeal Arbitration Arrangement' (2021) 24(3) J. Int. Econ. Law 534-550.

[181] *Submission from the Government of Bahrain,* UNCITRAL Working Group III (29 August 2019) para 27-33.

[182] *Submission from the Government of South Africa,* UNCITRAL Working Group III (17 July 2019) paras 90-91.

[183] *Submission from the Government of Morocco,* UNCITRAL Working Group III (11 February 2020) 3.

consensus.[184] Despite this safeguard, the risk of politicization of appointments still persists as the draft does not fully address this concern.

Another criticism of the proposed appointment mechanism is that states are directly involved in the selection of adjudicators. At the 2022 ICCA Conference, Tom Sikora - in-house counsel for a large multinational oil and gas company that has been involved in various investment disputes - criticized the ongoing reforms as being a one-sided state-led process and argued that the proposed court system would have 'zero legitimacy' as it disengages investor claimants.[185] As a result, the trust in the system would be undermined.[186]

The commentary to the draft and submissions of the EU have addressed this concern. Under this standing mechanism, no role is perceived for disputing parties in the composition of the tribunal. Indeed, decisions are made collectively, and States act in their capacity as parties to the founding Agreement taking into consideration multiple factors, i.e., when considering their votes, they not only need to consider their defensive interests as potential respondents in ISDS disputes, but they are also expected to take into account their offensive interests, namely the interests of their national investors.[187]

Lastly, in a lecture recently delivered at the 2022 ICCA Congress, UNCITRAL secretary Anna Joubin-Bret stated that the Working Group III plans to draft a framework convention over the coming years. The framework convention would automatically update ISDS clauses in the roughly 3,000 investment treaties. Further, the proposed instrument on the multilateral court system would be an additional opt-in protocol to the framework convention.[188] While the idea of a creation of a

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[184] See UNCITRAL Secretariat, *Standing multilateral mechanism: Selection and appointment of ISDS tribunal members and related matters* (n 219) paras 15, 32.

[185] See Cosmo Sanderson, '"Zero legitimacy": investment court under fire at ICCA', *Global Arbitration Review* (26 September 2022).

[186] *Submission from the Government of the Russian Federation*, UNCITRAL Working Group III (31 December 2019) para 8.

[187] *Submission from the European Union on Possible Reform of Investor-State Dispute Settlement (ISDS)*, Working Group III, Thirty-Fifth Session, UN Doc. A/CN.9/WG.III/WP.145 (12 December 2017) para 31; UNCITRAL Secretariat, *Note on possible reform of investor-State dispute settlement (ISDS) - Appellate and multilateral court mechanisms*, UNCITRAL Working Group III (29 November 2019) para 67; *Submission from the European Union and its Member States*, UNCITRAL Working Group III (24 January 2019) para 23; UNCITRAL Secretariat, *Standing multilateral mechanism: Selection and appointment of ISDS tribunal members and related matters* (n 219) para 5.

[188] See Cosmo Sanderson, '"Zero legitimacy": investment court under fire at ICCA' *Global Arbitration Review* (26 September 2022).

framework convention is in a nascent stage, such a multilateral treaty could potentially eliminate serious inconsistencies between investment treaties in terms of the qualifications and conduct of adjudicators. It could potentially replace the ICSID Convention and eliminate barriers created, and deficiency caused, by the latter Convention with respect to disqualification of panelists (i.e., a high threshold for proving that panelists lack the required qualities or involvement of peer arbitrators and the ICSID Chairman in the disqualification review process). A framework convention could also harmonize the procedural rules governing the appointment of ISDS adjudicators and reshape the structure of ISDS tribunals. Nevertheless, given considerable differences between States' positions with respect to ISDS in general,[189] and the qualifications and conduct of panelists in particular, it is not clear how such a convention could efficiently integrate divergent and, in some cases, opposing views of States.

Conclusion

ISDS adjudicators and the *ad hoc* appointment mechanism are a serious concern for States. To respond to the challenges arising out of the conduct and qualifications of adjudicators, States have initiated a series of reforms. The new shift brings a top-down rearrangement of the appointment mechanism as well as ITA. These reforms dramatically influence the eligibility requirements and behaviour of adjudicators. Also, these reconstructions limit the interpretative authority of adjudicators and replace the current ISDS mechanism with a new standing body.

A larger number of treaties incorporate personal qualifications requirements, compared to treaties with provisions on professional qualifications. This is evidence that States are more concerned with removing bias from adjudicators than ensuring their expertise. Recent developments in investment treaties include detailed provisions on the conduct and personal qualifications of

[189] For instance, UNCTAD's database shows that, as of August 2022, India terminated more than 70 of its BITs. It is expected India intends to renegotiate new treaty texts that notably advance its sovereign regulatory freedom and public interests while excluding the right of investors to submit their disputes to arbitration. Recent recommendations of India's Parliamentary Committee on External Affairs confirm this understanding of India's new treaty practice. The Committee recommended that India "should make all out efforts to draft BITs cautiously leaving no scope of investment disputes". See, Lok Sabha, *10th Report of India's Parliamentary Committee on External Affairs - India and Bilateral Investment Treaties* (December 2021) ¶2.19; Lok Sabha, *14th Report of India's Parliamentary Committee on External Affairs - India and Bilateral Investment Treaties* (April 2022) ¶¶14 and 19.

adjudicators. These treaties place heavier obligations on ISDS adjudicators compared to conventional investment treaties and institutional arbitration rules.

Some treaties set out more stringent professional eligibility criteria. They particularly require established expertise in PIL, and thus, disqualify those with limited knowledge of the field. These treaties support the view that sees ISDS as a field of PIL and promise a greater participation of PIL experts in ISDS. The approach adopted by these treaties goes against the situation of the contemporary pool of ISDS adjudicators where practitioners who had a background in private law represent a sizable proportion of members of the pool.

Treaties also include well-tailored provisions on structural reforms. Reconstruction of ITA is closely intertwined with reform of the appointment mechanism. Redesigning the organization of investment treaty disputes not only addresses challenges resulting from adjudicators' incorrect or inconsistent interpretations but also deficiencies of the *ad hoc* appointment mechanism. The underlying implication of the structural reconstruction is that a greater control is exercised over adjudicators, both in terms of their qualifications and their decision-making authority.

In spite of the above developments, treaties are not consistent in their approach towards reforms and the requirements imposed on adjudicators. Nevertheless, the treaty practice is united in its goal, i.e., a greater control over adjudicators. This transformation grants potential respondent States a growing influence over the selection of adjudicators and composition of arbitration tribunals.

As part of the ongoing ISDS reforms under the auspices of the UNCITRAL Working Group III, the proposed draft on the standing multilateral mechanism incorporates the developments in the recent treaty practice in terms of personal and professional eligibility standards. The draft also initiates a multi-layered, multilateral and transparent appointment process where a variety of actors are engaged, and States do not have an exclusive control over the process. The draft in particular sets out a solid oversight structure and establishes an independent screening process that decreases the risk of political influences in the appointment mechanism.

Conclusion: Rethinking the Investment Treaty Arbitrator

Investment treaty arbitrators have emerged as a controversial class of international adjudicators. The contemporary community of ITA panelists exhibits characteristics that distinctly differ from those of the small community of the 'grand old men'. ITA panelists' attributes and patterns of social behavior have evolved over the past few decades highlighting deficiencies in the existing procedures, rules and standards that govern the qualifications, appointment and behavior of panelists. These developments have in particular reshaped the composition, dynamics and culture of the ITA community.

With the inflow of commercial arbitration elites and practitioners who are connected to large law firms into the pool of ITA panelists, a transformation has occurred in the culture of the ITA community. Complex interactions of panelists both within the arbitration community and with other participants in ITA proceedings present unresolved problems to the ITA system both in terms of potential conflict of interest and its integrity and legitimacy.

Contemporary panelists interact within a complex network of arbitration practitioners and participants. Both the nature of the activities they are concurrently engaged in as well as the high number of arbitration actors within their circle of contacts unprecedentedly increase the likelihood of circumstances that may create doubt as to the panelist's independence and impartiality and, in some instances, may involve 'inherent' risk of conflict of interest. Yet, the ITA community has failed to become sufficiently self-regulated, while the existing system, as a whole, lacks vigorous and transparent screening processes and control mechanisms for the assessment of the qualifications, behavior and interactions of arbitrators.

To assess commentators' arguments as to the decision-making behavior of ITA panelists, this study conducted empirical work that examined the voting behavior of two distinct groups of arbitrators. The evaluation of dissenting opinions strongly supports van den Berg's conclusion in his 2009 study and reinforces the view that party-appointed panelists are not indifferent in their decision-making to the position of the party that appointed them. Indeed, contrary to Brower and Rosenberg's argument, dissenting opinions issued by party-appointed arbitrators advocate for the position of the appointing party.

This above finding is further supported by a second empirical work conducted on the voting behavior of frequent party-appointed panelists. The review of voting records of party-appointed arbitrators who received high or exclusive appointments only from one disputing 'side' shows that there is a relationship between excessive appointments and voting behavior of these influential arbitrators. Voting records of these elite insiders indicate a pattern of behavior that refutes the claim that party-appointed arbitrators are disinterested in their decision-making.

The results of two empirical works in Chapter 2 confirm the existence of a correlation between appointments and decision-making of party-appointed arbitrators. Party-appointed panelists represent the position of the party that appointed them and they act as an advocate for that party. The above evidence dismisses the claim that panelists are impartial and shows that the system lacks the neutrality of panelists, i.e., the cornerstone of international adjudication.

Another empirical study evaluated the composition, qualifications and behavior of panelists within the ICSID pool and the evolution of the attributes of ICSID panelists over the past five decades. It shows that the ICSID community suffers from a serious diversity deficit and documented that the pool is dominated by male panelists who are nationals of developed countries located in two specific regions, i.e., Western Europe and North America. Disputing 'sides' and the ICSID Chairman demonstrated fairly similar practices with respect to the composition of ICSID panels in terms of the diversity of arbitrators, though some instances of negligible or moderate differences exist between their appointment preferences.

While the empirical study conducted for the purpose of Chapter 3 does not specifically examine the alleged clash of culture between panelists who are experts in PIL and those who have a background in private law or private arbitration, it methodically uncovers that panelists who have expertise in private law or experience in private arbitration hold a strong presence in the ICSID pool. However, this study also found that the majority of ICSID panelists in the review period had expertise in PIL.

The outlook of ICSID panelists has also transformed in terms of the occupation they possess. While panelists who held academic and judicial appointments had a large presence in the early pools of ICSID, the contemporary pool is to a great extent represented by arbitration practitioners who had counsel positions. The present-day panelist at ICSID is a law firm partner who is involved in both investor-State and private arbitrations.

The above evidence substantiates the argument that affiliation to law firms and prior involvement in private arbitration are considered a doorway for appointments (and potentially reappointments) in ITA. Being a member at a global law firm highlights the visibility of the law firm partner as a potential candidate. Previous involvement in private arbitration is also considered a factor in appointment of the person to ITA panels at ICSID.

In addition to the developments in the composition of the pool of ITA panelists, the behavior of panelists has evolved with respect to double-hatting. As the empirical data show, with the exponential growth in the number of ICSID disputes over the past two decades and the increased involvement of law firm partners in ITA, the double-hatting practice has become widespread among ICSID panelists. This practice is more noticeable among two groups of panelists who exercise greater influence over the ITA system, i.e., presiding panelists and frequent appointees. The data evidence that these elite practitioners are more likely to switch their hats than other panelists. These arbitration practitioners concurrently influence both the composition of ITA panels (in cases where they represent a disputing party) and the decision-making process (where they act as adjudicator).

Arbitrators' relationships with other members of the arbitration community or other participants in ITA proceedings have resulted in a remarkable increase in disqualification requests; however, both institutional arbitration rules and conventionally-drafted investment treaties categorically fail to cope with novel forms of interactions of panelists that could potentially give rise to doubt about a panelist' impartiality and independence. In particular, the ICSID disqualification provisions impose a high threshold for proving that panelists lack the required qualities. In practice, unchallenged panelists or the ICSID Chairman, as decision-making authorities, generally adopt a favorable approach towards the behavior that is the subject of challenge. In other words, the implementation of the ICSID disqualification provisions is further exacerbated by the approach of the decision-makers in disqualification proceedings, particularly with regard to the identification of circumstances that constitute an 'evident' lack of the required qualities. Further, the involvement of peer panelists and the ICSID Chairman (in ICSID disputes) has further undermined the ITA disqualification review mechanism. The combination of the above circumstances has resulted in an excessively high percentage of denied disqualification requests at ICSID.

While the annulment committee in *Eiser* has recently adopted a distinct approach in its review of panelists' interactions with other participants in ITA proceedings, a fundamental transformation is required to remedy challenges that the ITA system, in general, and the ICSID framework, in particular, face. Along with other reform initiatives taking place across the ITA spectrum, modification of the ICSID Convention and modernization of its panelist eligibility standards and disqualification provisions can be seen as a viable alternative to address the above challenges.

Deficits of the existing ITA system demand transformation of eligibility requirements of its panels and how they interact within the arbitration community and with other participants in ITA proceedings. States, as primary actors in the international legal regime and holders of authority to create international legal rules, have realized that contemporary complexities arising out of ITA panelists require restructuring the whole ISDS mechanism, reshaping the personal and professional qualifications of adjudicators and imposing further requirements on the conduct of adjudicators. These reforms are taking place at two major venues: institutional and treaty-making levels. Despite some differences in approach, the objective remains the same - that is the exercise of greater control over ITA panelists.

At the institutional level, ICSID's 2022 Arbitration Rules and Arbitrator Declaration form expand the disclosure obligation of ICSID panelists, clarify the scope and content of this duty and methodologically specify the facts and circumstances that should be disclosed. The new amendments significantly reduce panelists' uncertainties and confusion over information that is expected from them. They lessen a party's struggle in its exploration and assessment of facts and circumstances that may give rise to doubts as to a panelist' independence or impartiality. However, the recent ICSID amendments are limited in nature and cannot effectively eliminate serious deficits of the ICSID framework in addressing contemporary challenges arising out of the qualifications and behavior of panelists, e.g., concurrent double-hatting or the involvement of unchallenged panelists or the ICSID Chairman in the disqualification review process. To overcome such challenges, substantial reforms of the ICSID Convention are required.

The proposed Code of Conduct for ISDS Adjudicators is a breakthrough in the history of international arbitration. The Code adds more clarity as to what is expected from adjudicators, imposes detailed commitments on them and demands a certain pattern of social behavior. Indeed, to ensure compliance with panelists' core obligations, i.e., impartiality and independence, the Code

specifies relationships and behavior that are deemed to be noncompliant with these obligations. Further, the Code of Conduct not only controls the behavior of panelists but also the restricts the freedom of the disputing parties and the discretion of appointing authorities in selecting and appointing panelists.

Regulating the practice of double-hatting has proved to be the most challenging part of the ongoing reform negotiations at the UNCITRAL Working Group III. In particular, States largely differ on whether concurrent engagements as arbitrator, counsel, and expert should be fully prohibited, or they should be subject to some restrictions. However, no State has supported the existing state of affairs with respect to double-hatting. The review of States' positions indicates that they support at minimum the imposition of some requirements on panelists who are engaged in the double-hatting practice. Both the full prohibition and modified restriction approaches view certain instances of this practice as embodying an inherent, rather than potential, risk of conflict of interest. This means that even in case the modified restriction alternative is agreed upon in the Code, panelists would be less encouraged in wearing more than one hat as they would be required to make special efforts to comply with certain requirements.

While the scope and contents of the disclosure obligation under the Code are not yet finalized, the direction of the ongoing reform negotiations show that the Code would impose considerable obligations on adjudicators. Extensive disclosure commitments would influence how panelists interact both within the arbitration community and within the broader network of participants in ITA proceedings. Specifically, in contrast to the disclosure provisions of the ICSID 2006 Arbitration Rules, the discretionary space left to panelists under the Code is non-existent or is relatively inconsequential. Under the Code, panelists would be required to disclose any circumstances and relationships that, in the 'eyes of the disputing parties', may give rise to doubts about their impartiality and independence.

Further, concerns over the qualifications and behavior of ITA adjudicators have reorientated the treaty-making policy of States. Unlike conventional BITs, the recent generations of BITs and FTAs with investment chapters allocate detailed provisions to panelists. These provisions reconstruct the qualifications of adjudicators, redesign the appointment process, restrict panelists' interactions, incorporate distinct codes of conduct for panelists and rearrange the disqualification review process. More notably, some treaties establish a two-tier court system or are built upon the parties'

commitments to join a future multilateral court system. These developments in the treaty-making practice assume a proactive role for the State in treaty disputes between foreign investors and States, influence the composition of the pool of panelists and change the dynamics of relationships between panelists and other actors in ITA proceedings.

The imposition of new requirements under the recent treaty practice indicates that some members of the existing pool of ITA panelists would not be qualified for appointment as they lack these new requirements. Primarily, treaty clauses requiring that panelists should have 'specialised knowledge' or 'expertise' in PIL mean that these eligibility requirements likely disqualify a significant proportion of ISDS panelists who do not have this technical qualification.

That said, the extent, success and coherency of such a transformation through treaty practice remain to be seen. This is in particular because the positions of States on various aspects of reform, e.g., technical qualifications of panelists, are divergent and treaties fail to adopt a consistent approach toward panelists. While a framework convention can be seen as a venue to harmonize inconsistent treaty clauses, the success of such an instrument depends on if it could garner the widest possible support by States. However, this may not be realistic due to the growing disagreement among States on whether to accept ISDS as a means of dispute settlement in the first place. Indeed, some States have revisited their approach towards ISDS and have adopted a defensive stance against this mechanism.

The proposed multilateral court system can be seen as a clear break from the *ad hoc* appointment mechanism. It is designed to address the shortcomings of the existing ISDS mechanism, in particular the concerns over the qualifications and behavior of ITA panelists. In addition to the recent and ongoing developments at the treaty level, the court system is an indication of the return of the State and 'top-down' reforms in the ISDS mechanism.

The ongoing progress at the UNCITRAL Working Group III conclusively demonstrates that States prioritize an independent forum over a panel that includes representatives of the parties. In a future multilateral court system, the tension between neutrality and representativeness is solved in favour of the former. Unlike the *ad hoc* appointment mechanism, the proposed court system promises a transparent appointment process where the disputing parties cannot unilaterally exercise influence over the selection and appointment of panelists.

The future court system fundamentally reconstructs the adjudicator governance mechanism. Under the court system, *ad hoc* panelists would be replaced by a diversified group of standing adjudicators who are subject to higher technical qualifications, a vigorous screening mechanism, high behavioral standards and an independent disqualification review process. In particular, adjudicators would be required to be experts in PIL, and this requirement reshapes the composition of the court's adjudicators as it excludes those who have expertise in other fields of law or other disciplines. The proposed court system sets out an independent governance framework for the screening and selection of adjudicators and suggests a freestanding oversight body for assessing disqualification challenges against the court's adjudicators. More notably, under the proposed system, the unchallenged adjudicators or the institution's administrative executives have no authority to decide disqualification requests.

Finally, the combination of the above developments reconstructs the composition of the pool of investment treaty panelists and influences how panelists interact within the pool and within the broader network of participants in ISDS proceedings. As a major consequence of ISDS reforms, potential candidates who hold expertise in a field other than PIL or those who are engaged in concurrent double-hatting would be unlikely or less likely to receive appointments in investment treaty disputes. The attributes of the next generation of investment treaty adjudicators would be considerably different from the characteristics of the contemporary generation of arbitrators.

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Annex to Chapter 3

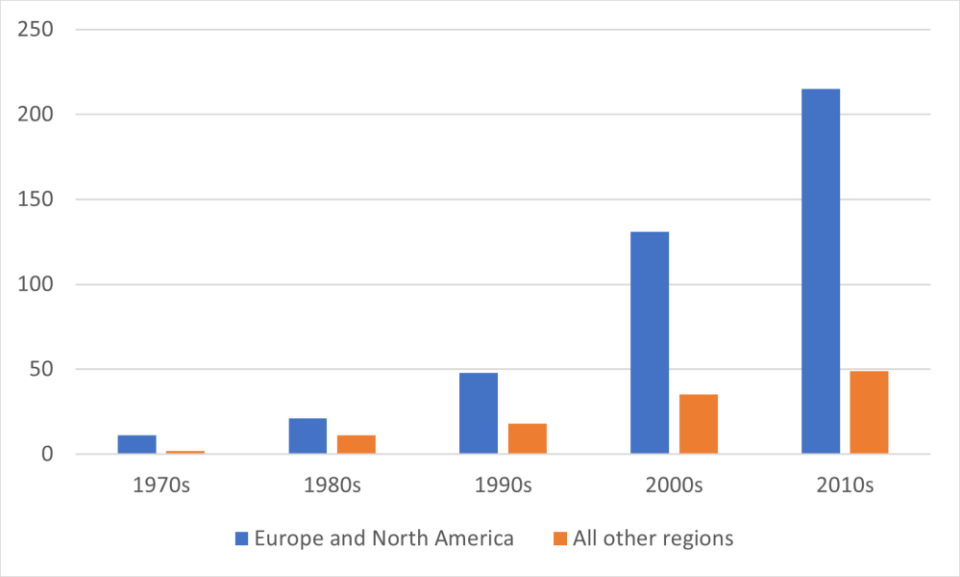

Figure 3.1.1 - Geographical distribution of arbitrators

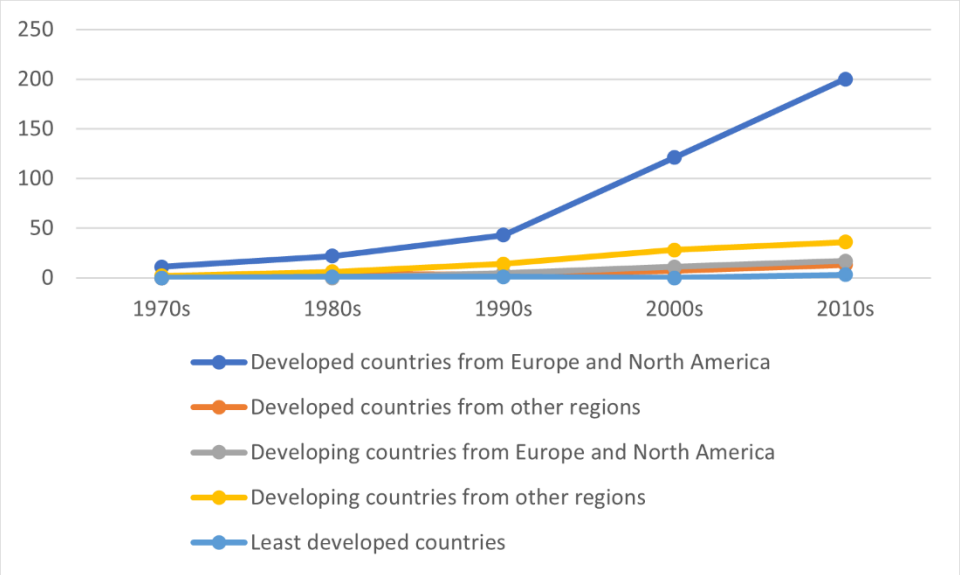

Figure 3.1.2 - Development status of the country of nationality of arbitrators

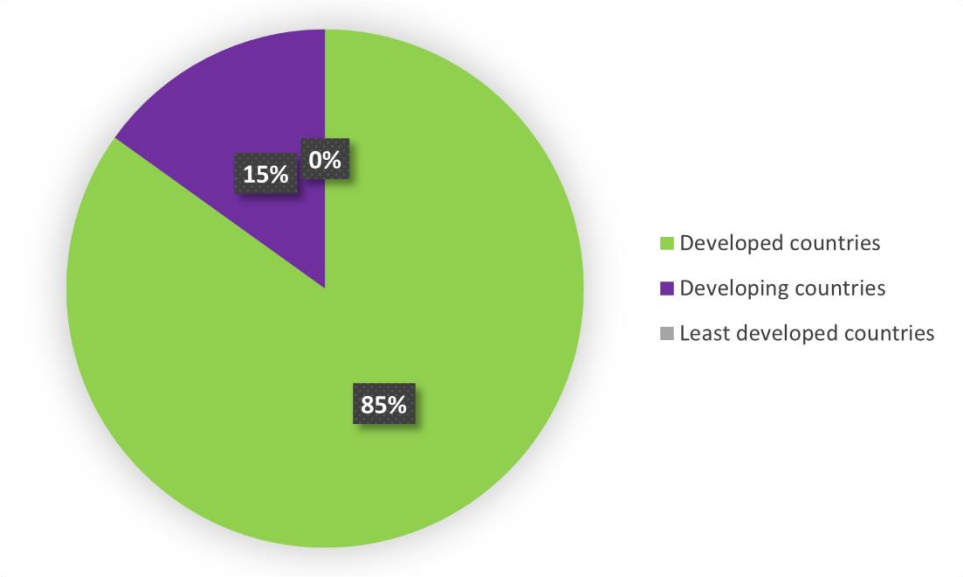

Figure 3.1.3 - Development status of the country of nationality of claimant arbitrators

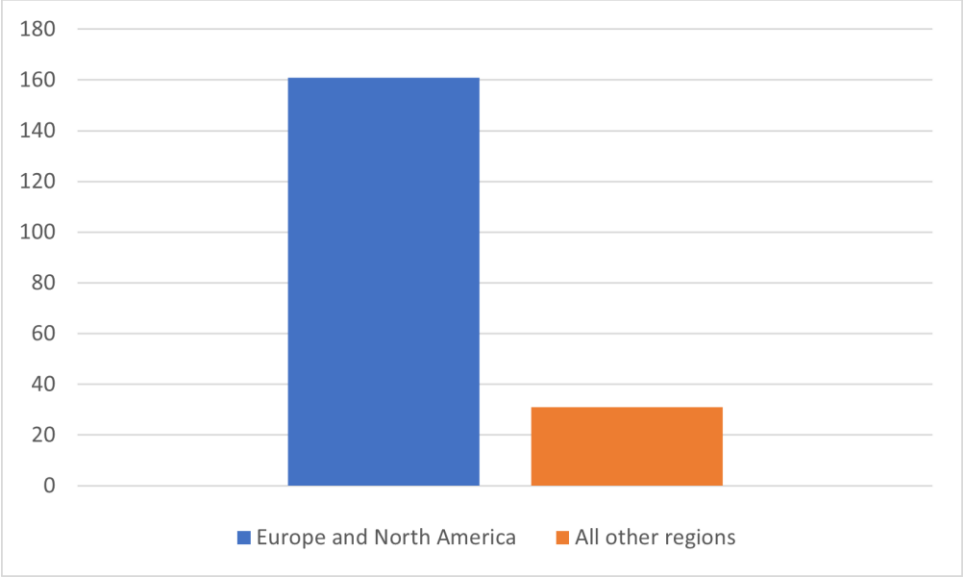

Figure 3.1.4 - Geographical distribution of claimant arbitrators

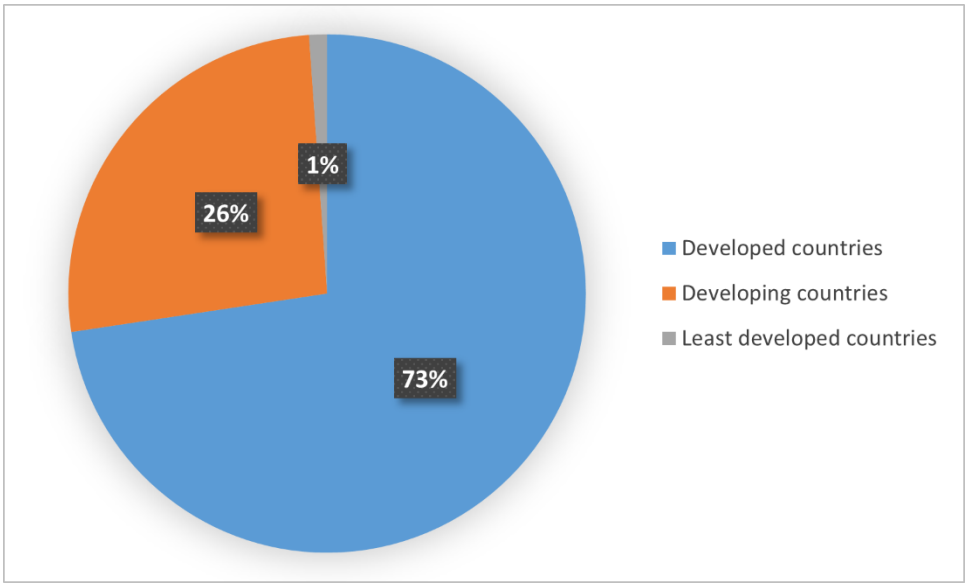

Figure 3.1.5 - Development status of the country of nationality of respondent arbitrators

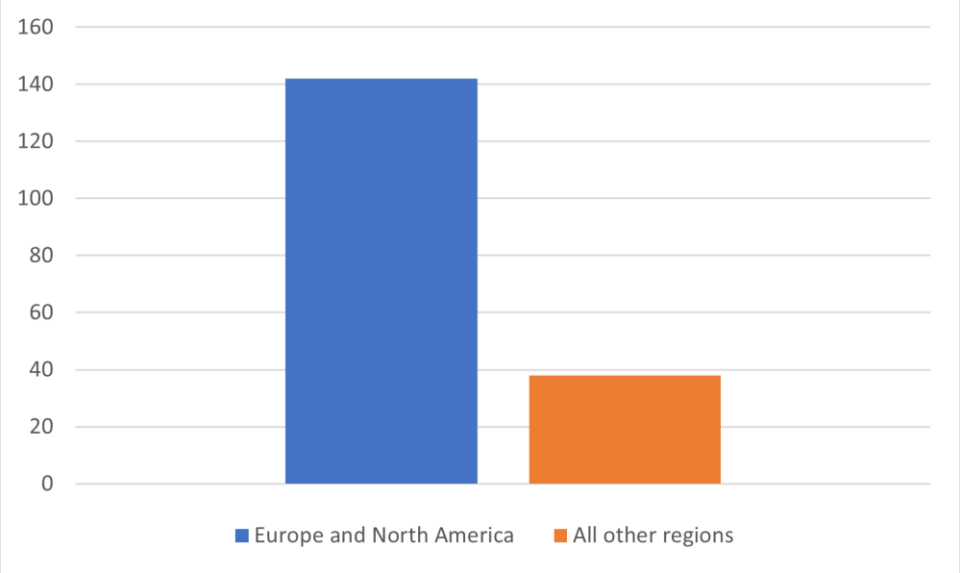

Figure 3.1.6 - Geographical distribution of respondent arbitrators

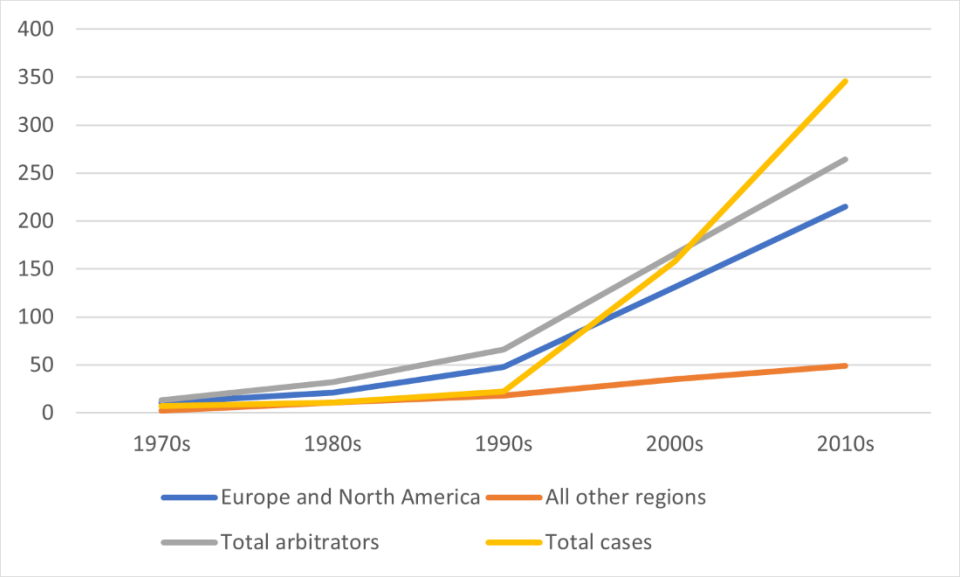

Figure 3.1.7 - Geographical distribution in light of total cases and total arbitrators

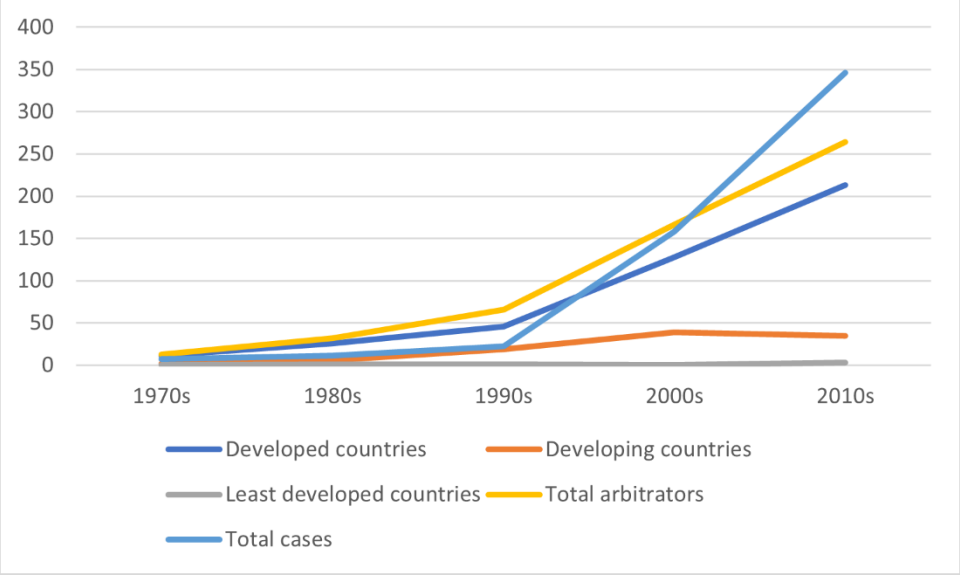

Figure 3.1.8 - Development diversity considering total cases and total arbitrators

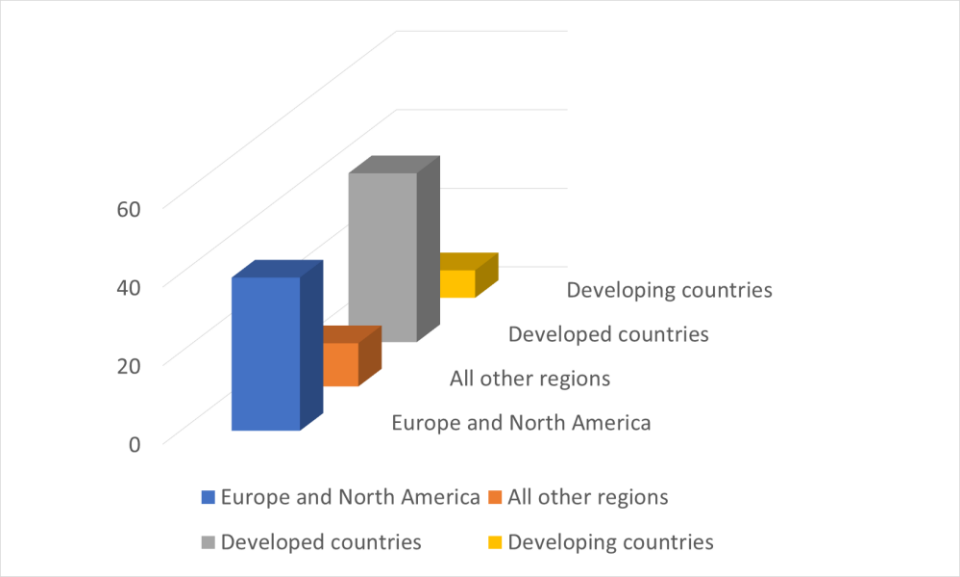

Figure 3.1.9 - Diversity of the most frequent arbitrators

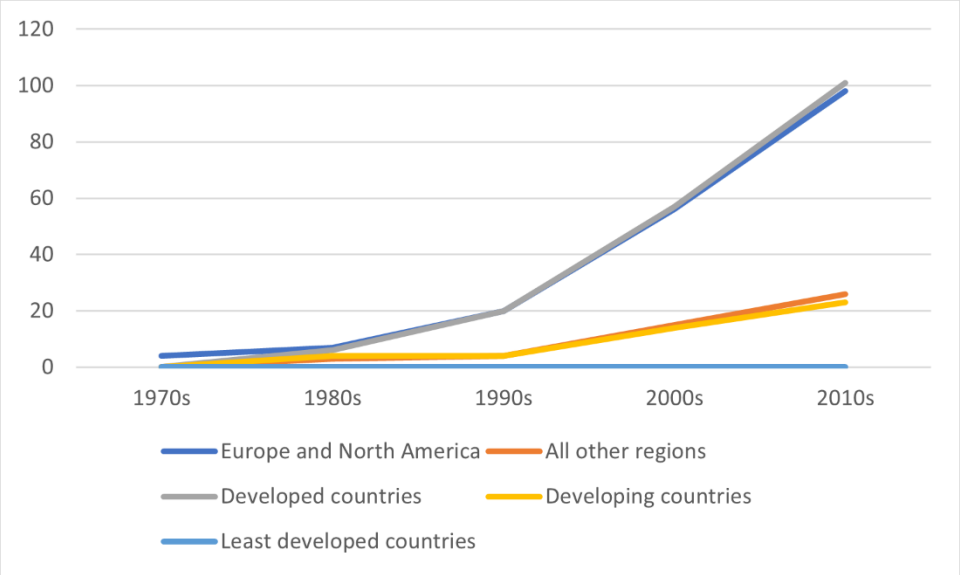

Figure 3.1.10 - Geographical distribution and development status of the country of nationality of presiding arbitrators

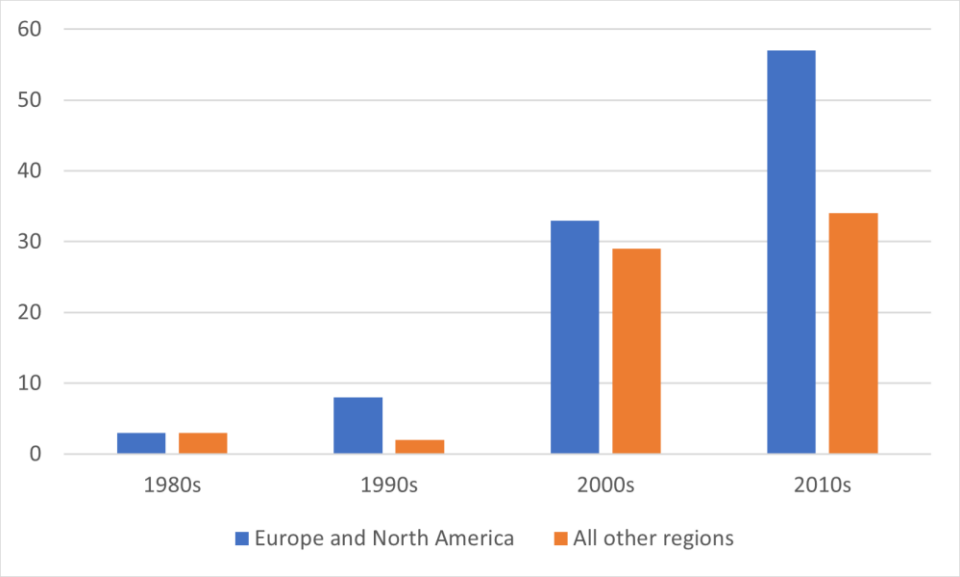

Figure 3.1.11 -Geographical distribution of annulment committee members

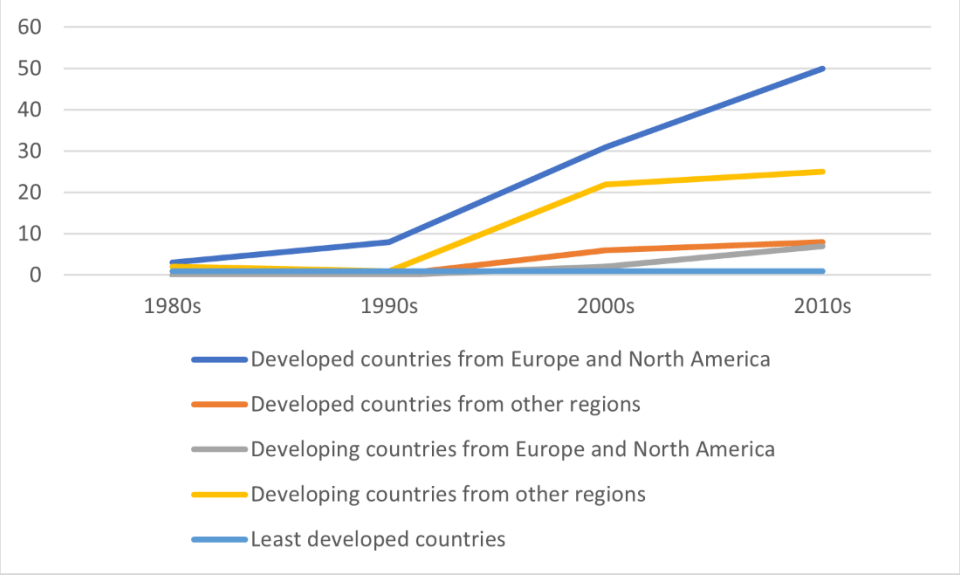

Figure 3.1.12 - Development status of the country of nationality of committee members

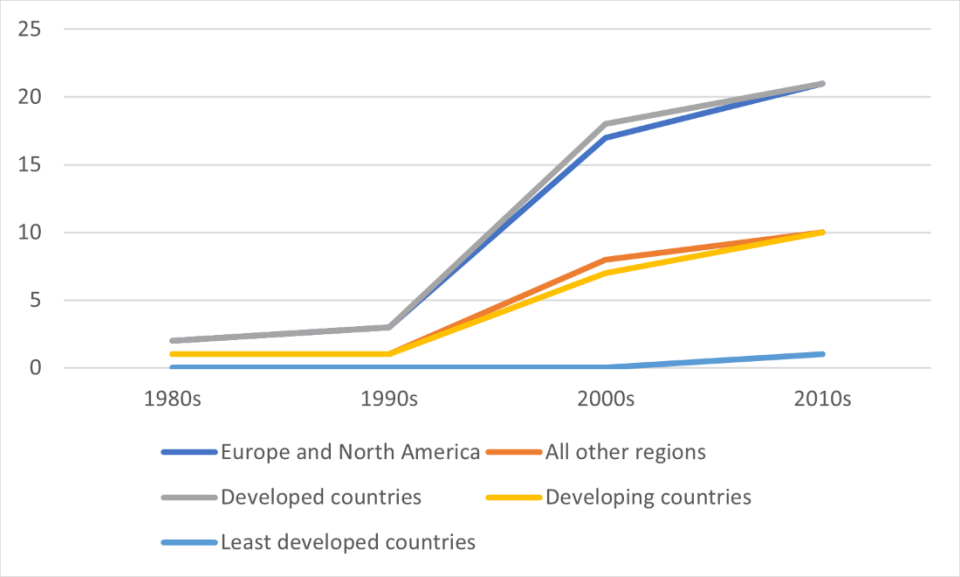

Figure 3.1.13 - Geographical distribution and development status of the country of nationality of presiding committee members

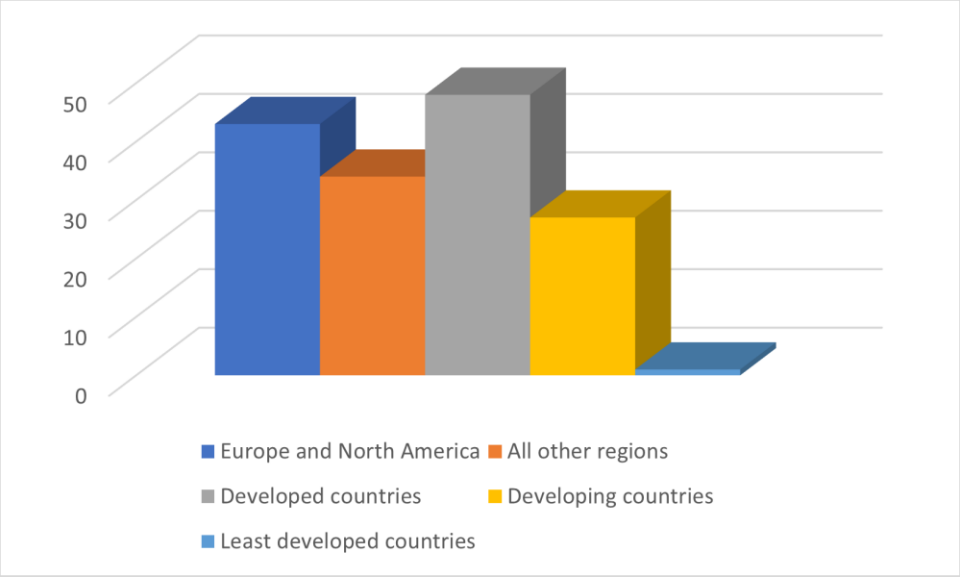

Figure 3.1.14 - Committee members who received reappointments

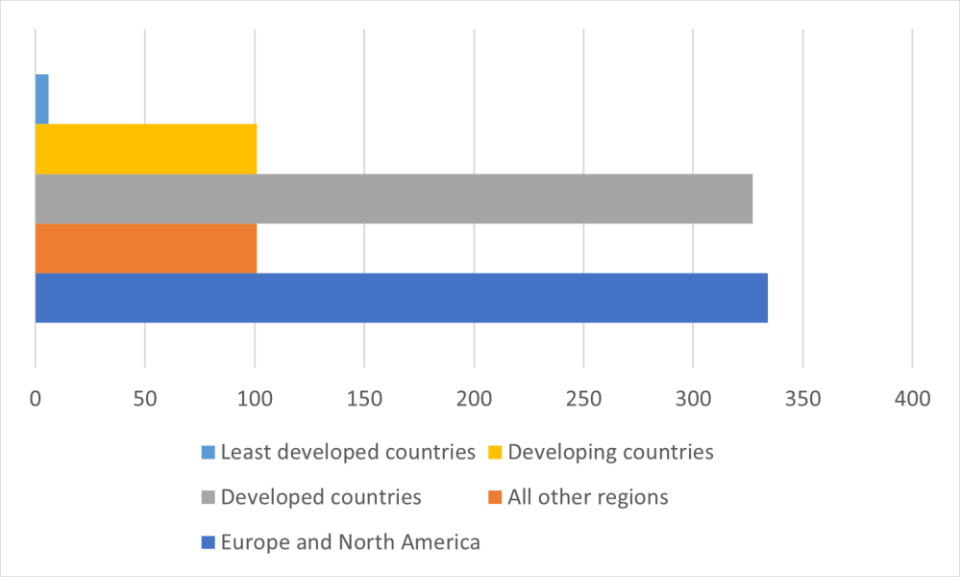

Figure 3.1.15 - Combined pool of ICSID arbitrators and committee members

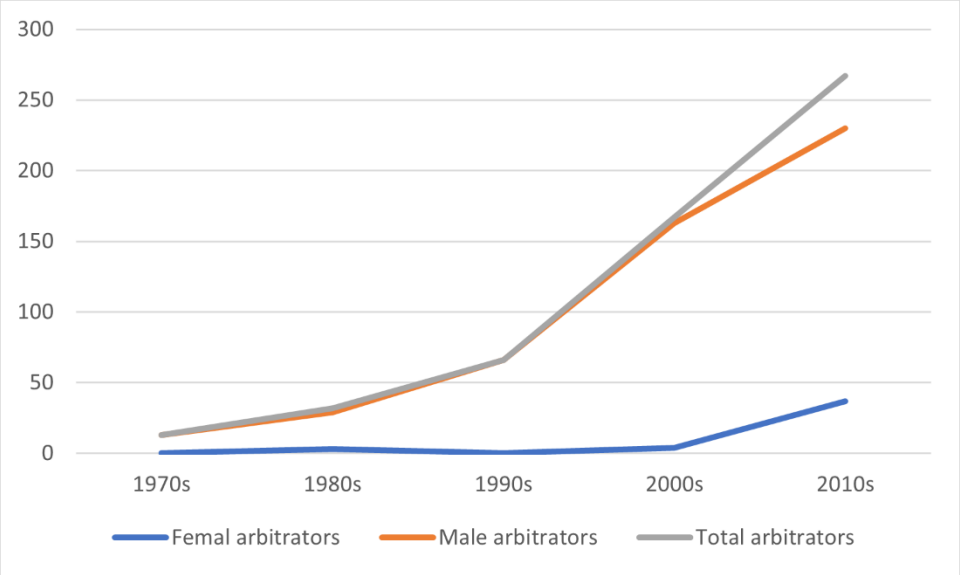

Figure 3.2.1 - Female arbitrators

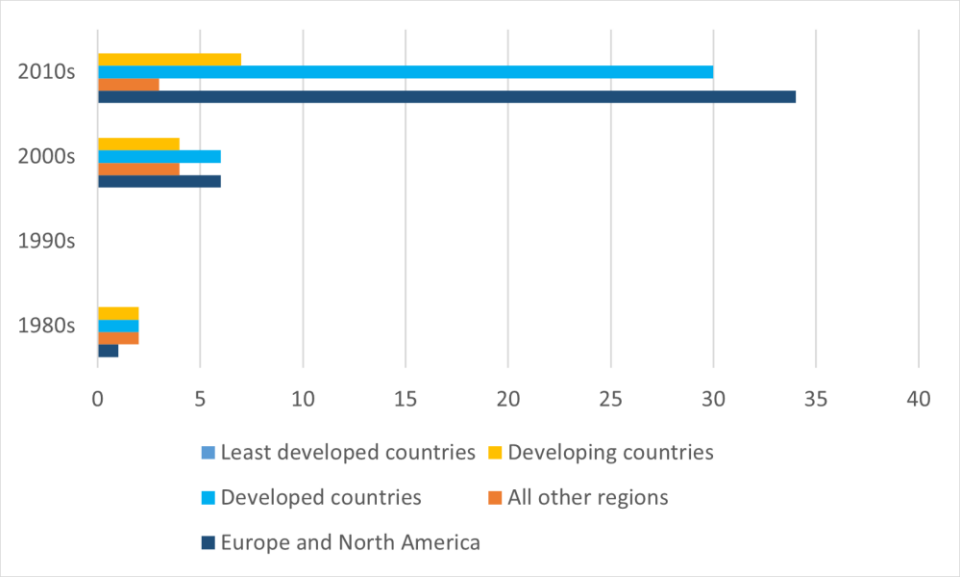

Figure 3.2.2 - Geographical distribution and development status of the country of nationality of female arbitrators

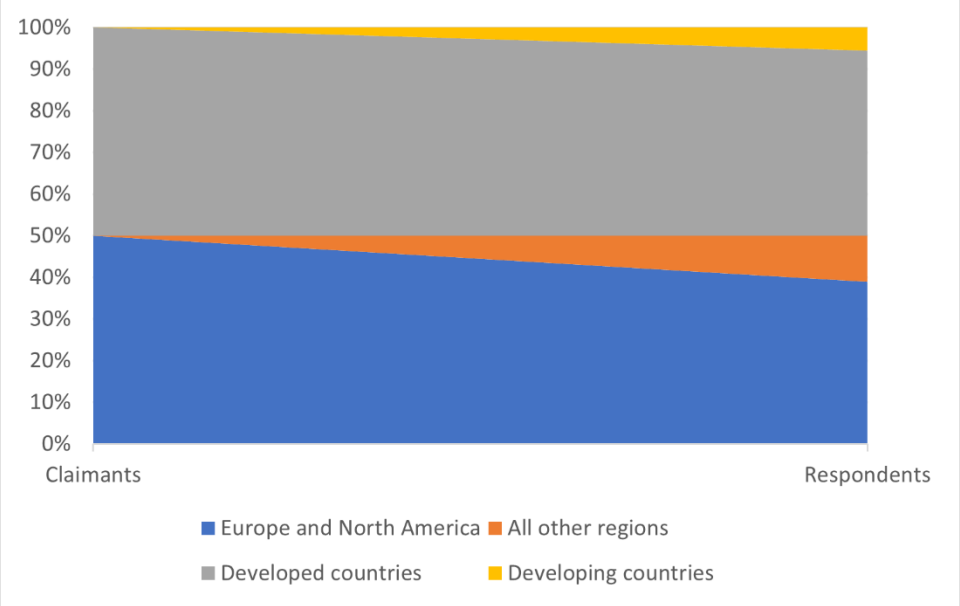

Figure 3.2.3 - Party-appointed female arbitrators in the 2010s

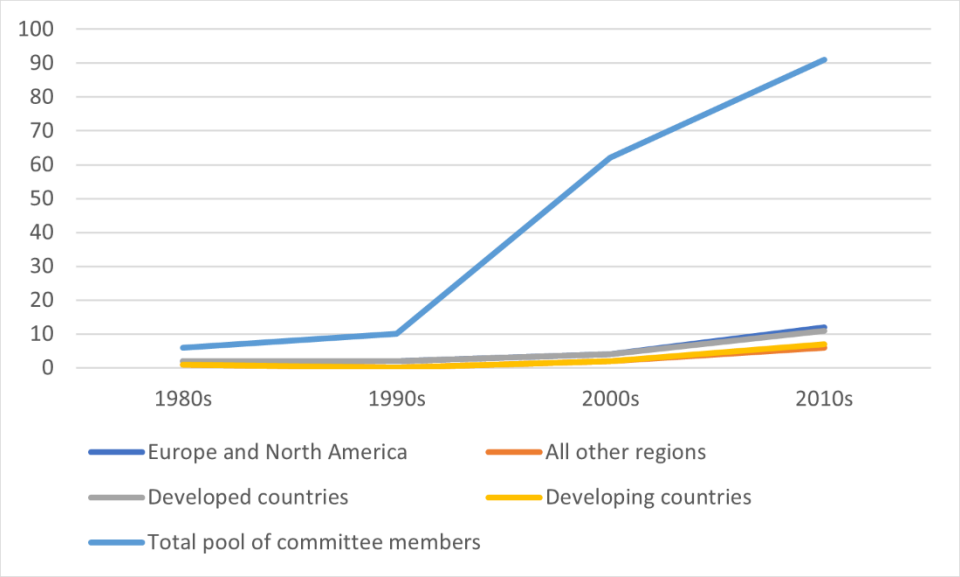

Figure 3.2.4 - Female committee members

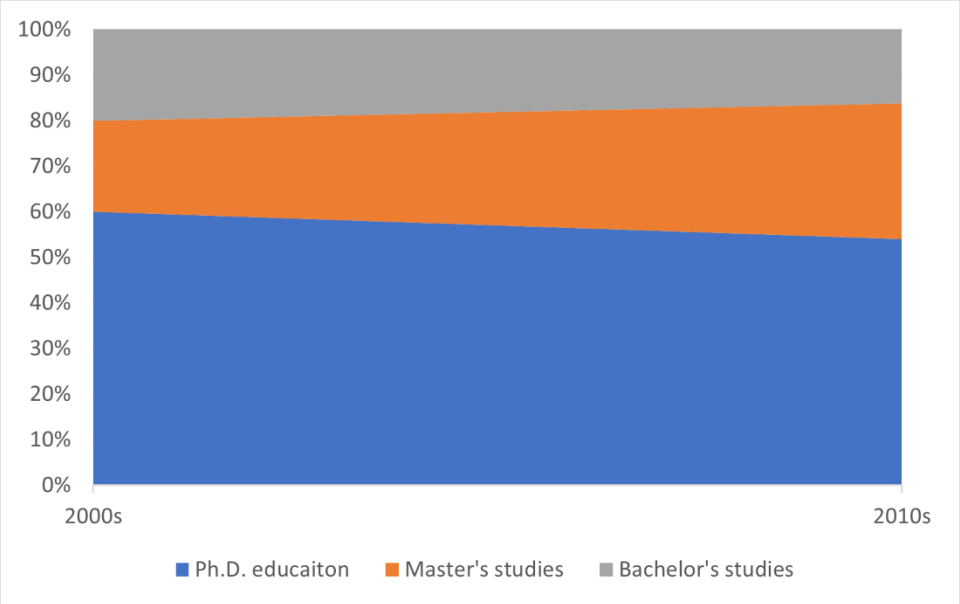

Figure 3.3.1 - Female arbitrators in the 2000s and 2010s

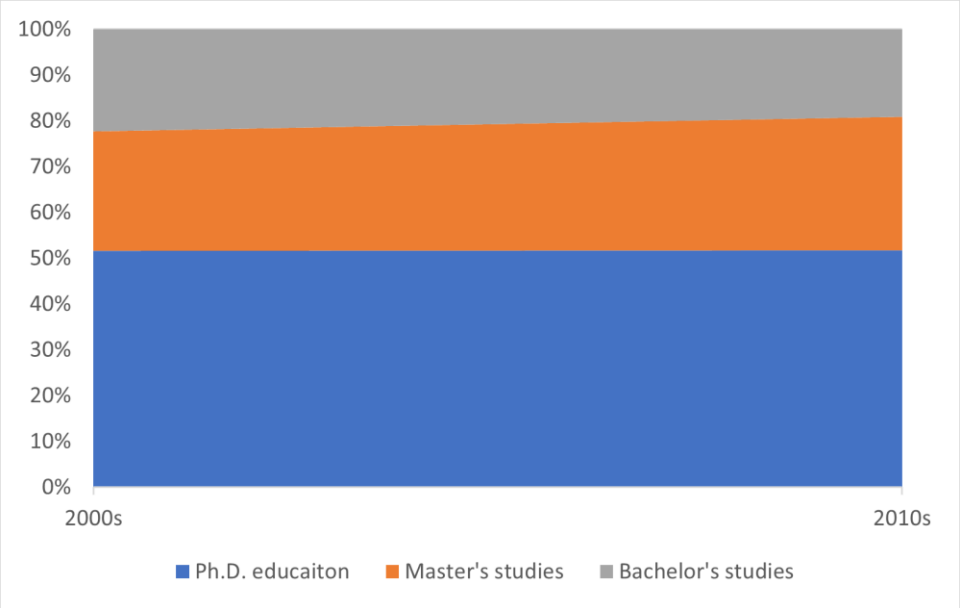

Figure 3.3.2- Male arbitrators in the 2000s and 2010s

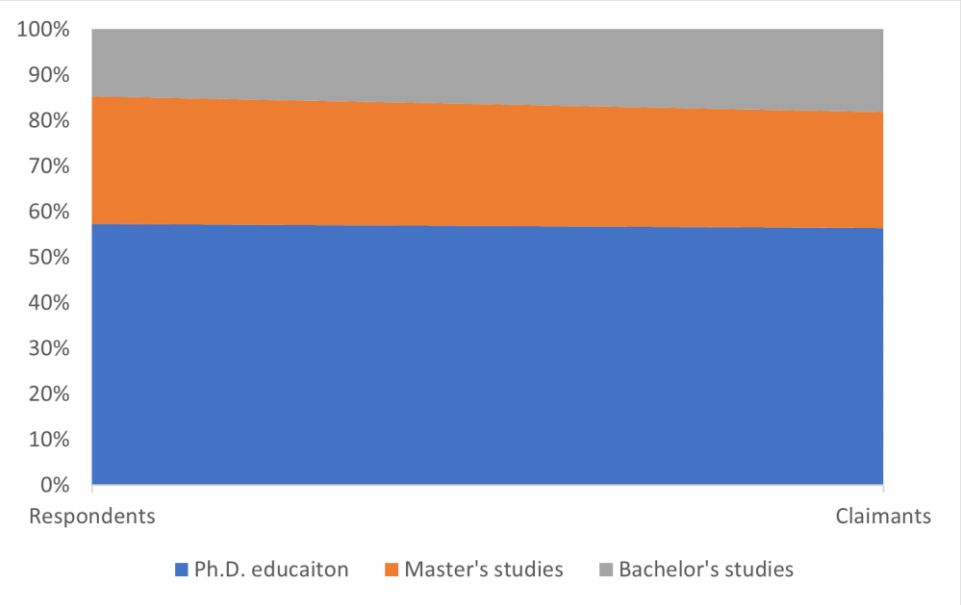

Figure 3.3.3 - Party-appointed arbitrators in the 2010s

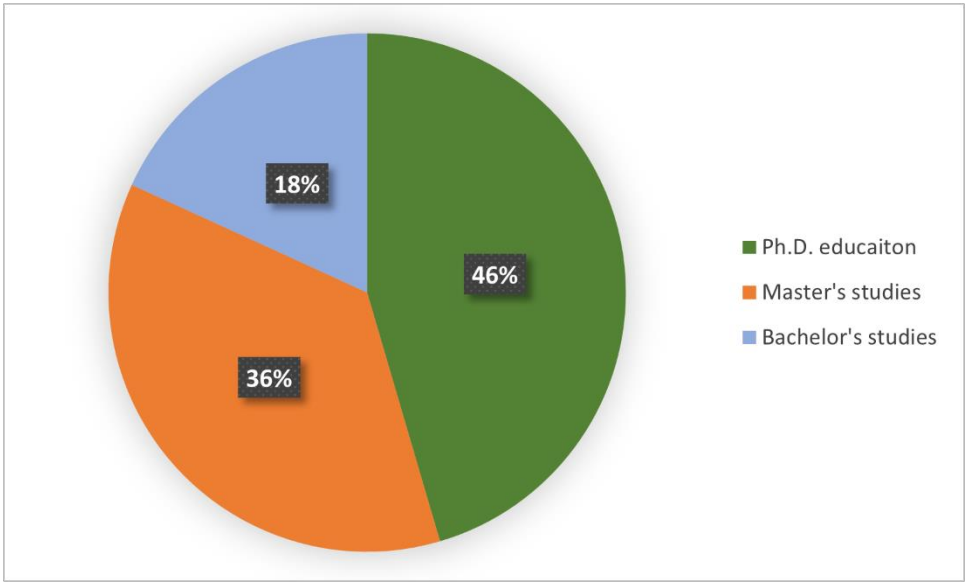

Figure 3.3.4 - Education level of female committee members

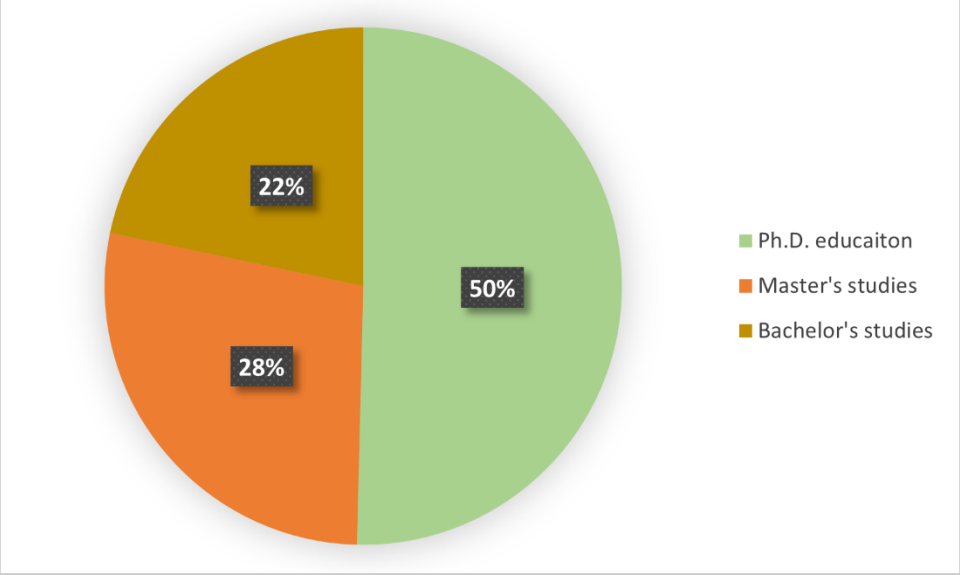

Figure 3.3.5 - Education level of committee members

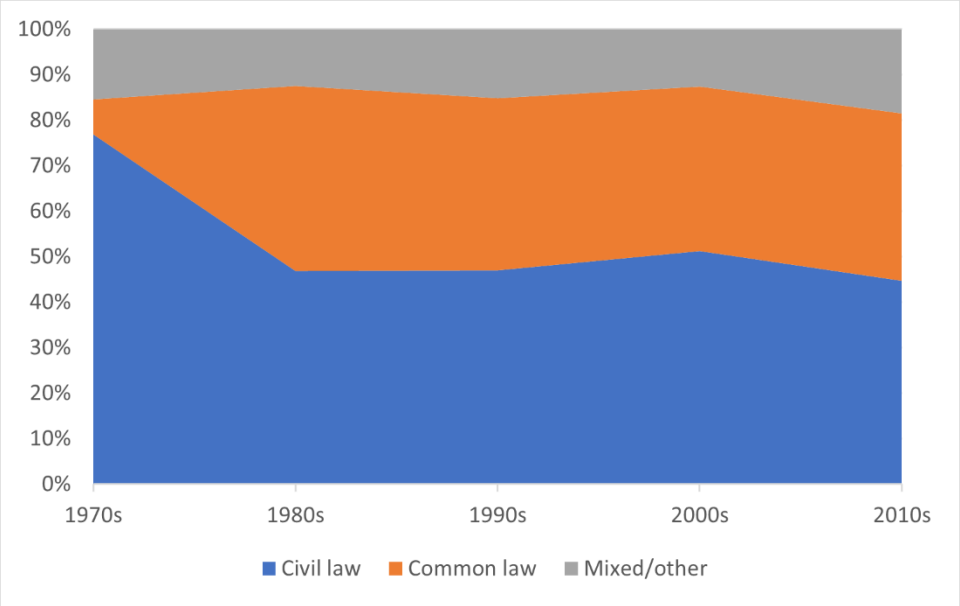

Figure 3.3.6 - ICSID arbitrators' legal background

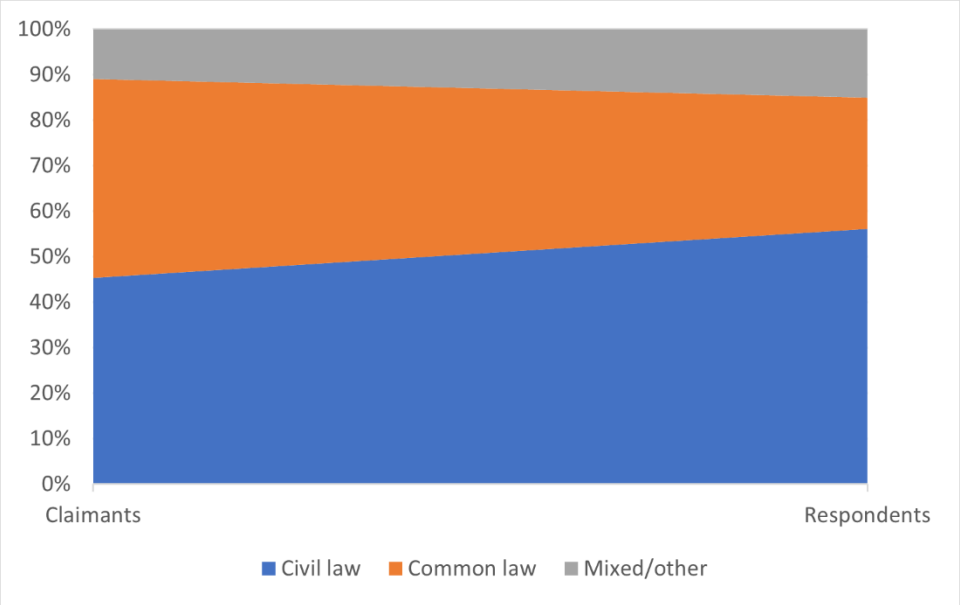

Figure 3.3.7 - Legal background of ICSID party-appointed arbitrators

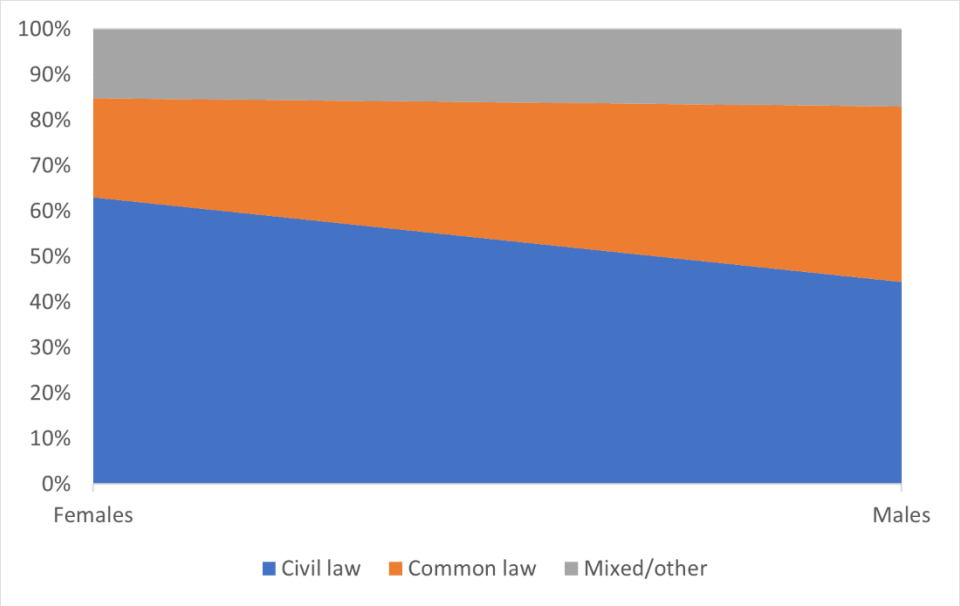

Figure 3.3.8 - Legal background of female and male arbitrators

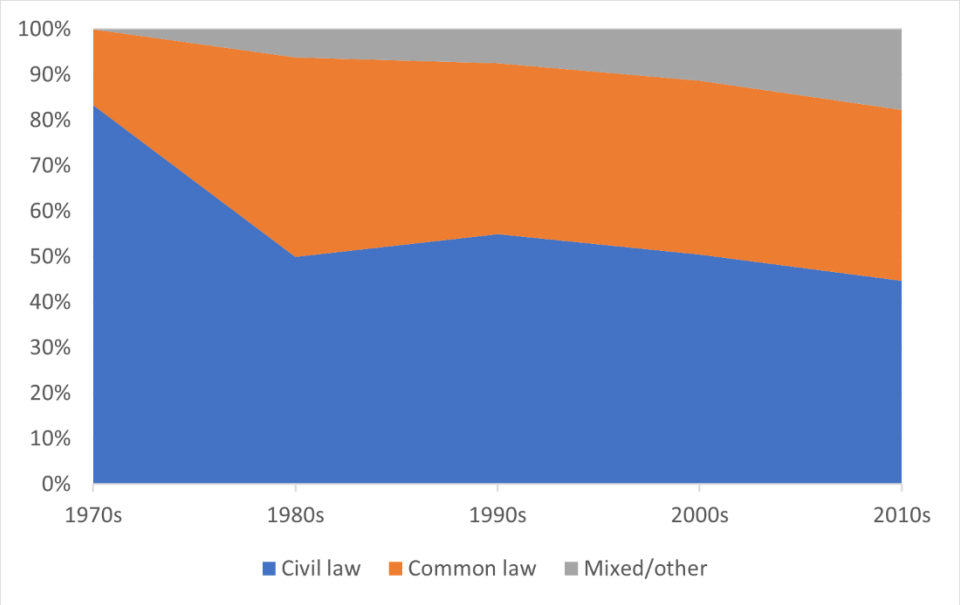

Figure 3.3.9 - Legal background of ICSID presiding arbitrators

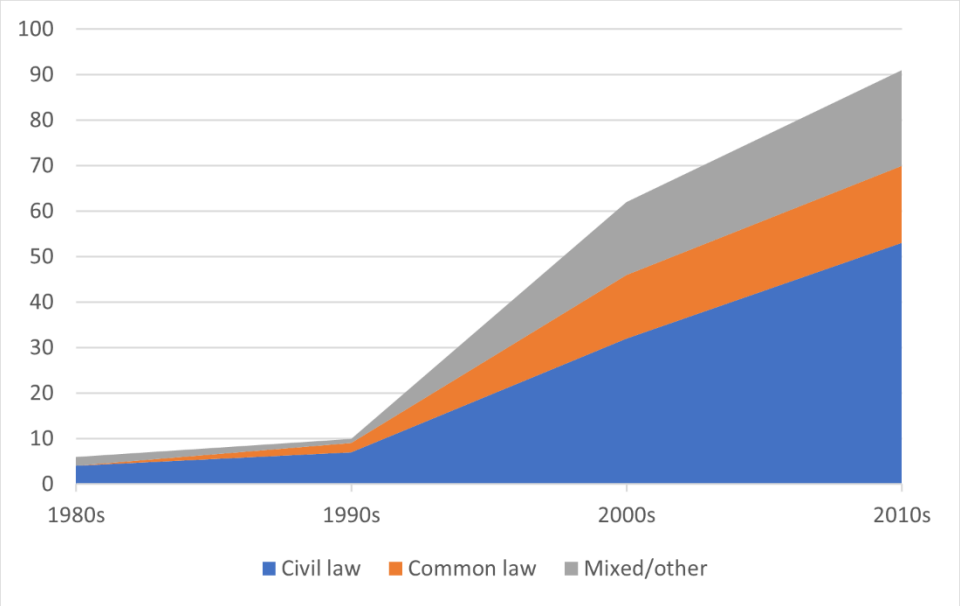

Figure 3.3.10 - Legal background of members of annulment committees

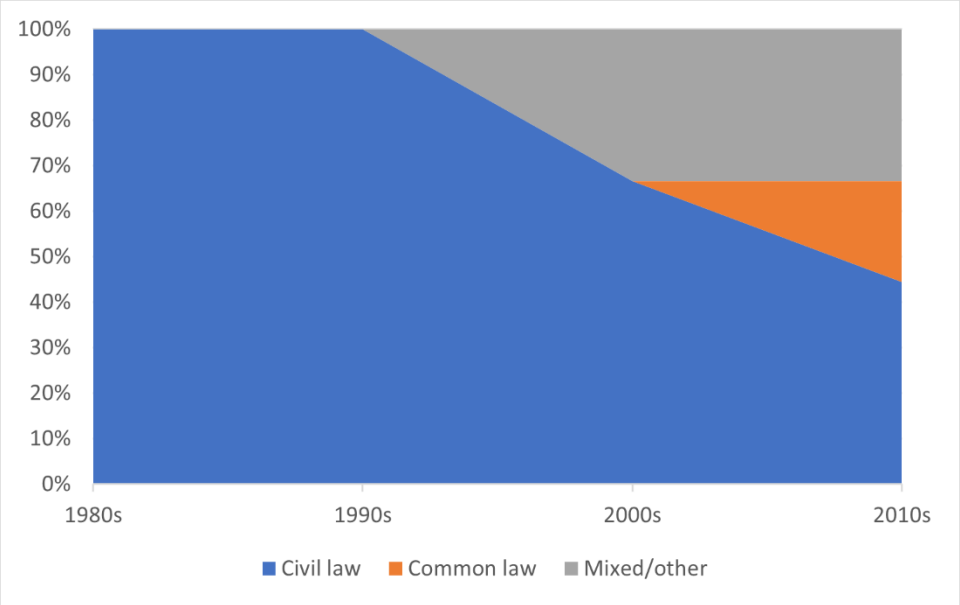

Figure 3.3.11 - Legal background of female committee members

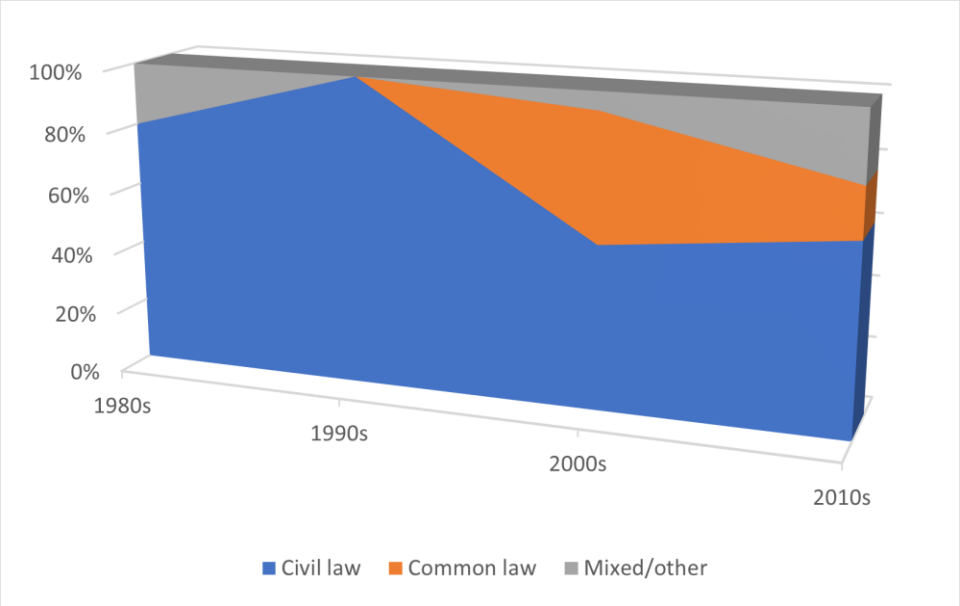

Figure 3.3.12 - Legal background of presiding committee members

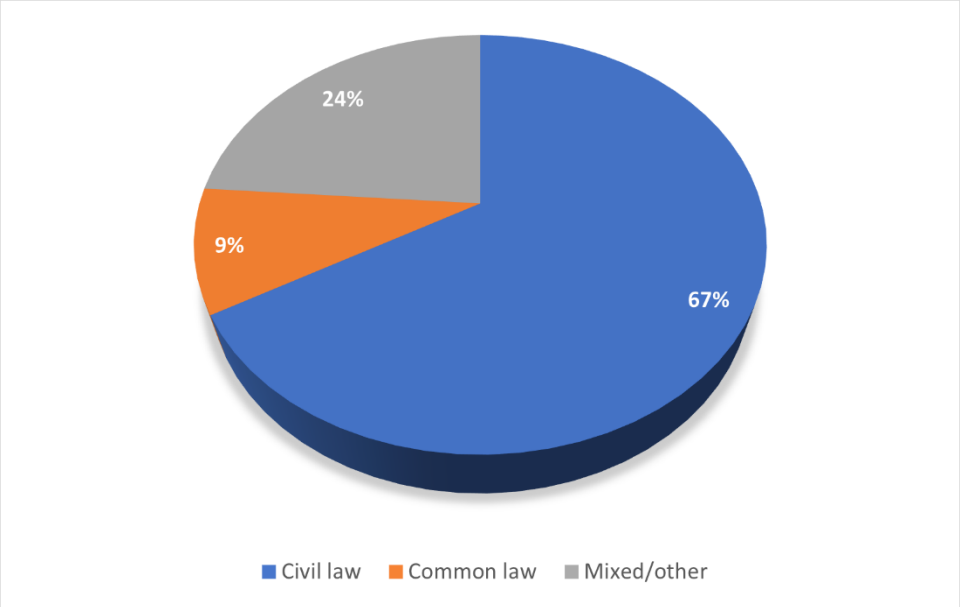

Figure 3.3.13 - Legal background of the most frequent committee members

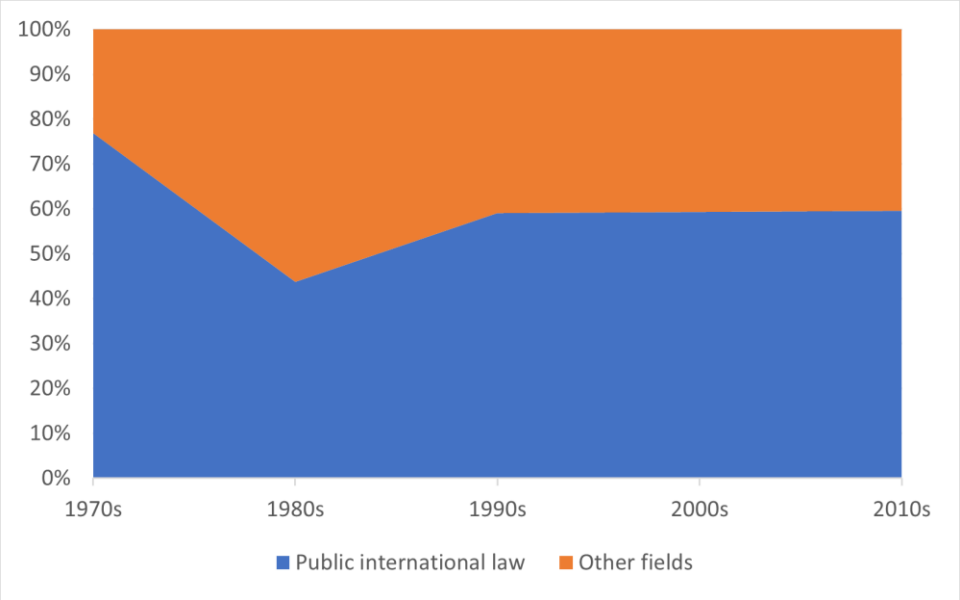

Figure 3.3.14 - Expertise of ICSID arbitrators

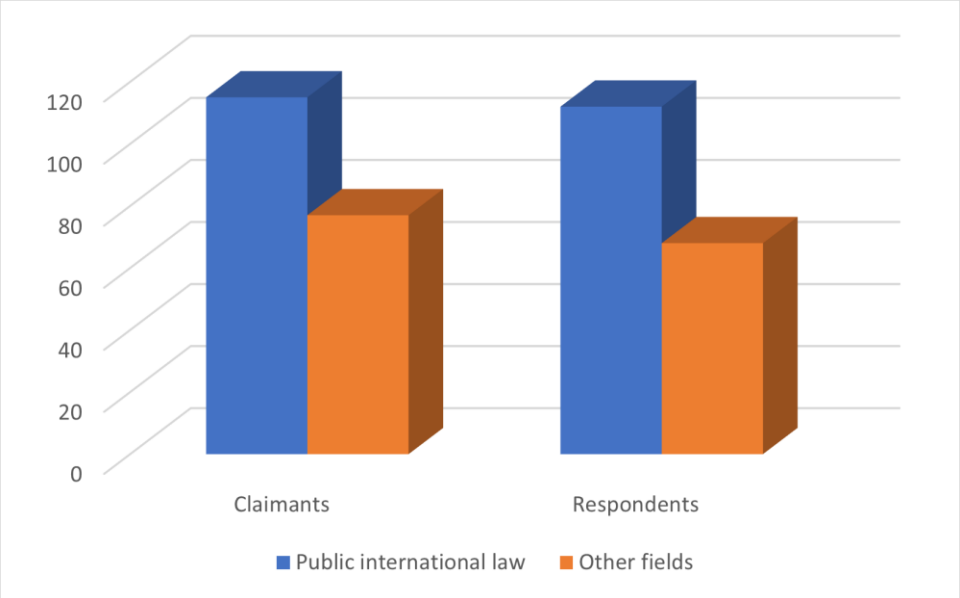

Figure 3.3.15 - Expertise of party-appointed arbitrators

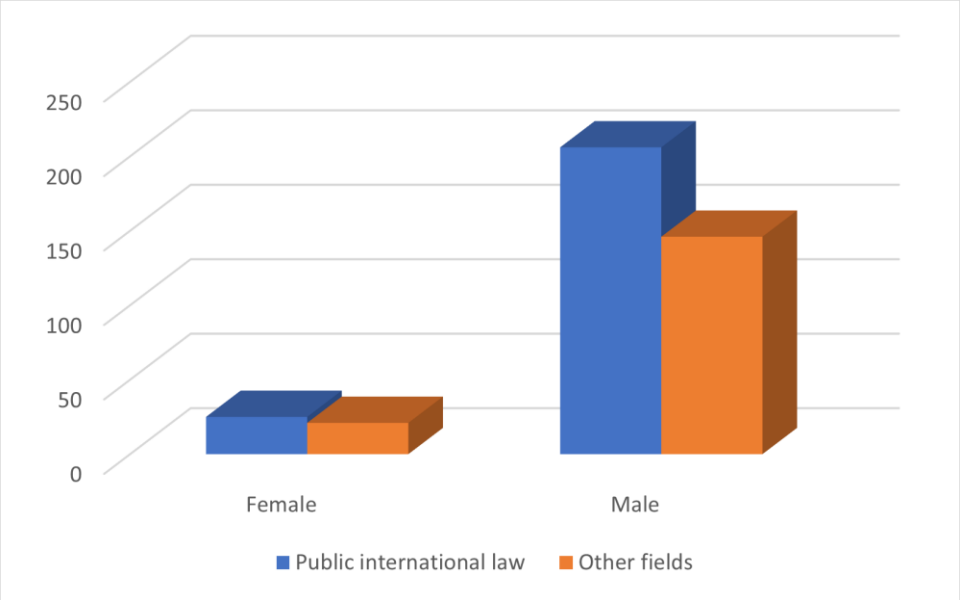

Figure 3.3.16 - Expertise of male and female arbitrators

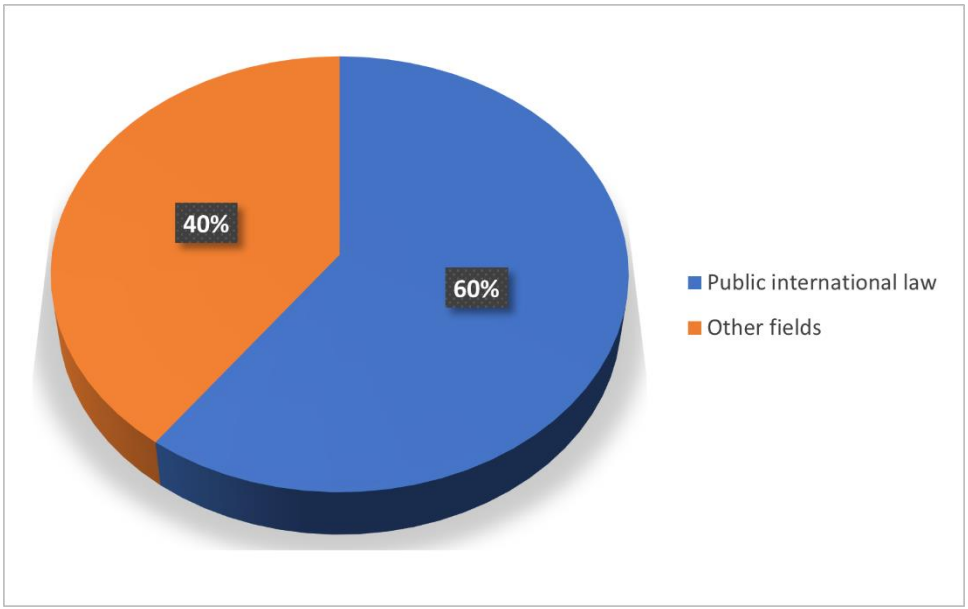

Figure 3.3.17 - Expertise of presiding arbitrators

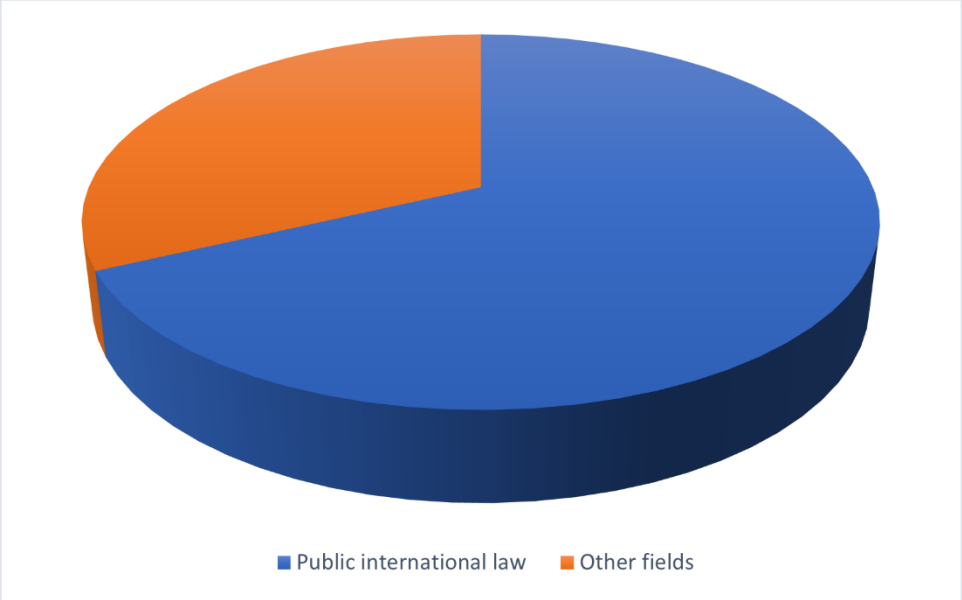

Figure 3.3.18 - Expertise of most frequent arbitrators

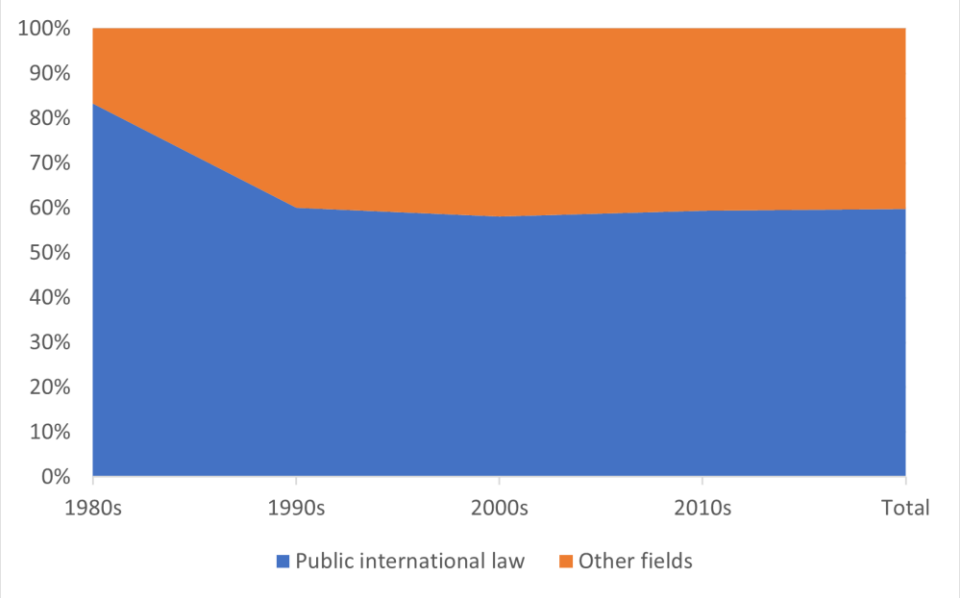

Figure 3.3.19 - Expertise of annulment committee members

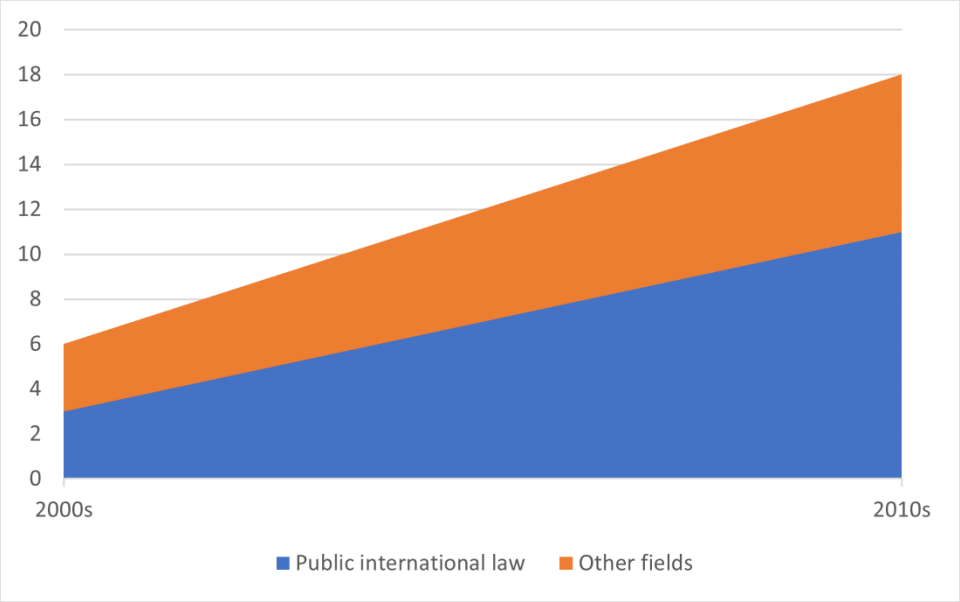

Figure 3.3.20 - Expertise of female committee members

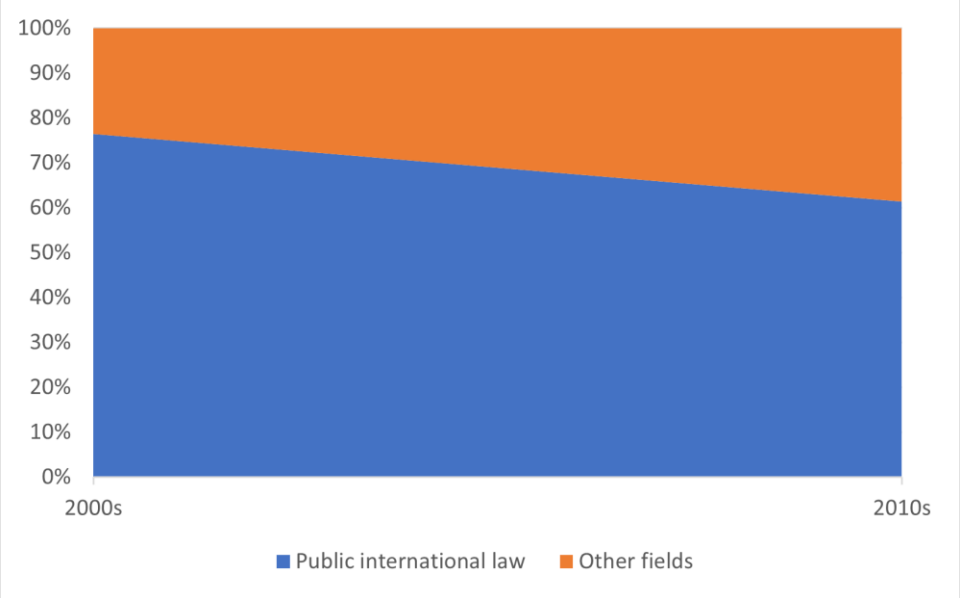

Figure 3.3.21 - Expertise of chairs of annulment committees

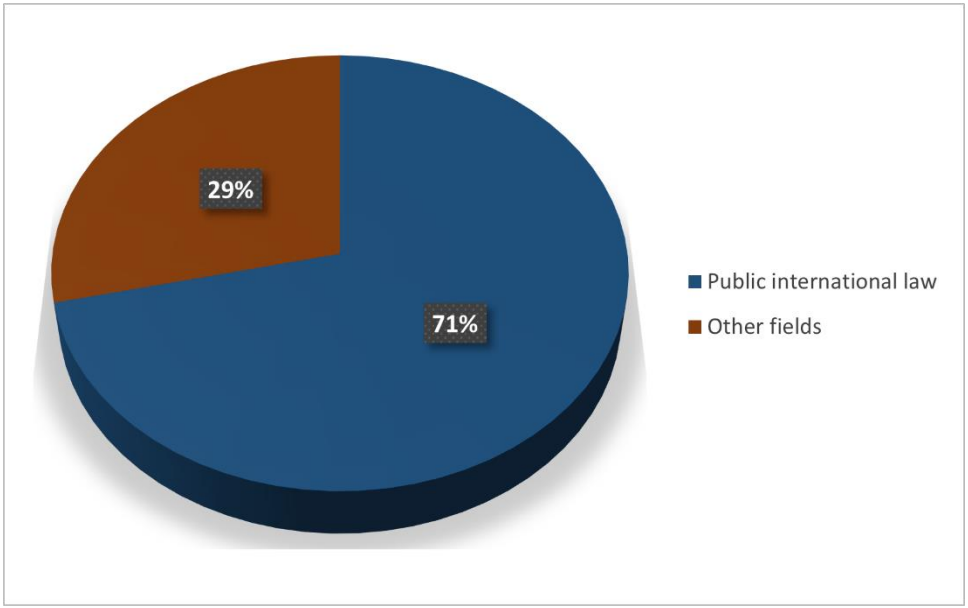

Figure 3.3.22 - Expertise of chairs of annulment committees

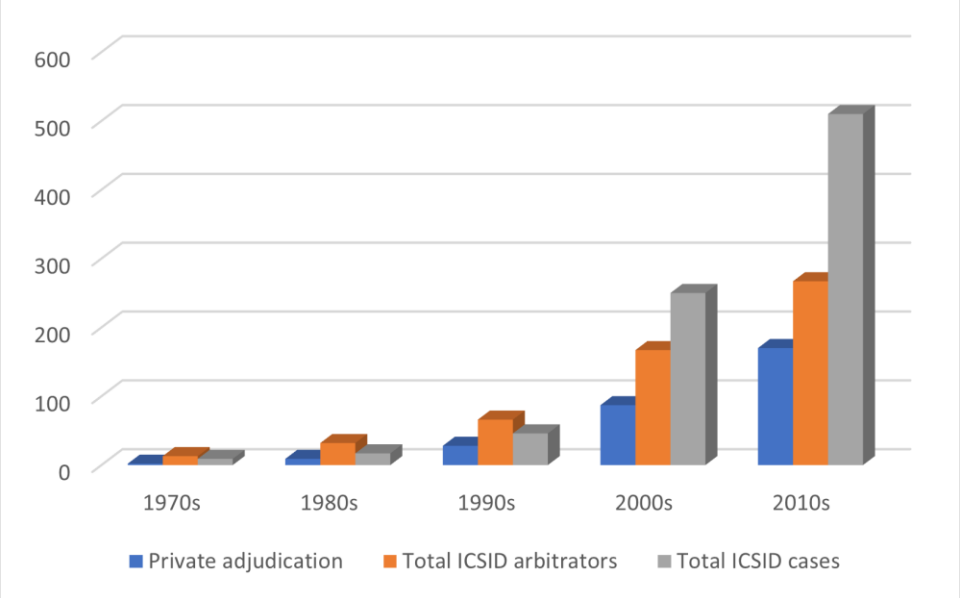

Figure 3.4.1 - Private arbitration experience

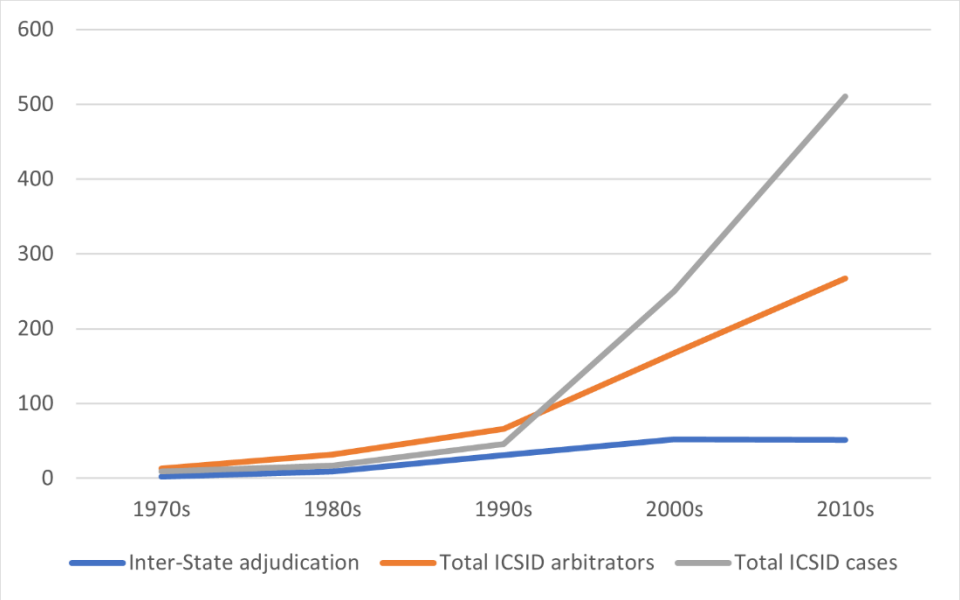

Figure 3.4.2 - Inter-State adjudication experience

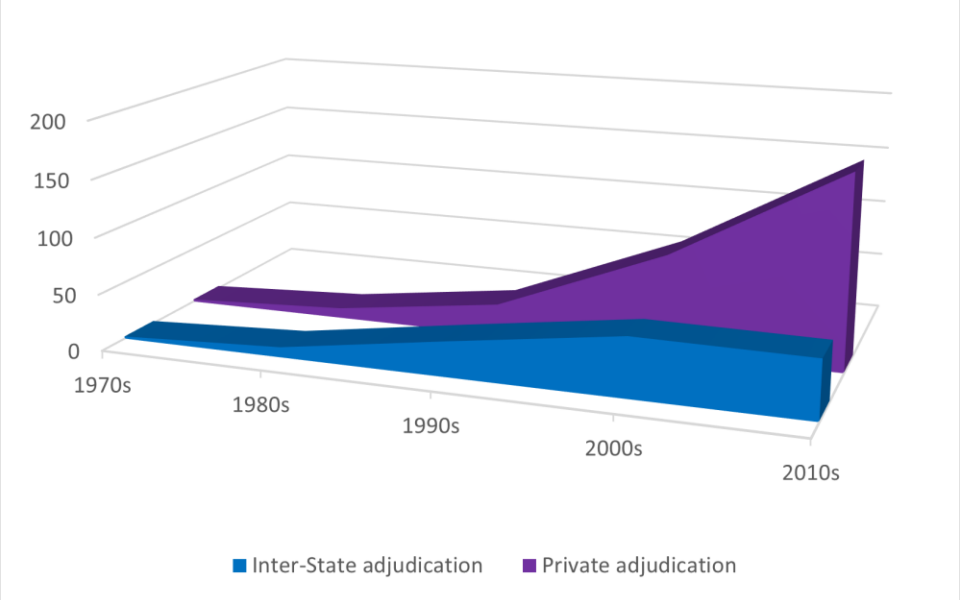

Figure 3.4.3 - Adjudication experience of ICSID arbitrators

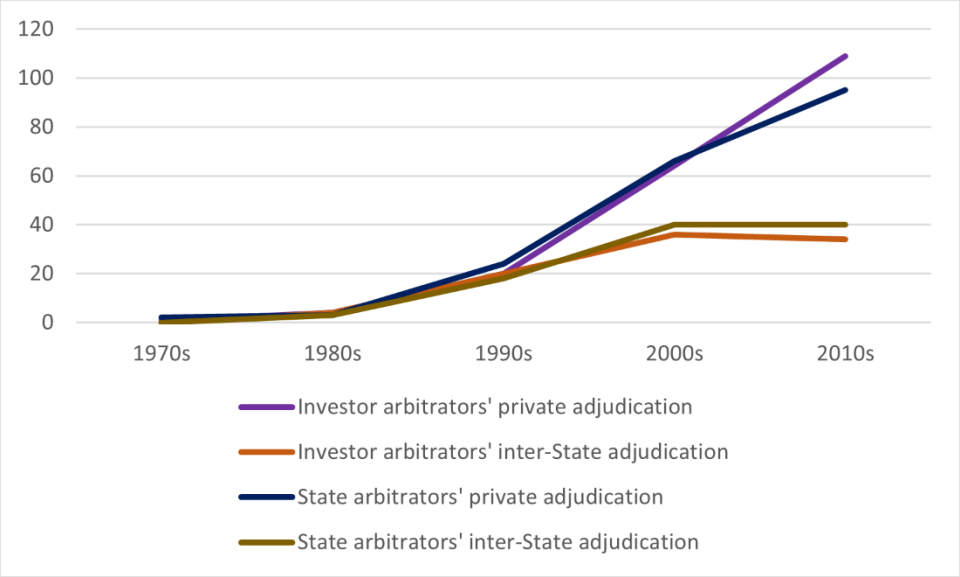

Figure 3.4.4 - Adjudication experience of party arbitrators

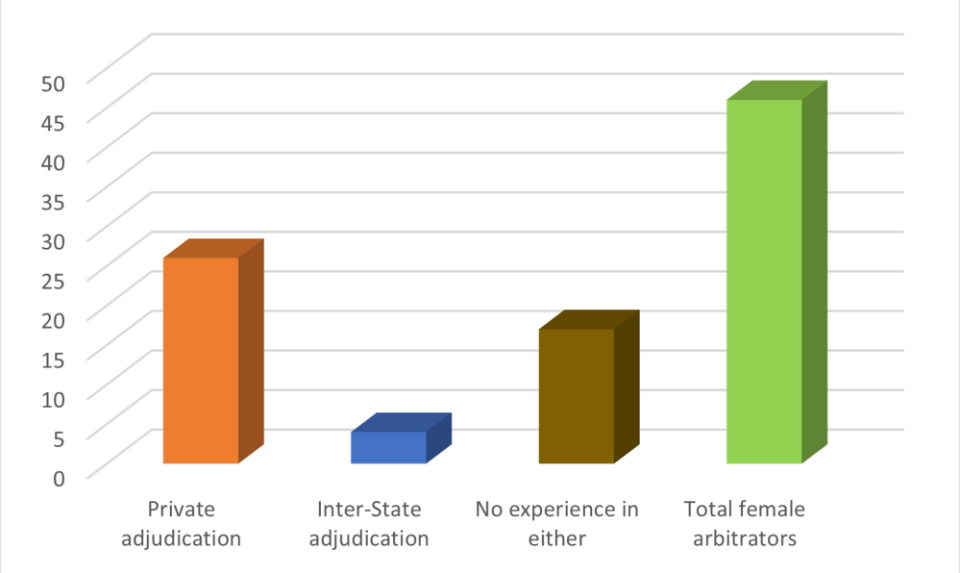

Figure 3.4.5 - Adjudication experience of female arbitrators

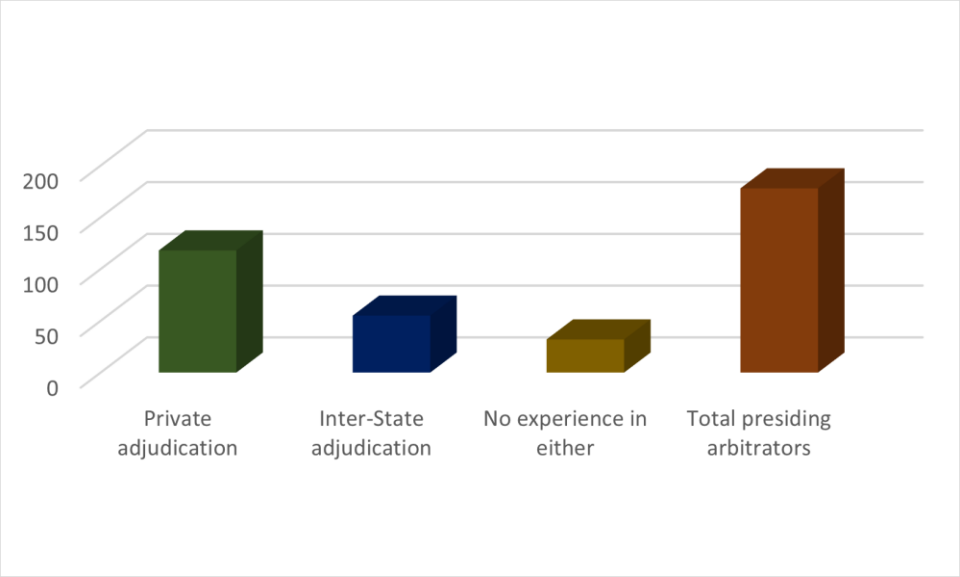

Figure 3.4.6 - Adjudication experience of presiding arbitrators

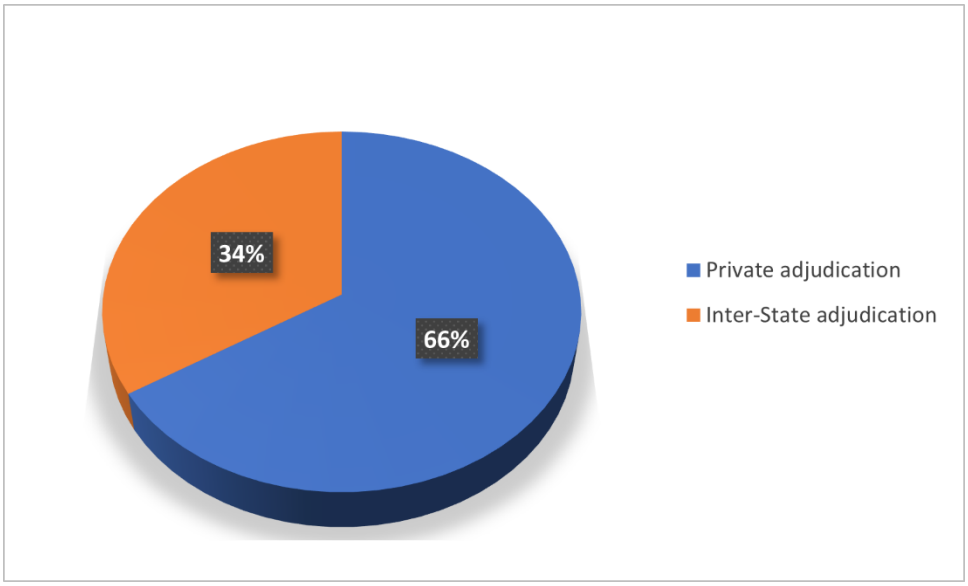

Figure 3.4.7 - Adjudication experience of the most frequent arbitrators

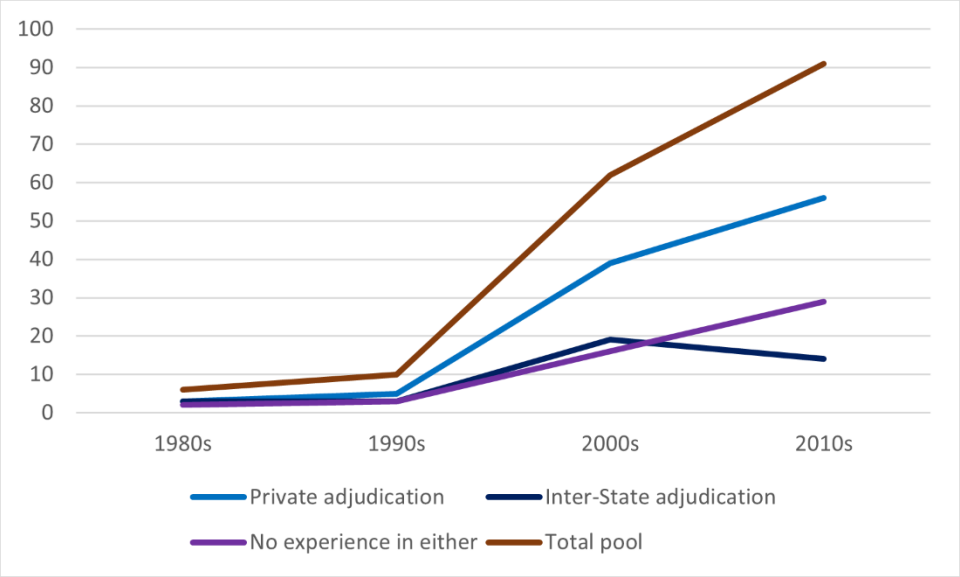

Figure 3.4.8 - Adjudication experience of ICSID committee members

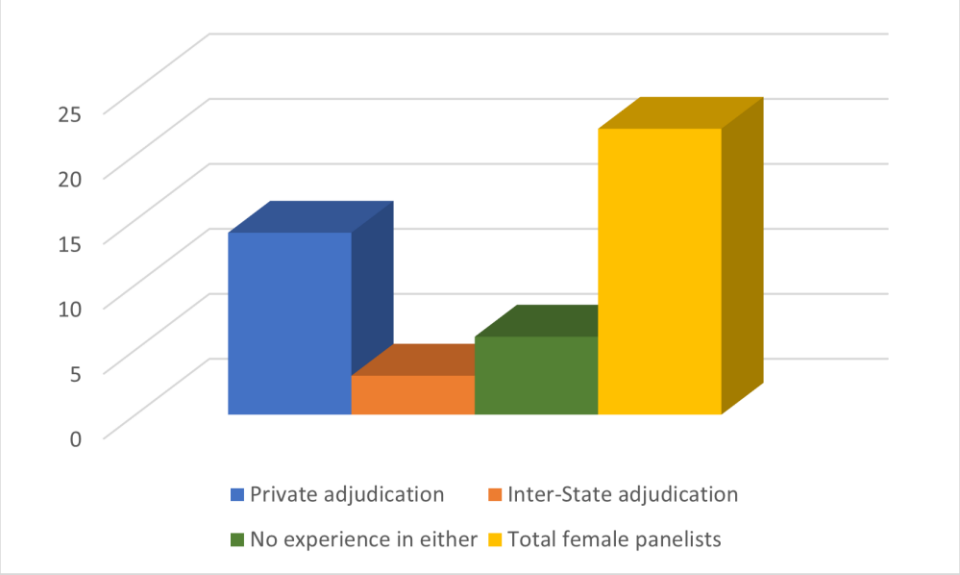

Figure 3.4.9 - Adjudication experience of female committee members

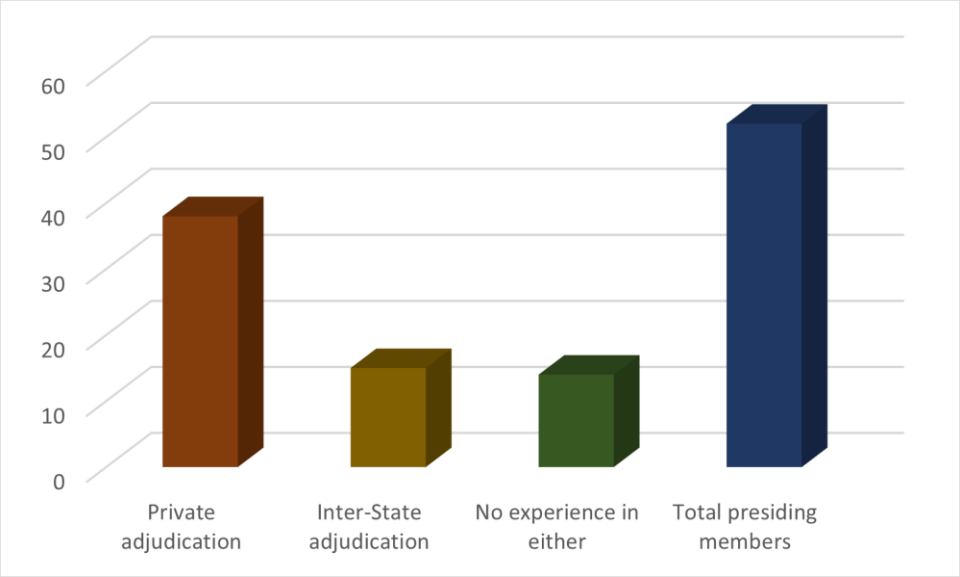

Figure 3.4.10 - Adjudication experience of presiding committee members

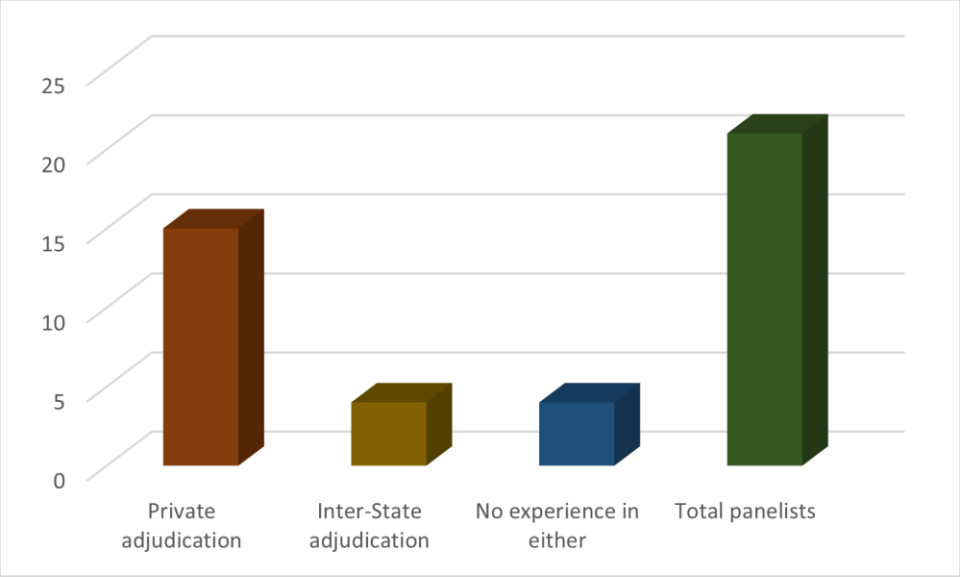

Figure 3.4.11 - Adjudication experience of the most frequent committee members

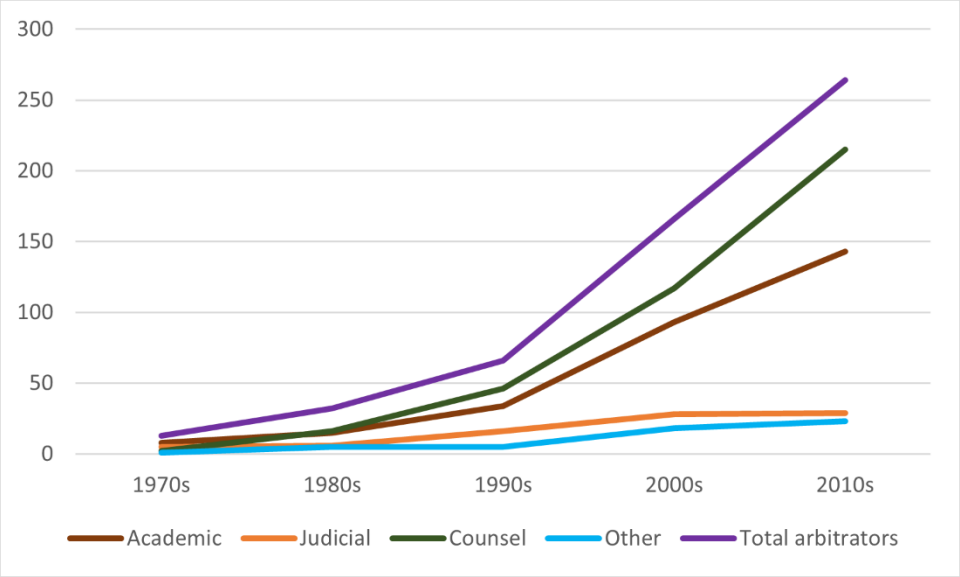

Figure 3.5.1 - Professions of ICSID arbitrators

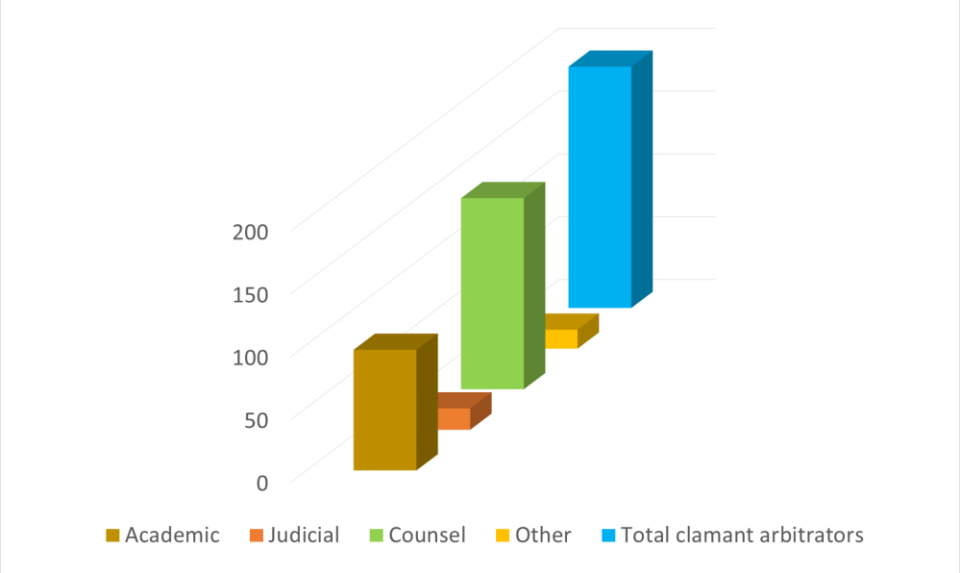

Figure 3.5.2 - Professions of clamant arbitrators

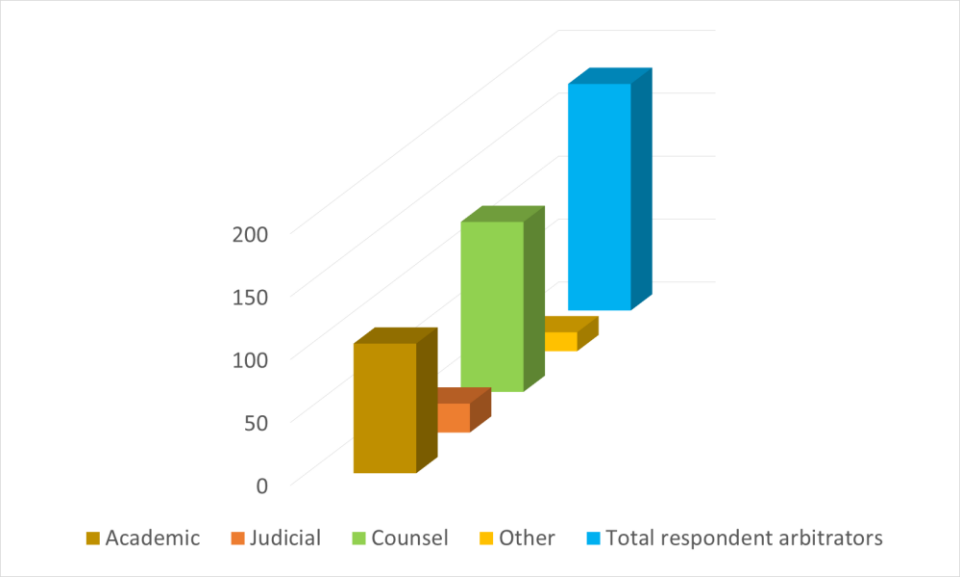

Figure 3.5.3 - Professions of respondent arbitrators

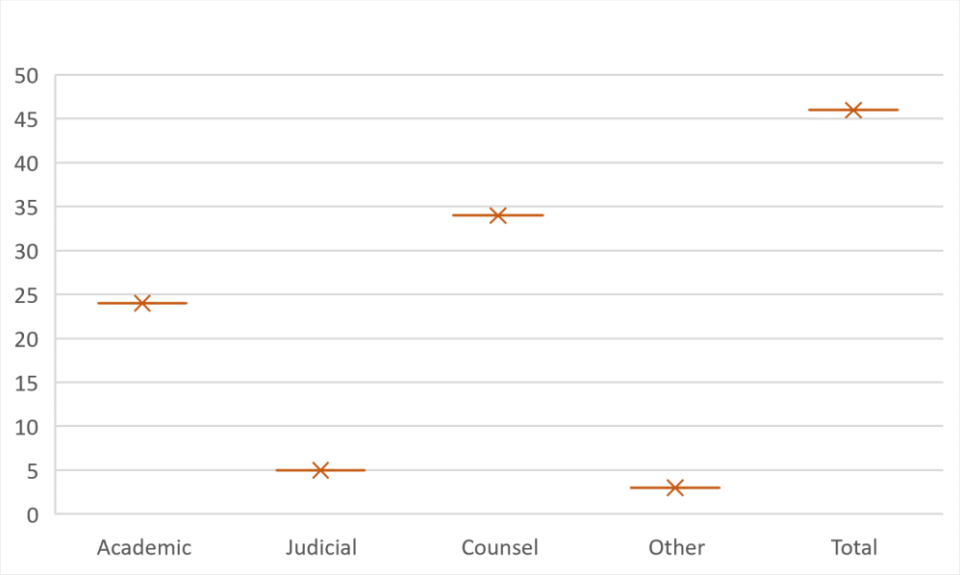

Figure 3.5.4 - Professions of female arbitrators

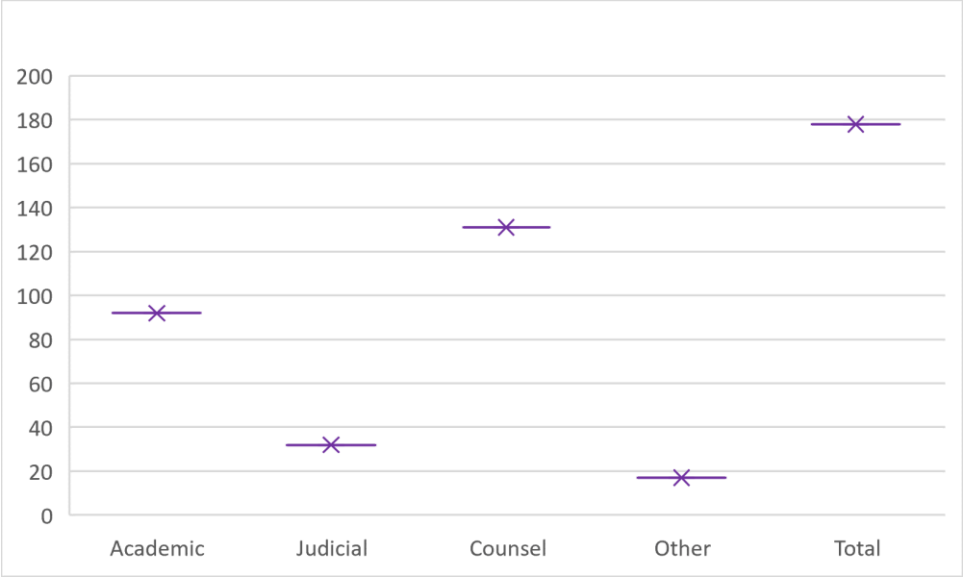

Figure 3.5.5 - Professions of presiding arbitrators

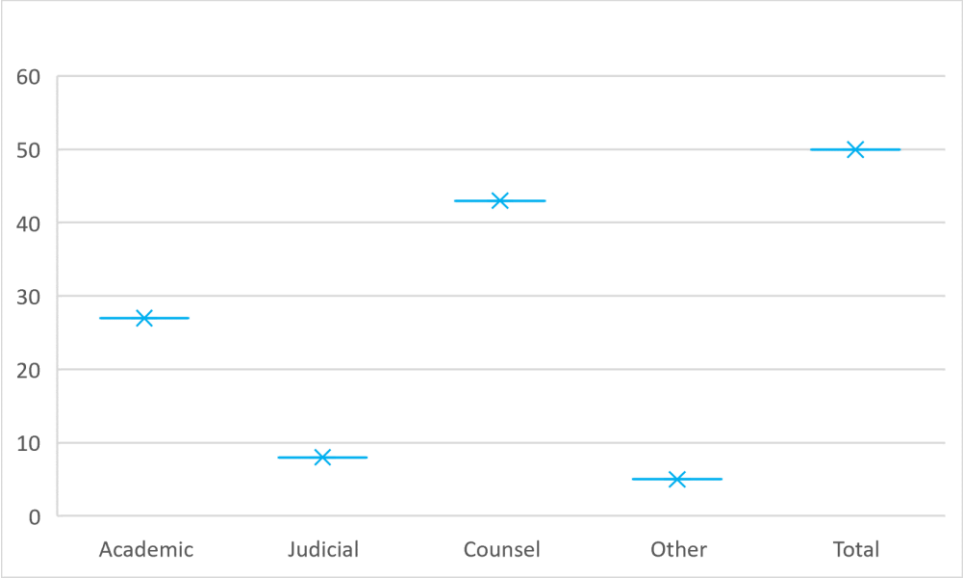

Figure 3.5.6 - Professions of the most frequent arbitrators

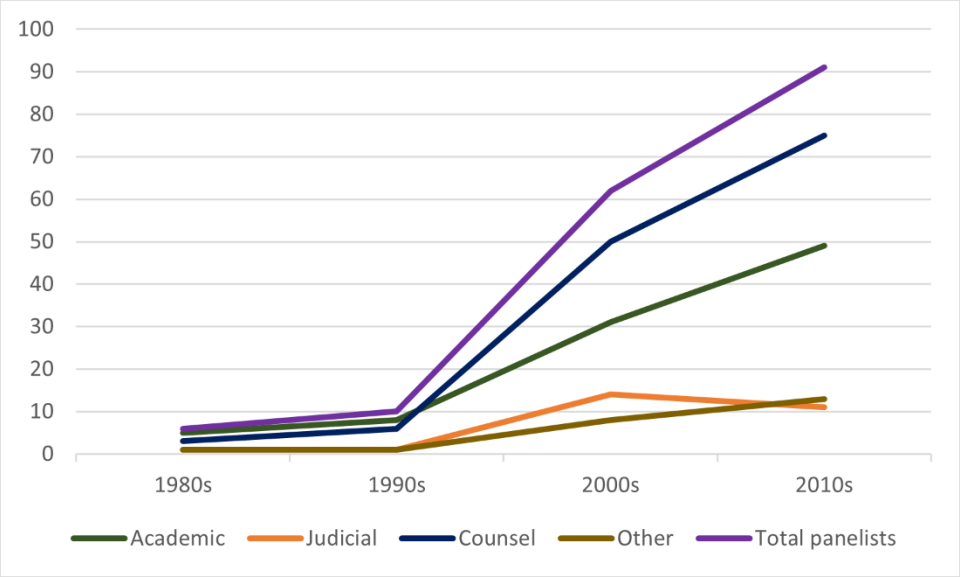

Figure 3.5.7 - Professions of annulment committee panelists

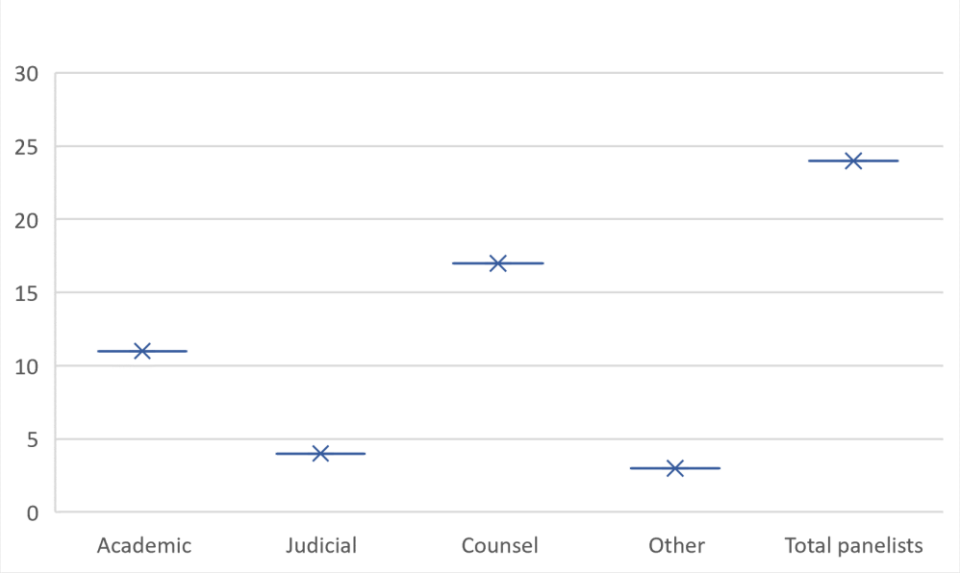

Figure 3.5.8 - Professions of female panelists at annulment committee

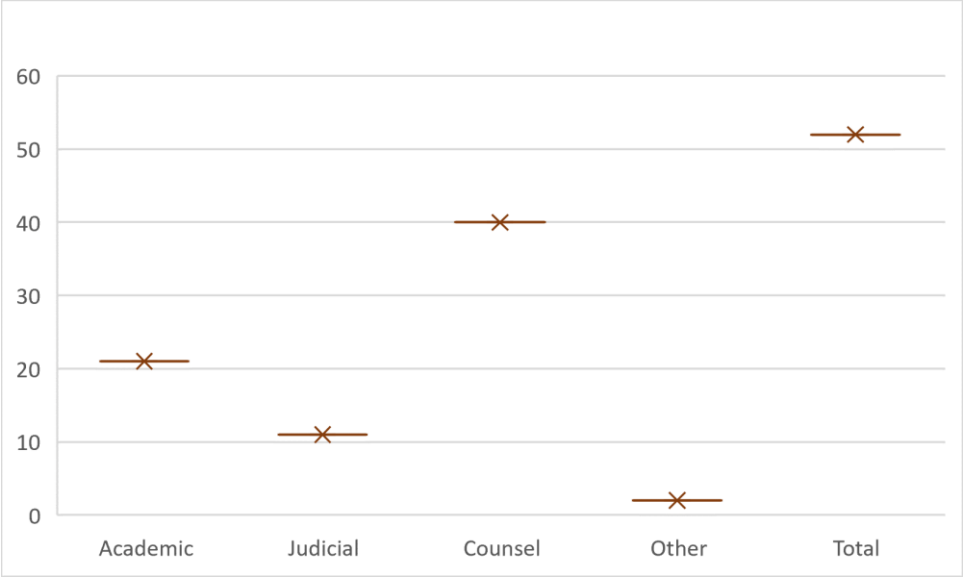

Figure 3.5.9 - Professions of presiding members

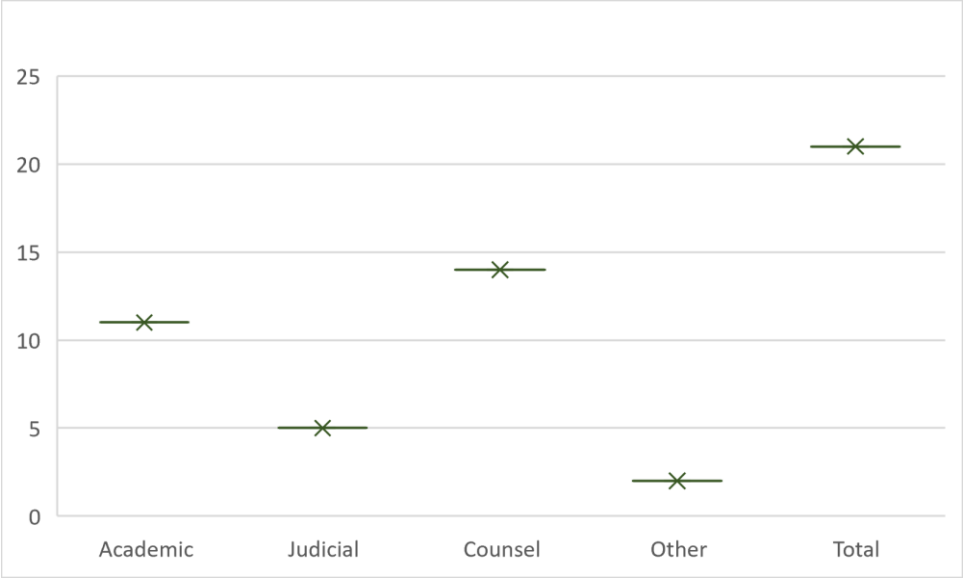

Figure 3.5.10 - Professions of most frequent committee members

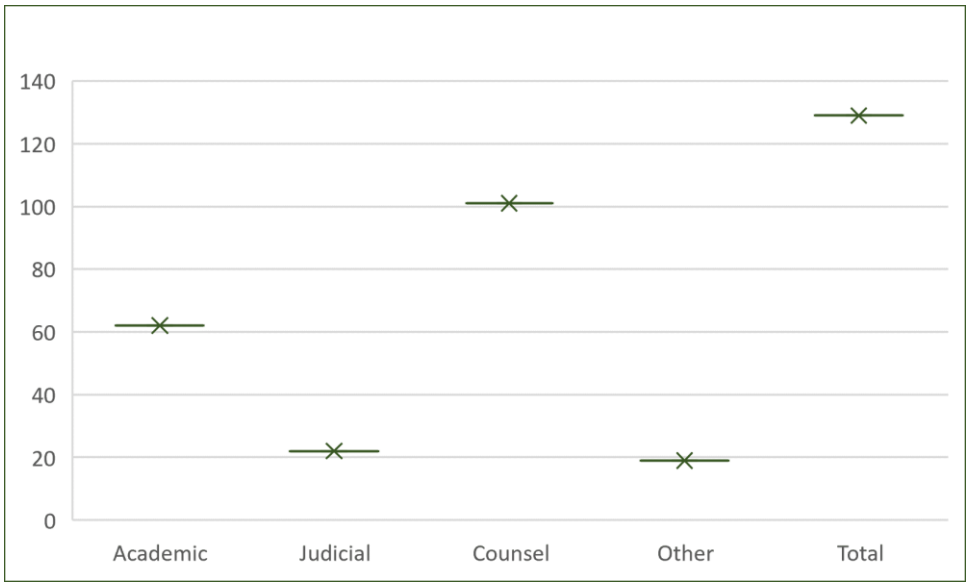

Figure 3.5.11 - Occupational backgrounds of panelists in the average pool of committee members

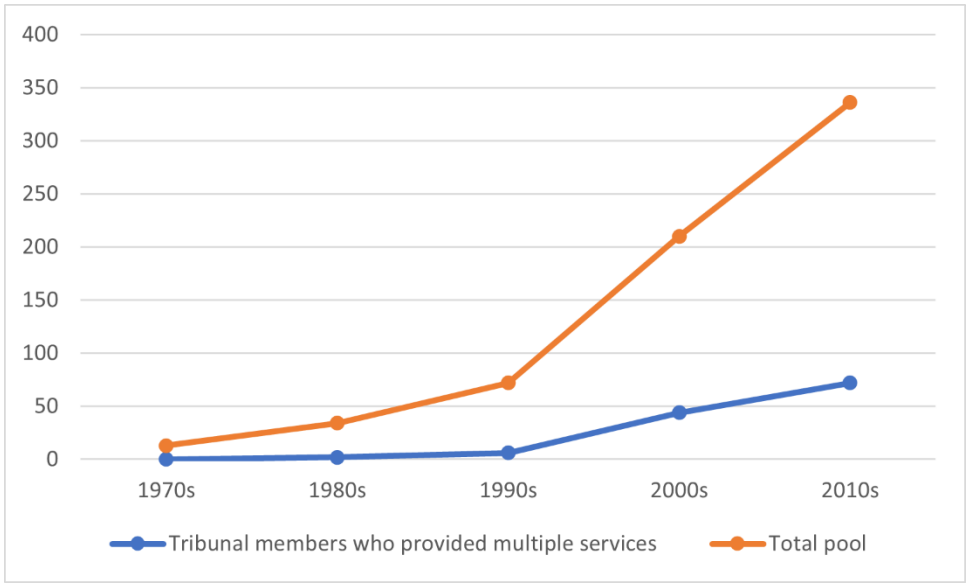

Figure 3.6.1 - Double-hatting at ICSID

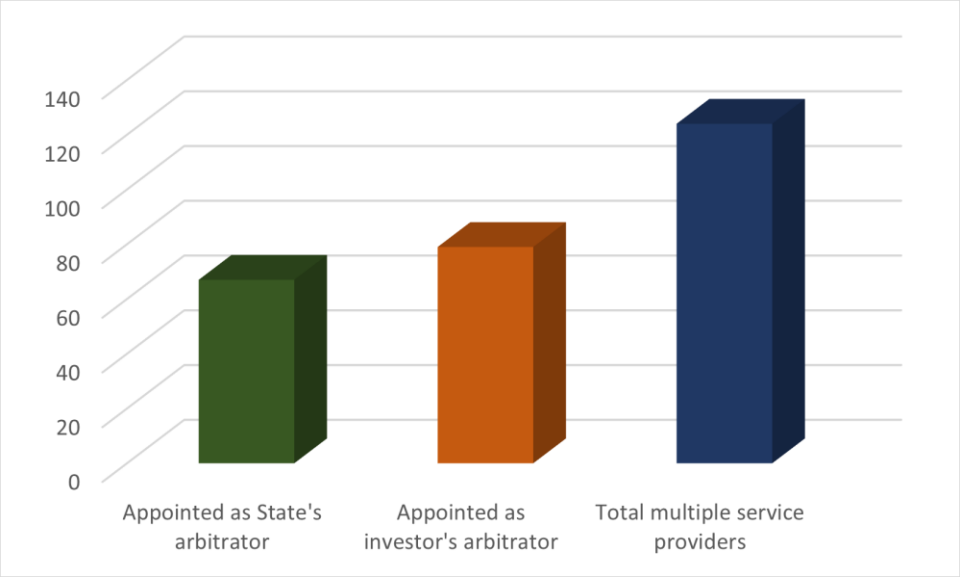

Figure 3.6.2 – Panelists who were engaged in double-hatting at ICSID

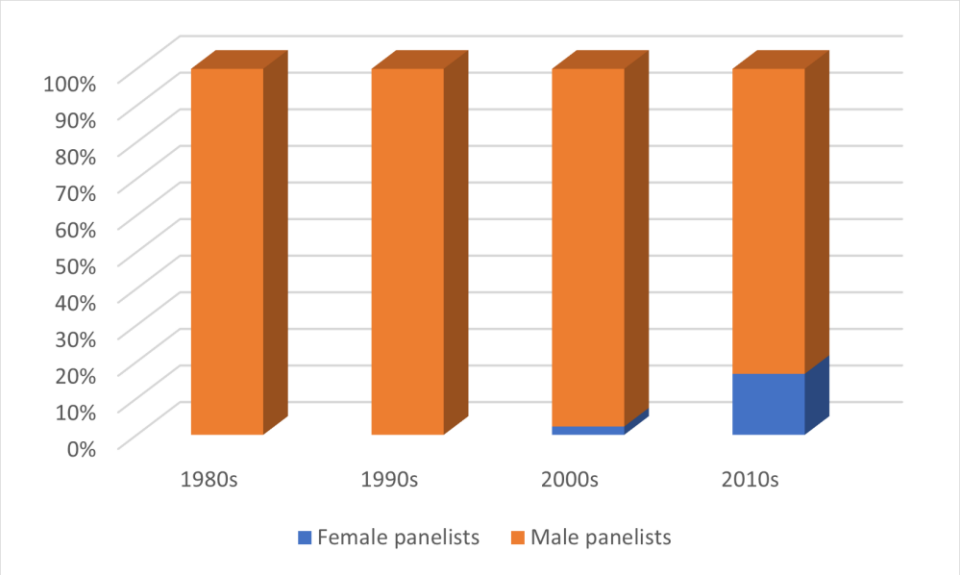

Figure 3.6.3 - Tribunal members who were involved in double-hatting at ICSID

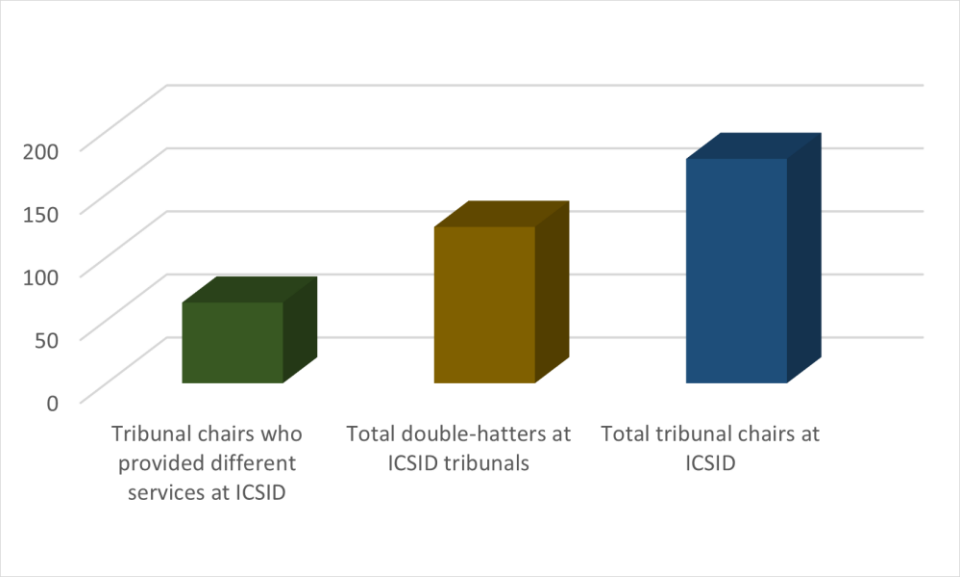

Figure 3.6.4 - ICSID tribunal chairs

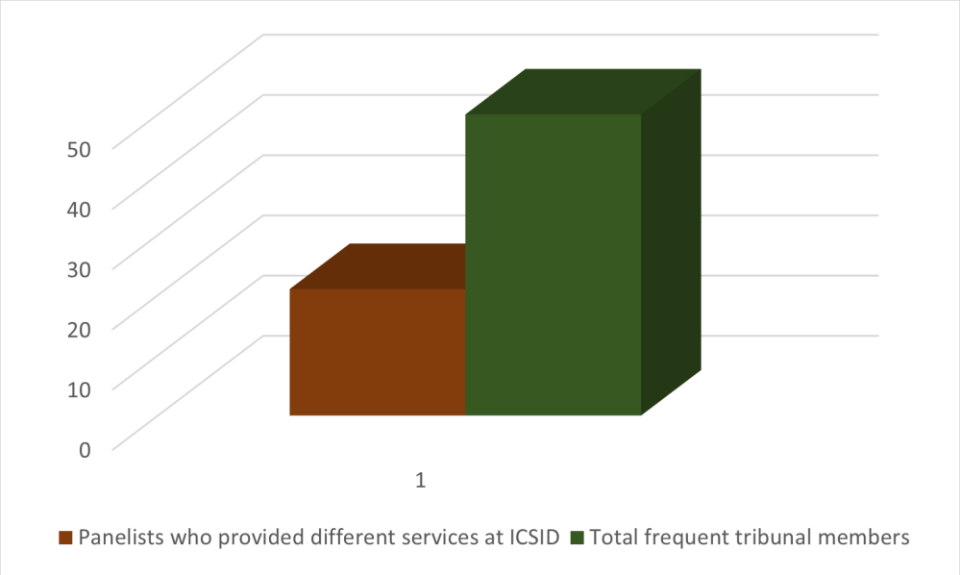

Figure 3.6.5 - The most frequent tribunal panelists

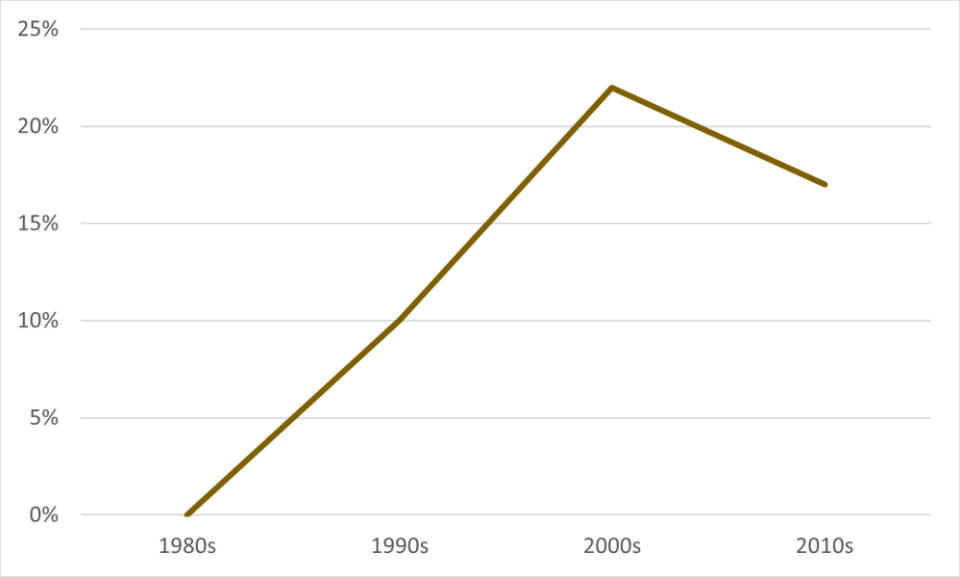

Figure 3.6.6 - Proportion of committee members who were involved in double-hatting

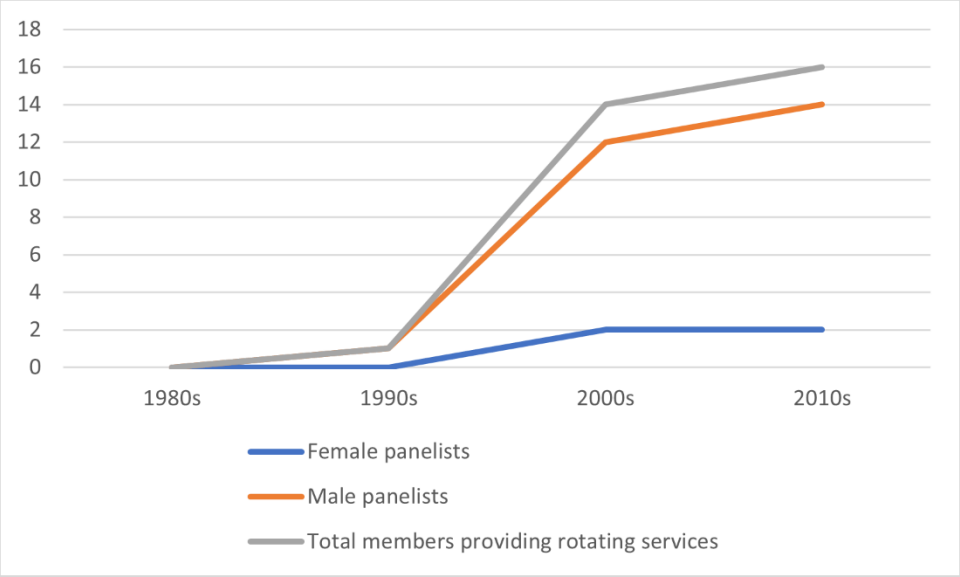

Figure 3.6.7 - Committee members who provided different services at ICSID

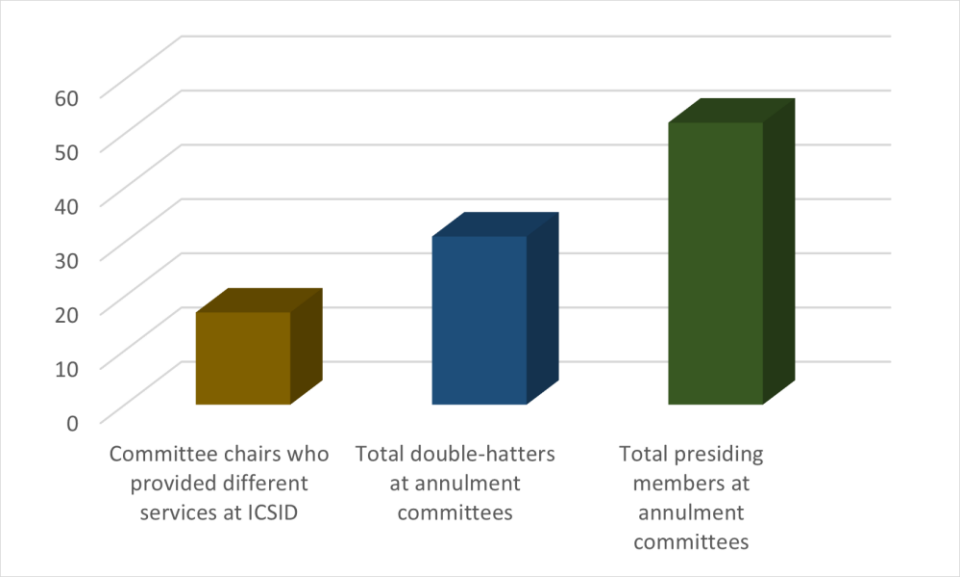

Figure 3.6.8 - Committee chairs who were involved in double-hatting at ICSID

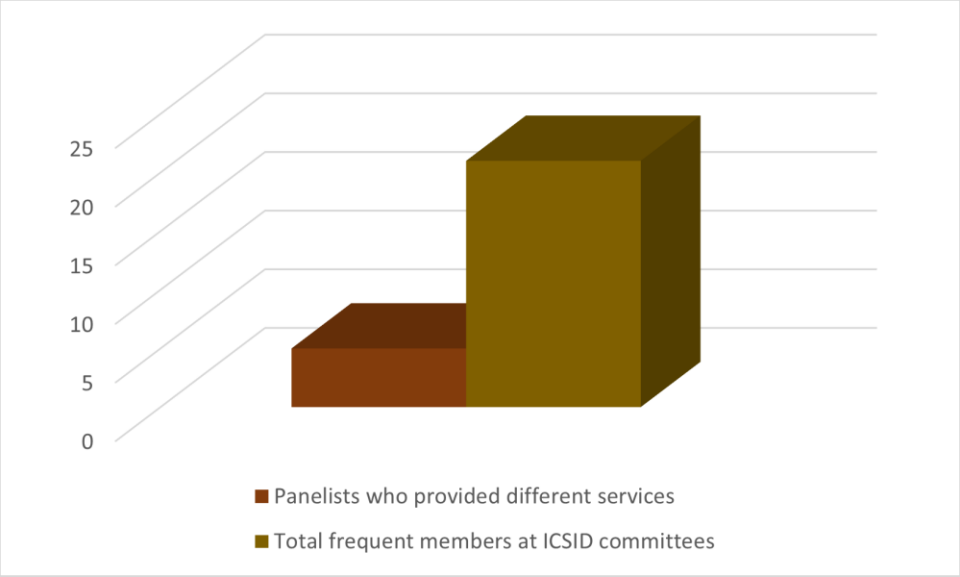

Figure 3.6.9 - Most frequent committee members