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Who Decides Who Decides In International Investment Arbitration?

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WHO DECIDES WHO DECIDES IN INTERNATIONAL INVESTMENT ARBITRATION?

CHIARA GIORGETTI*

ABSTRACT

The past twenty years have witnessed a dramatic rise in international adjudication, and especially in international investment arbitration. As international investment arbitration has become more prominent and pervasive, one of its fundamental tenets has come under fire: the practice of having the parties themselves nominate one or more of the arbitrators. Critics contend that party-appointed arbitrators are inherently biased and thus propose eliminating party-appointments altogether. In this article, I argue that moving away from party-appointed arbitrators is unwarranted and unwise, and would too radically transform international investment arbitration. Instead, I propose a simpler solution: adopting stricter arbitrator challenge rules and enlarging the pool of arbitrators. There is no need to gut the arbitration selection system to fix it. Instead, the solution lies in improving the process of deciding who decides the world's international investment disputes.

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TABLE OF CONTENTS

1.	INTRODUCTION.....	433
2.	THE ARBITRATOR SELECTION PROCESS IN INTERNATIONAL INVESTMENT ARBITRATION	438
	2.1. <i>How are International Arbitrators Selected?</i>	440
	2.1.1. <i>Selection by Parties</i>	442
	2.1.2. <i>Selection by Neutral Third-Parties</i>	446
	2.2. <i>Eligibility Criteria: Qualifications and Competences of International Arbitrators</i>	449
	2.2.1. <i>Nationality</i>	449
	2.2.2. <i>Impartiality and Independence</i>	451
	2.2.3. <i>Legal Expertise and Other Requirements</i>	453
3.	DOES ARBITRATOR SELECTION WORK? AN ASSESSMENT	454
	3.1. <i>Criticisms of the Party-Appointment System Based on the Innate Bias</i>	454
	3.2. <i>Criticisms of the Party-Appointment System Based on the Lack of Diversity</i>	458
	3.3. <i>Responding to Criticisms: Why Party-Appointments Should Remain</i>	461
	3.3.1. <i>There Are No Good Alternatives</i>	462
	3.3.2. <i>Party Preference for Party-Appointments</i>	465
	3.3.3. <i>Party-Appointment Is an Essential Element of International Investment Arbitration</i>	469
	3.3.4. <i>Procedural Safeguards Exist to Protect the System</i> ..	471
4.	STRENGTHENING ARBITRATOR SELECTION PROCEDURES IN INTERNATIONAL INVESTMENT ARBITRATION.....	474
	4.1. <i>Ensuring Impartiality (and Legitimacy) By Adopting Different Challenge Rules</i>	474
	4.2. <i>Ensuring Diversity (and Legitimacy) By Enlarging the Pool of Arbitrators</i>	481
	4.2.1. <i>Actions By Appointing Authorities and Secretariats</i>	482
	4.2.2. <i>Actions By Parties</i>	484
5.	CONCLUSION	485

1. INTRODUCTION

The past twenty years have seen a tremendous rise in international litigation.¹ More parties are prone to use international law mechanisms to resolve their disputes, and more forums are available to resolve them.² Indeed, the multifaceted growth of international dispute resolution is widely considered “the single most important development of the post-Cold War age.”³ In today’s interconnected world, the tools used to resolve international disputes have never been more important.

¹ As an example, of the 125 cases filed at the International Court of Justice since 1947, 53 were filed after 1995, see *List of Contentious Cases*, INTERNATIONAL COURT OF JUSTICE, <http://www.icj-cij.org/docket/index.php?p1=3&p2=3> (last visited Oct. 1, 2013) (listing the name of all the contentious cases that have been filed with the ICJ since its inception, including the fifty-three cases filed since 1995). Similarly, there were only thirty-eight cases filed with the International Centre for the Settlement of Investment Disputes (ICSID) between 1972 and 1996, while fifty cases were filed in 2012 alone. See *ICSID Caseload Statistics*, INT’L CTR. FOR SETTLEMENT OF INV. DISPUTE, no. 2013-1, 2013, at 7, available at <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&CaseLoadStatistics=True&language=English41> (representing diagrammatically the fact that fifty cases were registered with ICSID during the 2012 calendar year indicating a sharp rise in international disputes as compared to the period between 1972). Also consider that more than ninety percent of the judgments in the European Court of Human Rights’ first fifty years were delivered between 1998 and 2009. Christiane Bourloyannis-Vrailas, *The European Court of Human Rights, in THE RULES, PRACTICE, AND JURISPRUDENCE OF INTERNATIONAL COURTS AND TRIBUNALS* 323, 324 (Chiara Giorgetti ed., 2012) (citing *50 Years of Activity: The European Court of Human Rights- Some Facts and Figures* (E. Ct. H.R. Pub., 2010), 3, 5).

² See generally *THE RULES, PRACTICE AND JURISPRUDENCE OF INT’L COURTS AND TRIBUNALS* (Chiara Giorgetti ed., 2012) (outlining the spectrum of the international arbitration field including the differing arbitral bodies, their performance and the overall efficacy of the system) [hereinafter *RULES OF INTERNATIONAL COURT*].

³ Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT’L L. & POL. 709, 709 (1999) (stating further that the enormous expansion of the international judiciary will probably be seen by future international lawyers and scholars as the single most significant post-cold war development in international law). See generally Jonathan I. Charney, *The Impact on the International Legal System of the Growth of International Courts and Tribunals*, 31 N.Y.U. J. INT’L L. & POL. 697 (1999) (discussing the history of international law and its contemporary ramifications, particularly the adherence to previous judgments and court procedures and the dramatic increase in the rate of change from ad hoc tribunals to permanent ones); Benedict Kingsbury, *Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?*, 31 N.Y.U. J. INT’L L. & POL. 679 (1999) (discussing the issue of the rapid proliferation of international courts and tribunals and the increased activity of many of the courts).

The growing importance of international courts and tribunals to resolve disputes has intensified scrutiny of their work. Nowhere is this truer than in the international investment arbitration context – the “fastest growing area of international law”⁴ and “the preferred option for the settlement of investment disputes.”⁵

International investment arbitration is a unique and semi-private dispute resolution mechanism.⁶ International investment tribunals are often challenged to resolve very complex cases, in terms of both their public policy and financial implications. Indeed, politically, international investment tribunals hear highly significant and sensitive public issues with effects that go beyond the claims of the parties; these claims include issues related to a country’s environmental policy, health regulations, and sovereign debt restructuring.⁷ For example, in 2007, tens of thousands Italian bondholders, who lost substantial portions of their investment in Argentina’s sovereign debt, challenged that country’s debt restructuring policy upon alleged violations of international investment law.⁸ In 2009, after lengthy and acrimonious litigations in both U.S. and Ecuadorian courts, the Chevron oil company initiated international investment proceedings in the Hague, against Ecuador, to contest billions of dollars that Ecuadorian courts mandated Chevron pay for environmental damage to

⁴ Charles H. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 CHI. J. INT’L L. 471, 472.

⁵ Christoph Schreuer, *The Future of Investment Arbitration*, in LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 787, 788 (Mahnoush H. Arsanjani et al. eds., 2011).

⁶ Brower & Schill, *supra* note 4, at 471.

⁷ GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 156, 159–64 (2007) (“[A]rbitrators autonomously resolve core questions of public law: whether legislation is discriminatory, whether regulation is expropriation, whether a court decision is unfair or inequitable. The difficulty here is not that these issues are resolved by international adjudication but that they are resolved by private adjudicator without adequate supervision by public judges.”).

⁸ *Abaclat & Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶¶ 68, 238(i)-(iii) (Aug. 4, 2011) (formerly *Giovanna A Beccara & Others v. Argentine Republic*). Note that the decision on jurisdiction of this case recognized the right of qualified bondholders to bring the case to an investment tribunal. The decision on the merit is still pending. In the current economic climate, this decision is highly anticipated and will likely have repercussion well beyond the present dispute.

Ecuadorian land.⁹ More recently, in November 2011, tobacco giant Philip Morris Asia challenged Australia's 2011 Tobacco Plain Packaging Act, which requires cigarette companies to adopt plain packages for cigarettes devoid of any individualized logo or intellectual property.¹⁰

Further, in regards to state finances, claims brought by investors can amount to a large part of the budget of respondent states, so that "the findings of the tribunal may require major adjustment to public policy."¹¹ Final awards often grant claimants hundreds of millions of dollars in damages.¹² For example, a recent decision awarded onshore crude producer Occidental approximately \$1.7 billion in a dispute against Ecuador.¹³ Two

⁹ *Chevron Corp. & Texaco Petroleum Co. v. Republic of Ecuador*, UNCITRAL, Case No. 2009-23, Claimant's Notice of Arbitration (Perm. Ct. Arb. Sept. 23, 2009). See also Request of the Republic of Ecuador to the United States (June 28, 2011) (containing a request by Ecuador to submit the dispute regarding international investment to an arbitral tribunal).

¹⁰ *Philip Morris Asia (H.K.) v. Commonwealth of Australia* UNCITRAL, Case No. 2012-12, Notice of Arbitration (Perm Ct. Arb. Nov. 11, 2011). The case was brought under the Honk Kong-Australia BIT and is still pending at the PCA. Philip Morris Asia contests the public health effects of the law claims that the regulation substantially deprives its investment of its value. Pleadings and information are available on the web site of the Australian Government at: <http://www.ag.gov.au/internationalrelations/internationallaw/pages/tobaccoplainpackaging.aspx>. A similar case was filed by the Swiss subsidiary of Philip Morris against Uruguay under the Switzerland-Uruguay BIT, in relation to legislation adopted in 2008-09 by Uruguay, requiring all cigarettes manufacturers to adopt a single presentation requirement. The case is *FTR Holding S.A., Philip Morris Products S.A. (Switz.) & Abal Hermanos S.A. (Uru.) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7 (2010). The case is pending in front of an ICSID Tribunal. For more information, see <https://icsid.worldbank.org/ICSID/FrontServlet>.

¹¹ Michael Waibel & Yanhui Wu, *Are Arbitrators Political?* (Nov. 5, 2011) (unpublished manuscript at 2, quoted with permission) (on file with author).

¹² See, e.g., *CME Czech Republic B.V. (Neth.) v. Czech Republic*, UNCITRAL, Final Award (Mar. 14, 2003) (ordering the respondent to pay U.S. \$269,814,000 plus interest accruing at a rate of ten percent to claimant); *EDF Int'l S.A., SAUR Int'l S.A. & León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award (Jun. 11, 2012) (awarding claimants U.S. \$136,138,430 for damages plus interest); *Kyriaki Karadeli, Eni Hit with Hefty Gas Price Hike*, GLOBAL ARB. REV. (Sept. 25, 2012), <http://globalarbitrationreview.com/news/article/30846/> (highlighting the UNCITRAL panel in The Hague ordering the Italian company ENI to pay €833 million to Dutch trader GasTerra).

¹³ *Occidental Petroleum Corp., et al. v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, ¶ 876(v) (Oct. 5, 2012).

pending cases claim damages for over four billion dollars each.¹⁴ To finance the settlement of an ICSID claim, for example, the government of Paraguay recently decided to issue treasury bonds for about U.S. \$21 million.¹⁵

Most international investment arbitrations are decided by a three-member arbitral tribunal comprised of two party-appointed arbitrators (one per side) and a presiding arbitrator, chosen either by the parties themselves or by a neutral third-party. By and large, the parties decide who resolves their international investment disputes.

In recent years, this party-constructed system has come under fire.¹⁶ Critics, focusing specifically on the selection of party-appointed arbitrators, argue that they are biased and lack diversity, and are therefore inadequate to decide international disputes.¹⁷

¹⁴ Yukos Universal Ltd. (Isle of Man) v. Russian Federation, Case No. AA 227 (Perm. Ct. Arb.); *Abaclat & Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶¶ 68, 238(i)-(iii) (Aug. 4, 2011) (formerly *Giovanna A Beccara & Others v. Argentine Republic*).

¹⁵ Sebastian Perry, *Paraguay to Settle ICSID Claim with Bond Issuance*, GLOBAL ARB. REV. (July 19, 2013), <http://globalarbitrationreview.com/news/article/31757/paraguay-settle-icsid-claim-bond-issuance>.

¹⁶ See generally Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT'L L. 45, 75-93 (2013) (discussing the changing nature of investment arbitration).

¹⁷ Anthony DePalma, *NAFTA's Powerful Little Secret; Obscure Tribunals Settle Disputes, but Go Too Far, Critics Say*, N.Y. TIMES, Mar. 11, 2001, www.nytimes.com/2001/03/11/business/nafta-s-powerful-little-secret-obscure-tribunals-settle-disputes-but-go-too-far.html (stating, in reference to NAFTA arbitration, that "[t]heir meetings are secret. Their members are generally unknown. The decisions they reach need not be fully disclosed. Yet the way a small group of international tribunals handles disputes between investors and foreign governments has led to national laws being revoked, justice systems questioned and environmental regulations challenged. And it is all in the name of protecting the rights of foreign investors."). See also VAN HARTEN, *supra* note 7 (discussing the effect of a perceived lack of openness in the arbitration system in terms of revealing the reasoning underpinning the reasoning of an award); Brower & Schill, *supra* note 4, at 489 (stating that critics argue that arbitration is not suited for settlement of public law disputes as the arbitrators are "privately contracted" by the parties); *Behind Closed Doors: A Hard Struggle to Shed Some Light on a Legal Grey Area*, THE ECONOMIST, Apr. 23, 2009, available at www.economist.com/node/13527961 (reviewing the issue of transparency and secrecy in international arbitration and assessing calls for increased transparency). Published statistics refute this assertion. For example, ICSID found that in cases decided by ICSID Tribunals as of 2012 under the rules of the ICSID Convention or of the Additional Facility, only forty-eight percent of all the awards uphold claims in part or in full, while twenty-two percent of the awards decline jurisdiction,

Thus far, the debate is largely confined to polarized practitioners who either defend the *status quo*¹⁸ or suggest the elimination of the party selection process entirely.¹⁹

I argue that both approaches miss the mark. In particular, the radical changes now on the table are both unwarranted and unwise, and would deprive the parties of one of the fundamental reasons that led them to choose international arbitration: they are the ones to decide who decides their dispute. In the end, one need not gut the arbitration system to fix it. A better solution lies in fixing it by adopting better challenges rules and enlarging the pool of arbitrators.

The analysis proceeds as follows. In Part I, I first explain the process by which arbitrators are selected, and then analyze the selectivity requirements to become an arbitrator. In Part II, I consider the problems with the current arbitrator selection process, and ultimately reject the call to abandon the party-appointment selection mechanism as a solution to these problems. In Part III, I propose an alternative solution to reform the process rather than gut it. In the end, reforms are necessary, and the ones I suggest will be sufficient to rescue and strengthen the international arbitration system.

twenty-nine percent dismiss claims, and one percent decide that claims are manifestly without legal merits. See *ICSID Caseload Statistics*, *supra* note 1, at 13. On this issue, see Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARV. INT'L L.J. 435, 477–487 (2009) (arguing that the international arbitration system currently functions reasonably well without needing radical structural overhaul) and Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. REV. 1, 49–50 (2007) (statistically supporting the contention that more than 57.7% of cases end without investors receiving an award or payment of an award).

¹⁸ See e.g., Charles N. Brower, Michael Pulos & Charles B. Rosenberg, *So Is There Anything Really Wrong with International Investment Arbitration as We Know it?*, in THE FORDHAM PAPERS 2012 (Arthur W. Rovine ed., 2013) (suggesting that certain alterations or 'tweaks' to the system of appointment of arbitrators could be beneficial to international arbitration).

¹⁹ See Jan Paulsson, *Moral Hazard in International Dispute Resolution*, 25 ICSID REV. F. INV. L.J. 339, 355 (2010) (“[M]y proposal that we turn our backs on the practice of unilateral appointments.”); Hans Smit, *The Pernicious Institution of the Party-Appointed Arbitrators*, COLUM. FDI PERSP., no. 33, 2010, at 1, available at http://www.vcc.columbia.edu/files/vale/print/Perspective_33_Smit_2.pdf (stating that “party-appointed arbitrators should be banned” unless their affiliation to the party that nominated them is fully disclosed).

2. THE ARBITRATOR SELECTION PROCESS IN INTERNATIONAL INVESTMENT ARBITRATION

International investment arbitration is a *sui generis* dispute resolution system rooted in public international law, which characteristically involves disputes between a foreign private investor and the state recipient of the investment.²⁰ At its core, the system seeks to create a neutral forum to arbitrate disputes between foreign investors and host states²¹ and to provide an impartial and reliable dispute resolution system outside national courts of either of the parties involved.²² Parties' preference for arbitration has made it "the first-choice method of binding dispute resolution."²³

State consent to settle investor disputes with international investment arbitration is most often expressed in bilateral

²⁰ For a short overview, see generally Brooks W. Daly, *Permanent Court of Arbitration*, in RULES OF INTERNATIONAL COURT, *supra* note 2, at 37; Carolyn Lamm et al., *International Center for the Settlement of Investment Disputes*, in RULES OF INTERNATIONAL COURT, *supra* note 2, at 77 (discussing in detail the establishment of a neutral forum to decide disputes between states and foreign investors); Abby Cohen Smutny, *Arbitration Before the International Centre for Settlement of Investment Disputes*, 2002 BUS. L. INT'L 367 (2002); Abby Cohen Smutny, *ICSID Arbitration: Procedural Review*, 2 TRANSNAT'L DISP. MGMT. 35 (2005) (discussing the proliferation of bilateral and multilateral investment treaties which provides a forum to settle disputes).

²¹ SCHREUER, *supra* note 5, at 788 ("International arbitration provides an attractive alternative to the settlement of investment disputes by national courts or through diplomatic protection. Arbitration offers the parties the opportunity to select arbitrators who enjoy their confidence and who have the necessary expertise in the field. The private nature of the arbitration, assuring the confidentiality of proceedings, is often valued by parties to major economic development projects, although recently there have been calls for more transparency in international arbitration.").

²² W. Michael Reisman, *International Arbitration and Sovereignty*, 18 ARB. INT'L 231, 235 (2002) ("The private actor is generally unwilling to subject itself to the jurisdiction of the courts in command economies or economies in transition and even when a local judiciary can boast a decree of independence, the prudent foreign investor will be alert to subtle factors that could predispose a national court in favor of the home-town team. For its part, the government that hosts an international transaction or is a party to it is, ordinarily, unwilling to subject itself to the jurisdiction of the national courts of the foreign investor.").

²³ Adrian Winstanley, *Why Arbitration Institutions Matter*, LAW IN TRANSITION: CONTRACT ENFORCEMENT, Autumn 2001, at 33, 34; *see id.* at 33 (identifying several reasons that explain parties' favor for arbitration, including privacy and confidentiality, cost-effectiveness, party-control, neutrality, and speed).

international treaties (BITs).²⁴ These treaties generally designate investment arbitration to resolve disputes thus inserting a predominately private international law dispute resolution mechanism onto public international law.²⁵ Indeed, Professor Anthea Roberts calls international treaties the “platypus of international law,” because, although they share certain features with better-known species, they remain a very distinctive and exceptional animal.²⁶

²⁴ Indeed, the exponential growth of international investment in recent years has resulted in a tangible increase in BITs between foreign states, as well as regional and multilateral investment treaties. More rarely, consent can also derive from a contract between the state and the foreign investor in relation to a particular project or from national legislation. See Antonio R. Parra, *The Settlement of Investment Dispute: The Experience of ICSID in Transitional Countries and Elsewhere*, LAW IN TRANSITION: CONTRACT ENFORCEMENT, Autumn 2001, at 38, 39 (noting that the number of BITs has risen from 400 by the end of 1990 to 2,000 in 2000, and about 170 countries have signed one or more of these treaties.); see also Brower & Schill, *supra* note 4, at 472 (explaining that “investment treaties have proliferated to an unprecedented degree, having surged from less than 400 in 1989 to well over 2,500 bilateral, regional and sectorial treaties today” and that “the volume on investor-state arbitrations under these treaties has risen just within the last decade to well over two hundred, with new arbitrations being initiated on an almost daily basis.”).

²⁵ Roberts, *supra* note 16, at 45 (“[T]he investment treaty system grafts private international law dispute resolution mechanisms onto public international law treaties. However, there are other ways to understand the beast based on the regulatory relationship it establishes between host states (as governors) and foreign investors (as governed).”). The prototypical investment dispute no longer concerns a relatively easily identified case of nationalization of property without payment of compensation. Instead, “[i]nvestors are increasingly challenging specific regulatory actions [taken with respect to a particular investor] (such as the denial of building or operating permits) or general regulatory measures [adopted with respect to the public at large] (such as measures taken concerning the economy, the environment, human rights, and health and safety)” where these have adverse effects on foreign investors. *Id.* at 45-46. See also Andrea K. Bjorklund, *The Emerging Civilization of Investment Arbitration*, 113 PENN. ST. L. REV. 1269, 1270 (2008) (“Investment arbitration often involves public international law grafted onto a substructure of private commercial arbitration.”).

²⁶ Roberts, *supra* note 16, at 93. In terms of origin, international treaties are public international law agreements entered into by states acting in their public capacities. In terms of procedure, they permit investors to bring arbitral claims directly against states based on rules closely resembling those developed in the private international law that governs international commercial arbitrations and investor-state contracts. In terms of function, they empower privately constituted arbitral tribunals to hear cases going to the heart of states’ public, regulatory powers. And in terms of subject matter, they require a sensitive balancing of individual rights against societal interests, and economic interests against non-

One of these distinctive features is that the parties involved in the case - a private actor and a state - are largely in charge of deciding who decides their dispute. In the section below, I first explain how arbitrator selections are made, and then assess the requirements used to select arbitrators.

2.1. *How Are International Investment Arbitrators Selected?*

Professor William W. Park, a frequent arbitrator, remarked that the three key elements in international arbitration are "arbitrator, arbitrator, arbitrator."²⁷ Indeed, because arbitration decisions come from the arbitral panels, it is essential to understand who selects the international arbitrators that take the decision - and who gets selected.²⁸ The selection and appointment of arbitrators in international tribunals involves multiple steps, which depend on the applicable international treaty and the institutional rules applicable to the dispute.²⁹

The specific applicable procedures are found in the relevant dispute resolution instrument on which the parties rely to bring the case, normally the applicable BIT or a regional investment and trade agreement.³⁰ Dispute resolution instruments generally

economic goals, in a manner reminiscent of human rights law and trade law treaties. *Id.* at 93-94.

²⁷ Catherine A. Rogers, *The International Arbitrator Information Project: An Idea Whose Time Has Come*, KLUWER ARBITRATION BLOG (Aug. 9, 2012), <http://kluwarbitrationblog.com/blog/2012/08/09/the-international-arbitrator-information-project-an-idea-whose-time-has-come/> (citing Rusty Parks' remark that, "[i]n real estate the three key elements are 'location, location, location,' . . . in arbitration the applicable trinity is 'arbitrator, arbitrator, arbitrator.'").

²⁸ Indeed, the legitimacy of judicial decision-making relies on the person making the decision. This is all the more true in international investment arbitration, which is essentially premised on the free acceptance by private parties of the arbitral procedure. See generally Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705 (arguing that decision makers who are perceived as legitimate enhance the legitimacy of the dispute resolution system itself). See also Nienke Grossman, *Legitimacy and International Adjudicative Bodies*, 41 GEO. WASH. INT'L L. REV. 107, 110 (2009) (arguing that a legitimate international adjudicative body is one whose authority is perceived as justified).

²⁹ For an excellent discussion on the selection process at the International Court of Justice and the International Criminal Court, see generally Ruth Mackenzie et al., *SELECTING INTERNATIONAL JUDGES: PRINCIPLES, PROCESS, AND POLITICS* (2010).

³⁰ More rarely, a contract or national investment law may also provide for international investment arbitration as an option. See *ICSID Caseload Statistics*,

provide for arbitration either under the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention), or under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL Arbitration Rules).³¹ For example, the recently redrafted 2012 U.S. Model BIT explains that claimants can submit their claims under the ICSID Convention and ICSID Rules, the ICSID Additional Facility Rules, or the UNCITRAL Arbitration Rules.³²

supra note 1 (graphically indicating the number of cases registered in a calendar year).

³¹ See Convention of the Settlement of Investment Disputes Between States and Nationals of Other States (amended April 2006) [hereinafter ICSID Convention]; UNCITRAL Arbitration Rules as revised in 2010, G.A. Res. 65/22, U.N. Doc. A/RES/65/22 (Jan. 10, 2010) [hereinafter UNCITRAL Arbitration Rules (2010)]. In this article, I focus on ICSID and the PCA because the great majority of the known international investment disputes are brought in one of these *fora* and are resolved under their rules of procedures. Conclusions reached analyzing their practice, therefore, provide generally applicable lessons.

³² U.S. MODEL BIT, art. 24(3) (2012), available at <http://www.state.gov/e/eb/ifa/bit/index.htm> (indicating that “[p]rovided that six months have elapsed since the events giving rise to the claim, a claimant may submit a claim referred to in paragraph 1: a. under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both respondent and the non-disputing Party are parties to the ICSID Convention; b. under the ICSID Additional Facility Rules, provided that either the respondent or the non-disputing party is a party to the ICSID Convention; c. under the UNCITRAL Arbitration Rules; or d. if the claimant and respondent agree, to any other arbitration institution or under any other arbitration rules”). Similarly, Chapter Eleven of the North American Free Trade Agreement (NAFTA) contains provisions related to the settlement of disputes related to cross-border investors and provides that investors can submit their claims under the ICSID Convention, the ICSID Additional Facility Rules or under the UNCITRAL Arbitration Rules. North American Free Trade Agreement (NAFTA) art. 1120, 32 I.L.M. 289 (1992), available at <http://www.nafta-alena.gc.ca/en/view.aspx?x=299&mtpiID=142 #A1125> (indicating that “[e]xcept as provided in Annex 1120.1, and provided that six months have elapsed since the events giving rise to a claim, a disputing investor may submit the claim to arbitration under: (a) the ICSID Convention, provided that both the disputing Party and the Party of the investor are parties to the Convention; (b) the Additional Facility Rules of ICSID, provided that either the disputing Party or the Party of the investor, but not both, is a party to the ICSID Convention; or (c) the UNCITRAL Arbitration Rules”). Other rules complete the procedural framework applicable to ICSID disputes, including the ICSID Rules for Arbitration Proceedings, the Administrative and Financial Regulations, the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings and the Additional Facility Rules. These rules can be found on the website of ICSID at <https://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp>. UNCITRAL rules can be found on the PCA website at <http://pca-cpa.org/shownews>

As discussed below, the selection of the three-person arbitral tribunal is done by the parties to the dispute themselves, or by a neutral appointing authority.³³ Each party typically appoints one arbitrator, and the presiding arbitrator is selected by agreement of the parties, or, more often, by an appointing authority.³⁴

2.1.1. Selection by Parties

In most cases, each party in the dispute selects at least one arbitrator. This allowance gives the parties substantial say on the persons selected to judge their case, and is one of the most important features of international arbitration. As one commentator explains “the selection of the party-appointed arbitrator may be the most critical decision in an international

.asp?ac=actual&pag_id=1261. Similarly, the Permanent Court of Arbitration also provides for additional and more specific rules. In December 2012, the Administrative Council of the PCA adopted a new set of procedural rules, the “PCA Arbitration Rules 2012,” for the arbitration of disputes involving at least one State, a State-controlled entity, or an international organization, which consolidate previous rules of procedures. The new Rules are available at http://www.pca-cpa.org/showpage.asp?pag_id=1188. They are a consolidation of four sets of PCA procedural rules from the 1990s – the Optional Rules for Arbitrating Disputes between Two States (1992), the Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State (1993), the Optional Rules for Arbitration Between International Organizations and States (1996), and the Optional Rules for Arbitration Between International Organizations and Private Parties (1996).

³³ There are three overall mechanisms to select international judges and arbitrators: by the parties in the dispute, by a neutral party, or by election. As discussed in details *infra*, in most international arbitrations, the parties themselves can select their own arbitrators. Parties can also select *ad hoc* judges at the International Court of Justice (ICJ) in certain circumstances. Second, arbitrators can be selected by a neutral third party under certain circumstances, including inaction by one of the disputing party, the selection of the President of the tribunal and the selection of members of *ad hoc* committees. A neutral appointing authority can also be tasked with the selection of specific arbitrators. Third, judges in international courts are first nominated (usually by a national nominating committee) and then elected by a decision making body of an international organization (for example the General Assembly and the Security Council of the United Nations). In UN courts, including the International Courts of Justice and the International Criminal Court, the election of judges is partially a political process subject to election campaigning and vote trading. *See generally* Mackenzie et al., *supra* note 29 (describing in detail the process of selecting judges).

³⁴ *See generally* Lamm et al., *supra* note 20.

arbitral proceeding.”³⁵ It can be even at par with the choice of counsel.³⁶

For the parties, having a say in deciding their case is both appealing and reassuring, and strengthens their support to the entire process.³⁷ Parties to international investment arbitration consistently indicate party-appointment as a strong reason to prefer arbitration to litigation.³⁸ Professor Catherine Rogers calls the notion of party-appointed arbitrators “the ultimate form of forum shopping” because the arbitral tribunal can, in the absence of party agreement, determine many pivotal procedural issues, as well as the nature and conduct of hearings, the allocation of costs and fees, issues of evidence, and of course the tribunal ultimately decides the substantive outcome of the case.³⁹

³⁵ Claudia T. Salomon, *Selecting an International Arbitrator: Five Factors to Consider*, 17 MEALEYS INT’L ARB. REP. 10 (2002). Similarly, Wendy Miles notes “[t]he constitution of the arbitral tribunal is one of the most important steps in an international arbitration. The skills and qualifications of the arbitrator/s and the number of members on the tribunal may have significant impact on the development of the dispute resolution and, ultimately, the award itself.” Wendy Miles, *International Arbitrator Appointment*, 57 DISP. RESOL. J. 36, 37 (2002).

³⁶ See Constantine Partasides, *The Selection, Appointment and Challenge of Arbitrators*, 5 VINDOBONA J. 217, 217 (2001) (observing that the ability of the parties to influence the composition of the arbitral tribunal is one of the defining aspects of the arbitral process and that “their power to appoint, and the power to challenge, arbitrators are two of their most powerful tools”).

³⁷ See Susan D. Franck, *The Role of International Arbitrators*, 12 ILSA J. OF INT’L & COMP. L. 502, 503 (2006) (mentioning that the parties prefer the outcomes of their disputes to be warranted by a fair legal process which involves an independent legal analysis of the dispute); Catherine A. Rogers, *The Vocation of International Arbitrators*, 20 AM. U. INT’L L. REV. 957 (2005) (stating that in modern scenarios parties want the outcomes of their disputes to be warranted by reasons from an impartial authority bound by law); Rogers, *supra* note 27 (“Empirical studies consistently verify that parties’ ability to select arbitrators is one of the primary reasons they select arbitration as a means of dispute resolution.”).

³⁸ In view of the current debate on the best selection method for arbitral tribunal, a recent survey asked private practitioners, in-house counsel and arbitrators what were their preferred methods for selecting arbitrators. A substantial majority of respondents (seventy-six percent) preferred the selection of two co-arbitrators by each party unilaterally. The authors of the survey concluded “these figures show that there is general disapproval of the recent proposals calling for an end to unilateral party appointment.” Paul Friedland & Stavros Brekoulakis, *2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process*, WHITE & CASE, p. 5 (2012), http://annualreview2012.whitecase.com/International_Arbitration_Survey_2012.pdf.

³⁹ Rogers, *supra* note 27.

The dispute resolution clause of most BITs typically provides for the arbitration selection method to be adopted in the proceedings. For example, the 2012 U.S. Model BIT provides that, unless otherwise agreed by the disputing parties, "the tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties."⁴⁰

In the absence of choice, the ICSID Convention also contains default rules. Under ICSID, the arbitral Tribunal "shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the president of the Tribunal, appointed by agreement of the parties."⁴¹ UNCITRAL Rules contain a similar provision. They provide that "if three arbitrators are to be appointed, each party shall appoint one arbitrator."⁴²

⁴⁰ U.S. MODEL BIT, *supra* note 32, at art. 27 (providing for the selection of arbitrators). Likewise, NAFTA Article 1123 provides for the number of arbitrators and method of appointment and explains that "unless the disputing parties otherwise agree, the Tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties." NAFTA, *supra* note 32, at art. 1123 (providing for the Number of Arbitrators and Method of Appointment).

⁴¹ ICSID Convention, *supra* note 31, at art. 37 ("(1) The Arbitral Tribunal shall be constituted as soon as possible after registration of a request pursuant to Article 36 (2) (a) The Tribunal shall consist of a sole arbitrator or any uneven number of arbitrators appointed as the parties shall agree (b) Where the parties do not agree upon the number of arbitrators and the method of their appointment, the Tribunal shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the president of the Tribunal, appointed by agreement of the parties.").

⁴² The Rules of the United Nations Commission on International Trade Law, commonly referred to as UNCITRAL Rules, were first adopted by the UN General Assembly in 1976 by G.A. Res. 31/98, U.N. GAOR, 35th Sess., Supp. No. 17, U.N. Doc. A/31/17 at 182 (Dec. 15, 1976) (recognizing the value of arbitration in the settling of disputes) [hereinafter UNCITRAL Arbitration Rules (1976)]. The Rules were revised in 2010 and the 2010 UNCITRAL Rules were adopted by the UN General Assembly with G.A. Res. 65/22. They apply to arbitration agreement concluded after August 15, 2010. UNCITRAL Arbitration Rules are recognized as a very successful text and are used in a variety of cases, including disputes between private commercial parties, investor-State disputes, State-to-State disputes, and commercial disputes. The first paragraph of the UNCITRAL Rules, art. 9 (2010) provides that "1. If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the arbitral tribunal." The full text of the Rules can be found on the website of the Permanent Court of Arbitration at http://PCA-CPA.org/showpage.asp?pag_id=1064.

Parties and their counsel spend substantial time and resources selecting the party-appointed arbitrator, underlining the importance of the issue.⁴³ A proposed arbitrator's prior decisions and academic writings are scrutinized, as are any previous professional positions and relations.⁴⁴ In selecting their candidates, parties also take into consideration the applicable law, the forum, the kind of dispute, the location, the nationality of the parties, as well as many others issues.

Selection is also affected by a party's position in the case. For the claimant, the choice of arbitrator comes early, as the claimant has the right to nominate an arbitrator in the request for arbitration with which the arbitration begins. Thus, as the claimant goes first, the selection of the claimant's arbitrator is particularly delicate because it is done without knowledge of any other member of the tribunal or counsel for opposing party, and in the general posture of the case.⁴⁵ The selection is normally completed after serious research by counsel representing the claimant in consultation with the client.

The selection of arbitrators by the respondent state is also often complex, as it involves the advice of several governmental agencies

⁴³ Claudia T. Salomon advises to take five factors into consideration when choosing an arbitrator: first, select someone with legal and professional experience; second, choose an impartial but known party-appointed arbitrator and a neutral president; third, choose an arbitrator who manages people well; fourth, choose an arbitrator who demonstrates communicative proficiency and juridical open-mindedness; fifth and finally, choose an arbitrator with a manageable case-load. See Doak Bishop & Lucy Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration*, 14 *ARB. INT'L* 395, 395 (1998) (emphasizing that selection of an arbitrator by one party is the single most determinative step in arbitration); Claudia T. Salomon, *Selecting an International Arbitrator: Five Factors to Consider*, 17 *MEALEY'S INT'L ARB. REP.* 1, 1-4 (2002). See also Andreas Lowenfeld, *The Party-Appointed Arbitrator in International Controversies - Some Reflections*, 30 *TEXAS INT'L L. J.* 59, 60 (1995) (reflecting on certain aspects of the process of selecting arbitrators); James Wangelin, *Effective Selection of Arbitrators in International Arbitration*, 14 *MEALEY'S INT'L ARB. REP.* 69, 70 (1999) (citing Lord Hacking's list of qualifications for an arbitrator).

⁴⁴ LUCY REED, JAN PAULSSON & NIGEL BLACKABY, *GUIDE TO ICSID ARBITRATION* 77-79 (2d. ed. 2011).

⁴⁵ Waibel & Wu, *supra* note 11, at 13 ("The parties to investment arbitration cases and especially their counsel spend a great deal of time and effort to scrutinize the backgrounds of arbitrators, their relationship with the parties, published works and prior appointments. The time spent on choosing the right arbitrators suggests that the personality and background of the arbitrator matters substantially for arbitration outcomes.").

that can potentially be involved in the litigation. In the United States, the office of the legal adviser of the State Department often takes the lead, although it often consults with U.S. government offices, including the Department of Commerce, the Treasury and the Office of the U.S. Trade Representative.⁴⁶ Given the growing public relevance of international investment arbitration, the selection of the arbitrator by the state also becomes essential, as it is an important instrument for the state to broaden the dispute beyond its bilateral terms and to include adequate consideration of the public interest.⁴⁷

In the great majority of cases, parties themselves select their arbitrators; in the International Centre for Settlement of Investment Disputes, this occurs up to seventy-five percent of the time.⁴⁸

2.1.2. Selection by Neutral Third-Parties

A neutral authority can also play a role in the arbitrators' selection process under both ICSID and UNCITRAL rules. The neutral appointing authority selects an arbitrator when, as it is often the case, there is no agreement among the parties on the selection of the president of the arbitral tribunal, or when one of the parties defaults in its selection.⁴⁹

⁴⁶ Jeremy K. Sharpe, *Representing a Respondent State in Investment Arbitration*, in LITIGATING INTERNATIONAL INVESTMENT DISPUTES: A PRACTITIONER'S GUIDE (Chiara Giorgetti ed.) (forthcoming Martinus Nijhoff Publishers, 2014).

⁴⁷ See, e.g., George H. Aldrich, *The Selection of Arbitrators*, in THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION 65 (David D. Caron & John R. Crook eds., 2000) (discussing in some detail the process of choosing the third-country arbitrators at the Iran-U.S. Claims Tribunal).

⁴⁸ Eloise M. Obadia, *Remarks by Eloise M. Obadia at 105th ASIL Annual Meeting*, 105 AM. SOC'Y INT'L PROC. 74 (2011). Historically, of the total 850 appointments made by ICSID in cases registered under the ICSID Convention and Additional facility since its first case, 460 were made by parties. In 2012, party-appointed arbitrators counted for 101 of the 139 appointments, showing a trend toward greater party-selection. *ICSID Caseload Statistics*, *supra* note 1, at 19, 31.

⁴⁹ ICSID Rules of Procedure for Arbitration Proceedings, r. 3 (amended 2006) [hereinafter ICSID Arbitration Rules] (stating rule three titled "Appointment of Arbitrators to a Tribunal Constituted in Accordance with Convention Article 37(2)(b))" and provides that "(1) If the Tribunal is to be constituted in accordance with Article 37(2)(b) of the Convention: (a) either party shall in a communication to the other party: (i) name two persons, identifying one of them, who shall not have the same nationality as nor be a national of either party, as the arbitrator appointed by it, and the other as the arbitrator proposed to be the President of the Tribunal; and (ii) invite the other party to concur in the appointment of the arbitrator proposed to be the President of the Tribunal and to appoint another

In ICSID proceedings, if the respondent defaults or the parties cannot agree on a president, the Chairman of ICSID's Administrative Council, who is also the President of the World Bank, will appoint the missing arbitrators.⁵⁰ In his choice of arbitrators, the Chairman of the ICSID Administrative Council is restricted to those people listed in a Panel of Arbitrators, which contains names of arbitrators selected by ICSID Contracting Parties and by the Chairman.⁵¹ The Chairman also selects the three

arbitrator; (b) promptly upon receipt of this communication the other party shall, in its reply: (i) name a person as the arbitrator appointed by it, who shall not have the same nationality as nor be a national of either party; and (ii) concur in the appointment of the arbitrator proposed to be the President of the Tribunal or name another person as the arbitrator proposed to be President; (c) promptly upon receipt of the reply containing such a proposal, the initiating party shall notify the other party whether it concurs in the appointment of the arbitrator proposed by that party to be the President of the Tribunal. (2) The communications provided for in this Rule shall be made or promptly confirmed in writing and shall either be transmitted through the Secretary-General or directly between the parties with a copy to the Secretary-General"). See also ICSID Convention, *supra* note 31, at art. 37.

⁵⁰ ICSID Convention, *supra* note 31, at art. 38 ("If the Tribunal shall not have been constituted within 90 days after notice of registration of the request has been dispatched by the Secretary-General in accordance with paragraph (3) of Article 36, or such other period as the parties may agree, the Chairman shall, at the request of either party and after consulting both parties as far as possible, appoint the arbitrator or arbitrators not yet appointed. Arbitrators appointed by the Chairman pursuant to this Article shall not be nationals of the Contracting State party to the dispute or of the Contracting State whose national is a party to the dispute."). In practice, what happens is that once the ninety days have expired, the ICSID Secretariat would first try to find an agreement between the parties. To that end, they will first propose to the parties a roster of three persons and ask the parties to advise the Secretary General - and not each other - whether they would agree on these proposals, without explanations. If the parties agree, then the person is named and becomes the president of the tribunal. This result would be counted as a party-selection. See Obadia, *supra* note 48, at 76. NAFTA similarly provides that if the tribunal is not constituted within ninety days from the date of the claim submission to arbitration, the Secretary-General, on the request of either disputing party, shall appoint the arbitrators not yet appointed. See also NAFTA, *supra* note 32, at art. 1124(2), 275 (providing that "If a Tribunal, other than a Tribunal established under Article 1126, has not been constituted within 90 days from the date that a claim is submitted to arbitration, the Secretary-General, on the request of either disputing party, shall appoint, in his discretion, the arbitrator or arbitrators not yet appointed, except that the presiding arbitrator shall be appointed in accordance with paragraph 3").

⁵¹ ICSID Convention, *supra* note 31, at art. 40 ("(1) Arbitrators may be appointed from outside the Panel of Arbitrators, except in the case of appointments by the Chairman pursuant to Article 38."). Each contracting state has a right to designate up to four persons to the Panel of Arbitrators. The

members of *ad hoc* annulment committees, a special, party-led procedure that offers limited review on awards. When selecting members of *ad hoc* annulment committees, the Chairman is also limited to nominate only members from the Panel of Arbitrators and cannot designate those nominated to the Panel of Arbitrators by either of the two States involved.⁵²

Similarly, under both the UNCITRAL Rules of 1976,⁵³ and 2010,⁵⁴ parties can request the Secretary General of the PCA to designate an "appointing authority" for the purpose of appointing an arbitral tribunal if they fail to do so by the proscribed limit of thirty days.⁵⁵ In addition, under the 2010 UNCITRAL Rules, a party may also propose that the PCA Secretary General himself acts as the appointing authority.⁵⁶

UNCITRAL provisions also specify how the appointing authority should make his nomination. First, at the request of one of the parties, the appointing authority communicates to both parties an identical list containing at least three names for possible appointment as arbitrator. Second, within a specified deadline, each party returns the list to the appointing authority after deleting the names to which the party objects and numbering the remaining

Chairman of the ICSID Administrative Tribunal can designate ten persons. The appointment is for ten years, but it can continue until the nomination is expressly revoked.

⁵² The latest published ICSID Statistics explain that as of May 20, 2012, there were 158 signatories to the ICSID Convention. See *List of Contracting States And Other Signatories of the Convention*, ICSID (Nov. 1, 2013), <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English>. Under ICSID Convention, article 13, each Contracting party may designate to the Panel of Arbitrators four persons, including its nationals. The Chairman can designate ten persons, each having a different nationality. Not all contracting states have exercised their right to nominate. Obadia states that there were 350 persons designated to the panel of arbitrators in April 2011. See Obadia, *supra* note 48, at 75.

⁵³ Note that under UNCITRAL Rules, the first attempt to choose the presiding arbitrator is given to the two part-appointed arbitrators. U.N. Comm'n on Int'l Trade Law (UNCITRAL), Arbitration Rules, G.A. Res. 31/98, art. 6, 7, 12, U.N. Doc. A/RES/31/98 (Dec. 15, 1976).

⁵⁴ U.N. Comm'n on Int'l Trade Law (UNCITRAL), Arbitration Rules (as revised in 2010), G.A. Res. 65/22, art. 6.8-13, U.N. Doc. A/RES/65/22 (Jan. 10, 2010).

⁵⁵ PERMANENT COURT OF ARBITRATION, 111TH ANN. REP. 1 (2011). For an interesting overview of the PCA's appointing authority activity in 2011, see *id.* at 11-13.

⁵⁶ UNCITRAL Arbitration Rules (2010), *supra* note 31, at art. 6.

names on the list in the order of preference. Third, and finally, the appointing authority will select the missing arbitrators following the preferences outlined by the parties.⁵⁷ The majority of the requests to appoint Respondent's arbitrators were withdrawn as the selection was then made by the party itself.⁵⁸

After detailing who decides, the next section examines who can be nominated, and thus be asked to decide.

2.2. Eligibility Criteria: Qualifications and Competences of International Arbitrators

In addition to providing a framework that specifies how to select arbitrators, applicable rules of procedure also require arbitrators to possess certain legal qualifications and competences, which, as discussed below, are rather general.⁵⁹

2.2.1. Nationality

First, under both ICSID and UNCITRAL rules, certain nationality restrictions apply. Under Article 39 of the ICSID Convention, the majority of the Tribunal must be "nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute."⁶⁰ To

⁵⁷ See *id.* at art. 6. See also UNCITRAL Arbitration Rules (1976), *supra* note 42, at art. 7.

⁵⁸ PERMANENT COURT OF ARBITRATION, *supra* note 55, at 11-13. Note that in 2011, under the above UNCITRAL provisions, the PCA received eighteen new requests for the Secretary-General to designate an appointing authority for the appointment of arbitrators and ten requests for the Secretary-General to act as appointing authority for the appointment of arbitrators. Among these, eight relate to the appointment of the presiding arbitrator or a sole arbitrator. *Id.*

⁵⁹ Note that more recently, newly constituted courts and tribunals have added more detailed requirements for selection. Specifically, the Statute of the recently established International Criminal Court requires judges to have expertise in criminal law and procedure or, alternatively, have expertise in international humanitarian law and human rights law. See Rome Statute of the International Criminal Court, art. 36, U.N. Doc. A/CONF.183/9 (July 17, 1998) (requiring geographical distribution and representation of the principle legal systems of the world, as well as a fair representation of female and male judges).

⁶⁰ ICSID Convention, *supra* note 31, at art. 39 ("The majority of the arbitrators shall be national of States other than the Contracting State party to the dispute and the Contracting State whose national is a part to the dispute and the Contracting State whose national is a party to the dispute; provided, however, that the foregoing provisions of this Article shall not apply if the sole arbitrator or each individual member of the Tribunal has been appointed by agreement of the parties.").

avoid that the party making the first appointment selects one of its nationals, and thus blocks the other party from doing the same, Rule 1(3) of the ICSID Arbitration Rules requires the consent of the other party to appoint national arbitrators.⁶¹

Rules under UNCITRAL are similarly general, but are somehow less stringent in relation to nationality requirements. Article 7 of UNCITRAL requires the appointing authority to only take into account "the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties."⁶²

The reasons for the exclusion of arbitrators who share the same nationality with one of the parties can be found in the presumption that such arbitrators may be perceived as being too close to the appointing party, and therefore be inclined to be excessively sympathetic to that party's position. As Swigart observes, "as an identifier, nationality suggests more than a mere category of citizenship or allegiance to a particular state."⁶³ Nationality, as explained below, is also an important mark of diversity.⁶⁴

⁶¹ ICSID Arbitration Rules, *supra* note 49, at r. 3, 104-05 ("(1) If the Tribunal is to be constituted in accordance with Article 37(2)(b) of the Convention: (a) either party shall in a communication to the other party: (i) name two persons, identifying one of them, who shall not have the same nationality as nor be a national of either party, as the arbitrator appointed by it, and the other as the arbitrator proposed to be the President of the Tribunal.").

⁶² UNCITRAL Arbitration Rules (1976), *supra* note 42, at art. 6(4); UNCITRAL Arbitration Rules (2010), *supra* note 31, at art. 6(7).

⁶³ Leigh Swigart, *The "National Judge": Some Reflections on Diversity in International Courts and Tribunals*, 42 MCGEORGE L.R. 223, 224 (2010) ("Like their domestic counterparts, international courts and tribunals depend on public faith in their judges to inspire confidence in court decisions and in the judicial system more generally. These courts look for the same qualities in their judges as those laid out in national codes of conduct and other documents like the Bangalore Principles of Judicial Conduct, such as independence, impartiality, integrity, propriety, equality, competence, and diligence. Both domestic and international courts also recognize that some relationships, involving such things as a prior connection to a case or the parties or an interest in the outcome of the case, might give rise to actual or perceived partiality. International courts, however, have something to contend with that domestic courts do not. Unlike domestic courts, international courts must consider the nationalities of its judges, and how these nationalities may affect the judges' ability to decide cases involving their states of origin with impartiality and independence. While this concern can be an issue in all of the major categories of international courts and tribunals - i.e., human rights, interstate dispute resolution, and criminal - it may be most relevant in cases where states themselves are the parties before the court.").

⁶⁴ See *infra* Parts II.B, III.B.

2.2.2. *Impartiality and Independence*

In addition to nationality restrictions, arbitrators must be impartial and independent, and these qualifications are expressed in a different, yet similar, way in the rules. As practitioner Noah Rubins explains, “independence and impartiality are two distinct but interrelated qualifications, required of every arbitrator.”⁶⁵ Impartiality fundamentally means that an arbitrator “is not partial—or biased—in favor of, or against, a particular party or its case, while an independent arbitrator is one who has no close relationship—financial, professional or personal—with a party or its counsel.”⁶⁶

The qualification of these requirements is at times complex and their assessment in practice can be difficult. As observed recently by a tribunal rejecting an arbitrator challenge based on alleged lack on impartiality,

[t]he concepts of independence and impartiality, though related, are often seen as distinct, although the precise nature of the distinction is not always easy to grasp. Generally speaking independence relates to the lack of relations with a party that may influence an arbitrator’s decision. Impartiality, on the other hand, concerns the absence of a bias or predisposition toward one of the parties.⁶⁷

Both qualities are necessary for an arbitrator to perform his or her adjudicative function.

Upon constitution of the tribunal, each arbitrator is also required to sign a declaration confirming that, to the best of his knowledge, there are no reasons why he should not serve as an arbitrator, that he will keep confidential all information received and that he will “judge fairly as between the parties, according to

⁶⁵ Noah Rubins & Bernhard Lauterburg, *Independence, Impartiality and Duty of Disclosure in Investment Arbitration*, in INVESTMENT AND COMMERCIAL ARBITRATION—SIMILARITIES AND DIVERGENCES 153, 154. (Christina Knahr et al. eds., 2010) (citation omitted).

⁶⁶ Partasides, *supra* note 36, at 219.

⁶⁷ Suez, Sociedad General de Aguas de Barcelona S.A., & InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic, ICSID Case No. ARB/03/17, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal ¶ 29 (Oct. 22, 2007) (citations omitted).

the applicable law, and shall not accept any instruction or compensation with regard to the proceedings from any source except as provided" by the ICSID Convention.⁶⁸

Under the UNCITRAL Arbitration Rules (1976):

A prospective arbitrator shall disclose to those who approach him in connexion with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, once appointed or chosen, shall disclose such circumstances to the parties unless they have already been informed by him of these circumstances.⁶⁹

⁶⁸ ICSID Arbitration Rules, *supra* note 49, at r. 6. The full text of the signed statements states:

To the best of my knowledge there is no reason why I should not serve on the Arbitral Tribunal constituted by the International Centre for Settlement of Investment Disputes with respect to a dispute between _____ and _____. I shall keep confidential all information coming to my knowledge as a result of my participation in this proceeding, as well as the contents of any award made by the Tribunal. I shall judge fairly as between the parties, according to the applicable law, and shall not accept any instruction or compensation with regard to the proceeding from any source except as provided in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States and in the Regulations and Rules made pursuant thereto. Attached is a statement of (a) my past and present professional, business and other relationships (if any) with the parties and (b) any other circumstance that might cause my reliability for independent judgment to be questioned by a party. 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.

Id. Each Arbitrator must sign the declaration before or at the first session of the Tribunal, failing to do so by the end of the first session of the Tribunal shall be deemed tantamount to resignation.

⁶⁹ UNCITRAL Arbitration Rules (1976), *supra* note 42, at art. 9. UNCITRAL Arbitration Rules (2010), *supra* note 31, at art. 11 amended the text of the article to state that:

When a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties and the other arbitrators unless they have already been informed by him or her of these circumstances.

Id.

The appointing authority is similarly tasked to have regard for considerations that are “likely to secure the appointment of an independent and impartial arbitrator.”⁷⁰ Independence and impartiality remain difficult to define. As explained in more detail below, an arbitrator’s subjective biases cannot be known, and can only be inferred from his or her conduct.⁷¹ There are no objective tests that can fully evaluate an arbitrator’s personal conduct.

2.2.3. *Legal Expertise and Other Requirements*

Under the ICSID Convention, arbitrators must be persons of “recognized competence” in the fields of law, as well as commerce, industry, or finance.⁷² A proposal to require arbitrators to be lawyers was discussed and rejected during the negotiations of the ICSID Convention, as it was deemed to be excessively restrictive.⁷³

Additionally, it was widely acknowledged that both the parties and the appointing authorities take into consideration other elements when making their selection. These include legal background, knowledge of the specific technical field and of the applicable law, and knowledge of the language of the proceeding and of the documents.⁷⁴

These apparently simple selection methods result in the selection of a small group of highly talented international arbitrators, who are generally experienced lawyers of high

⁷⁰ UNCITRAL Arbitration Rules (1976), *supra* note 42, art. 6(4); UNCITRAL Arbitration Rules (2010), *supra* note 31, at art. 6(7).

⁷¹ *See infra* Parts II.A, III. A.

⁷² ICSID Convention, *supra* note 31, at art. 14(1).

⁷³ *See* KAREL DAELE, CHALLENGE AND DISQUALIFICATION OF ARBITRATORS IN INTERNATIONAL ARBITRATION 84 (2012) (noting that the rules reflect a compromise: arbitrators do not have to be lawyers, but must be reasonably competent in the field of law).

⁷⁴ *See* Obadia, *supra* note 48, at 76. Obadia notes that several issues are considered when making an appointment, including “language of the proceedings, but also of the documents, as it may be different.” She also explains that, when making appointments

we also look at availability of the arbitrators . . . experience of the candidate as an arbitrator, not only in investment arbitration but also in commercial arbitration and other types of arbitration . . . knowledge of the relevant law, which is often public international law, and the knowledge of international investment law, which has become more and more complex.

Id. Finally, “the cohesiveness of the tribunal” is also a factor.

international standing, often multilingual and capable of handling complex cases involving complicated sets of facts, diverse applicable law and rules of procedures, and multi-cultural parties.⁷⁵ Most generally, the group is composed of public international law academics and international law practitioners.

The extent of the system's success is a distinct question, which is explored in the next part.

3. DOES ARBITRATOR SELECTION WORK? AN ASSESSMENT

The international investment arbitrator selection system appears straightforward and effective from afar. Certain problematic issues become more apparent on closer scrutiny, however. First, some practitioners and experts have criticized the idea of the party-appointed arbitrator because of the possible built-in biases in favor of the party that appointed him or her.⁷⁶ Second, critics have focused on the fact that a very small number of individuals make up the vast majority of arbitrators and that arbitration panels include too many repeat appointments and lack diversity.⁷⁷

Critics claim that these two flaws fatally undermine decisions taken by international investment tribunals and that, as a consequence, party-appointments must be eliminated. I address these issues below.

3.1. *Criticisms of the Party-Appointment System Based on Innate Bias*

Practitioners and other stakeholders have taken issue with the institution of the party-appointed arbitrator.⁷⁸ The criticisms focus on innate biases that arbitrators may have in favor of the party that

⁷⁵ See Rogers, *The Vocation of International Arbitrators*, *supra* note 37, at 958–59 (noting that “[i]nternational arbitrators are exceptionally talented individuals” with diverse language skills, excellent educational backgrounds, and extensive legal experience as well as expertise in other industries; furthermore, “their cumulative credentials are frequently parlayed into professorships and enhanced by rich scholarly research”) (footnotes omitted).

⁷⁶ See *infra* section 3.1.

⁷⁷ See *infra* section 3.2.

⁷⁸ Alexis Mourre, *Are Unilateral Appointments Defensible? On Jan Paulsson's Moral Hazard in International Arbitration*, KLUWER ARBITRATION BLOG (Oct. 5, 2010), <http://kluwarbitrationblog.com/blog/2010/10/05/are-unilateral-appointments-defensible-on-jan-paulsson%E2%80%99s-moral-hazard-in-international-arbitration>.

appointed them and against the opposing party.⁷⁹ Critics claim that innate biases would result in a propensity of the party-appointed arbitrator to be too sympathetic to the arguments put forth by the appointing party, pressuring other arbitrators to reach a solution that is particularly advantageous to that party, or at least not too disadvantageous to it.⁸⁰ The issue is whether party-appointed arbitrators suffer from inevitable bias: does the very nature of party appointment skew their incentives from the start?⁸¹

The assessment is difficult. For example, in considering a challenge of an arbitrator for alleged lack of impartiality due to the arbitrator's prior ruling against the respondent in a similar ICSID prior case, the arbitral tribunal in charge of resolving the challenge rejected the challenge and acknowledged that:

Independence and impartiality are states of mind. Neither the Respondent, the two members of this tribunal, or any other body is capable of probing the inner workings of any arbitrator's mind to determine with perfect accuracy whether that person is independent and impartial. Such state of mind can only be inferred from conduct either by the arbitrator in question or persons connected to him or her.⁸²

The difficulty in assessing the possible lack of impartiality is an important criticism.⁸³ Some specialists and practitioners have

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ See David Branson, *Sympathetic Party-Appointed Arbitrators: Sophisticated Strangers and Governments Demand on Them*, 25 ICSID REV. FOREIGN INV. L.J. 367, 368 (2010) (noting that party-appointment of arbitrators is subject to 'moral hazard' if "one party-appointed arbitrator sees a 'duty' to act for the benefit of the appointing party and the other follows the dictates of the law and remains neutral, then there is imbalance, the process can be unfair and it can produce injustice").

⁸² *Suez, Sociedad General de Aguas de Barcelona S.A., & InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal ¶ 30 (Oct. 22, 2007).

⁸³ See Smit, *supra* note 19, at 1 ("Once selected, an arbitrator's personal incentive is to secure reemployment by providing his or her party with a favorable outcome."). For a discussion of repeating arbitrators, see generally Fatima-Zahra Slaoui, *The Rising Issue of 'Repeat Arbitrators': A Call for Clarification*, 25 ARB. INT'L 103 (2009) (arguing that the issues of 'repeated appointment' and 'repeat arbitrator' are in need of more attention and to tackle the issues, more

pointed out that a non-neutral arbitrator can disrupt the process in several ways including: delaying meetings, refusing to participate in proceedings,⁸⁴ and issuing damaging dissents.⁸⁵

International investment arbitrators themselves are weary of the system. For example, the late Hans Smit also acknowledged that party-appointed arbitrators could feel pressured to decide in favor of the party that appointed them. This sentiment could materialize in many forms, including a reluctance to vote against the appointing party and a tendency to advocate for reduced awards or costs. Smit observed: "The incentive of the party and its counsel is to appoint an arbitrator who will win the case for them. That incentive will be particularly strong when its case, on its merits, is not particularly strong."⁸⁶

He also noted that,

Even if arbitrators are willing to rule against the party that appointed them, there are still ways in which they can influence the final outcome of a case to favor their party. For example, they may try to persuade the other panel members to reduce the award in favor of their party in return for joining them in a unanimous award. This compromise will ordinarily be attractive to the chair of the panel, for his or her reputation for obtaining unanimous awards may increase the likelihood of being appointed to future panels. Even if the award is not affected, the party-appointed arbitrator may bargain for not awarding counsel fees. . . . It might be argued that these are relatively minor disadvantages, that there is virtually always reason for compromise and that this is an acceptable price to be paid. But it is not only untoward compromises that the institution of party-appointed arbitrators promotes. The presence of a partisan arbitrator on a panel will normally

comprehensive definitions of 'repeated appointment' and 'repeat arbitrator' are necessary).

⁸⁴ NIGEL BLACKABY, CONSTANTINE PARTASIDES, ALAN REDFERN, & J. MARTIN HUNTER, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 320-25 (2009).

⁸⁵ Alan Redfern, *The 2003 Freshfields – Lecture Dissenting Opinions in International Commercial Arbitration: The Good, the Bad and the Ugly*, 20 ARB. INT'L 223, 242 (2004) (suggesting that arbitrators can be collaborative and fulfill their duties with diligence or rebellious and refuse to participate in the proceeding and also issuing ugly dissents).

⁸⁶ Smit, *supra* note 19, at 1.

reduce, if not eliminate, the free exchange of ideas among the members of the panel. The chair will be less receptive to arguments that appear to be moved by partisan considerations or may join one of the arbitrators, with the result that the other party-appointed arbitrators feel excluded from the deliberations.⁸⁷

Other well-known arbitrators share this sentiment and identify the culprit in the party-appointment process. For example, Albert Jan van den Berg notes that “[t]he root of the problem is the appointment method. Unilateral appointments may create arbitrators who may be dependent in some way on the parties that appointed them.”⁸⁸ Yves Derains argues that party-appointed arbitrators are often too partial and that they can create “pathologic” deliberations within the tribunal.⁸⁹ Jan Paulsson maintains that a party’s paramount desire to win results in speculation about “ways and means to shape a favorable tribunal or at least to avoid a tribunal favorable to the other side.”⁹⁰

Indeed, recent empirical data also show a possible connection between the selection and how the case is ultimately resolved. An important new study by Waibel and Wu, for example, analyzes 388 ICSID cases from 1978 to 2011. The study finds that arbitrators who are normally appointed by claimants in ICSID cases are more likely to affirm jurisdiction, while arbitrators who are often appointed by host states in general are less likely to uphold

⁸⁷ *Id.* at 2.

⁸⁸ Albert Jan van den Berg, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, in *LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN* 821, 834 (Mahanoush Arsanjani et al. eds., 2010).

⁸⁹ Yves Derains, *Fifth Annual International Commercial Arbitration Lecture: The Arbitrator’s Deliberation*, 27 *Am. U. Int’l L. Rev.* 911, 913–919 (2012).

⁹⁰ Jan Paulsson, *Inaugural Lecture as Holder of the Michael R. Klein Distinguished Scholar Chair at the Miami University School of Law* 11 (Apr. 29, 2010), available at http://www.arbitration-icca.org/media/0/12773749999020/paulsson_moral_hazard.pdf. See also Jan Paulsson, *Are Unilateral Appointments Defensible?*, *KLUWER ARBITRATION BLOG*, (Apr. 2, 2009), <http://kluwerarbitrationblog.com/blog/2009/04/02/are-unilateral-appointments-defensible/> (criticizing the mechanism of appointment of arbitrators by party and suggesting possible alternatives, including selection by a neutral institution or the use of list for the appointment of all arbitrators, following the example of the Court of Arbitration for Sport).

jurisdiction.⁹¹ The authors conclude that "arbitrators who are pro-investor/pro-host state tend to vote in favour of the investors/host state."⁹² Data also shows that dissenting opinions are more often produced by arbitrators appointed by the losing party in the arbitration. Indeed, this is the case in nearly all the cases surveyed.⁹³

3.2. *Criticisms of the Party-Appointment System Based on the Lack of Diversity*

Aside from possible systemic biases, a chief complaint of party-selected arbitrators is their limited number and demographic characteristics. Indeed, arbitrators have been typecast as "pale, male and stale."⁹⁴

Newly available data analyzed the profile of those who have been selected to sit on international investment tribunals, taking into consideration gender, nationality, professional background, legal education, and method of appointment. These data empirically support some of the anecdotal unease associated with international arbitration, painting a picture of a system which is not diverse or representative, and where the same few people tend to be reappointed time and again.⁹⁵

⁹¹ See Waibel & Wu, *supra* note 11, at 34-35 (concluding that data show that: (1) female arbitrators, arbitrators who also act as counsel and those with experience in international organizations are more likely to affirm jurisdiction; (2) arbitrators from developing countries are more likely to decline jurisdiction; (3) arbitrators from the same legal family as the host country are less likely to affirm liability; and (4) those with experience in international organizations and those that have served often as presidents are more likely to affirm liability).

⁹² *Id.* at 36. For a slightly older, but thorough analysis of the voting behavior of ICSID arbitrators, see Rogério Carmona Bianco, *The International Centre for Settlement of Investment Dispute (ICSID): An Empirical Research on the Voting Behavior of Arbitrators* (Working Paper, 2009) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1514882 (analyzing the voting behaviors of ICSID arbitrators based on empirical data collected from ICSID).

⁹³ van den Berg, *supra* note 88, at 824-25.

⁹⁴ See Michael D. Goldhaber, *Madame La Présidente: A Woman Who Sits As President of a Major Arbitral Tribunal Is a Rare Creature. Why?*, AM. LAW: FOCUS EUR. (2004) ("Arbitration is dominated by a few aging men, many of whom pioneered the field. In the words of Sarah François-Poncet of Salans, the usual suspects are 'pale, male, and stale.'").

⁹⁵ See Franck, *Development and Outcomes*, *supra* note 17, at 437 (stating that national origin of arbitrators impacts results of arbitration).

The most recent ICSID statistics show that 68% of all appointments in cases registered and administered by ICISD are from Western Europe and North America.⁹⁶ Conversely, only about 6% of all cases registered under the ICSID Convention and Additional Facility Rules include a State Party from North America or Western Europe.⁹⁷ Interestingly, although about 85% of the cases are brought by an investor from a developed country against a developing country, only about one third of the arbitrators come from developing countries.⁹⁸

An analysis of gender representation shows an even more striking lack of diversity.⁹⁹ As of May 2010, only 6.5% of all arbitrators appointed in investment treaty arbitration were women.¹⁰⁰ Disappointingly, the percentage actually falls to 5.63%

⁹⁶ These include 704 arbitrators appointed by parties and 230 appointed by ICSID. *ICSID Caseload Statistics*, *supra* note 1, at 18-19 (showing that the appointment of arbitrators, conciliators and *ad hoc* Committee Members appointed in cases registered under the ICSID Convention and the Additional Facility Rules were geographically distributed as follows: forty-six percent Western Europe; twenty-two percent North America (Canada, Mexico and the United States); eleven percent South America; ten percent South and East Asia and the Pacific; five percent Middle East and North Africa and two percent each from Central America & the Caribbean and Sub-Saharan Africa).

⁹⁷ *Id.* at 11 (showing the following geographical distribution all ICSID cases by State Party Involved: one percent Western Europe; five percent North America (Canada, Mexico and the United States); thirty percent South America; nine percent South & East Asia & the Pacific; ten percent Middle East and North Africa; six percent Central America and the Caribbean and sixteen percent Sub-Saharan Africa).

⁹⁸ Waibel & Wu, *supra* note 11, at 27.

⁹⁹ The paucity of international women judges is common in international courts and tribunals and has been subject of several recent interesting studies. See Grossman, *supra* note 28; see also LAWYERS COMM. FOR HUM. RTS., LCHR'S CHART SHOWING GENDER AND REGIONAL BALANCE IN ELECTIONS TO INTERNATIONAL COURTS AND TRIBUNALS, available at http://www.humanrightsfirst.org/wp-content/uploads/pdf/judges_gender_region_040303.pdf (interfering that women make up only about five percent of the total appointments).

¹⁰⁰ Gus Van Harten, *The (Lack of) Women Arbitrators in Investment Treaty Arbitration*, COLUM. FDI PERSP., no. 59, 2012, at 1. available at <http://www.vcc.columbia.edu/content/lack-women-arbitrators-investment-treaty-arbitration> ("In 249 known investment treaty cases until May 2010, there were 631 appointments. Of these, 41 were appointments of women—just 6.5% of all appointments. Worse, of the 247 individuals appointed as arbitrators across all cases, only 10 were women. Women thus comprised 4% of those serving as arbitrators. The story is also almost entirely that of two women, Gabrielle Kaufmann-Kohler and Brigitte Stern, who together captured 75% of appointments of women. In contrast, the two most frequently appointed men accounted for 5% of the 593 appointments of male arbitrators."). See also Franck, *Empirically*

when considering ICSID's more recent appointments.¹⁰¹ Significantly, 75% of all female arbitrator appointments went to two women; thus without counting their appointments, the percentage of women arbitrators would be even lower.¹⁰² It is also worth noting that, counter-intuitively, women account for only 3.49% of appointments made by the Chairman of the Administrative Counsel of ICSID for all *ad hoc* annulment committee members appointed since 2008.¹⁰³

Additionally, few repeat players seem to dominate the field. For example, almost 20% of all arbitrators selected in the cases decided on the merits by ICSID in the 1994-2009 period were appointed at least four times.¹⁰⁴ Moreover, often repeat players inter-change roles, acting both as counsel and arbitrators, which compound their impact in the field.

These data give support to the concern expressed in recent discussion as to whether, given the lack of diversity that results from party-selection, the existing selection procedures result in the selection of the best decision makers.¹⁰⁵ The lack of diversity becomes more important as arbitrators are deciding more complex and public policy cases, in which a wide variety of viewpoints would be particularly beneficial.

Indeed, investment arbitration has fallen victim to its own success, drawing criticism regarding the elitist and partial nature

Evaluating Claims, *supra* note 17, at 81 (commenting on the surprisingly small number of women in arbitration relative to other similar professions).

¹⁰¹ C. Mark Baker & Lucy Greenwood, *Getting a Better Balance on International Arbitration Tribunals*, 27 *ARB. INT'L* 653, 655 (2012).

¹⁰² See Irene Ten Cate, *Binders Full of Women . . . Arbitrators?*, *INTLAWGRRLS*, (Nov. 2, 2012), <http://www.intlawgrrls.com/2012/11/bindere-full-of-women-arbitrators.html> (reporting that Brigitte Stern was appointed 51.61% of the time and Gabrielle Kaufmann-Kohler 22.58%).

¹⁰³ *Id.* ("One might expect to encounter more women in annulment committees, whose members are appointed by the Chairman of the Administrative Counsel of ICSID. After all, doesn't ICSID have greater incentives than parties to consider gender balance? Perhaps not. Women account for only 3.49% of annulment committee members appointed since 2008.").

¹⁰⁴ Daphna Kapeliuk, *The Repeat Appointment Factor: Exploring Decisions Patterns of Elite Investment Arbitrators*, 96 *CORNELL L. REV.* 47, 73 (2010).

¹⁰⁵ Brower & Schill, *supra* note 4, at 475 (stating that the perceived shortcoming of investment arbitration - including the *ad hoc* appointment of arbitrators - have led to call for the replacement or "radical redesign of investor-state dispute-settlement mechanisms").

of the process.¹⁰⁶ Concerns about party-appointment of arbitrators ultimately question whether existing selection procedures produce the best decision makers.¹⁰⁷ Suggestions to better international investment arbitration should be carefully considered. However, as I will explain next, the call for a drastic change in the selection procedures is premature and is hardly warranted, given the fact that there are other ways to strengthen the arbitrators' selection procedures.

3.3. *Responding to Criticisms: Why Party-Appointments Should Remain*

The combination of new data, intense criticism, increased awareness, and practice of international investment arbitration has resulted in a call for a reassessment and modification of the practice of party-appointments.¹⁰⁸ Despite criticisms by both experts and practitioners, party-appointment is a sound choice for international investment arbitration and should be maintained for a number of reasons. Parties support it, and there are good policy reasons to maintain it. Additionally, there are procedural safeguard in place to protect it from possible abuse, which could, as proposed, be also further strengthened.

¹⁰⁶ See e.g., PIA EBERHARDT & CECILIA OLIVET, *TRANSNAT'L INST. & CORP. EUR. OBSERVATORY, PROFITING FROM INJUSTICE: HOW LAW FIRMS, ARBITRATORS AND FINANCIERS ARE FUELLING AN INVESTMENT ARBITRATION BOOM* (2012), available at <http://corporateeurope.org/sites/default/files/publications/profitting-from-injustice.pdf> (arguing that a "small club of international law firms, arbitrators and financial speculators are fuelling an investment arbitration boom that is costing taxpayers billions of dollars and preventing legislation in the public interest").

¹⁰⁷ Brower & Schill, *supra* note 4, at 474–475.

¹⁰⁸ See, e.g., VAN HARTEN, *supra* note 7 (advocating for a method of appointment of judges for a set term to make judges independent). See also Paulsson, *Are Unilateral Appointments Defensible?*, *supra* note 90 (criticizing the mechanism of appointment of arbitrators by party and suggesting possible alternatives, including selection by a neutral institution or the use of list for the appointment of all arbitrators, following the example of the Court of Arbitration for Sport); Hans Smit, *supra* note 90 (stating that party-appointed arbitrators are often unable to provide the objectivity demanded by the position). See generally Gus Van Harten, *A Case for an International Investment Court* (Soc'y of Int'l Econ. L. Inaugural Conf., Working Paper No. 22/08, 2008), available at <http://ssrn.com/abstract=1153424> and <http://dx.doi.org/10.2139/ssrn.1153424> (arguing for an alternative to the existing system of investment treaty arbitration measured against criteria that normally apply in public law).

3.3.1. *There Are No Good Alternatives*

International investment arbitration is the culmination of a very delicate and carefully-negotiated process. As Professor Michael Reisman eloquently notes, “[p]robably no arbitral institution . . . better captures the curious convergence of dissimilar interests of governments, foreign investors and international institutions than the Washington Agreement of 1965, which produced the International Center for the Settlement of Investment Disputes.”¹⁰⁹ International investment arbitration offers a unique and indispensable dispute resolution mechanism to resolve disputes between a state and investor, and as such, it provides an important and useful service to both investors and states.

The balance of interests achieved by the international investment process, moreover, would be difficult to recreate in any alternative situation. None of the recent proposals that call for a change in the party-selection system provide a feasible alternative. For example, Paulsson suggests that arbitrators should be either selected by a neutral authority or should only be selected from a pre-approved list.¹¹⁰ However, having a neutral authority select all the arbitrators would change completely the balance of interests negotiated by the parties, while not ensuring that the neutral authority does not take into consideration the diverse interests represented by each party. Similarly, selecting from a pre-approved list would not guarantee the absence of biases any more than the present system. Instead, it would only anticipate the selection of preferred arbitrators by the party while further restricting the number of available candidates.

Smit suggested that “party-appointed arbitrators should be banned unless their role as advocates for the party that appointed them is fully disclosed and accepted.”¹¹¹ However, while each party is indeed fully aware of the role played by each arbitrator and is cognizant of who selected whom, the role of arbitrator is

¹⁰⁹ Reisman, *supra* note 22, at 236 (observing that “[p]robably no arbitral institution in contemporary international arbitration better captures the curious convergence of dissimilar interests of governments, foreign investors and international institutions than the Washington Agreement of 1965, which produced the International Center for the Settlement of Investment Disputes”).

¹¹⁰ Paulsson, *supra* note 19, at 348.

¹¹¹ Smit, *supra* note 19, at 1.

very different than that of an advocate, and is instead that of an adjudicator.

Gus Van Harten suggests the creation of a permanent international investment court.¹¹² The reality is that it would be just impossible to negotiate the creation of another permanent court and to find the will and interest to negotiate the creation of a new institution. Further, nominations of judges in international courts are not simple, apolitical processes.¹¹³ The same balance of different views will be found in a permanent investment court.

Complete overhaul of the system to eliminate party-appointed arbitrators is also practically unfeasible. Changing the dispute resolution clause would not only require a renegotiation of the ICSID Convention and UNCITRAL Model law, it would also require the renegotiation and redrafting of the innumerable BITs and investment protection treaties that include a dispute resolution clause that provides for the selection by the parties and by a neutral appointing authority.¹¹⁴ Realistically, moreover, as Veeder suggests "the fact is that most institutions cannot at present be trusted with any arbitral appointments not made with the prior informed consent of all parties."¹¹⁵

Indeed, often, there is just "no alternative to arbitration."¹¹⁶ Judge O. Thomas Johnson concludes:

[t]he alternative to compulsory investor-State arbitration is either compulsory State-to-State arbitration, which requires the claimant State either to take an adversarial posture with respect to the host State or to leave its injured national

¹¹² See VAN HARTEN, *supra* note 7, at 180-84 (arguing for a new method for appointing judges). See generally Gus Van Harten, *A Case for an International Investment Court*, *supra* note 103.

¹¹³ Mackenzie et al., *supra* note 29.

¹¹⁴ Parties to investment arbitration have clarified their preference for participating in the selection process of arbitrators, as this is of paramount importance for the choice to go to arbitration. A change to permanent judiciary would undermine the arbitration system.

¹¹⁵ V.V. Johnny Veeder, Inaugural International Arbitration Lecture in Honor of Charles Brower, 107th ASIL Annual Meeting (Apr. 5, 2013).

¹¹⁶ David D. Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 AM. J. INT'L L. 104, 116 (1990) ("On the municipal level, arbitration is attractive because it is perceived to a desirable alternative to the courts. But on the international level, there often is no alternative to arbitration. In many international situations, neither party will agree to submit all possible disputes to the courts of the other.").

without a remedy, or direct diplomatic and/or economic intervention by the claimant State. It is difficult to imagine a foreign minister of either a capital-importing or a capital-exporting country who would welcome any of these alternatives.¹¹⁷

This system is needed because there is no other alternative forum where parties agree to bring their international investment disputes.

In the end, we may be just asking arbitrators to be impossibly unaffected by the world around them, while also defining bias too loosely. As Professor Susan Franck argues:

[m]odern international arbitration requires the objective application of rules to facts and the exercise of bounded discretion to ensure that the process and final outcome is warranted. While parties may pick arbitrators with particular cultural and legal backgrounds and specific personal experiences, arbitrators also generally have an obligation to disclose those matters that would call into question their independence. Although all humans are inevitably influenced by their experiences, in international arbitration, parties ask arbitrators to put aside biases in order to fairly and impartially exercise their independent judgment and apply their expertise to the facts on the record to render a decision based upon the law.¹¹⁸

That ability to fairly decide a dispute without being influenced by external factors is the core ability of an international arbitrator.

At its core, international investment arbitration is a system that combines aspects of international public law and commercial law to create a unique system. This system relies on party-appointment. Getting rid of party appointment would denaturalize the core of international investment arbitration and transform it into a different system. As it is explained below, what could initially be seen as a downside is indeed an upside for international investment arbitration, because it provides a strong

¹¹⁷ O. Thomas Johnson, Jr. & Jonathan Gimblett, *From Gunboats to BITs: The Evolution of Modern International Investment Law*, 2010/2011 Y.B. ON INT'L INVESTMENT L. & POL'Y (Vale Columbia Ctr. on Sustainable Int'l Inv., Karl P. Sauvant ed.) 692.

¹¹⁸ Franck, *supra* note 37, at 505-07 (footnotes omitted).

support to a voluntary system by all the main participants. Both parties have a strong interest in upholding and respecting decisions of an arbitral tribunal, which they played a part in selecting.

3.3.2. *Party Preference for Party-Appointments*

The possibility of choosing their own arbitrators is a key reason why parties, both investors and states, agree and elect to arbitrate. Rogers notes that “[e]mpirical studies consistently verify that parties’ ability to select arbitrators is one of the primary reasons they select arbitration as a means of dispute resolution.”¹¹⁹ In October 2012, the School of International Arbitration at Queen Mary, University of London and White & Case released the results of the “2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process,” a global survey on practices in international arbitration which comprised responses from more than 700 practitioners.¹²⁰ The survey showed that seventy-six percent of respondents preferred selection of two co-arbitrators by each party unilaterally in a three-member arbitral tribunal.¹²¹

While users’ support is always important, it is particularly relevant for international investment arbitration. International investment arbitration seeks to find a solution in a dispute where parties—a state and an investor—have diametrically different interests. The fact that they could agree on a dispute resolution system capable of converging and resolving such dissimilar interests, and thus eventually in the resulting award, is an achievement worth protecting.¹²²

¹¹⁹ Rogers, *supra* note 27.

¹²⁰ SCH. OF INT’L ARBITRATION AT QUEEN MARY, UNIV. OF LONDON & WHITE & CASE, 2012 INTERNATIONAL ARBITRATION SURVEY: CURRENT AND PREFERRED PRACTICES IN THE ARBITRAL PROCESS 2 (2012), available at <http://arbitration.practicallaw.com/6-522-2998>. For a short overview and commentary on the study, see John Templeman, *The 2012 International Arbitration Survey: Looking Behind the Closed Doors of International Arbitration*, PRACTICAL L. CO. (Nov. 7, 2012), <http://uk.practicallaw.com/cs/Satellite/about/5-522-2994>.

¹²¹ 2012 INTERNATIONAL ARBITRATION SURVEY, *supra* note 120, at 2.

¹²² See Bjorklund, *supra* note 25, at 1300 (“The burgeoning emphasis on transparency and public participation is at once a response to the public’s fascination with investment arbitration and a facilitator of that fascination; international commercial arbitration, a largely private endeavor, has never captured public interest to the same extent.”).

As Professor Andreas Lowenfeld explains "one of the principal functions of a party-appointed arbitrator is to give confidence in the process to the parties and their counsel" ¹²³ Party-appointed arbitrators are nominated with the expectation that they understand the party's position and they may be well predisposed to it. ¹²⁴ This must not, and does not, equate to bias. ¹²⁵ Parties make a selection and appoint an arbitrator who is 'philosophically' inclined to decide along the views of the claimant or of the respondent. Thus, an arbitrator does not decide in a certain way because of the specific appointment by a party, but because he or she shares the same *Weltanschauung* as the party that appointed them. This also explains (and justifies) the time and money spent on the selection of arbitrators and the propensity for repeated (and safer) appointments. ¹²⁶ A well-prepared party can ensure that he or she selects an arbitrator that has a certain predisposition to issues that are important to the appointing party. ¹²⁷ As Claudia Salomon advises when choosing an arbitrator, parties should "[c]hoose [a]n [i]mpartial, [b]ut [k]nown [p]arty-[a]ppointed [a]rbitrator." ¹²⁸

¹²³ See Lowenfeld, *supra* note 43, at 62 ("Sometimes that confidence can be based on mutual acquaintances, without direct personal contact; some potential arbitrators become well-known through published writings, lectures, committee work, or public office. Others are not so well known, and I understand that lawyers or clients or both want to have a firsthand look. I think, however, some restraint should be shown by both sides.").

¹²⁴ See Martin Hunter, *Ethics of the International Arbitrator*, 58 *ARBITRATION* 219, 223 (1987) ("[W]hen I am representing a client in an arbitration, what I am really looking for in a party-nominated arbitrator is someone with the maximum predisposition towards my client, but with the minimum appearance of bias.").

¹²⁵ Catherine A. Rogers, *Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct*, 41 *STAN. J. INT'L L.* 53, 56 (2005) ("[T]he mirage of absolute judicial impartiality becomes more distorted when it is superimposed onto the arbitrator.").

¹²⁶ Rogers highlights the importance, in this context, of information asymmetry and advocates for the creation of an "Arbitrators Information Project" to provide information related to arbitrators to both parties equally. Catherine A. Rogers, *The Politics of International Investment Arbitrators*, *SANTA CLARA J. INT'L L.* (forthcoming 2013), available at <http://digitalcommons.law.scu.edu/globalevents/investment/symposia/3>.

¹²⁷ See Hunter, *supra* note 124.

¹²⁸ Claudia T. Salomon, *Selecting an International Arbitrator: Five Factors to Consider*, *MEALEYS INT'L ARB. REP.*, Oct. 2002, at 2, available at <http://www.arbitralwomen.org/files/publication/0405202743129.pdf>.

A case that is often cited as a demonstration of a possible arbitrator bias is *Loewen Group, Inc. v. United States*.¹²⁹ The case involved a Canadian inventor who brought a case under NAFTA against the United States for denial of justice by Mississippi courts, which had found against him in a \$3 million transaction and awarded \$400 million in punitive damages and \$75 million for emotional distress.¹³⁰ Loewen was unable to appeal because he did not have sufficient funds to post the \$625 million bond required (125% of the judgment).¹³¹ The case bankrupted the Canadian company.¹³² The NAFTA Tribunal found that "the conduct of the trial judge was so flawed as to constitute a miscarriage of justice" but denied jurisdiction over Loewen for lack of nationality.¹³³ In a symposium held after the award was made public, the arbitrator that the Respondent had appointed, a federal judge, recounted that he had met officials of the U.S. Department of Justice prior to accepting the appointment; the officials had told him that, if the United States lost the case, "we could lose NAFTA."¹³⁴ The arbitrator remembered replying "[w]ell, if you want to put pressure on me, then that does it."¹³⁵

At first reading, this case appears very troubling because it seems to demonstrate that pressure was exercised towards one of the arbitrators, who seemed to be inclined to give in to the pressure. On a deeper analysis, however, we may be reading too much into the reported discussion, especially because it is interpreted with the knowledge of how the case was finally disposed, which has been widely criticized.¹³⁶ In fact, the arbitrator's narration shows that the party interviewed him prior to the selection as the arbitrator.¹³⁷ There are no suggestions of

¹²⁹ *Loewen Group, Inc. v. United States*, ICSID Case No. ARB(AF)/98/3, Award (June 26, 2003).

¹³⁰ *Id.* ¶¶ 3-4.

¹³¹ *Id.* ¶¶ 5-6.

¹³² *Id.* ¶ 29.

¹³³ *Id.* ¶ 54, ¶¶ 234-36. For a detailed analysis of the *Loewen* case, see Jan Paulsson, Inaugural Lecture, *supra* note 90.

¹³⁴ Paulsson, *supra* note 90, at 6.

¹³⁵ *Id.*

¹³⁶ For a thoughtful discussion of this case, see Veeder, *supra* note 115. See also V. V. Veeder, *The Lena Goldfields Arbitration: The Historical Roots of Three Ideas*, 47 INT'L & COMP. L.Q. 747, 755 (1998).

¹³⁷ Veeder, *supra* note 115.

improper discussion with the Department of Justice after his appointment to the panel. Moreover, although the U.S. arbitrator was privy to the general knowledge about the *Loewen* case's importance to the future of NAFTA, he did not seem to discuss any of the specifics of the case. The arbitrator's reply was similarly general and non-committal.

What the case does show, however, is that what may seem normal to a U.S. practitioner, namely the pre-appointment meeting of counsel with possible arbitrators, may seem objectionable to a non-U.S. practitioner. The different ethics standards and the lack of guidance thereof is an important issue. As I will explain below, it should be properly addressed in order to strengthen investment arbitration.

Another recent decision rejecting an arbitrator's challenge highlights the difficulties in assessing behavior and reinforces the need for more guidance on ethical issues. In *Urbaser S.A. v. The Argentine Republic*, the remaining two members of an ICSID Tribunal were called upon to decide a challenge by Argentina based on academic writings of the challenged arbitrator, which Argentina claimed had demonstrated a pre-judgment of certain important issues.¹³⁸ The Tribunal concluded that:

No arbitrator and, more generally, no human being of a certain age is, in absolute terms, independent and impartial. Simply put, every individual is conveying ideas and opinions based on its moral, cultural, and professional education and experience. What is required, when it comes to rendering judgment in a legal dispute, is the ability to consider and evaluate the merits of each case, without relying on factors having no relation to such merits.¹³⁹

International investment arbitration is a complex system where actors are sophisticated. Manifest or obvious bias will be very rarely found. The requirement of an absolute *tabula rasa* for arbitrators may just be unachievable. All decision-makers have their own experiences and ideas, which inform their decision. This

¹³⁸ *Urbaser S.A. v. The Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan, Arbitrator, ¶ 40 (Aug. 12, 2010).

¹³⁹ *Id.* ¶¶ 20-25.

does not result in biased decisions, however.¹⁴⁰ Sacerdoti notes that:

Empirical evidence from the rejection of most disqualification requests confirms that the great majority of arbitrators are serious professionals who take care and pride in being independent and impartial. If a party-appointed arbitrator is biased he or she will end up in the minority. On the other hand, there is nothing wrong if such an arbitrator shares in good faith the position of the party who has made the appointment.¹⁴¹

Experienced arbitrators have no difficulties evaluating the merits of each case and will disregard other factors that have no bearing with the merits of the case. Arbitrators are not agents of the parties that appointed them, but rather are adjudicators who have to decide the dispute fairly.¹⁴²

A party preference for a system, of course, is not by itself sufficient to maintain a system if it is faulty. In addition to parties' preferences, there are other important reasons to support party-appointment of arbitrators.

3.3.3. Party-appointment is an Essential Element of International Investment Arbitration

Another key argument in favor of party-appointment relies on the very nature of international investment arbitration as a dispute resolution process that is distinct from adjudication by permanent—either domestic or international—courts.¹⁴³

¹⁴⁰ *Id.* ¶ 40. For example, compare the discussions about the experience and political views of Supreme Court Justices, which inform their decisions but do not condition them.

¹⁴¹ Giorgio Sacerdoti, *Is the Party-Appointed Arbitrator a "Pernicious Institution"?* A Reply to Professor Hans Smit, COLUM. FDI PERSP., no. 35, 2011, at 1, available at <http://www.vcc.columbia.edu/content/party-appointed-arbitrator-pernicious-institution-reply-professor-hans-smit>.

¹⁴² *Id.* (writing that rather than being "agents of the parties appointing them," arbitrators are "trustees").

¹⁴³ See BLACKABY, ET AL., *supra* note 84, at 313 (2009) ("An arbitral tribunal established to determine an international commercial dispute operates in an entirely different context from a judge sitting in a national court. Judges sit in a legal environment that clearly defines the extent of their powers and duties. They are generally given full immunity in respect of any potential liability arising out of the conduct of their judicial function. Their jurisdiction, and the extent to which

Arbitration is a more neutral setting than what is found in international or domestic courts of either the investor or the State. Indeed, the importance of depoliticizing investment disputes was among the factors that prompted the creation of ICSID—an international forum where such disputes could be brought.¹⁴⁴

International arbitration, moreover, allows parties to agree on basic issues of applicable law, jurisdiction, language, and procedural rules. The selection of arbitrators, and the possibility of selecting an arbitrator that has specific characteristics of expertise, education, language capacity, or background, is a fundamental feature of international investment arbitration and part and parcel of the parties' autonomy.¹⁴⁵ In turn, the parties' trust in the process makes their eventual enforcement of the award more likely.

The suggested radical change to a selection procedure that eliminates party-appointed arbitrators would undermine the arbitration system and erode parties' support for arbitration in the first place.¹⁴⁶ Indeed, a party's traditional right to appoint an arbitrator is, as distinguished arbitrator V.V. Veeder said, "a genie

decisions in relation to jurisdiction may be reviewed by an appellate court, are clearly established in the law governing the proceedings. The position differs in arbitration, particularly in international arbitration, where the powers, duties, and jurisdiction of an arbitral tribunal arise from a complex mixture of the will of the parties, the law governing the arbitration agreement, the law of the place of arbitration, and the law of the place where recognition or enforcement of the award may be sought.").

¹⁴⁴ See Waibel & Wu, *supra* note 11, at 2 ("Investors sometimes bring large claims in relation to the budgets of the respondent states, in many cases developing countries. The findings of the tribunal may require major adjustment to public policy.").

¹⁴⁵ See Joseph M. Matthews, *Difficult Transitions Do Not Always Require Major Adjustment—It's Not Time to Abandon Party-Nominated Arbitrators in Investment Arbitration*, 25 ICSID REV.—FOREIGN INVESTMENT L. J. 356, 359 (2010) (finding that the roles of arbitrators in investment arbitration are: 1. to seek the truth about what happened; 2. to set specific reasonable expectations for the parties and to reject unreasonable ones; 3. to help along a fair finding of the fact and the law; and 4. to maintain overall confidence in the arbitral tribunal).

¹⁴⁶ Note that parties' preference for appointing one arbitrator is rooted in the history of international arbitration. In fact, the first modern international arbitration involving States arose out of the 1794 Jay Treaty between the United Kingdom and the newly independent United States. The treaty provided for the establishment of several commissions consisting of one or two commissioners/arbitrators nominated by the each party, with the third or fifth commissioner being chosen by agreement of the parties or by drawing lots. See REED ET AL., *supra* note 44, at 65–66.

that cannot easily be put back into the bottle.”¹⁴⁷ Once the parties are given the choice, it would be virtually impossible to reverse course.

3.3.4. *Procedural Safeguards Exist to Protect the System*

Additionally, by and large, there are several official and unofficial tools to ensure that choice of an arbitrator by the parties is fair and not abused.¹⁴⁸ First, rules of procedure of the selected institutions provide the initial guideposts that monitor the selection of arbitrators by the parties.¹⁴⁹ The rules set limits on party autonomy and require arbitrators to possess certain threshold qualities. The nationality requirement, which bars parties from selecting arbitrators who are their nationals, is a good example of a guidepost. Further, arbitrators are required to generally be impartial and independent. They must disclose situations giving rise to potential conflicts of interest, and make sworn statements declaring that they will judge “fairly as between the parties.”¹⁵⁰ If and when the rules are insufficient to guarantee that the arbitration selection process works, they should be amended as necessary, which is argued and elaborated in the next section of this article.

In addition to explicit procedural rules, unwritten checks and balances also preserve the independence and neutrality of arbitrators.¹⁵¹ Primarily, arbitrators face reputational costs if they

¹⁴⁷ V.V. Vedeer, *Inaugural Lecture in Honor of Charles Brower*, *supra* note 115.

¹⁴⁸ BLACKABY ET AL., *supra* note 143, at 313-14 (describing well the challenge arguing that a “balance must be struck between the sanctions that may be imposed on arbitrators who carry out their functions in a careless or improper manner, and the equally necessary requirement that an arbitral tribunal should be able to perform its task without consistently ‘looking over its shoulder’ in fear of being challenged through legal process. On one view, it may be argued that arbitrators should be given virtually unlimited powers, in order to adapt the process to the dispute in question and encourage speed and effectiveness in the arbitral process; but the requirement of public policy, whether national or international, make some control necessary so as to ensure that the parties are not without recourse if there is wrongful conduct on the part of an arbitral tribunal. In particular, it is considered critical that an arbitral tribunal give the parties a fair hearing and that it decide only matters within its competence, or jurisdiction”) (footnotes omitted).

¹⁴⁹ Sacerdoti, *supra* note 141.

¹⁵⁰ ICSID RULES OF PROCEDURE FOR ARBITRATION PROCEEDINGS RULE 6 (2006).

¹⁵¹ See Franck, *supra* note 37, at 516-18 (arguing that there are three different market forces which can remedy arbitrators’ misconduct: 1. professional word of

demonstrate lack of independence or impartiality.¹⁵² International arbitrators are selected by parties or neutral appointing authorities after much vetting and thought, and rely intensely on their reputation for thoughtfulness and fair judgment in order to be selected.

An arbitrator who gains a reputation for supporting the positions of the party that appointed him or her will quickly become ineffective and will not be re-appointed.¹⁵³ First, s/he will become ineffective as a member of the arbitral tribunal because the other two arbitrators on the Tribunal will identify and sideline an arbitrator if he or she 'acts as counsel.' An arbitrator who is perceived as biased has less power in deliberations.¹⁵⁴ Second, a non-neutral arbitrator will not be appointed to sit in future arbitrations.¹⁵⁵ Indeed, Charles Brower calls the party-selection of arbitrators the "ultimate meritocracy" because an arbitrator's behavior is continuously scrutinized for potential appointments and "he is somewhere in the world always up for re-election."¹⁵⁶

mouth in the arbitration marketplace; 2. market-based incentives which can create financial incentives to behave appropriately; and 3. institutional incentives that can establish certain consequences for improper conduct).

¹⁵² See e.g. Rogers, *The Vocation of International Arbitrators*, *supra* note 37, at 974 (stating that "[r]eputational sanctions are another form of control frequently proposed as an alternative to formal regulation" and arguing that this may not be sufficient given the information asymmetries that exist in the system).

¹⁵³ See Lowenfeld, *supra* note 43, at 60 (arguing that overzealous party-appointed arbitrators lose credibility with the other members of the tribunal).

¹⁵⁴ See Swigart, *supra* note 63, at 229 ("[O]ne current [ICJ] judge ad hoc, speaking confidentially, lamented that, in fact, members of the regular bench assume that he is biased in favor of the state that appointed him and consequently do not take his views seriously. He added that other judges ad hoc in his acquaintance have felt the same way—their colleagues on the bench do not value their views and draft judgments.").

¹⁵⁵ See Franck, *Role of International Arbitrators*, *supra* note 37, at 516–17 ("The internal arbitrator marketplace, where professional credibility and word-of-mouth recommendations affect appointment and re-appointment of arbitrators, plays a significant role. Arbitrators can earn hundreds of thousands of dollars from a single arbitration and gain personal prestige from having been involved in significant case. For those 'repeat-players,' reputation and credibility as a fair, independent and reasoned decision maker is vital. In multimillion and multi-billion dollar disputes, parties are likely to be unwilling to appoint an arbitrator who is likely to be challenged, who cannot fully consider fully the facts and laws at issue and who may be incapable of rendering an enforceable award.") (footnotes omitted).

¹⁵⁶ Judge Charles N. Brower, *Remarks at the Leading Figures in International Dispute Resolution Series—The Future Of International Arbitration: Is The Past*

What is more, certain group dynamics are common and intrinsic. Complex decision-making by an arbitral tribunal does not differ substantially from group decisions by permanent judges or by other groups of decision-makers.¹⁵⁷ An experienced president of the arbitral tribunal will know how to manage the discussion. He or she will spot a non-neutral arbitrator fast, and will take that into consideration and act accordingly during deliberations. This is one of the reasons why the choice of the president of the arbitral tribunal is a fundamental one for the parties.¹⁵⁸

Further, each party appoints an arbitrator. Thus, each party is equally represented during the proceedings and deliberation. There is a presumption of equality of arms. During the proceedings, an arbitrator may want to assist the tribunal with understanding the view of the party that appointed him or her. An arbitrator who does that excessively, however, will quickly undermine his or her power during deliberations.

Ultimately, moreover, an arbitrator who is not impartial and independent can be challenged during the proceedings. An award that is given by an impartial arbitrator can be submitted to challenge and annulment review.¹⁵⁹ It is therefore of fundamental importance, as will be seen below, that challenge procedures are fair, effective, and expeditious.

In sum, the investment arbitration system is not in need of the complete transformation that eliminating party-appointment would bring. The appointment of arbitrators by the parties is justified and is an indispensable part of its process. In the great majority of cases, parties endorse an arbitration result and willingly enforce awards, which ultimately demonstrates arbitration success.

When parties are not satisfied, mechanisms of appeal and redress exist as further protections. There is no need for a major overall reform of international investment arbitration to eliminate party-appointed arbitrators. Rather, it is possible to build a better

Prologue? Interest Group on International Courts and Tribunals, AM. SOC. OF INT'L L. (Jan. 17, 2013), <http://www.asil.org/conversation-judge-charles-n-brower-future-international-arbitration>.

¹⁵⁷ Rogers, *supra* note 126.

¹⁵⁸ *Id.*

¹⁵⁹ ICSID Convention, *supra* note 31, at art. 52.

system by strengthening the existing rules. Two proposals to enhance the international investment system are discussed below.

4. STRENGTHENING ARBITRATOR SELECTION PROCEDURES IN INTERNATIONAL INVESTMENT ARBITRATION

Investment arbitration has proven to be a reliable, efficient mechanism to resolve complex international disputes. Now that the reasons to preserve party-appointment of arbitrators have been laid out, it is necessary to also address the specific criticisms of lack of diversity and innate bias to minimize their downsides. These important questions are addressed in this section.

The need is to recalibrate and make targeted adjustments to a system that otherwise works.¹⁶⁰ Necessary changes can be obtained by, first, adopting different challenge rules to arbitrator selection and by, second, modifying the arbitrator selection mechanisms to ensure diversity.

4.1. *Ensuring Impartiality (and Legitimacy) By Adopting Different Challenge Rules*

As discussed above, critics express concerns that party-appointments of arbitrators may lead arbitrators to harbor bias. I have assessed above the safeguards that exist during the selection process to guarantee the appointment of qualified arbitrators. It is also important to ensure that similar safeguards exist if one of the parties questions the impartiality of an appointed arbitrator.

If a party believes that one of the appointed arbitrators lacks the qualities required to perform the function of arbitrator and is biased or partial, robust challenge procedures must exist. Strong challenge procedures not only address and resolve parties' concerns, but also consolidate the arbitrators' selection system and generally strengthen international investment arbitration as an effective dispute resolution option.

Existing challenge procedures are not always effective. This is particularly true under the ICSID rules. Indeed, ICSID challenge procedures are deficient both procedurally and in terms of the applicable threshold for challenge. First, under ICSID procedure, decisions on disqualification proposals are taken by the remaining members of the Tribunal, or, in the case of a proposal to disqualify

¹⁶⁰ Rogers, *supra* note 125.

the sole arbitrator or majority of the arbitrators, by the Chairman.¹⁶¹ Second, challenge proposals must be based on a “manifest lack of [the] qualities” that are required to serve as an arbitrator, a standard hard to meet. Cumulatively, these two requirements make the threshold for a successful challenge very difficult and are, in practice, ineffective. Indeed, of the thirty disqualification proposals so far decided according to ICSID procedures, all were dismissed but one.¹⁶² Additionally, in ICSID arbitration “no arbitrator has ever been disqualified by the other members of the tribunal.”¹⁶³

Under the normal ICSID proceedings, when one arbitrator is challenged, the two remaining members of the Tribunal sit in judgment of the challenge of the third member of the arbitral tribunal, as it happened in the recent Decision on the Proposal to Disqualify an Arbitrator in *ConocoPhillips v. Venezuela*.¹⁶⁴ The challenge was brought by Venezuela after claimant-appointed arbitrator informed the Secretary General of ICSID of certain facts related to a forthcoming merger of his firm with a firm that acted against Venezuela in the past, and of which he had just learned.¹⁶⁵ The regular ICSID proceeding was thus suspended until the challenge was resolved. The remaining members of the Tribunal asked both parties and the challenged arbitrator to comment on the challenge and finally rejected it.¹⁶⁶

¹⁶¹ ICSID Convention, *supra* note 31, at art. 58 (“The decision on any proposal to disqualify a conciliator or arbitrator shall be taken by the other members of the Commission or Tribunal as the case may be, provided that where those members are equally divided, or in the case of a proposal to disqualify a sole conciliator or arbitrator, or a majority of the conciliators or arbitrators, the Chairman shall take that decision. If it is decided that the proposal is well-founded the conciliator or arbitrator to whom the decision relates shall be replaced in accordance with the provisions of Section 2 of Chapter III or Section 2 of Chapter IV.”). See also *id.*, at r. 9 (detailing the procedure for disqualifying an arbitrator).

¹⁶² KAREL DAELE, CHALLENGE AND DISQUALIFICATION OF ARBITRATORS IN INTERNATIONAL ARBITRATION 84 (2012).

¹⁶³ *Id.*

¹⁶⁴ *ConocoPhillips Company v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator (Feb. 27, 2012), available at <http://icsid.worldbank.org/ICSID/Index.jsp>.

¹⁶⁵ Judge Kenneth Keith of the International Court of Justice and Professor Georges Abi-Saab.

¹⁶⁶ *Abaclat v. Argentine Republic*, ICSID Case No. ARB/07/5, Recommendation Pursuant to the Request by ICSID on the Respondent’s Proposal

In terms of the threshold standard required to win a challenge, the ICSID Convention provides that a party may propose the disqualification of an arbitrator "on account of any fact indicating a manifest lack of the qualities" required to be nominated.¹⁶⁷ This standard of review was used in ICSID Decision on the Proposal to Disqualify an Arbitrator in *ConocoPhillips v. Venezuela*. In this case, a few days after the proceedings were suspended, the challenger's arbitrator informed the parties and the Tribunal members that he had resigned from his firm.¹⁶⁸ He also confirmed that an ethics screen was established and would be maintained until his departure.¹⁶⁹ In its pleadings, Venezuela argued, however, that several facts constituted "a circumstance that might cause [an arbitrator's] reliability for independent judgment to be questioned by a party."¹⁷⁰ Venezuela asserted its objection was "not

for the Disqualification of [Arbitrator] (Dec. 19, 2011). Note that, under ICSID Rules, when the sole arbitrator is challenged, or when the majority of the arbitrators are challenged, it is for a neutral authority to decide on the challenge. Decisions are normally taken by the Chairman of the Administrative Council of the World Bank, but are also at times referred to a neutral authority, like the Secretary General of the Permanent Court of Arbitration (PCA).

¹⁶⁷ See ICSID Convention, *supra* note 31, at art. 57 (noting that the necessary "qualities" are listed in paragraph (1) of Article 14 and adding that "[a] party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV."). See also ICSID Arbitration Rules, *supra* note 49, at r. 9 (detailing the procedure to be taken: "(1) A party proposing the disqualification of an arbitrator pursuant to Article 57 of the Convention shall promptly, and in any event before the proceeding is declared closed, file its proposal with the Secretary-General, stating its reasons therefor. (2) The Secretary-General shall forthwith: (a) transmit the proposal to the members of the Tribunal and, if it relates to a sole arbitrator or to a majority of the members of the Tribunal, to the Chairman of the Administrative Council; and (b) notify the other party of the proposal. (3) The arbitrator to whom the proposal relates may, without delay, furnish explanations to the Tribunal or the Chairman, as the case may be. (4) Unless the proposal relates to a majority of the members of the Tribunal, the other members shall promptly consider and vote on the proposal in the absence of the arbitrator concerned. If those members are equally divided, they shall, through the Secretary-General, promptly notify the Chairman of the proposal, of any explanation furnished by the arbitrator concerned and of their failure to reach a decision. (5) Whenever the Chairman has to decide on a proposal to disqualify an arbitrator, he shall use his best efforts to take that decision within 30 days after he has received the proposal. (6) The proceeding shall be suspended until a decision has been taken on the proposal.").

¹⁶⁸ *ConocoPhillips*, ICSID Case No. ARB/07/30, ¶ 11.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* ¶¶ 23-25 (change in original).

predicated on any actual lack of independence or impartiality, but on apprehension of the appearance of impropriety.”¹⁷¹ In contrast, ConocoPhillips argued a disqualification must be based on facts that demonstrate “a manifest lack of the required qualities” in an arbitrator.¹⁷²

The Tribunal found the applicable legal standard was provided in Article 57 of the ICSID Convention, and stated that a party may propose the disqualification of any tribunal member for “manifest lack of the qualities” required to sit as an arbitrator, namely a “high moral character” and the capacity to “exercise independent judgment.”¹⁷³ The Tribunal also remarked that the term “manifest” in Article 57 means “‘obvious’ or ‘evident’ and highly probable, not just possible.”¹⁷⁴ Applying the “manifest” standard, the Tribunal dismissed the challenge.¹⁷⁵

Regardless of the specific merits of any case, having the remaining arbitrators decide a challenge to a fellow arbitrator is improper and puts the remaining arbitrators in a difficult and uneasy position. Arbitrators are still selected from a small group of qualified individuals and most know each other and have long-standing professional relationships. Asking arbitrators to judge

¹⁷¹ *Id.* ¶ 31, at 10 (stating Venezuela’s argument that the case does not revolve around the possibility of lack of independence but on the apprehensions of appearance of impropriety).

¹⁷² *Id.* ¶ 35, at 16 (stating that the Tribunal noted that Respondent had referred to General Standard 7(c) of the IBA Guidelines, stating that “[a]n arbitrator is under a duty to make reasonable enquiries to investigate any potential conflict of interest, as well as any facts or circumstances that may cause his or her impartiality of independence to be questioned. Failure to disclose a potential conflict is not excused by lack of knowledge if the arbitrator makes no reasonable attempt to investigate.”).

¹⁷³ *Id.* ¶ 51, at 16 (mentioning that the Convention provides in art. 14(1) that the members of the panel have to be of high moral character).

¹⁷⁴ *Id.* ¶ 56. The Tribunal noted that article 57 states that the term “manifest” means “obvious” and this standard “imposes a relatively heavy burden on the party proposing disqualification.” *Id.*

¹⁷⁵ *Id.* ¶¶ 64-65 (noting that the Tribunal had no reason to doubt Mr. Fortier’s statements that he “had not been involved in any way in the negotiation, that he had not taken part in or been privy to the plans for the international arbitration group in the combined firm, that he had no knowledge of any file, if any exists, on which lawyers from the two firms had been working together and he ‘categorically’ stated that he had no involvement in any such file, nor had he been made privy to any information about any such file.”). This denial implies that his high moral character and capacity to exercise independent judgment were thus not called into question.

challenges of a person with whom they likely have and will continue to have professional relations is improper.

Further, the threshold adopted by tribunals does not properly address concerns that may arise relating to party-appointed arbitrators who are perceived as being excessively inclined to decide in favor of the party that appointed them. This is particularly true for repeat appointments. A revision of the ICSID challenge procedure would significantly alleviate the inherent biases concern. The example set in the UNCITRAL Rules is a step in the right direction.

The 2010 UNCITRAL Arbitration Rules provide that any arbitrator may be challenged if circumstances exist that give rise to "justifiable doubts as to the arbitrator's impartiality or independence."¹⁷⁶ The UNCITRAL threshold is different and would allow more meaningful review of the facts that lead to the challenge. Further, challenges under UNCITRAL Rules are to be decided by the appointing authority, and not by the remaining members of the Tribunal.¹⁷⁷

For example, the Decision on the Challenge of an Arbitrator in *Vito G. Gallo v. Canada* was taken under UNCITRAL Rules.¹⁷⁸ In this case, the claimant filed a challenge after learning that the professional situation of the arbitrator appointed by Respondent had changed since the commencement of the arbitration. At the time of his appointment, the challenged arbitrator was in the process of joining a large Canadian law firm as an independent

¹⁷⁶ UNCITRAL Arbitration Rules (2010), *supra* note 31, at art. 12, 10(1).

¹⁷⁷ *Id.* at art. 13(4) (stating that "[i]f, within 15 days from the date of the notice of challenge, all parties do not agree to the challenge or the challenged arbitrator does not withdraw, the party making the challenge may elect to pursue it. In that case, within 30 days from the date of the notice of challenge, it shall seek a decision on the challenge by the appointing authority"). The prior UNCITRAL Arbitration Rules 1976 adopted the same general method. Article 12 provides:

the decision on the challenge will be made: (a) [w]hen the initial appointment was made by an appointing authority, by that authority; (b) [w]hen the initial appointment was not made by an appointing authority, but an appointing authority has been previously designated, by that authority; (c) [i]n all other cases, by the appointing authority to be designated in accordance with the procedure for designating an appointing authority as provided for in article 6.

UNCITRAL Arbitration Rules (1976), *supra* note 42, at art. 12(1).

¹⁷⁸ *Vito G. Gallo v. Gov't of Canada, NAFTA/UNCITRAL, Decision on the Challenge to Mr. J. Christopher Thomas*, QC (Oct. 14, 2009).

consultant to focus on serving as an arbitrator.¹⁷⁹ In this new role, he subsequently agreed to advise Mexico on legal matters, which could include international investment arbitration.¹⁸⁰ The case was filed with the ICSID Deputy Secretary-General, who acted as the appointing authority in the case.¹⁸¹ The Deputy Secretary General heard comments from all parties and eventually determined that the arbitrator would have to choose between continuing to provide legal advice to Mexico or serving as an arbitrator in the case.¹⁸²

The Deputy Secretary-General examined the situation and clarified that the applicable standard under UNCITRAL arbitration rules was an objective one.¹⁸³ In his view, the potential for conflict in this case lay in the fact that Mexico under NAFTA could participate in the proceedings (as non-disputing parties) on questions of interpretation of NAFTA.¹⁸⁴ He therefore clarified that “from the point of view of a ‘reasonable and informed third party’

. . . there would be justifiable doubts about [the arbitrator’s] impartiality and independence . . . if he were not to discontinue his advisory services to Mexico for the remainder of this arbitration.”¹⁸⁵ The arbitrator resigned from the arbitration seven days later.¹⁸⁶

The comparisons above demonstrate that UNCITRAL Rules provide a better challenge procedure because a neutral authority

¹⁷⁹ *Id.* ¶¶ 6-7.

¹⁸⁰ *Id.* ¶ 8.

¹⁸¹ *Id.* ¶¶ 2-3.

¹⁸² *Id.* ¶ 36.

¹⁸³ *Id.*

¹⁸⁴ *Id.* ¶ 36.

¹⁸⁵ *Id.*

¹⁸⁶ In another interesting case, *ICS Inspection & Control Services Ltd. v. The Republic of Argentina*, Decision on Challenge to Mr. Stanimir A. Alexandrov, the challenge of an arbitrator was upheld by the appointing authority chosen by the Secretary-General of PCA under the UNCITRAL Rules. See generally *ICS Inspection & Control Services Ltd. v. Republic of Argentina*, UNCITRAL, Decision on Challenge to Mr. Stanimir A. Alexandrov, Arbitrator (Dec. 17, 2009). In the case, Argentina challenged Mr. Alexandrov, the arbitrator appointed by claimant, claiming that he and his law firm’s concurrent representation in a separate, long-running case against Argentina gave rise to justifiable doubts as to the arbitrator’s independence and impartiality. *Id.* In making his decision upholding the challenge, the appointing authority referred to the IBA Guidelines and found that the facts underlying Mr. Alexandrov’s disclosure were reflected in scenarios set forth in the Guidelines. *Id.* The appointing authority concluded that the conflict was sufficiently serious to give rise to objectively justifiable doubts as to Mr. Alexandrov’s impartiality and independence. *Id.*

resolves challenges and the threshold is different, requiring a “justifiable doubt” standard. To ensure legitimacy of its decisions and a wider support of international investment arbitration, ICSID should also move towards asking a neutral tribunal to decide on challenges, based on a different threshold. This change can only be made through an amendment of the ICSID Convention. Though it would be very difficult to negotiate, it is necessary if we wish to maintain the success of the international investment arbitration system and support of all parties involved.¹⁸⁷

It is also important to note that most tribunals refer to the International Bar Association’s Guidelines on Conflict of Interests in International Arbitration to assess challenges, and specifically the existence of a conflict.¹⁸⁸ These Guidelines are particularly important because they are detailed and offer a viable framework to decide on the existence of a conflict. Moreover, because they refer to the point of view of a “reasonable and informed third party,” they also offer a clear angle to be used by tribunals.¹⁸⁹ Their continued and more frequent use by tribunals operating under both ICSID and UNCITRAL rules is desirable. Indeed, it would be useful if parties specifically agree to use the IBA Guidelines at the outset of the arbitral proceedings.

The importance of adopting common rules to strengthen the arbitrator selection system cannot be overestimated. It will give the parties clear guidance and predictability when selecting international arbitrators. It will also allow arbitrators to adopt uniform and clear behavior, and send a strong signal to the general public that their concerns are fully taken into consideration.

4.2. *Ensuring Diversity (and Legitimacy) By Enlarging the Pool of Arbitrators*

An important criticism recognized empirically is the lack of diversity – both geographic and gender - of those who are selected as arbitrators. Thus, a second important measure that can be taken

¹⁸⁷ On this issue, see Chiara Giorgetti, *Challenges of International Investment Arbitrators – How it Works, and Does it Work?*, 7 WORLD ARB. & MED. REV. 303 (2013).

¹⁸⁸ COUNCIL OF THE INT’L BAR ASS’N, IBA GUIDELINES ON CONFLICT OF INTEREST IN INTERNATIONAL ARBITRATION (2004), available at http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

¹⁸⁹ *Id.* at 8.

to strengthen the international arbitration system is to enlarge the pool of arbitrators. More arbitrators from outside Europe and North America, and more women are needed.

In fact, though the numbers of international arbitration cases has increased in recent years, the group of arbitrators selected by parties to decide their cases is still small. This means that often the same persons are appointed. Moreover, instances exist where the same person may act as counsel in a case and as arbitrator in another case. These situations lead to criticism of the arbitration system. Additionally, the lack of diversity seen together with the increased use of arbitration will inevitably result in more real or perceived conflicts by selected arbitrators and thus in more challenges by the parties.¹⁹⁰ Indeed, non-party stakeholders also identify lack of diversity as a cause of concern.¹⁹¹

As arbitration is based on the freedom of the party, it may sound counterintuitive, or even contradictory, to guide a party's choice as a way to strengthen investment arbitration. However, as the number of cases increases, a larger pool of arbitrators will also result in expedited proceedings and fewer challenges of arbitrators during the proceedings.

It is widely accepted both at domestic and international levels that "a diverse judiciary is an indispensable requirement of any democracy."¹⁹² Indeed, the need for geographical representation is even more important in the international dispute resolution setting.¹⁹³ Chief Justice McLachlin of Canada argued specifically that a better gender balance between female and male judges

¹⁹⁰ See Jeremy K. Sharpe, *Introductory Note to the Arbitral Tribunal Constituted Under Annex VII of the 1982 United Nations Convention on the Law of the Sea: Republic of Mauritius v. United Kingdom & Northern Ireland, Reasoned Decision on Challenge*, 51 I.L.M. 350, 351 (2012) (highlighting "the complications that can arise when the arbitrator plays multiple roles, including as counsel, adviser, or international judge").

¹⁹¹ EBERHARDT & OLIVET, *supra* note 106 (describing the community of arbitrators as "'small, secret, clubby,' 'an inner circle,' 'a closed homogenous group comprised of grand old men' . . . 'or even an arbitration mafia'") (internal quotations and citations omitted).

¹⁹² Centre for Int'l Cts. & Tribunals, *Selecting International Judges: Principle, Process and Politics* 37 (University College London, Discussion Paper, 2008), available at http://www.ucl.ac.uk/laws/cict/docs/Selecting_Int_Judges.pdf (quoting Lady Hale, *The Appointment and Removal of Judges: Independence and Diversity*, International Association of Women Judges 8th Biennial Conference (May 3-7, 2006)).

¹⁹³ *Id.*

would better reflect the composition of our society, and thus more women judges would increase the legitimacy of the courts, reflect the commitment to equality of our society, best use available human capital, bring a new perspective, and route out rooted stereotypes.¹⁹⁴

The same can be said in support of other types of diversity. Indeed, diversity is beneficial for several reasons. First, diversity brings more points of views in deliberation so that a more comprehensive understanding of the parties' position is granted. Thus, diversity brings better judgments. Second, diversity enhances legitimacy because a more diverse tribunal better mirrors the composition of society. Hence, diversity also results in stronger judgments. Importantly, as international investment cases increasingly touch on public policy matters, it becomes particularly important to include multiple and diverse point of views within the persons that decide disputes.

To ensure that diversity is enhanced within the party-guided system that characterizes international investment arbitration, efforts should concentrate on voluntary measures. First, several actions to enlarge the pool of arbitrators can be taken directly by the neutral appointing authorities when making selection. Second, the parties can also play a role in reaching that goal.

4.2.1. *Actions By Appointing Authorities and Secretariats*

The neutral authorities that participate in the selection of arbitrators can directly adopt several targeted measures to directly enhance diversity, and, at different stages in the proceedings, do not require any specific mandate by Member States. First and foremost, appointing authorities should promote diversity when they select presiding and co-arbitrators or members of *ad hoc* annulment committees. Specifically, for example, the Administrative Council Chairman, the ICSID Secretary General and the PCA Secretary General should, whenever possible, include

¹⁹⁴ See Mary-Ann Hedlund & Susan Glazebrook, *Foreward*, in THE IAWJ: TWENTY YEARS OF JUDGING FOR EQUALITY 2, 3 (Mary-Ann Hedlund, Susan Glazebrook, Arline Pacht & Jill Wainwright eds., 2010), available at www.iawj.org/JUBILEE_BOOK_IAWJ_WEBSITE_FINAL_1_.pdf (stating that in a world where one of the primary functions of the judiciary is to promote equality, it would be anomalous to exclude women from being a part of it). See also Van Harten, *supra* note 100.

new and diverse candidates on the lists of three candidates given to the parties for selection.

Second, the Chairman of the ICSID Administrative Council can more specifically further diversity when exercising his or her right in selecting the ten members of the Panel of Arbitrators. In his last selection in 2012, the Chairman designated only three women out of ten.¹⁹⁵ This is not sufficient. Though other diversity requirements were considered, more must be done at the institution level.

Third, ICSID's Secretary General should urge ICSID Contracting States to nominate arbitrators to the ICSID Panel of Arbitrators with the objective of advancing diversity. Each Contracting State has a Convention right to nominate four people, who do not necessarily have to be nationals of the nominating State, to the Panel of Arbitrators.¹⁹⁶ Members of the Arbitrator Panels are important: if the parties fail to agree on who to nominate as the presiding arbitrators, the Chairman of the Administrative Council must select the members of the panel to make the nomination. Panel members are also used to nominate members of *ad hoc* annulment committees and arbitrators that the parties have failed to nominate. Thus, a list that contains more names of potential arbitrators will offer the Chairman of the Administrative Council more choice. At the moment, less than half of the parties to the ICSID Convention avail themselves of that right and nominate members in the List of Arbitrators.¹⁹⁷ If more

¹⁹⁵ News Release, ICSID, New Designations to the ICSID Panels (Aug 29, 2012), available at <https://icsid.worldbank.org/ICSID/ICSID/ViewNewsReleases.jsp>.

¹⁹⁶ Under the ICSID Convention.

[t]he Centre maintains a Panel of Conciliators and a Panel of Arbitrators pursuant to Articles 12-16 of the ICSID Convention. Each ICSID Contracting State may designate up to four persons to each Panel. The designees may, but need not, be nationals of the designating country. In addition, up to ten persons may be designated by the Chairman of the ICSID Administrative Council. Each designee normally serves for a renewable term of six years.

News Release, ICSID, New Designations to the ICSID Panels (Feb. 8, 2012), available at <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement104>.

¹⁹⁷ At present, 108 out of the 158 member states have made some forms of arbitrators' selection. See ICSID, *Members of the Panels of Conciliators and of Arbitrators*, ICSID/10, at 4-6 (Sept. 2013) (providing a list of the 108 states which

parties to the Convention nominated diverse arbitrators, this would increase diversity substantially. While there have been some efforts to urge Member States to designate their members in the Panel of Arbitrators, the efforts are still inadequate and more can be done. For example, there could be a yearly reminder sent to parties urging them to make selections. Additionally, when new members join – like Kosovo and South Sudan have recently done – they should immediately be advised to make their selections.

Fourth, the ICSID and the PCA Secretariats could develop a best-practices policy for parties and third-party appointing authorities to include diversity as an item to be considered when making arbitration selections. These guidelines would not be mandatory, but would enumerate and describe the issues to be considered when making appointments. They could highlight the existence and importance of diversity as a consideration when making appointments. To be effective, these guidelines should explain the benefits of diversification and include statistics related to past appointments.

None of these measures require Member States' authorizations and can be immediately implemented by the appointing authorities. If explained carefully, they will not be seen as an imposition to the parties, but, rather, a form of assistance to decision making.

4.2.2. Actions By Parties

Although most of the new nominations will likely result from appointments by the neutral appointing authority, parties can also be urged to include diversity in their choice. Many governments, which by definition are one of the parties to the dispute, have policies mandating diversity. These policies should be used for the selection of arbitrators and the nomination of members of the panel of arbitrators. Further, best practices given to parties can provide background and reinforce the importance of diversity and new appointments.

Moreover, as a general policy, data on the lack of diversity should be publicized. While anecdotal evidence is often discussed, it is now possible to back that evidence with hard data. The data

have designated panel members), *available at* <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&reqFrom=ICSIDPanels&language=English>.

should be publicized to counsel, practitioners and stakeholders. In conjunction with the lack of diversity, the benefits of diversity should also be made known.¹⁹⁸ Additionally, and more concretely, the data should be included in ICSID's and PCA's annual reports. This dissemination of information would foster dialogue among stakeholders, organizing conferences, and public statements.

Once the appointing authority tests new and diverse arbitrator appointments, the confidence and reliance of new arbitrators will trickle down to party appointments. This will eventually result in a larger pool of arbitrators. Appointments of new candidates should be publicized by the parties involved and can be used to strengthen support of domestic constituencies and other stakeholders. For example, the United States is the only country to have appointed three women as arbitrators in its disputes. Publicizing this fact would strengthen the US's position amongst critics of international arbitration.

Although these measures will take time to bring concrete results, these soft measures would ensure that a larger pool of arbitrators is available. Importantly, because they have been vetted by practice, these arbitrators will find support within the international arbitration practitioner circle.

5. CONCLUSION

International investment arbitration process is still a relatively new species among the international dispute resolution genres. As Professor Brigitte Stern suggests "Darwinism applies to arbitration."¹⁹⁹ The difficulties international investment arbitration

¹⁹⁸ This includes the inclusion of more points of view in the discussion of a case, resulting in a better and more thorough decision and time saved, because there would be more available arbitrators.

¹⁹⁹ *An Interview with the Honorable Charles N. Brower and Professor Brigitte Stern*, ARBITRATION TRENDS (Quinn, Emanuel, Urquhart & Sullivan, LLP), Winter 2013, at 13 (quoting Professor Brigitte Stern as stating: "Darwinism applies to arbitration: I see evolutions, criticisms and further evolutions. Four years ago, I was in a colloquium at Columbia University where the central topic was the legitimacy crisis of the system of international arbitration. I said at that time that, a [sic] far as I was concerned, this looked like a *crise de croissance*, a teenager's crisis, the BIT revolution having only started some 18 years ago. The teenager is now in his twenties and should become more reasonable. . . . It is true that some countries have manifested their discontent with recent awards or annulment decisions and that some countries - Bolivia in May 2007, Ecuador in July 2009 and Venezuela in January 2012 - have denounced the ICSID Convention . . . [t]his is certainly a sign of dissatisfaction but should not be overestimated.").

suffers are the normal products of its evolution. Criticisms will allow the growth and betterment of the system. As academics and practitioners, we should ensure the evolution of the species, not its extinction.