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Independence and Impartiality in Investment Dispute Settlement: Assessing Challenges and Reform Options

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Abstract

As discussions on the reform of Investor-State Dispute Settlement (ISDS) deepen and gather momentum at the United Nations Commission on International Trade Law (UNCITRAL), this article delves into a specific issue of fundamental importance: the requirement that adjudicators in investment disputes are and remain independent and impartial. The article begins by providing a framework and understanding of the principle of independence and impartiality in international courts and tribunals, with a focus on arbitral institutions. It then highlights the specific concerns that the present system of investor-state arbitration raises for the independence and impartiality of investment dispute settlement. Finally, it provides a comparative analysis of how different reform proposals presently discussed with UNCITRAL Working Group III would fare in terms of delivering a dispute resolution mechanism that ensures independence and impartiality. Rather than providing one specific solution, this article develops a framework to assess different options, and should therefore be helpful to both policy-makers considering reform and other stakeholders and scholars.

Keywords

Adjudicators – Arbitrators - Independence –Investor-State Dispute Settlement - Impartiality - Investment arbitration reform - Multilateral Investment Court – Rule of law - United Nations Commission on International Trade Law -

1. Introduction¹

Whether at the domestic or international level, independence and impartiality of adjudicators are essential elements of any adjudicatory mechanism that is based on the idea of the rule of law. Both concepts are recognized widely as principles of national law, human rights law,

¹ This paper was prepared by the ISDS Academic Forum Working Group 6 - *Lack of Independence and Impartiality of Arbitrators*, which was chaired by Professor Steven Ratner. An earlier version of this paper was presented as concept paper at the April 2019 session of UNCITRAL Working Group III negotiations, and is available here: <https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/concept-papers-spring-2019.html>. We wish to thank the ISDS Academic Forum members, Special Issue editors and peer reviewers for their comments on earlier versions of the paper.

and the law governing international adjudication, and as such constitute part of the general principles of law within the meaning of Article 38(1)(c) of the Statute of the International Court of Justice (ICJ).² Independence and impartiality help safeguard the objectivity and fairness of legal proceedings. They do so by ensuring that decisions of adjudicators are based only on the law itself and not by extrinsic, non-legal factors, whether financial, political, ideological, or personal. In this respect, independence and impartiality are crucial to the legitimacy of any legal system.

Ensuring independence and impartiality is also a key concern in the discussions on the possible reform of investor-state dispute settlement (ISDS) in the United Nations Commission on International Trade Law (UNCITRAL).³ The possible presence of external influences and factors in arbitral decision-making has been at the center of many critiques of ISDS, such as the propriety of connections between arbitrators and parties, multiple appointments and double hatting, issue conflict and pro-investor or investment bias.⁴ As the November 2018 Report of UNCITRAL Working Group III states:

Independence and impartiality were described as key elements of any system of justice, including arbitration. The concerns relating to the possible lack of independence and impartiality of decision makers, or of the perception thereof, were said to be particularly acute in the field of ISDS, as ISDS cases usually involved public policy issues and involved a State. It was re-affirmed that, in order to be considered effective, the ISDS framework should not only ensure actual impartiality and independence of decision makers, but also the appearance thereof. Therefore, it was said that any reform in that respect should aim at addressing both actual and perceived lack of independence and impartiality.⁵

This article seeks to provide a general assessment and a response to some of the systemic and specific criticisms to ISDS which focus on issues of impartiality and independence of adjudicators, and aims at building a constructive dialogue on reform. Rather than providing a

² See Report of the Special Rapporteur Param Cumaraswamy, Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers, UN Doc E/CN.4/1995/39, para 34.

³ United Nations Commission on International Trade Law (UNCITRAL), 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. 66-83.

⁴ See discussion below in Section 3 below.

⁵ United Nations Commission on International Trade Law (UNCITRAL), 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) para 67 (footnotes omitted).

specific solution, it explains and weighs the pros and cons of reform proposals presently at the center of discussions at UNCITRAL Working Group III with the aim of assisting both policy makers and other stakeholders. With this objective in mind, the analysis is divided in three parts. Section 2 introduces the principle of independence and impartiality comparatively and explains how it is applied in a variety of international courts and tribunals (ICTs) and arbitral institutions. Section 3 highlights some of the contexts in which independence and impartiality are at play in ISDS, and identifies and explains issues that may be or are considered problematic. Section 4 assesses, in practice, the impact the different ISDS reform proposals currently discussed could have over these issues.

2. Independence and Impartiality of Adjudicators: The Existing Framework

Independence and impartiality are complex concepts. In concretizing what these concepts mean for investment dispute settlement, inspiration can be drawn from comparative analysis of both domestic legal systems and international adjudication.⁶ Such a comparison is justified because national and international tribunals likewise need independent and impartial adjudicators.⁷ This is all the more so considering that ISDS, in a significant number of cases, functions as a public governance system, both because the disputes involve assessing the legality of a state's exercise of public authority in relation to private economic actors and because decisions by arbitral tribunals function as persuasive authority in concretizing and further developing the international legal standards that govern investor-State relations.⁸ In such a situation it appears difficult, if not impossible, to argue that ISDS should apply more lenient standards of independence and impartiality as compared to what is required in public dispute settlement systems in other contexts, whether at the domestic or international level. Indeed, the gist of the content of the general

⁶ Anja Seibert-Fohr, 'Judicial Independence- The Normativity of an Evolving Transnational Principle', in A. Seibert-Fohr (ed.), *Judicial Independence in Transition*, pp. 1279-1360 (Springer 2012).

⁷ See generally Shimon Shetreet (Ed.), *The Culture of Judicial Independence: Rule of Law and World Peace* (2014).

⁸ See Stephan W Schill, 'International Investment Law and Comparative Public Law: An Introduction' in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010) 3.

principle requiring independence and impartiality of adjudicators is a fundamental principle of any sound administration of justice.⁹

The notion of *independence* is generally used to refer to the institutional independence of the judiciary and adjudicators from the other branches of government.¹⁰ In addition, independence is also used to designate the absence of legally relevant relationships between the adjudicator and the parties to a dispute. The notion of *impartiality*, in turn, refers to the absence of legally relevant relationships between the adjudicator and the parties to a dispute as well as the lack of pre-judgment of the decision-maker in relation to the case or the parties before her.¹¹ It encompasses both the actual absence of pre-disposition and conflicts of interest and the perception thereof, because ‘Not only must justice be done; it must also be seen to be done.’¹² For example, in international dispute settlement, unlike in the domestic context, diversity of nationality between the parties and the adjudicator is often considered to be a positive representation of independence and impartiality.¹³

In the context of the debate about ISDS reform, it is important to distinguish between notions of independence and impartiality in relation to 1) the parties to an individual dispute; 2) all present and potentially future parties to an investment treaty dispute; and 3) all others potentially affected by investment dispute settlement, including individuals and other stakeholders.

⁹ Chiara Giorgetti, ‘Between Legitimacy and Control: Challenges and Recusals of Arbitrators and Judges in International Courts and Tribunals,’ (2014) 49 *George Washington International Law Review* 101.

¹⁰ See CJEU, Opinion of the Court 1/17 (Full Court) EU-Canada CET Agreement, 30 April 2019 (assessing the compatibility with EU law of the proposed Investment Court System provided for in the Comprehensive Economic and Trade Agreement Between Canada and the EU, and specifically on the demands for independence and impartiality expressed in Art 47 of the Charter of Fundamental Rights of the EU) [“*indépendance d’ordre externe*,” according to the CJEU]; see also ECtHR, *Mutu and Pechstein* Request 40575/10 and 67474/10, 2 October 2018 (dealing with the notion of independence and impartiality in sports arbitration from an ECHR perspective and finding that the procedures followed by the Court of Arbitration for Sport complied with the right to a fair hearing, apart from the refusal to hold a public hearing).

¹¹ See Opinion 1/17 (n XX) para 203 (stating that impartiality ‘seeks to ensure that an equal distance is maintained from the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law’); see also *Mutu and Pechstein* (n XX) paras 141-142.

¹² This adage goes back to *R v Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256 (stating that ‘it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done’). It is cited frequently in courts around the world, including in international adjudication. See only *Mutu and Pechstein* (n XX) para 143.

¹³ See Pierre Lalive, ‘On the Neutrality of the Arbitrator and the Place of Arbitration’ in Claude Remond et al (eds), *Swiss Essays on International Arbitration* (Schulthess 1984) 23.

Distinguishing between these different levels explains why concerns with respect to independence and impartiality of decision-makers are raised not only in relation to individual disputes and the concerns of disputing parties, but also as to whether the system of dispute settlement as such lives up to the requirements of independence and impartiality when considering the impact of ISDS decisions on other users of the system and other third parties.

Concerns regarding independence and impartiality in ISDS are relatively well addressed at the level of individual disputes in the existing investment arbitration system, especially through its disclosure requirements and challenges procedures.¹⁴ The systemic aspects, by contrast, are often more elusive and difficult to address. What is more, while the one-off nature of arbitration to settle private-public disputes may not be an obstacle to independent and impartial dispute settlement as such, the widespread mixing of roles of those active in present-day investment arbitration as arbitrators and counsel, academics, and experts, and the financial, professional, and personal entanglements resulting from such mixing of roles, are central to the systemic debate over independence and impartiality, both in the ISDS generally as it stands now, and in respect of future reforms.¹⁵

In order to address the issue systematically, the paragraphs that follow set the stage and briefly explain how the criteria of independence and impartiality are incorporated in the most commonly used ISDS rules and the regulatory mechanisms generally adopted to ensure the application of these criteria.

Concerns over how best to promote independence and impartiality are not unique to investment dispute settlement; indeed, virtually all other international systems of dispute settlement have developed rules and mechanisms to ensure independence and impartiality. The Statute of the International Court of Justice (ICJ), for example, requires the court to “be composed of a body of independent judges.”¹⁶ The Statute of the International Tribunal for the Law of the Sea (ITLOS) similarly requires judges to be ‘independent’ and to be chosen from ‘persons

¹⁴ Though, as explained in this article, more detailed disclosure requirements and enhanced challenges procedures are discussed as potential reform at UNCITRAL Working Group III.

¹⁵ See generally Jeff Dunoff and Chiara Giorgetti, ‘Introduction to the Symposium: A Focus on Ethics in International Courts and Tribunals,’ 113 AJIL 279 (2019), as well as the contributions therein.

¹⁶ ICJ Statute, Art. 2, see generally Aznar-Gomez, Article 2, in *The Statute of the International Court of Justice, A Commentary* (Andreas Zimmermann, Karin Oellers-Frahm & Christian Tomoschat eds., 2nd ed., 2012).

enjoying the highest reputation for fairness and integrity.’¹⁷ Similar provisions regarding judges are found in the statutes or rules of international courts and tribunals, and states have acknowledged that these requirements are fundamental to any rule-of-law based dispute system.¹⁸

The language found in international arbitration rules is generally similar, but usually more specific in addressing what will be concerns resulting in a lack of independence and impartiality. This results from the fact that while judges in international courts are appointed by an appointing authority for terms of several years, arbitrators in investment arbitration are appointed by the parties for just one case at the time. This makes arbitrators’ appointments and existing control systems key procedural features in arbitration. Thus, most international arbitration rules address arbitrator qualifications generally, including specific requirements for independence and impartiality. In addition, these rules typically address disclosures requirements designed to ensure independence and impartiality and provide for challenges procedures through which disputing parties can complain about the real or apparent lack of an arbitrator’s independence or impartiality. If successful, such procedures will result in the removal of the arbitrator concerned and his or her replacement with an individual that is independent and impartiality.¹⁹

The UNCITRAL Arbitration Rules (2010) require the appointing authority to “have regard’ to considerations “likely to secure the appointment” of independent and impartial arbitrators. In this context, the appointing authority “shall take into account” the advisability of “appointing arbitrators of nationalities other than that of the parties.”²⁰ The Convention for the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) provides that those who serve as arbitrators shall be “persons of high moral character,” possess “recognized competence in the fields of law, commerce, industry or finance” and should “be relied upon to exercise independent judgment.”²¹ While the English-language version and the French-language

¹⁷ ITLOS Statutes, Art. 2.

¹⁸ See Note by the Secretariat on Possible Reform of investor-State dispute settlement, UN. Doc. A/CN.9/WG.III/WP.151 (20 Aug 2018). Note that in most international courts, including ICJ and ITLOS, parties have the choice to appoint an ad hoc judge when a judge of their nationality is not present on the bench.

¹⁹ On procedures to remove and challenge judges in international courts, see Chiara Giorgetti (ed), *Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals* (Brill, 2015).

²⁰ UNCITRAL Rules, art. 6. – UNCITRAL Arbitration Rules, UN Doc A/31/98, 31st Session Supp. No 17.

²¹ ICSID Convention, Arts. 14, 40, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (International Centre for Settlement of Investment Disputes [ICSID]) 575 UNTS 159.

version of ICSID texts do not mention ‘impartiality,’ the Spanish-language version of the ICSID Convention does, though it does not mention ‘independence’. All language versions are equally authentic, and there is general consensus that both requirements apply.

Other international arbitration rules contain similar provisions. For example, the International Chamber of Commerce (ICC) Rules require that an arbitrator “be and remain independent of the parties.”²² The rules of the London Court of International Arbitration (LCIA) requires that an arbitrator “be and remain at all times impartial and independent of the parties.”²³ And the arbitration rules of the Stockholm Chamber of Commerce (SCC) requires every arbitrator to be “impartial and independent.”²⁴

In order to ensure that arbitrators live up to the requirements of independence and impartiality, most arbitration rules provide for two control instruments: disclosure obligations incumbent upon arbitrators and challenge procedures that allow disputing parties to raise specific concerns about the independence and impartiality of arbitrators.

As to *disclosure*, the UNCITRAL Arbitration Rules expressly provide that it is necessary in “any circumstances likely to give rise to justifiable doubts” concerning “impartiality or independence.”²⁵ Arbitrators “shall” without delay disclose any such circumstances to the parties and other arbitrators. Likewise, the ICSID Arbitration Rules require disclosure of any circumstances that might cause a party to question an arbitrator’s “reliability for independent judgment.”²⁶ The ICC Rules similarly require that a prospective arbitrator disclose “any facts or circumstances which might . . . call into question the arbitrator’s independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator’s impartiality.”²⁷ And the same obligations exists under the LCIA and SCC.²⁸ An arbitrator’s duty

²² ICC Rules, Art. 1191), available at <https://iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration-and-2014-Mediation-Rules-english-version.pdf.pdf>.

²³ LCIA Rules, Art. 5(3), available at https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx#Article%205.

²⁴ SCC Rules, Art. 18, available at https://sccinstitute.com/media/293614/arbitration_rules_eng_17_web.pdf.

²⁵ UNCITRAL Rules, art. 11.

²⁶ ICSID Rules, Rule 7.

²⁷ ICC Rules, Art 11.

²⁸ See LCIA Rules, Article 5(5) (stating that “each arbitral candidate shall thereby assume a continuing duty as an arbitrator, until the arbitration is finally concluded, forthwith to disclose in writing any circumstances becoming known to that arbitrator after the date of his or her written declaration (under Article 5.4) which are likely to give rise in the mind of any party to any justifiable doubts as to his or her impartiality or independence, to be delivered to the LCIA Court, any other members of the Arbitral Tribunal and all parties in the arbitration.”) and SCC Rules, Article

of disclosure is continuous.²⁹ Thus, should any issue arise after appointment that might cause a party to question the arbitrator's reliability for independent judgment, such as a new appointment in a new case, arbitrators have the duty to inform the administering institution and/or the parties.

Various soft law instruments also supplement these arbitration rules, especially regarding the circumstances that require disclosure. Notably, the Guidelines on Conflicts of Interest in International Arbitration elaborated by the International Bar Association (IBA) in 2004 and revised in 2014 are an important instrument specifying what an arbitrator's independence and impartiality mean in practice.³⁰ They set out general principles concerning the meaning of an arbitrator's independence and impartiality and provide guidance of whether specific situations and circumstances prompt disclosure requirements or should result in the disqualification of an individual to serve as arbitrator in a given case. The IBA Guidelines contain a so-called "Red," "Orange," and "Green" list of actual or potential situations by arbitrators that may require disclosure.³¹ The Guidelines are not, however, binding on arbitrators, and they have been criticized for being too tolerant of possible appearances of partiality.³²

18(4) (stating that "an arbitrator shall immediately inform the parties and the other arbitrators in writing if any circumstances that may give rise to justifiable doubts as to the arbitrator's impartiality or independence arise during the course of the arbitration.")

²⁹ See for example ICSID Rules Art. 7 (Arbitrator's declaration stating that "I acknowledge that by signing this declaration, I assume a continuing obligation promptly to notify the Secretary-General of the Centre of any such relationship or circumstance that subsequently arises during this proceeding." See also ICC Rules, art. 11(3) (stating that "An arbitrator shall immediately disclose in writing to the Secretariat and to the parties any facts or circumstances of a similar nature to those referred to in Article 11(2) concerning the arbitrator's impartiality or independence which may arise during the arbitration.").

³⁰ Available via https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx. See generally Stipanowich, Thomas, *Soft Law in the Organization and General Conduct of Commercial Arbitration Proceedings* (2014). Chapter in, *Soft Law in International Arbitration* (2014); Pepperdine University Legal Studies Research Paper No. 2014/4. Available at SSRN: <https://ssrn.com/abstract=2407187>.

³¹ The Red List is a non-exhaustive list of specific situations that, depending on the particular facts, give rise to justifiable doubts as to an arbitrator's impartiality and independence, such as when an arbitrator or her firm regularly advises a party, or an affiliate of the party, and the arbitrator or the firm derives significant financial income therefrom. The Orange List sets out specific situations that may, in the eyes of the parties, give rise to doubts as to an arbitrator's impartiality and independence, such as when the arbitrator has, within the past three years, served as counsel for or against one of the parties on an unrelated matter. The Green List sets out specific situations where no appearance and no actual conflict of interest exists from an objective point of view, such as when the arbitrator has a relationship with counsel for a party through membership in the same professional association or charitable organization.

³² See generally Margaret Moses, *The Role of the IBA Guidelines on Conflicts of Interest in Arbitrator Challenges*, *KluwerArbitrationBlog*, Nov. 23, 2017.

Moreover, arbitration rules include detailed procedures for parties to *challenge* arbitrators when they consider that they lack independence and impartiality.³³ Thus, if a disputing party believes that an arbitrator lacks or ceases to have the qualities required to serve as an arbitrator, including the need to be independent and impartial, it can challenge that arbitrator and ask the body designated under the applicable arbitration rules to make a determination on whether the challenge is successful and the arbitrator should consequently be removed. A neutral and effective challenge procedure is fundamental to the actual and perceived legitimacy of ISDS and of each member of the arbitral tribunal and it is therefore important that efficient and fair rules are included in any arbitration rules.³⁴

Provisions on challenges procedures are found in, among others, Article 57 of the ICSID Convention, Article 13 of the UNCITRAL Rules, Article 10 of the LCIA Rules and Article 14 of the ICC Rules and SCC Article 19. Pursuant to those rules, parties are generally required to file a request for disqualification with the institution administering the proceedings. Under the UNCITRAL Rules- which characteristically does not have a determined administering institution - parties must communicate the request directly to the other party and the arbitrators. All rules provide for a relatively tight deadlines for disputing parties to challenge an arbitrator.³⁵

³³ See generally Chiara Giorgetti, *The Selection and Removal of Arbitrators in Investor-State Dispute Settlement*, Brill Research Perspectives, (2019).

³⁴ For decision on challenged decided under the ICSID Convention, see <https://icsid.worldbank.org/en/Pages/Process/Decisions-on-Disqualification.aspx>. Another excellent source of information on investment arbitrations is the PluriCourts Investment Arbitration Database (PITAD), available at <https://pitad.org/index#welcome>

³⁵ See Giorgetti, Selection and Removal, supra note 33.

The challenge is decided by either the appointing authority or the institution administering the proceedings. Under the UNCITRAL Arbitration Rules, if the parties do not agree on the challenge, the decision is taken by the appointing authority. In ICC proceedings, the International Court of Arbitration - which exercises judicial supervision of ICC arbitral proceedings)- decide; and in LCIA proceedings, the LCIA Court – which, similarly to the ICC Court of Arbitration, supervises LCIA proceedings - decides. ICSID is an outlier in this respect: when only one arbitrator of a panel of three is challenged, the unchallenged co-arbitrators decide on the challenge. If they cannot agree on the challenge, or if the challenge involves more than one arbitrator, or the sole arbitrator, the Chairman of the Administrative Council of ICSID (who is also the President of the World Bank) decides. This system has been criticized because it is for the remaining arbitrators to decide on the fate of another arbitrator, which may affect the dynamics of the arbitration panel. The proposed amendments to the ICSID Rules, which are presently under discussion, would allow the remaining arbitrators by agreement to refer challenge decisions to the Chairman of the Administrative Council for any reason.³⁶

The standards guiding the decision on the challenge also differ slightly depending on the applicable arbitration rules. Under the UNCITRAL Arbitration Rules, arbitrators may be challenged “if circumstances exist” that give rise to “justifiable doubts” as to the impartiality or independence of an arbitrator.³⁷ A similar standard is found in the LCIA Rules. *Gallo v. Canada*, a widely-cited case decided under the UNICTRAL Arbitration Rules, holds that the apprehension of bias should be to an “objective observer, reasonable.”³⁸ ICSID requires a “manifest lack of the qualities” required to sit as an arbitrator. In practice, the term ‘manifest’ had generally been strictly applied to mean ‘obvious’ or ‘evident’ and highly probable, not just possible. This interpretation has been criticized, resulting in a high threshold to overcome for those challenging an appointment.³⁹ More recently, ICSID tribunals have called this standard “an ‘objective standard

³⁶ https://icsid.worldbank.org/en/amendments/Documents/Homepage/Amendments-Vol_1_Synopsis_EN,FR,SP.pdf

³⁷ add ref.

³⁸ Vito G. Gallo v. The Government of Canada, UNCITRAL, PCA Case No. 55798, Decision on the Challenge to Mr. J. Christopher Thomas, QC, 14 OCT 2009.

³⁹ *Blue Bank Int'l & 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, paras. 22–26 (Nov. 12, 2013) (Chairman upheld the challenge and applied “an objective standard based on a reasonable evaluation of the evidence by a third party” and interpreted the word “manifest” in the ICSID Convention “as meaning ‘evident’ and ‘obvious’ and relating to the ease with which the alleged lack of qualities can be perceived.”).

based on a reasonable evaluation of the evidence by a third party’ or ... on the ‘point of view of a reasonable and informed third person’,” thus aligning themselves to the standard adopted by other rules.⁴⁰

Overall, challenge requests are increasing, yet, they are often unsuccessful, e.g., only five out of 75 disqualification proposals brought at ICSID proceedings to date have been upheld.⁴¹

The independence and impartiality of adjudicators is a key principle of international law. It is a principle governing both the composition of permanent international courts, but has also been incorporated in all major international arbitration rules and concretized through the control mechanisms of disclosure obligations and arbitrator challenge procedures. Because of its centrality, it also gives rise to concerns as to whether the current system of settling investment disputes through international arbitration lives up to the requirements of independence and impartiality. It is to these concerns that this article turns next.

3. Key Issues for Consideration and their Underlying Causes

Concerns over lack of independence and impartiality have emanated from many stakeholders in respect of how investor-State dispute are current settled through arbitration. The reasonable perception of a lack of independence and impartiality might be sufficient to call into question the legitimacy of ISDS. Several empirical studies have also recently focused on these issues.⁴²

Following the framing of the topic above, the section below focuses on the specific ensuing issues that have generated criticism and questions in the eyes of both users and the stakeholders. These issues are both systemic and individual, and often result from the very structure of ISDS. These include the very topic of party-appointment per se, the propriety of connections between arbitrators and parties, the issues of multiple appointments, double hatting, issue conflict, and

⁴⁰ *Caratube International Oil Company v. Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch (20 March 2014) 35, para. 110.

⁴¹ <https://icsid.worldbank.org/en/Pages/Process/Decisions-on-Disqualification.aspx>. Another excellent source of information on investment arbitrations is the PluriCourts Investment Arbitration Database (PITAD), available at <https://pitad.org/index#welcome>

⁴² See the summary in Daniel Behn, Malcolm Langford and Laura Létourneau-Tremblay, *Empirical Perspectives on Investment Arbitration: What do we know? Does it Matter?*, (2020) 21 *Journal of World Investment and Trade* #.

implicit pro-investor bias, and, for ICSID arbitrations, the mixing of roles between arbitrators and members of annulment committees.

3.1 Party appointment per se

The appointment of adjudicators by the parties in the dispute is one of the distinctive characteristics of investment arbitration and at the very core of international arbitration. Surveys strongly suggest that party appointment is one of the reasons why parties favor international arbitration over domestic litigation - parties are granted agency to exercise power over the process.⁴³ The preference for party-appointment is even stronger for ISDS, which uniquely gives access to international remedies to investors, who generally lack access to other international courts and tribunals that are normally reserved for states only and not to individuals (although companies have sued states under the European Convention on Human Rights for seizures of property).⁴⁴

Critics, however, see party appointment of arbitrators as a “moral hazard” and find it unsatisfactory and problematic.⁴⁵ First, critiques point to the fact that because of the key role

⁴³ See, e.g., White & Case and Queen Mary University of London, *International Arbitration Survey: The Evolution of International Arbitration*, Chart 3, p. 7, <https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2018-18.pdf>.

⁴⁴ W. Michael Reisman, ‘International Arbitration and Sovereignty’ (2002) 18 *Arbitration International*, 231, Andreas F. Lowenfeld, ‘The Party-Appointed Arbitrator in International Controversies: Some Reflections’ (1995) 30 *Texas International Law Journal* 59, 70. See also Chiara Giorgetti, ‘Who Decides Who Decides in International Investment Arbitration?’ (2014) 35 *University of Pennsylvania Journal of International Law* 101. On the position of individuals in international courts and tribunals, see Chiara Giorgetti, ‘Rethinking the Individual in International Law’ (2018) 22 *Lewis and Clark Law Review*, 1085 and Kate Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (Cambridge University Press 2011).

⁴⁵ Jan Paulsson, *Moral Hazard in International Dispute Resolution*, Inaugural lecture as holder of the Michael R. Klein’s Chair at the Miami University School of Law, 29 Apr. 2010, http://www.arbitration-icca.org/media/0/12773749999020/paulsson_moral_hazard.pdf. See also Jan Paulsson, *Are Unilateral Appointments Defensible?* 2 Apr. 2009, <http://kluwerarbitrationblog.com/>. As to whether party-appointment generally or the pattern of repeat appointments affects the outcomes of individual cases, or create a systemic bias in favor of investors, studies come to different conclusions. One experimental study asking actual or potential arbitrators how they would rule on certain issues knowing or not knowing who appointed them (using a constructed protocol, not actual cases or interviews with participants) found a bias in favor of the party that appoints an arbitrator. The authors then used this data to support a move to blind appointments. See, e.g., Sergio Puig, ‘Social Capital in the Arbitration Market’ (2014) 25 *European Journal of International Law* 387; Malcolm Langford, Daniel Behn, and Runar Lie, ‘The Revolving Door in International Investment Arbitration’ (2017) 20 *Journal of International Economic Law* 301, Sergio Puig and Anton Strezhnev, ‘Affiliation Bias in Arbitration: An Experimental Approach’ (2017) 46 *Journal of Legal Studies* 371, Sergio Puig, ‘Blinding International Justice’ (2016) 56 *Virginia Journal of International Law* 647, 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 Journal* 540, 575-76.

arbitrators play in deciding the dispute in all substantive, jurisdictional, and procedural matters, parties have a clear incentive to select a person who is as sympathetic and close to their own views as possible, and that there is too fine a line between being sympathetic and becoming partial.⁴⁶ Second, critics point out that even if an arbitrator does not cross the line on substantive issues, the very choice by a party to appoint an arbitrator may create an incentive by that arbitrator to favor the appointing party in procedural matters by, for example, voting in its favor and advocating for reduced awards or costs. Critics claim that this results in an intrinsically unfair process, placing too much power on parties' choice. Further, a biased arbitrator can disrupt the process in many ways (e.g. delaying meetings, refusing to participate in proceedings, and issuing damaging dissents). Critiques also point to cognitive bias, possibly leading to inaccurate judgments, decisions, and interpretations.⁴⁷ For all these reasons, they note that arbitrators will inevitably side with the party that appointed them.⁴⁸ While the situation *may* be mitigated by the possibility that each party's choice cancels out the other's (assuming the each party-appointed arbitrator sides with the party that appointed them), the status quo gives substantial power to the presiding arbitrator. Such power undercuts the very idea of a three-arbitrator (as opposed to sole-arbitrator) tribunal. Third, criticism also revolves around party appointments as perpetrating a non-diverse system, an issue discussed in the preceding article in this special issue.⁴⁹

⁴⁶ Albert Jan van den Berg, 'Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration,' in Mahnoush Arsanjani et al (eds.), *Looking to the Future: Essays on International law in Honor of W. Michael Reisman* (Nijhoff, 2011); David Branson, 'Sympathetic Party-Appointed Arbitrators: Sophisticated Strangers and Governments Demand on Them' (2010) 25 ICSID Review 367.

⁴⁷ Stavros Brekoulakis, 'Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making' (2013) 4 Journal of International Dispute Settlement, 553. Cognitive bias is a concept related to lack of impartiality and is considered endemic to all decision-making, including by judges. Behavioral economists have identified elements of this phenomenon, including framing errors and groupthink. Studies have examined its manifestation in domestic judging, and one can assume that arbitrators are also susceptible to cognitive bias. No quantitative study has sought to measure it in IA, although the insights from knowledge of cognitive bias may have relevance for the design of improvements to IA. See Georgios Dimitropoulos, 'Investor-State Dispute Settlement Reform and Theory of Institutional Design' (2018) 9 Journal of International Dispute Settlement 535. See also summary of research on arbitral bias in Daniel Behn, Malcolm Langford and Laura Létourneau-Tremblay, *Empirical Perspectives on Investment Arbitration: What do we know? Does it Matter?*, (2020) 21 Journal of World Investment and Trade #. New studies address the possibility of a bias against developing countries in ISDS. While data suggest a correlation between a host state's level of economic development and the likelihood of its prevailing as a respondent, scholars differ as to the possible causal mechanisms.

⁴⁸ Paulsson 2010; Puig 2016.

⁴⁹ Available via <https://www.cids.ch/academic-forum-concept-papers>; revised in this JWIT Special Issue.

Others, however, think that arguments against party appointment are overblown and that both arbitrators and parties are capable of acting within the parameters of independence and impartiality set out by the arbitration system. They cite the professionalism of the arbitrators and the self-policing nature of the system: biased arbitrators would not be re-appointed because, if they become known as non-neutral, they will become ineffective in deliberations. Indeed, many awards, on both the jurisdiction and merits, are unanimous, which might suggest that arbitrators do not simply do the bidding of the party that appointed them. Further, supporters of the status quo argue that there are sufficient procedural safeguards to ensure that arbitrators lacking independence and impartiality are weeded out and do not sit in a tribunal. These procedures include disclosure requirements, oaths, and challenge procedures. Finally, supporters of the status quo hold that as party appointment is at the very core of arbitration and IA, changing that system would undermine arbitration in an existential way. They cite surveys in support of their view and the lack of real alternatives. The “genie” of party-appointment, they said, “cannot easily be put back into the bottle.”⁵⁰ Yet many of these responses address the actual independence and impartiality of arbitrators, rather than the perceptions thereof by other actors and observers in the current system.

3.2 Inappropriate contact between arbitrators and parties

A salient problem in ISDS is whether contacts between arbitrators and parties are appropriate or not, and whether contacts can create conflict and the appearance of partiality. While contacts between judges and parties could be an issue in domestic adjudication also, it becomes more problematic in ISDS for the very reason that parties themselves may select the arbitrators, which in turn may create the impression of the existence of bias or alliances. This situation is also exacerbated by the fact that ISDS mostly involves a small circle of people who already tend to know each other.⁵¹ There is little regulation that provides a general framework, and the problem is compounded by the different attitudes on the issue across legal systems. This is especially the case

⁵⁰ V.V. Veeder, *The Historical Keystone to International Arbitration: The Party-Appointed Arbitrator—From Miami to Geneva*, (2013) 107 Proceedings of the Annual Meeting (American Society of International Law) 387-405.

⁵¹ See, e.g., Sergio Puig, ‘Social Capital in the Arbitration Market’ (2014) 25 *European Journal of International Law* 387; Malcolm Langford, Daniel Behn, and Runar Lie, ‘The Revolving Door in International Investment Arbitration’ (2017) 20 *Journal of International Economic Law* 301.

for pre-appointment contacts, for example, which are considered necessary due diligence under certain legal systems but viewed as unethical under others.⁵²

A first-order question is to determine what constitutes an impermissible contact between parties and arbitrators. As investment arbitration includes a small group of people, some form of contact is inevitable, such as participation in conference, workshops etc. Are casual contacts permissible? And what are casual contacts? Do they include working groups in learned societies or on certain legal questions? And how about common membership in government advising groups? As discussed further below, casual contact is even more likely for arbitrators who engage in double-hatting.⁵³

A second-order question is time-related, because the importance and relevance of contacts between parties and arbitrators may vary depending on the stage of the arbitral procedure. In the pre-appointment phase, most casual contacts are considered permissible, though the question remains as to who decides the threshold to be adopted. But is a pre-appointment conference, considered by some participants to be important, at all proper? If so, what issues can be discussed, and is there a duty to disclose to the other parties that it occurred and its content?⁵⁴ During proceedings, any contacts between the parties and the arbitrators are generally prohibited, with the possible exception of casual contacts in the social context. If any sort of communication occurs, they should be open and disclosed.⁵⁵ In the post-proceeding phase, the duty of confidentiality remains even when the strict prohibition of contact relaxes.

3.3 Multiple appointments

Concerns related to the independence and impartiality of arbitrators have also arisen from the practice of multiple appointments by the same party or (less well studied until recently) by the same law firm in successive or parallel IA arbitrations, or in proceedings against the same host

⁵² Alston & Bird LLP, 'New IBA guidelines greatly limit interviewing an arbitrator before appointment' Lexology, 31 May 2013.

⁵³ Quantitative scholarship on independence and impartiality has confirmed that a relatively small number of arbitrators play a dominant role in appointments. Double-hatting remains a quite widespread practice. See, e.g. Sergio Puig and Anton Strezhnev, 'Affiliation Bias in Arbitration: An Experimental Approach' (2017) 46 *Journal of Legal Studies* 371.

⁵⁴ Kabir Singh and Elan Krishna, 'Interviewing Prospective Arbitrators' Kluwer Arbitration Blog, 29 Sept. 2015.

⁵⁵ *Id.*

state.⁵⁶ Runar Lie has found that 41% of the party appointments of the top 25 arbitrators (who are present in the overwhelming majority of cases) are made on the advice by the top 25 law firms; and the five law firms who act in the most cases have advised clients to appoint 20 of the top 25 arbitrators.⁵⁷ There is a risk that the arbitrator will be incentivized to have, or at least be perceived as having, a tendency to decide in favor of those making such appointments.⁵⁸ Moreover, a recent study found that in 13 challenges in ICSID arbitrations regarding repeat appointments, only one was upheld. In cases decided under UNCITRAL, ICC, and Stockholm Chamber of Commerce (SCC) Rules, disqualifications occurred more frequently for multiple appointments by one party or even the same law firm.⁵⁹

Two approaches have emerged in decisions on challenges regarding multiple appointments by a party. One is quantitative, encouraged by the IBA Guidelines on Conflicts of Interest. These focus on whether in the last three years the arbitrator has been appointed twice or more by a party or affiliate (s 3.1.3) or three times or more by a counsel or law firm (3.3.8). Yet the Guidelines' limits are typically non-binding and numbers mentioned in "Orange List" situations trigger disclosure by arbitrators, rather than disqualification (as with "Red List" situations).⁶⁰ A more stringent approach would be to impose a reversed burden of proof regarding multiple appointments, so if arbitrators have a set numbers of appointments by the same party, they need to prove how they retain independence and impartiality, as well as outright prohibitions in certain situations.⁶¹ The second approach is qualitative, with numerical indicators as only one factor in assessing bias. This may be more compatible with the overarching "justifiable doubts" standard in the Guidelines and many arbitration rules and laws.⁶²

⁵⁶ See generally William W. Park, Arbitrator Integrity, in Michael Waibel et al, *The Backlash Against Investment Arbitration* (2010) and Luke A. Sobota, 'Repeat Arbitrator Appointments in International Investment Disputes in C. Giorgetti (ed.) *Challenges and Recusals of Judges and Arbitrators in International courts and Tribunals* (Brill, 2015).

⁵⁷ Runar H. Lie, 'The Influence of Law Firms in ISDS', in Daniel Behn, Ole Kristian Fauchald and Malcolm Langford, *The Legitimacy of International Investment Arbitration: Empirical Perspectives* (Cambridge University Press, 2020).

⁵⁸ Van den Berg 821-43; Puig and Strezhnev.

⁵⁹ Maria Nicole Cleis, *The Independence and Impartiality of ICSID Arbitrators: Current Case Law, Alternative Approaches, and Improvement Suggestions* (Brill 2017) 72, 153-4, 157.

⁶⁰ Even with a "Red List" situation, an English High Court judgment declined automatically to disqualify the arbitrator: *W Ltd v M SDN BHD* [2016] EWHC 422 (Comm). For a summary and critique, see Nick Longley, 'IBA Guidelines on Conflict of Interest: The Traffic Lights Flash Amber' Mealey's International Arbitration Report, April 2016, Vol.31(4), available at <http://www.lexisnexis.com/mealeys>.

⁶¹ Maria Nicole Cleis, *The Independence and Impartiality of ICSID Arbitrators*, supra note 58, 239-240, 247.

⁶² Will Sheng Wilson Koh, 'Think Quality Not Quantity: Repeat Appointments and Arbitrator Challenges' (2017) 34 *Journal of International Arbitration* 711.

3.4 Issue conflict

A separate concern, possibly exacerbated by arbitrators' re-appointments, is the possibility that the arbitrator may have an "issue conflict" -- signaling or holding a known *general* opinion on the subject matter under dispute, through public awards, proceedings, publications, and conference presentations.⁶³ (Judges on permanent courts are typically not subject to this criticism.) Yet only three ICSID arbitration challenges were based on (over-)familiarity with the subject matter, with only one disqualification ensuing from the challenge.⁶⁴ In cases under other rules, disqualifications also have also been rare regarding the arbitrator's familiarity or views expressed concerning the subject matter generally.⁶⁵

The IBA Guidelines allocate to the Green List (s 4.1.1) the situation where: "The arbitrator has previously expressed a legal opinion (such as in a law review article or public lecture) concerning an issue that also arises in the arbitration (but this opinion is not focused on the case)." Publicly advocating a position on the case is on the Orange List (s 3.5.2), which instead triggers disclosure duties for the arbitrator. However, it has been suggested that a situation should be considered on a case-by-case basis as possibly giving rise to justifiable doubts about impartiality where "the arbitrator has previously expressed a legal opinion concerning a specific legal issue which arises in the arbitration in an academic publication."⁶⁶

⁶³ See generally ASIL-ICCA (2016), Report of the ASIL-ICCA Joint Task Force on Issue Conflicts in Investor-State Arbitration, ICCA Reports No. 3 (17 March 2016) Judith Levine, 'Dealing with Arbitrator "Issue Conflicts" in International Arbitration' (2008) Transnational Dispute Management 4.

⁶⁴ Maria Nicole Cleis, *The Independence and Impartiality of ICSID Arbitrators*, supra note 58, 72-3 (urging prohibitions where: 'The same party (or its affiliate), the same counsel or the same law firm have appointed the arbitrator in a proceeding concerning the same or highly similar factual circumstances and/or the same or highly similar specific legal questions, within the past three years').

⁶⁵ See generally Gavan Griffith, 'Pure' Issue Conflict in Investment Treaty Arbitration' in David D. Caron, Stephan W. Schill, Abby Cohen Smutny, and Epaminontas E. Triantafilou, eds. *Practising Virtue: Inside International Arbitration*, (OUP, 2015).

⁶⁶ Maria Nicole Cleis, *The Independence and Impartiality of ICSID Arbitrators*, supra note 58, 249. Cleis recommends adding an express grounds for disqualification situations where ICSID arbitrators may experience *specific* issue conflict due to (perceived) pre-judgment of issues now in dispute: "The arbitrator has previously served as an arbitrator in a proceeding involving one of the parties, and has as such co-authored an award to the detriment of said party, which was annulled within the last three years" and "The arbitrator has previously served as an arbitrator in a proceeding, and has as such co-authored an award concerning the same factual circumstances and/or the same specific legal questions, which was annulled within the last three years."id at 247, elaborated at 236-7 ('Since the reasons for an annulment of an award are strict, and annulments are therefore rare, it is not unreasonable to assume that arbitrators who have participated in the making of an award are taken aback by its annulment. They may perceive the annulment of the award as a criticism of their work and be prejudiced towards the party which requested the annulment, or feel the urge to justify the considerations that led to the annulled award, by deciding similarly in a subsequent proceeding.')

Such situations also raise broader issues regarding mixing the roles as arbitrator and annulment committee members, discussed further below.⁶⁷

3.5 Double-hatting or “role confusion”

A criticism that is virtually unique to ISDS yet imbedded in its structure is “double hatting,” i.e. situations in which either arbitrators serve as counsel for or against one of the parties in another investment arbitration or other matters or an arbitrator also acts as counsel in investment arbitration matters generally.”⁶⁸ These situations may create the appearance of conflict and empirical studies suggest up to half of ISDS cases may be affected.⁶⁹ As pointed out “the first category can involve conflicts of interest arising from the arbitrator’s relationship with the parties and with the issues in the case. The second category, which also can include cases from the first category, primarily involves problems created by issue conflicts”.⁷⁰

Double hatting has generated discussion and condemnation.⁷¹ In practice, regulations have been unclear and challenges to arbitrators for double-hatting face obstacles. For example, little guidance can be taken from the IBA Guidelines on Conflicts of Interest for arbitrators, which do not specifically regulate the issue of double-hatting and are in general not directly applicable. The 2013 IBA Guidelines on Party Representation in investment arbitration also do not regulate the double-hatting specifically.⁷² Similarly, challenges to arbitrators themselves based on double hatting tend to be dismissed because double-hatting is perceived to be commonplace and inherent in the investment arbitration. A few treaties and institutions have therefore started to ban double-

⁶⁷ Cfr. 3.8 below.

⁶⁸ Nathalie Bernasconi-Osterwalder, Lise Johnson and Fiona Marshall, *Arbitrator Independence and Impartiality: Examining the Dual Role of Arbitrator and Counsel* (IISD 2010) 17, https://www.iisd.org/sites/default/files/publications/dci_2010_arbitrator_independence.pdf (giving relevant ISDS cases involving each category).

⁶⁹ See generally Malcolm Langford, Daniel Behn and Runar Hilleren Lie, ‘The Ethics and Empirics of Double Hatting’ (2017) 6 ESIL Reflection,

⁷⁰ Nathalie Bernasconi, *supra* note 67.

⁷¹ Phillipe 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* (New York: Brill, 2012), 28-49. A related concern involves sequential appointments as arbitrator and counsel or the “revolving door.” UNCITRAL, ‘Possible Reform of Investor-State Dispute Settlement (ISDS): Ensuring Independence and Impartiality on the Part of Arbitrators and Decision Makers in ISDS’ (30 August 2018), UN Doc. A/CN.9/EG.III/WP.

⁷² Available via https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx. One exception is the recent Chile-Argentina FTA in which double hatting in all its varieties is banned for ISDS: http://www.sice.oas.org/TPD/ARG_CHL/ARG_CHL_e.ASP

hatting outright, as discussed below (Part 4 – Option 1) in the context of other perceived problems and solutions regarding this practice.

3.6 Implicit pro-investor bias due to the structure of investment arbitration

A systemic criticism of ISDS generally is that it may itself be biased in favor of investors, and thus the arbitrators may lack independence and impartiality for systemic and structural reasons. Several reasons may explain this perception.⁷³

First, investment arbitration has an unusual party structure. Investors harmed by an alleged breach of a BIT or other relevant treaty are authorized to sue the host state. The system does not, however, generally contemplate a host state as a claimant filing an action against an investor as respondent. There is some concern that this “one-way” party structure, where only investors generally act as claimants, in conjunction with other structural feature of investment arbitration (such as party appointment and cost) may introduce a pro-investor bias into the system, or create an appearance thereof.⁷⁴ Critics object to the asymmetry that results from a system that imposes duties only on states, but places no obligation upon investors to behave reasonably in return.⁷⁵

Another structural feature is also said to contribute to pro-investor bias. Arbitrators are typically paid for their services on an hourly basis, with no cap on remuneration. This compensation system is thought to generate incentives for arbitrators to advantage investors and disadvantage states.⁷⁶ For example, many investment arbitration cases involve challenges to jurisdiction and to the admissibility of claims. Some claim that arbitrators tend to interpret jurisdictional clauses widely and favor the admissibility of claims. Dismissing claims would

⁷³ With respect to claims of systemic pro-investor partiality from party appointments, one study found “only very tentative evidence of the expectations of systemic bias” in favor of Northern investors on issues without claiming bias of individual arbitrators. See, Sergio Puig and Anton Strezhnev, ‘Affiliation Bias in Arbitration: An Experimental Approach’ (2017) 46 *Journal of Legal Studies* 371.

⁷⁴ The following (alleged) pro-investor biases are generally considered to be empirically not (yet) founded. See Matthias Fekl, ‘Les contestations de l’arbitrage d’investissement et les négociations commerciales internationales contemporaines’ 2018-3 *Les Cahiers de l’Arbitrage*, 413, 422 ; Marc Bungenberg and August Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court* (Springer, 2018), 17.

⁷⁵ See Sergio Puig & Gregory Shaffer, ‘Imperfect Alternatives: Institutional Choice and the Reform of Investment Law’ (2018) 112 *AJIL* 361. See also Report of the Independent Expert on the promotion of a democratic and equitable international order (2015), U.N. Doc. A/70/285, para. 23; Report of the Independent Expert on the promotion of a democratic and equitable international order (2016), U.N. Doc. A/HRC/33/40, para. 28.

⁷⁶ For a thorough analysis, see David Gaukrodger, *Adjudicator Compensation Systems and Investor-State Dispute Settlement*, OECD Working Papers on International Investment 2017/05 (2017).

terminate the arbitration, as well as the number of billable hours. Permitting claims to proceed to the merits allows arbitrators to sit longer and receive greater remuneration.⁷⁷

For much the same reasons, some claim that arbitrators tend to render final awards favorable to investors. Producing “pro-state” results may create disincentives for investors to file future claims; fewer cases would lead to fewer opportunities to serve as arbitrator.⁷⁸ “Pro-investor” results, on the other hand, are thought to be likely to incentivize the filing of additional cases, creating the possibility of additional work for arbitrators. This logic applies equally to arbitrators appointed by states, as they share an interest in future appointments.⁷⁹

Finally, institutions that act as appointing authorities are said to face a similar incentive structure.⁸⁰ The institutions that administer investment arbitration claims compete with each other for cases. In practice, this means that the institutions compete for claimants, as it is the claimant who generally determines the choice among available arbitral institutions. As claimants consider where to file their claims, they might be incentivized to file at institutions thought to have pro-investors features. This pattern may in turn create incentives for institutions to appear attractive to investors⁸¹ by developing a reputation for appointing “pro-investor” arbitrators. The strongest version of this claim suggests that arbitral institutions face a “race to the bottom” dynamic, where each has an incentive to appear to be more investor-friendly than its competitors.⁸²

⁷⁷ M. Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (2015). For a discussion of how compensation arrangements can induce bias, see Sergio Puig, ‘Blinding International Justice’ (2016) 56 *Virginia Journal of International Law* 647.

⁷⁸ See Pia Eberhardt and Cecilia Olivet, *Profiting from injustice*, Corporate Europe Observatory, 2012, p. 36.

⁷⁹ See discussion in Malcolm Langford and Daniel Behn, ‘Managing Backlash: The Evolving Investment Arbitrator?’, (2018) 29(2) *European Journal of International Law*, 551.

⁸⁰ See generally, OECD, Investment Division, ‘Appointing Authorities and the Selection of Arbitrators in Investor-State Dispute Settlement: An Overview’ March 2018. Note that this would not apply to the appointing authorities designated by the PCA Secretary-General under UNCITRAL Rules.

⁸¹ The logic is developed in William Landes & Richard Posner, ‘Adjudication as a Private Good’ (1979) 8 *Journal of Legal Studies* 235. Historical research suggests that fee-based compensation systems induced judges to adopt a broad view of their own jurisdiction. James Pfander, ‘Judicial Compensation and the Definition of Judicial Power in the Early Republic’ (2008) 107 *Michigan Law Review* 1.

⁸² Yves Dezalay & Bryant G. Garth (1995) “Merchants of Law as Moral Entrepreneurs: Constructing International Justice from the Competition for Transnational Business Disputes,” 29 *Law & Society Rev.* 27–64; Joshua D.H. Karton, *The culture of international arbitration and the evolution of contract law* (Oxford University Press 2013), Andrea Carlevaris, *The Geography of International Arbitration – Places of Arbitration: the Old Ones and the New Ones*, in *The Evolution and Future of International Arbitration* (Stavros Brekoulakis, ed., Wolters Kluwer, 2016), 331-340.

3.7 Staff and secretariat loyalties

Investor-state arbitration today is almost invariably institutional arbitration supported by a secretariat. Some tribunals also recruit additional assistants from among practicing lawyers and academics (including from the arbitrator's own institution); and arbitrators often work with their own assistants, often without disclosure to the disputing parties or their co-arbitrators.⁸³

Secretariats clearly offer some benefits to investment arbitration. First, they can assist with preparing, researching, and drafting awards, and with the logistics of the arbitration. Assistance with researching and drafting the award could increase the quality of the award and reduce the cost and duration of the arbitration, especially for those with arbitrators in great demand. Second, the secretariat may marginally compensate for the lack of diversity among arbitrators. Third, the continuity and embeddedness of a secretariat, especially in a permanent institution independent of the parties, can provide a form of legitimacy to investment arbitration tribunals.⁸⁴

However, secretariats and support staff pose at least two challenges to the independence and impartiality of investment arbitration.⁸⁵ First, secretariats and assistants may unduly influence the conduct and outcome of arbitrations (the inverse of the first benefit discussed above).⁸⁶ A recent landmark award is a case in point: In *Yukos v. Russia*, Respondent Russia challenged the award arguing that the secretariat of the tribunal had written at least part of the award, and thus acted as a 'fourth arbitrator' not appointed by the parties.⁸⁷ The challenge was based on the number of hours billed by the tribunals' secretary compared to the number of hours billed by the arbitrators. Second, staff in secretariats may have conflicts of interest, including relationships with law firms where

⁸³ See generally Constantine Partasides 'The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration' (2002) 18 *Arbitration International* 147. See also Pauwelyn, Joost and Pelc, Krzysztof, Who Writes the Rulings of the World Trade Organization? A Critical Assessment of the Role of the Secretariat in WTO Dispute Settlement (September 26, 2019). Available at SSRN: <https://ssrn.com/abstract=3458872>.

⁸⁴ See generally, Michael Polkinghorne and Charles B. Rosenberg, 'The Role of the Tribunal Secretary in International Arbitration: A Call for a Uniform Standard' IBA, 5 March 2015, <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=987d1cfc-3bc2-48d3-959e-e18d7935f542>.

⁸⁵ Kabir Singh, Shobna Chandran, Siddhartha Premkumar and Andrew Foo, 'Tribunal secretaries: a tale of dependence and independence' *Kluwerarbitrationblog*, 11 Dec. 2016. See also,

⁸⁶ Peter Hirst, 'When Does a Tribunal Secretary Overstep the Mark?' *Kluwerarbitrationblog*, 18 April, 2017. New research by Langford, Behn and Lie provides an initial estimation of potential award writing by assistants through a stylometric analysis: 'Machine Learning and Stylometry: Predicting the Authorship of Investment Treaty Awards', in Ryan Whalen (ed.), *Computational Legal Studies* (Edward Elgar, 2020).

⁸⁷ Dmytro Galagan, 'The Challenge of the Yukos Award: An Award Written by Someone Else – a Violation of the Tribunal's Mandate?' *Kluwerarbitrationblog*, 27 Feb. 2015 (note that the award was annulled by the court in The Hague on different jurisdictional ground).

they once practiced or hope to practice in the future (a risk that could be addressed through cooling off periods); relationships with the arbitrators they support; and relationships with the parties. Principle 5(b) of the IBA Guidelines on Conflict of Interest state that the same standard of impartiality and independence applies to tribunal or administrative secretaries as to arbitrators, whether they assist the tribunal as a whole or an individual arbitrator. The extent of compliance with this principle in practice is unclear.

3.8 Mixing of roles as arbitrator and a member of ICSID annulment committees

Finally, another problem linked to independence and impartiality of arbitrators, which is specific to ICSID arbitrations, consists in the absence of a distinction between the group of individuals who serve as arbitrators in ICSID cases and those serving on ICSID annulment committees; the latter are competent to hear requests for annulments against ICSID awards, which is the only regular remedy a party can bring against an ICSID award.⁸⁸ The mixing of roles of individuals serving as arbitrators in ICSID cases and acting as annulment committee members in other ICSID cases can be seen as in contrast to how judicial control mechanisms for domestic courts and for non-ICSID arbitrations are organized.⁸⁹ In those cases, there is a clear functional distinction between individuals (judges or arbitrators) who decide cases at the first instance and those who sit on court of appeals or supreme courts hearing appeals. The same holds true in international adjudication systems that have a two-tier structure, such as the WTO Dispute Settlement Body.

The dual role of people serving as ICSID arbitrators and ICSID annulment committee members may result in issue conflicts (for example if findings of an ICSID annulment committee can be useful as precedent for decisions of an ICSID arbitration, or vice versa); and a perception that ICSID annulment committees do not exercise control in a sufficiently strict manner, as no annulment committee member who also sits as arbitrator would be seen to be interested in a strict control and in-depth review of ICSID arbitrations.

4. Mapping Solutions Through the Four Options

⁸⁸ On a related issue see Joel Dahlquist, 'ICJ President Reveals that ICJ Judges Will Not Participate in Investor-State Arbitration in the Future' *Investment Arbitration Reporter*, 27 October 2018.

⁸⁹ In non-ICSID arbitrations, it is national courts that hear applications for either setting aside an arbitration award or opposing its recognition and enforcement.

As with the other papers in this issue, this article now examines how each of these concerns about the shortcomings of the status quo with respect to arbitrator independence and impartiality would be addressed through the four major proposals for investment arbitration reform that UNCITRAL Working Group III is considering at the moment of writing.⁹⁰ To be clear, we do not seek to propose any specific solution. We limit our analysis to an examination of how criticisms related to independence and impartiality would be resolved by each reform proposal.

Option 1: IA improved

The scenario of targeted investment arbitration improvement would allow a focus on specific issues. This option may address some concerns about independence and impartiality insofar as improvements can be targeted at the most pressing and specific problems. For example, some improvements could include:

- more onerous disclosure requirements and limits on contacts between parties and especially party-appointed arbitrators – this to address general concerns about arbitrator’s selection and questions of independence and impartiality as well as specific problems of contacts and repeat appointments;
- quantitative and/or qualitative limits on multiple appointments or disqualification for having expressed particular views on an issue now at hand;
- ex ante or ex post controls over various types of double hatting;
- clearer standards or revised procedures for challenging arbitrators;
- counter-claims by states or other changes to offset potential pro-investor tendencies;
- separation of the pool of individuals serving as ICSID arbitrators from those on annulment committees; and/or
- specific regulations on the role of tribunals assistant and secretariats.

⁹⁰ See Malcolm Langford, Daniel Behn, Gabrielle Kaufman-Kohler and Michele Potesta, ‘UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions – An Introduction’, (2020) 21 *Journal of World Investment and Trade* #.

Even under a differentiated approach that targets one or more specific problems along the lines listed above, there remain questions about where best to set out such improvements. Soft-law approaches like the IBA Guidelines are usually not directly applicable or binding, and they are developed for both commercial arbitration and investment arbitration. They were developed mostly by lawyers from prominent law firms,⁹¹ and have been already recently revised (2014 regarding conflicts for arbitrators) or generated (2013 regarding conflicts for counsel). It might therefore be better to develop a binding legal instrument, possibly a treaty, for example following the Mauritius Transparency Convention, where targeted changes could be included. Institutions can also play an important role in so far as they can develop Codes of Conduct and administer arbitral proceedings accordingly.

Second, as for the key existing rules, the UNCITRAL Rules were recently revised too, so further amendments would take time to complete. They are also used for commercial arbitration, not just investment treaty arbitration, where public interests and therefore restrictions on arbitrators are generally greater. Moreover, mandatory provisions of the chosen seat may override or add glosses to any revised rules. The current draft amendments of the ICSID Rules are constrained by the ICSID Convention, and they do not address many of the concerns discussed here (e.g. double hatting, multiple appointments) or only partly (e.g. co-arbitrators initially ruling on challenges). However, the ICSID Rules could be supplemented by “Guidance” on their application.⁹² UNCITRAL might also prepare “Recommendations” for IA-focused interpretations of its Rules, the Model Law, and the New York Convention, as it did in 2006 regarding some aspects of that convention.⁹³

Thus, the most likely approach to implement targeted changes as per Option 1 over the short- to medium-term may be to (re)draft provisions in specific bilateral or regional treaties, perhaps supplemented by a new multilateral treaty as will be outlined below. Though this is likely to take time, it would afford the chance for targeted and generally- supported change. Thus, states

⁹¹ Michael Bond, “A Geography of International Arbitration” (2005) 21 *Arbitration International* 99.

⁹² See generally Cleis, *supra* note 58.

⁹³ UNCITRAL, Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, 7 July 2006, <http://www.newyorkconvention.org/uncitral/recommendations>.

might incorporate the improvements noted above or, more ambitiously, add any or all of the following into new or existing treaties:

- Abolish party appointment and replace with designated authority appointments (note that this option is linked to other issues such as the roles and neutrality of secretariat or ICSID annulment committee personnel, which may not be open to regulation at bilateral or even regional levels given that the ICSID Convention is multilateral);
- Limit party appointment, for example by allowing appointment by investors as well as host states only from a roster agreed in advance by the relevant states;
- Limit appointments in other ways with reference to background or expressed views, other professional roles (e.g. double-hatting), or career (e.g. multiple appointments by the same party or law firm)
- Restrict other conduct seen as inappropriate before, during or after appointment.

As an alternative to, or in addition to, treaty revision or other binding rules, it might be possible to promote self-regulation. Yet the persistence of double-hatting, for example, suggests that this would need to be accompanied by recommendations from, or even commitments required of members by, professional associations (like the IBA or the Chartered Institute of Arbitrators) or arbitral institutions.⁹⁴

Given the concerns about double-hatting specifically, four types of reform have been proposed recently that target double-hatting.⁹⁵ First, self-regulation, for example when an arbitrator declines counsel work once appointed as arbitrator.⁹⁶ Second, enhanced transparency includes publicizing updated lists of the top double-hatters. But past trends suggest that even such “shaming” may be insufficient. A third reform may include more litigation or other challenges to clarify applicable standards and clarify thresholds. But this may add to existing uncertainties and will, in any case, exacerbate costs and delays.⁹⁷ Fourth are institutional reforms, i.e., arbitration

⁹⁴ Langford, Behn and Lie ‘The Revolving Door’ (suggesting that such voluntary restraint has been insufficient for double-hatting to work itself clean).

⁹⁵ See generally Langford, Behn and Lie, ‘The Ethics and Empirics of Double Hatting’, supra note 68.

⁹⁶ See for example, Philippe Sands, ‘Conflict and Conflicts in Investment Treaty Arbitration: Ethical Standards for Counsel’ in *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (Brill, 2012) 28-49.

⁹⁷ Catherine Titi, Julien Chaisse, Facundo Pérez Aznar, Gabriel Bottini, Marko Jovanovic, ‘Excessive Costs and Recoverability of Cost Awards in Investment Arbitration’, (2020) 21 *Journal of World Investment and Trade* #; Anna De Luca, Clara López Rodríguez, Crina Baltag, Daniel Behn, Gregory Shaffer, Holger P. Hestermeyer, Jonathan

rule changes or interpretive statements; revisions to IBA Guidelines; and amendments to investment treaties. The latter seem most promising to restore consistency. Treaty (re)drafting could clarify the principle of independence and impartiality more clearly and amend mechanisms to apply them in challenges, or set some ex ante restrictions such as:

- A complete and permanent ban (in treaty text or a separate code of conduct). This is one possible interpretation of recent EU-style treaties,⁹⁸ albeit in the wider context of the investment court alternative to ISDS, and a plausible interpretation is rather that it means a temporary ban. A permanent ban could also be over-inclusive insofar as it could restrict the entry of arbitrators from diverse backgrounds who may need other sources of income (especially after an arbitration is finished); and under-inclusive insofar as it does not address other concerns about repeat players.⁹⁹
- A temporary ban on double-hatting, as discussed by ICJ Judge Buergenthal in 2006.¹⁰⁰ Examples from other fields can be found in the 2001 ICJ Practice Direction VII (preventing ad hoc judges from serving as counsel before the ICJ simultaneously and for the ensuing three years) and since 2010 in the Court for Arbitration for Sport (CAS).¹⁰¹ This sort of ex ante restriction could address the argument that a permanent ban is unfair for those taking on a first IA appointment; after the temporary ban, s/he could revert to counsel work in the absence of sufficient further appointments as arbitrator. There seems to be no evidence that temporary bans have caused pools of qualified adjudicators or counsel to dry up significantly in the ICJ or CAS, which might suggest the need for caution in introducing such limits on double-hatting in IA. Notably, on 19 January 2019, the inter-state Commission established under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) adopted a Code of Conduct for ISDS that expressly bans an arbitrator – once appointed, during the proceedings – from serving as counsel or party-appointed expert or witness in any pending or new investment dispute under the CPTPP or any other international agreement.¹⁰² A similar rule is incorporated in Article 3.40(1) of the EU-Vietnam Investment Protection Agreement, signed on 30 June 2019.¹⁰³

Bonnitcha, José Manuel Alvarez-Zarate, Loukas Mistelis, Malcolm Langford, Simon Weber, “Duration of Proceedings in International Investment Arbitration” (2020) 21 *Journal of World Investment and Trade* #. *

⁹⁸ Cleis, supra note 58, 215.

⁹⁹ Id 202-4.

¹⁰⁰ Thomas Buergenthal, ‘The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law’ 21(1) *ICSID Review* 126.

¹⁰¹ References

¹⁰² Governing Principle 3(d), available via <https://dfat.gov.au/trade/agreements/in-force/cptpp/official-documents/Pages/official-documents.aspx>.

¹⁰³ <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>>

- “Disinvolvement upon challenge,” which is an approach already found in some national and international systems. This approach is even less intrusive. However, it arguably does not address concerns that reasonable outside observers would still consider the person to be biased.¹⁰⁴
- Specific ex ante prohibitions to limit the most egregious double-hatting. Examples that could be added to the IBA Guidelines on Conflicts of Interests as (non-waivable) “incompatibilities” or disqualifications for arbitrators are when: “(a) the arbitrator serves as a counsel in a concurrent proceeding, in which one of the counsel to a party in the present dispute serves as an arbitrator; (b) the arbitrator serves as a counsel in a concurrent proceeding, in which the same legal questions are determinative”.¹⁰⁵ Such a ban also appears in the Code of Conduct of the new Hague Rules on Business and Human Rights Arbitration.¹⁰⁶

One option for efficiently retrofitting such improvements on the plethora of existing treaties is the Mauritius Transparency Convention, although that multilateral instrument has not yet attracted many ratifications.¹⁰⁷ Another approach recently discussed in UNCITRAL reform deliberations is the OECD’s Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Sharing (MLI), which arguably allows more flexibility:

“It allows each party to specify the tax treaties to which the Convention will apply. When two parties specify a mutual treaty, a ‘match’ occurs, and a new layer of rules then applies to that treaty. In this regard, the MLI is similar to the Mauritius Convention. The MLI has an additional feature that may prove useful: it enables states to opt-in block-by-block or piece-by-piece, rather than signing or not signing the entire Convention. This feature means that there can be matches between and within particular blocks of rules. If two states sign

¹⁰⁴ Cleis, *supra* note 58, 205-6.

¹⁰⁵ *Id.* 237-8, 247.

¹⁰⁶ Hague Rules on Business and Human Right Arbitration, Code of Conduct, art. 4(2), www.cilc.nl.

¹⁰⁷ See generally Stephan W. Schill and Geraldo Vidigal, ‘Designing Investment Dispute Settlement à la Carte: Insights from Comparative Institutional Design Analysis’, in Chiara Giorgetti, Laura Letourneau-Trembley, Malcolm Langford and Daniel Behn, Special Issue: Reforming International Investment Arbitration, in 18 (2019) *Law and Practice of International Courts and Tribunals* (forthcoming). See also https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-3&chapter=22&clang=_en, and submissions (including by one of the present authors) and committee report due soon for an Australian parliamentary inquiry into ratification at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/ISDSUNConvention. See also

onto the framework and both opt for updating the procedural rules while only one accepts structural reforms, only the former would apply between them. Within the block of procedural reforms, if both end up accepting the code of conduct, but only one opts for a limitation on damages, only the former would apply to arbitrations under their treaties.

There could even be sub-matches: for instance, some states may choose strict regulation of third-party funding while other states choose disclosure only. In these topics, states may wish to define minimum standards or obligations, another feature of the MLI model. Minimum standards could provide useful additional flexibility for states on topics where their preferred reform options vary, but it is possible to agree on a common baseline.”¹⁰⁸

Option 2: IA with an appeals process

An appellate procedure for IA could address some criticisms of the legitimacy of IA, but appeal itself does not offer an obvious solution to the independence and impartiality problems discussed above. Rather, only certain forms of appeal might address these concerns. Generally, the greater proximity to full independence from the parties, the greater the likelihood that appeal would be seen as an improvement to the status quo. Moreover, the backgrounds of the members of the appellate body will influence perceptions of independence and impartiality. However, even a fully independent appellate body may not completely eliminate doubts about the independence and impartiality of the first-level arbitrators. Efforts of education and information spreading are always necessary.

1. Party appointment: Appeals may allay concerns about party appointment if the members of the appellate body are themselves not appointed by parties. But institutionally appointed arbitrators may be seen as loyal to certain institutions as well.

2. Arbitrator/party contact: An appellate body will not specifically address this concern, but specific cases head by the appeal panel might develop clear rules on what is appropriate. be able to do if in specific cases.

¹⁰⁸ Anthea Roberts, ‘UNCITRAL and ISDS Reform: Visualising a Flexible Framework’ EJIL:Talk! (24 October 2019) <https://www.ejiltalk.org/uncitral-and-isds-reform-visualising-a-flexible-framework/>

3. Multiples appointment/issue conflict: An appellate body may alleviate some concerns insofar as it would offer de novo review of the law and be seen as more independent of the parties. Parties however may continue to have concerns as even judges on an appellate body will develop views on legal issues that may cause parties to see them as partial (yet, all judges develop such views so these concerns, in so far as they exist, seem difficult to address).

4. Double-hatting: Depending on the specific regulation of the issue, an appellate body may dispel concerns about double-hatting if stakeholders believe it corrects instances of partiality caused by double-hatting. An appellate body should not allow for double-hatting by its members. This would mostly happen in the permanent appointment stage presumably, but may certainly arise in specific cases.

5. Challenges/disqualifications: An appellate body could be structured to allow specific challenges of its members during cases, and the vetting of the appellate arbitrators before their appointment to the appellate body would allow for broader scrutiny of their background. Yet the existence of the body does not in itself and without more assist in providing standards for disqualifying party-appointed arbitrators.

6. Implicit pro-investor bias: An appellate body would create less of an impression of a systemic pro-investor bias because its caseload and the judge's salary would not be systematically related to investor wins. At the same time, to the extent that investors will only use ISDS if the caselaw gives them a possibility to win, even an appellate body might be seen to be implicitly pro-investor.

7. Panel/annulment committee: If an appellate body had completely different decisionmakers, it would avoid clearly the problem created when certain individuals serve as both panel and annulment committee members in different cases.

8. Secretariat: The extent to which an appellate body would improve this problem would depend on how insulated the secretariat is from the parties.

Option 3: Multilateral investment court (MIC)

The specific architecture of a MIC is still being developed. Thus, whether a MIC would successfully address the concerns regarding independence and impartiality will turn, in large part, on the precise institutional design. That said, virtually all discussions of the proposed MIC

contemplate a number of distinctive features which depart significantly from, and thus could represent a significant improvement upon, current practices.

Notably, the proposed MIC would consist of a first instance tribunal and an appeal tribunal. The first instance tribunal would conduct hearings, undertake fact-finding, and apply applicable law to the facts. An appellate tribunal would hear appeals from the court of first instance. The appellate tribunal would review issues of law, including procedural shortcomings, and possibly manifest error in the appreciation of facts. It is intended that an appellate mechanism would ensure predictability and consistency in both doctrine and results. MIC judges will serve for a specified term of years, be appointed by the states party to the treaty creating the MIC, and be employed full-time.

These and other design features of the proposed MIC have significant implications for many of the concerns identified in this report.

1. Party appointment: The MIC would replace the current system of party appointment with a system of tenured judges. Proponents argue that tenured judges will exhibit greater independence and impartiality than ad hoc arbitrators, as they will not be beholden to the parties before them for current and future employment prospects. Critics counter that a state-controlled appointment mechanism will lead to a bench populated only by “pro-state” judges. Still others respond that states will adopt a “long term perspective” when selecting judges, recognizing that from time to time they may be respondents, and from time to their citizens will be claimants. Thus, states would seek neutral judges not biased towards investors or states. The precise selection criteria and processes associated with a future MIC will prove important to ensuring actual impartial and independent decision-making. Yet the perceived independence and impartiality emanating from a permanent court, with full-time judges accountable to states, would be significantly improved from that associated with party appointment.

2. Arbitrator/party contact: Having a group of full-time adjudicators would remove the link between arbitrators (or potential arbitrators) and counsel for investors and states who are the gate-keepers to appointment. At the same time, an MIC may introduce contact at a different stage of the process, as states may engage in contact with prospective judges when they are deciding which individuals to nominate to the MIC.

3. Multiple appointment/issue conflict: The adjudicators at the proposed MIC would most likely serve for long-term, non-renewable terms of office. Non-renewable terms obviate concerns

that arise from multiple appointments. That said, should judges on the future MIC have renewable terms, they may decide cases with an eye towards an upcoming re-election, particularly near the end of their term.¹⁰⁹ Thus, much will turn on the precise terms of the MIC, including how judges are selected, the length of their terms, and whether terms are renewable. The ban on double-hatting, discussed below, would address, in part, concerns about issue conflict.

4. Double-hatting: Under current proposals, the adjudicators at the proposed MIC would hold full-time positions. Consistent with practice at many other international courts, MIC judges would be precluded from engaging in other remunerated professional activities (with the possible exception of teaching). Thus, the MIC judges would not engage in the practice of double-hatting.

5. Implicit pro-investor bias: Proponents argue that a MIC would reduce or eliminate pro-investor bias. Judges' compensation will not be fee-based; permanent judges not dependent upon litigants for future appointments would have little economic incentive to produce "pro-investor" awards. If the MIC replaces the current arbitral system, there will be no competition for cases, meaning no need to incentivize claimants to file with the MIC as opposed to alternative fora. If the MIC exists alongside a vibrant IA system, then competition for cases may replicate whatever pro-investor bias now exists in the context of arbitrator appointments. At the same time, it remains possible that even a MIC could have a slight pro-investor bias to ensure that investors do not simply give up on this forum in favor of commercial arbitration.

6. Panel/annulment committee conflict: Assuming that different individuals serve on the first-level and appellate tribunals, the issue of panel/annulment conflict would not exist.

7. Secretariat: A new MIC would require institutional support. It is possible that an existing institution could play this role. Alternatively, the legal instrument creating the MIC could also provide for a secretariat. Regarding concerns that secretariat staff are too influential due to time pressures on arbitrators, a MIC staffed by full time adjudicators would alleviate this concern.

Option 4: No ISDS

Option 4 envisages a scenario without ISDS. In this case also, how independence and impartiality will fare will depend much on what the alternative dispute resolution mechanism will look like.

¹⁰⁹ See discussion in Olof Larsson, Theresa Squatrito, Øyvind Stiansen, and Taylor St John, *Selection and Appointment in International Adjudication: Insights from Political Science*, Academic Forum Concept Paper 2019/10.

The two possible options are using domestic courts or other inter-state international courts and arbitral tribunals, whose personal jurisdiction will most probably be limited to States and not investors.¹¹⁰

Domestic litigation has some advantages over investment arbitration from the perspective of independence and impartiality. (We leave aside here the other advantages and disadvantages of domestic litigation, including providing the same avenues of legal recourse to domestic and foreign investors, ease of enforcement, time and costs.) First, in states where the rule of law is entrenched, judges are far more likely to be truly independent of the parties. They may serve long terms and are typically prohibited from outside legal work. Their salary often does not turn on ruling for one party or the other (unless the government plays a role in their reappointment). Second, in many states judges are subject to significant mandatory ethical rules that help avoid perceptions of partiality. Those rules may be enforced through binding means like disciplinary sanctions or even removal from office.

However, there may be downsides to elimination of investment arbitration from the vantagepoint of independence and impartiality. First, even in states with a strong tradition of the rule of law, domestic courts can be biased, or perceived as such, against foreign investors or lack independence from the host state, or may interpret international law through methods that favor the interests of the state. As a result, investment arbitration may deliver better justice to the disputing parties, as party appointments of arbitrators mitigate this risk in investment arbitration. Second, many states that are parties to investment treaties have judiciaries that include judges who may not be independent or impartial. They may be under strong governmental control or susceptible to bribes; they may have frequent contacts with the litigants before them. It is thus difficult to determine whether, on balance, replacing investment arbitration with domestic adjudication would result in more independence and impartiality among decisionmakers. In some cases it would, and in others it probably would not.

¹¹⁰ Schill, 'From investor-state dispute settlement to a multilateral investment court? Evaluating options from an EU law perspective' in EP, EU investment protection after the ECJ opinion on Singapore: Questions of competence and coherence (2019) available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2019/603476/EXPO_STU\(2019\)603476_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2019/603476/EXPO_STU(2019)603476_EN.pdf)

A second alternative to investment arbitration is for a state to bring a claim against another state, known as state-state dispute settlement (“SSDS”).¹¹¹ Cases can be brought in an ad hoc arbitration, through a special claims commission or claims tribunal, or a standing tribunal such as the International Court of Justice. Such a claim might be brought after domestic litigation if the underlying law requires exhaustion of remedies, but it might be brought during or instead of such proceedings if exhaustion were not required. There have been three types of such claims in the field of investments, namely a state bringing a diplomatic protection claim on behalf of its investors, a state seeking an authoritative interpretation of a treaty, or a state seeking a declaratory award. Because all cases are brought by states, which have the sole discretion whether to espouse a claim or bring their own, the amount of cases would likely shrink dramatically.

SSDS has some advantages from the perspective of independence and impartiality. (As with domestic litigation, we leave aside advantages and disadvantages of SSDS that do not bear on the independence and impartiality of the decisionmakers, e.g., concerning the propriety of diplomatic protection.) First, because the judges or arbitrators are appointed by states, they may be seen as less motivated to advance the cause of investors generally, as discussed above under Option 3 regarding the MIC. Second, if state-state claims are brought before standing tribunals, such as the ICJ, they will be considered by permanent judges, who would be subject to special ethical requirements, such as bans on double-hatting. Third, because far fewer cases would be brought under SSDS compared to IA, the concerns about lack of independence due to multiple appointments of arbitrators by the same party are less (although the same law firms may be involved).

On the other hand, to the extent state-state claims are filed before ad hoc arbitrators, they may be subject to precisely the same concerns about independence and impartiality as those brought forward in respect of investment arbitration, e.g., loyalty to the party that appoints them, inappropriate contact with the parties (as shown in the recent *Slovenia-Croatia* maritime

¹¹¹ See generally Anthea Roberts, ‘State-to-state investment treaty arbitration: a hybrid theory of interdependent rights and shared interpretive authority’ (2014) 55 *Harvard International Law Journal* 1, 4; Jonathan Bonnitcha, Lauge Poulsen, and Michael Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford University Press, 2017) 66.

arbitration¹¹²), and double-hatting. Thus, the type of SSDS will bear a great deal on both the reality and perception of independence and impartiality. In that sense, SSDS may bring a different set of biases.

3. Conclusion

Reforming ISDS is momentous. ISDS is a complex dispute resolution mechanism that include many moving parts: touching one would likely influence how others work. In this short essay, we focused on issues linked to the independence and impartiality of arbitrators and examined how related criticisms would be addressed and possibly resolved under four proposed scenarios. Many states and other stakeholders seem ready to engage in a process of reform. In that sense, some kind of ISDS reform seems increasingly likely to occur in the near future. Yet, it remains difficult to predict with confidence where the reform is heading. Low-hanging fruits, such as the creation of a Code of Conduct for Arbitrators, seem very feasible. More overarching reforms is still further away. It is possible that some states, like the members of the European Union, will continue to pursue for systemic reforms. Other states will opt for more nuanced changes. While we are conscious that more in-depth analysis will be needed as the reform process progresses, we hope this initial assessment will assist policy-makers in developing tangible and necessary reform.

¹¹² As reported by, inter alia, Arman Sarvarian and Rudy Baker, ‘Arbitration between Croatia and Slovenia: Leaks, Wiretaps, Scandal’, EJILTalk! July 28, 2015.