Northwestern Journal of International Law & Business

Volume 36
Issue 2 *Spring 2016*

Spring 2016

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Georgios Dimitropoulos

Printed in U.S.A.
Northwestern Journal of International Law & Business
Vol. 36, No. 2

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Georgios Dimitropoulos[*]

Abstract: Disqualification challenges against international investment arbitrators are increasing. This poses a great challenge for the legitimacy of the international investment regime. The aim of the Article is to trace the source of this development and to propose ways for the future structuring of an international investment regime that is both transparent and effective. Legal literature understands arbitrator independence as a standard imposed by legal rules. This does not capture the reality of international investment arbitration, especially in the framework of the ICSID Convention, which seems to set a lower standard of independence for ICSID arbitrators.

This Article presents the latest trends in the challenge process based on an empirical study of the most recent ICSID tribunal decisions. The thesis of the Article is that arbitral independence in international investment arbitration is the result of a "process of communication" among different actors and prompted by the arbitration community itself. Arbitral independence is only partially a result of legal rules. It is also a consequence of the creation of a tightly connected community of international arbitrators that has been established over the years of arbitral practice and which has transposed their ethos and professional practices onto investment arbitration. This community has constructed a very high standard of independence for international investment arbitration, which is now set in motion by other actors involved in the field. The Article proposes finally the introduction of a new system of control in international investment arbitration that can address the peculiarities of the constructed process of the creation of investor-state arbitration: certification.

[*] Ph.D., LL.M. (Yale). Senior Research Fellow, Max Planck Institute Luxembourg. I am most grateful to Professor W. Michael Reisman for valuable advice and support of this research. I am also thankful Professors Alec Stone Sweet, Giacinto della Cananea, Bryant G. Garth, and Tara Davenport for very helpful comments and discussions.

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I. INTRODUCTION

Judicial independence is usually understood as a functional concept serving either the establishment of the rule of law and due process,[1] or the work of judges.[2] This understanding reflects a predominantly domestic context where institutions are more established and legal concepts more defined than in international law. In the uncertain, complex, and fragmented international legal order,[3] with a far smaller historical record, institutions and concepts cannot be taken for granted; their existence and meaning is very often constructed by the actors involved in the field. Independence of international adjudicators is a perfect example of the constructed development of international law. Given the judicialization of international investment arbitration,[4] there is increasing attention to the need for independence of international investment arbitrators.[5] The cases in which concerns have

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[1] Anja Seibert-Fohr, *Judicial Independence – The Normativity of an Evolving Transnational Principle*, *in* JUDICIAL INDEPENDENCE IN TRANSITION 1279, 1353–56 (Anja Seibert-Fohr ed., 2012).

[2] Yuval Shany, *Judicial Independence as an Indicator of International Court Effectiveness: A Goal-Based Approach*, *in* THE CULTURE OF JUDICIAL INDEPENDENCE: CONCEPTUAL FOUNDATIONS AND PRACTICAL CHALLENGES 251 (Shimon Shetreet & Christopher Forsyth eds., 2012).

[3] W. MICHAEL REISMAN, THE QUEST FOR WORLD ORDER AND HUMAN DIGNITY IN THE TWENTY-FIRST CENTURY: CONSTITUTIVE PROCESS AND INDIVIDUAL COMMITMENT 87–94 (2012).

[4] *See* Alec Stone Sweet, *Investor-State Arbitration: Proportionality's New Frontier*, 4 L. & ETHICS HUM. RTS. 47, 59–67 (2010).

[5] *See, e.g.*, Sam Luttrell, *Bias Challenges in Investor-State Arbitration: Lessons from International Commercial Arbitration*, *in* EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION 445 (Chester Brown & Kate Miles eds., 2011) [hereinafter Luttrell, *Bias Challenges in Investor-State Arbitration*]; Noah Rubins & Bernhard Lauterburg, *Independence, Impartiality and Duty of Disclosure in Investment Arbitration, in* INVESTMENT AND COMMERCIAL ARBITRATION: SIMILARITIES AND DIVERGENCES 153 (Christina Knahr et al. eds., 2010); Gabriel Bottini, *Should Arbitrators Live On Mars? Challenge Of Arbitrators in Investment Arbitration*, 32 SUFFOLK TRANSNAT'L L. REV. 341 (2009); Federica Cristani, *Challenge and Disqualification of Arbitrators in International Investment Arbitration: An Overview*, 13 L. & PRAC. INT'L CTS. & TRIBUNALS 153 (2014); Nathalie Bernasconi-Osterwalder et al., Arbitrator Independence and Impartiality: Examining the Dual Role of Arbitrator and Counsel, IV Annual Forum for Developing Country Investment Negotiators Background Papers, New Delhi, 27–29, Oct. 2010 (IISD, 2011); James Crawford, Challenges to Arbitrators in ICSID Arbitrations, Confronting Global Challenges: From Gunboat Diplomacy to Investor-State Arbitration, PCSA Peace Palace Centenary Seminar (Oct. 11, 2013).
Many commentators treat the issue of independence in international commercial and investment arbitration in the same context. *See, e.g.*, H.E. Markus Buechel, *The Independence of International Arbitrators*, *in* THE CULTURE OF JUDICIAL INDEPENDENCE: CONCEPTUAL FOUNDATIONS AND PRACTICAL CHALLENGES 243 (Shimon Shetreet & Christopher Forsyth eds., 2012); Stavros Brekoulakis, *Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making*, 3 J.

been raised, and challenges against arbitrators have been filed, are increasing.[6] Arbitrator practice also views the field as increasingly judicialized with a need for more independence.[7]

Over the last years, international legal documents, scholars, and practitioners involved in investment law have developed a standard of independence of international investment arbitrators similar to that which applies to domestic and international judges. A natural consequence of this development is the increasing rate of challenges against arbitrators in the different arbitral fora. As of June 30, 2014, the International Center for Settlement of Investment Disputes[8] had registered 473 cases under the ICSID Convention and Additional Facility Rules.[9] Out of these cases, 68 arbitrators were sub-

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INT'L DISP. SETTLEMENT 1 (2013); K. V. S. K. Nathan, *The Independence of Arbitrators*, 68 AMICUS CURIAE 18, 22 (2006); William W. Park, *Arbitrator Integrity: The Transient and the Permanent*, 46 SAN DIEGO L. REV. 629, 635 (2009); JONATHAN COTTON, SLAUGHTER AND MAY, HOW TO CHALLENGE AN ARBITRATOR'S INDEPENDENCE AND IMPARTIALITY 1 (May 2008), https://www.slaughterandmay.com/media/1428119/how_to_challenge_an_arbitrators_independence_and_impartiality_may_2008.pdf. The same questions also arise in the field of international commercial arbitration. *See, e.g.*, Christopher R. Drahozal, *Behavioral Analysis of Arbitral Decision Making*, *in* TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH 319 (Christopher R. Drahozal & Richard W. Naimark eds., 2005) [hereinafter Drahozal, *Arbitral Decision Making*]; SAM LUTTRELL, BIAS CHALLENGES IN INTERNATIONAL COMMERCIAL ARBITRATION: THE NEED FOR A 'REAL DANGERS' TEST (2009) [hereinafter LUTTRELL, BIAS CHALLENGES IN INTERNATIONAL COMMERCIAL ARBITRATION]; Leon E. Trakman, *The Impartiality and Independence of International Arbitrators Reconsidered*, 10 INT'L ARB. L. REV. 999 (2007); Felipe Mutis Tellez, *Arbitrators' Independence and Impartiality: A Review Of SCC Board Decisions on Challenges to Arbitrators (2010-2012)* (unpublished, on file with the author); *see also* Christopher R. Drahozal, *A Behavioral Analysis of Private Judging*, 67 L. & CONTEMP. PROBS. 105 (2004) [hereinafter Drahozal, *Private Judging*]; Baiju S. Vasani & Shaun A. Palmer, *Challenge and Disqualification of Arbitrators at ICSID: A New Dawn?*, 30 ICSID REV. 194 (2014) and CHALLENGES AND RECUSALS OF JUDGES AND ARBITRATORS IN INTERNATIONAL COURTS AND TRIBUNALS (Chiara Giorgetti ed., 2015) were published when the present Article was in the final editing process and have not been considered.

[6] Undeniably, "there has been a recent uptick in challenges to arbitrators." Charles B. Rosenberg, *Challenging Arbitrators in Investment Treaty Arbitrations*, 27 J. INT'L ARB. 505, 506 (2010).

[7] *See* Compañía de Aguas del Aconquija S.A. & Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for Annulment of the Award Rendered on 20 August 2007, ¶ 231 (Aug. 10, 2010), http://www.italaw.com/documents/VivendiSecondAnnulmentDecision.pdf ("It may have been possible at first to consider Professor Kaufmann-Kohler's attitude in these matters as a one-off serious lapse of judgment but her removal by the Permanent Court of Arbitration in the Yukos cases after her refusal voluntarily to withdraw appears to confirm that she has more broadly a view of her independence and of the relevant criteria in this connection which do not or do no longer accord with the minimum standards that now prevail in these matters").

[8] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention]; INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, ICSID CONVENTION, REGULATIONS AND RULES (Apr. 10, 2006), https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf [hereinafter ICSID REGULATIONS AND RULES].

[9] *See* ICSID, THE ICSID CASELOAD – STATISTICS (ISSUE 2014-2) 7 (2014), https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202014-

ject to a challenge procedure.[10] Most proposals for arbitrator disqualification in ICSID have been brought forward only in the last few years. The empirical study of the most recent ICSID tribunal disqualification awards reveals some changes in the disqualification standard of review of arbitral independence, the challenge process, and the final decisions of the deciding authorities.[11] The aim of this Article is to trace the source of this development and to propose ways for the future structuring of an international investment regime that is both transparent and effective.

In the volatile and uncertain world of international law,[12] international courts have had difficulties adapting. The flexibility of international arbitration is one reason why international investment arbitration has been so successful in recent years and especially since the late 1990s.[13] International investment tribunals operate as functional equivalents to courts in international law. For this reason, and under the guidance of the arbitration community, investor-state tribunals had to operate under similar independence standards in order to achieve legitimacy in the eyes of the international community.

The thesis of the Article is that the quest for arbitral independence is the result of a "process of communication"[14] and interaction between the members of the international arbitration community, states, international organizations, arbitration houses, and international courts prompted by the arbitration community.[15] Arbitral independence is only partially a result of

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2%20(English).pdf.

[10] The present study builds on KAREL DAELE, CHALLENGE AND DISQUALIFICATION OF ARBITRATORS IN INTERNATIONAL ARBITRATION 455–61 (2012). The relevant information is obtained primarily from *Newly Posted Awards, Decisions & Materials, ITALAW*, http://www.italaw.com/ (last visited Jan. 30, 2015).

[11] It is unfortunately difficult to collect similar data on investment cases in other fora like the Permanent Court of Arbitration and the International Chamber of Commerce. The Article will also not be dealing with the related and very interesting latest occurrence of the exclusion of counsel. *See* Hrvatska Elektroprivreda v. Slovenia*,* Tribunal's Ruling Regarding the Participation of David Mildon QC in Further Stages of the Proceedings, ICSID Case No. ARB/05/24 (May 6, 2008), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC950_En&caseId=C69; Rompetrol Group N.V. v. Romania, ICSID Case No. ARB/06/3, Decision of the Tribunal on the Participation of a Counsel (Jan. 14, 2010), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1370_En&caseId=C72.

[12] REISMAN, *supra* note 3.

[13] *See* UNCTAD, Recent Developments in Investor-State Dispute Settlement (ISDS), U.N. Doc. UNCTAD/WEB/DIAE/PCB/2013/3 (Apr. 10, 2013); ICSID, *supra* note 9.

[14] *See* W. Michael Reisman, *International Lawmaking: A Process of Communication*, 75 AM. SOC'Y INT'L L. PROC. 101, 101 (1981).

[15] *See generally* YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER (1996) [hereinafter DEZALAY & GARTH, DEALING IN VIRTUE] (on the role of the arbitration community in the construction of international arbitration). A similar influence of lawyers in the construction of international legal fields has been observed also in other areas. The relevant literature is rapidly growing; *see generally*

legal rules. A comparison between adjudication fora shows that there are great similarities and great differences between the independence guarantees of international judges and those of international arbitrators. Both types of adjudicators share three common standards of personal independence: (a) qualifications of the adjudicators; (b) rules on disclosure (and investigation), primarily concerning possible conflicts of interest; and (c) challenge rules. However, standards of organizational independence such as safeguards regarding tenure and salaries are not shared and apply only to judges. Arbitral independence is rather the effect of the creation of a tightly connected community of international arbitrators that has been established over the years of arbitral practice.[16] It is largely the same community of people that deals with international investment cases in the international investment fora. They have transposed their ethos and professional practices onto the investment law regime and arbitration.

The international arbitration community applies the higher "appearance of bias" standard of international courts to the evaluation of arbitral independence. The standard is also usually applied in the ICSID framework, despite Articles 14 and 57 of the ICSID Convention seemingly setting a different standard of independence, namely "manifest lack of independent judgment." This is substantially lower than the appearance of bias

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LAWYERS AND THE CONSTRUCTION OF TRANSNATIONAL JUSTICE (Yves Dezalay & Bryant G. Garth eds., 2012); LAWYERS AND THE RULE OF LAW IN AN ERA OF GLOBALIZATION (Yves Dezalay & Bryant G. Garth eds., 2011); THE PARADOX OF PROFESSIONALISM: LAWYERS AND THE POSSIBILITY OF JUSTICE (Scott L. Cummings ed., 2011); *see also* ASIAN LEGAL REVIVALS: LAWYERS IN THE SHADOW OF EMPIRE (Yves Dezalay & Bryant G. Garth eds., 2010) (on the role of lawyers in institutional reform in Asia); A HISTORY OF LAW AND LAWYERS IN THE GATT/WTO: THE DEVELOPMENT OF THE RULE OF LAW IN THE MULTILATERAL TRADING SYSTEM (Gabrielle Z. Marceau ed., 2015) (on the role of lawyers in the World Trade Organization); THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES (Yves Dezalay & Bryant G. Garth eds., 2002) (concerning the role of lawyers in institution-building in Latin America); LAW AND THE FORMATION OF MODERN EUROPE: PERSPECTIVES FROM THE HISTORICAL SOCIOLOGY OF LAW (Mikael Rask Madsen & Chris Thornhill eds., 2014) (on the role of lawyers in the transformation of Europe); LAWYERING EUROPE: EUROPEAN LAW AS A TRANSNATIONAL SOCIAL FIELD (Antoine Vauchez & Bruno de Witte eds., 2013); Yves Dezalay & Bryant G. Garth, *From the Cold War to Kosovo: The Rise and Renewal of the Field of International Human Rights*, 2 ANN. REV. L. & SOC. SCI. 231 (2006) (on the role of lawyers in the construction of the field of human rights); John Hagan, Ron Levi & Gabrielle Ferrales, *Swaying the Hand of Justice: The Internal and External Dynamics of Regime Change at the International Criminal Tribunal for the Former Yugoslavia*, 31 L. & SOC. INQUIRY 585 (2006) (on the role of lawyers in the construction of international criminal law); *cf. also* Mikael Rask Madsen, *Sociological Approaches to International Courts*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 388, 392 (Cesare P.R. Romano, Karen J. Alter & Yuval Shany eds., 2014) (on similar transformations in the field of European human rights); ANTOINE VAUCHEZ & LAURENT WILLEMEZ, LA LUSTICE FACE À SES RÉFORMATEURS (1980–2006): ENTREPRISES DE MODERNISATION ET LOGIQUES DE RÉSISTANCES (2007) (concerning the role of lawyers in the reform of the French judicial system); Mikael Rask Madsen, *From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics*, 32 L. & SOC. INQUIRY 137 (2007).

[16] *See* DEZALAY & GARTH, DEALING IN VIRTURE, *supra* note 15, *passim*.

standard that applies in international courts and other fora of international arbitration. Still, the arbitration community usually adheres to an interpretation beyond the grammar of Articles 14 and 57 in its willingness to be and appear to be independent to the outside world. The ultimate manifestation of the willingness of the arbitration community to be and appear independent is the International Bar Association's "Guidelines on Conflicts of Interest in International Arbitration,"[17] which are practically identical on the issues of the independence standard and the functional independence and impartiality to the statutes of international courts and "The Burgh House Principles on the Independence of the International Judiciary."[18]

In ICSID, a modified appearance of bias standard as reflected in the recent case law of ICSID tribunals is applicable. The Article proposes, though, the application of the non-modified appearance of bias standard for the chairperson of the tribunal. The differences between the two standards are the burden of proof of the challenging party and the disqualification standard of review of the deciding authority. The challenging party has to pass a higher bar in order to prove dependence or partiality of the party-appointed arbitrator in comparison to the chairperson of the tribunal; the deciding authority—either the unchallenged arbitrators, or the Chairperson of the Administrative Council of ICSID—should apply good faith review in the case of the party-appointed arbitrators in comparison to full substantive review in the case of the chairperson.

Given current dissatisfaction among some participants and observers with both the overall structure of the investor-State arbitration and the results it produces,[19] several proposals have been put forward as alternatives to the current system.[20] This Article argues an arbitrator certification system is the best solution.

This Article's analysis of the construction of arbitral independence reveals that the best way to improve the overall investor-state arbitration sys-

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[17] INT'L BAR ASS'N, GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION (2004), http://www.ibanet.org/Document/Default.aspx?DocumentUid=21D27F55-134B-4791-A01C-F8B6658BAB24 [hereinafter IBA GUIDELINES].

[18] Study Group of the International Law Association on the Practice and Procedure of International Courts and Tribunals, in association with the Project on International Courts and Tribunals (adopted June 2004), http://www.ucl.ac.uk/laws/cict/docs/burgh_final_21204.pdf [hereinafter Burgh House Principles].

[19] *See generally* Charles N. Brower & Sadie Blanchard, *What's in a Meme? The Truth about Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States*, 52 COLUM. J. TRANSNAT'L L. 689 (2014).

[20] *See, e.g.*, UNCTAD, Reform of Investor-State Dispute Settlement: In Search of a Roadmap, U.N. Doc. UNCTAD/WEB/DIAE/PCB/2013/4 (June 13, 2013) (discussing five main reform paths, namely promoting ADR, tailoring the existing system through individual international investment agreements, limiting investor access to ISDS, introducing an appeals facility and creating a standing international investment court); *see generally* THE EVOLVING INTERNATIONAL INVESTMENT REGIME: EXPECTATIONS, REALITIES, OPTIONS (Jose E. Alvarez et al. eds., 2011).

tem is by focusing on the arbitration community, the arbitrators and their qualities, rather than on any major institutional reform. A solution cannot include fundamental changes to the legal and institutional framework if it is to be at all viable and accepted by all players in the field. The proposal put forward in this Article is to regulate investor-state arbitration in a completely different way than the alternatives proposed so far, by introducing a new system of control[21] in international investment arbitration that can address the peculiarities of investor-state arbitration: arbitrator certification.[22] The proposed certification system shifts the focus from the institutions to the arbitration community and the person of the arbitrator,[23] and certification becomes extremely relevant in view of the discussions on the adoption of the Transatlantic Trade and Investment Partnership (TTIP) and the Trans-Pacific Partnership (TPP).

Part II of the Article introduces the issues of arbitral independence. First, it presents a recent case from a non-investment law forum, an Article VII United Nations Convention for the Law of the Sea Tribunal. The decision in the disqualification challenge between *Mauritius v. U.K.* is important to the independence of international arbitrators since it deals with several open issues and involves many of the specialists in the field, either as arbitrators, counsel, or experts.[24] *Caratube v. Kazakhstan*, one of the latest decisions on a disqualification challenge from an ICSID tribunal, is a major step towards further crystallization of the rapidly evolving ICSID case law.[25] The remainder of Part II compares the independence standards applicable in the various international courts. Independence guarantees in the statutes of the four courts with universal jurisdiction have been identified: the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS), the International Criminal Court, and the

[21] *See generally* MICHAEL REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION: BREAKDOWN AND REPAIR (1992); W. Michael Reisman, *Reflections on the Control Mechanism of the ICSID System*, 6 REV. INT'L ARBITRAL AWARDS 197 (2010); W. Michael Reisman, *The Breakdown Of The Control Mechanism in ICSID Arbitration*, 1989 DUKE L.J. 739 (1989).

[22] *See also* Catherine A. Rogers, *Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct*, 41 STAN J. INT'L L. 53, 62 n.53, 121 & n.383 (2005) ("Finally, as some have already suggested for the domestic context, perhaps the time has come for licensing or certification procedures to regulate arbitrator conduct. These steps are inevitable as the pool of international arbitrators transforms from being an ad hoc collection of highly talented independent contractors into a fully formed profession.").

[23] *See also* Rogers, *supra* note 22, at 82–106 (developing a functional approach to the regulation of arbitrators).

[24] *See* Republic of Mauritius v. United Kingdom of Great Britain & Northern Ireland, Reasoned Decision on Challenge, PCA Case. No. 2011-3/1 (Perm. Ct. Arb. 2011), http://pca-cpa.org/showfile.asp?fil_id=1782.

[25] Caratube Int'l Oil Co. LLP & Mr. Devincci Salah Hourani v. Republic of Kazakhstan, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch (Mar. 20, 2014), http://www.italaw.com/sites/default/files/case-documents/italaw3133.pdf.

World Trade Organization Appellate Body (WTO AB). The Article then discusses independence standards in the rules of the most important arbitration houses like the International Chamber of Commerce and the London Court of International Arbitration, and turns quickly to issues that are more relevant to international investment arbitration, especially the discussion of the independence guarantees of ICSID tribunals where most investment cases are adjudicated.

The nature of independence among international investment arbitrators entails only part of the guarantees of independence that international judges enjoy. Still, international investment arbitrators are considered to be independent and strive to give an appearance of non-biased decisionmaking towards governments and investors. Part III traces the reasons for this development in international investment law. First, the international arbitration community has transposed its ethos onto the international investment regime; second, the functional equivalence of arbitration and judicial settlement in international dispute resolution has brought about common standards.

Part IV discusses five reform proposals that have been put forward for an institutional re-shaping of international investment arbitration, namely: abolishing party-appointed arbitrators; introducing an appeal mechanism or standing international investment court; adopting Codes of Conduct; or returning to a combination of diplomacy and domestic courts. The Article explains why these proposals are not viable solutions for the reform of international investment arbitration. The Article then proposes introducing a new system of control in international investment arbitration, which has been tested in the field of mediation: certification. Based on a functional understanding of the field of international investment arbitration,[26] the reform proposal focuses less on institutions and more on the attributes of the arbitration community. After all, it is arbitrators who have the most influence on the quality of the arbitration system.[27]

II. INDEPENDENCE OF INTERNATIONAL ADJUDICATORS

According to several accounts, the field of international investment ar-

[26] *See* Rogers, *supra* note 22, at 109 (footnotes omitted) ("This sketch of the universal core features of international arbitrators provides a basis for a definition of the arbitrator's functional role, from which it is possible to outline broadly the structure of arbitrator ethics."). According to the functional approach, ethical obligations cannot simply be transplanted from other professions, but must instead be derived from the nature of the decisionmaker's role. *See also* CATHERINE A. ROGERS, ETHICS IN INTERNATIONAL ARBITRATION 338–39 (2014).

[27] *Cf.* Erik Voeten, *International Judicial Independence*, *in* INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART 421, 424 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013) ("An independent judge is thus not by definition a good judge; although good judges tend to be independent.").

bitration is undergoing a phase of judicialization similar to that observed in other international regimes.[28] The unfolding concerns regarding arbitral independence seem to corroborate these accounts.[29] Due to judicial globalization of the international legal order in general, judicial independence has become a pressing issue in international courts and tribunals. There is increasing attention to not only the need for independence of international judges generally, but also the need for independent international commercial[30] and international investment arbitrators. The number of cases filed raising concerns and challenges against arbitrators is increasing, and the arbitral profession confronts a growing need for independence. This Chapter discusses two of the most important recent cases for the development of the law of independence in international investment arbitration: *Mauritius v. U.K.* and *Caratube v. Kazakhstan*, which highlight how both the substance and process of decisionmaking is critically important. The discussion then turns to the development of a global standard of international adjudicator independence and compares it with the applicable standard in international investment arbitration. This part then discusses the peculiarities of the ICSID framework and how it has been interpreted and applied in the most recent case law.

A. An Increasing Trend in International Arbitration: Two Recent Cases

1. Mauritius v. U.K.

This well-reasoned decision on a disqualification proposal by a Tribunal constituted under Annex VII of the United Nations Convention for the Law of the Sea (UNCLOS) has considered all the issues regarding arbitral independence in international law.[31] The challenge arose out of a law of the sea case between the Republic of Mauritius and the U.K. Many of the key figures in international dispute settlement were involved in this case.[32] This

[28] *See* Sweet, *supra* note 4, at 47. Sweet mentions four judicialization indicators that apply to Investor-State arbitration: the creation of precedent; the adoption of balancing techniques; the admission of *amicus* briefs; and the push for appellate supervision of arbitral awards. These are substantive indicators of judicialization that prove the existence of at least the arbitrators' judge-like function in view of the new and evolving governance field of Investor-State arbitration.

[29] Gus Van Harten, for example, criticizes the lack of independence of Investor-State arbitrators and the delegation of the judicial function of the states to arbitration panels. *See* GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 172 (2007).

[30] *See, e.g.*, sources cited *supra* note 5, particularly Drahozal, *Private Juding*, at 105, and Drahozal, *Arbitral Decision Making*, at 319.

[31] *See* Republic of Mauritius v. United Kingdom of Great Britain & Northern Ireland, Reasoned Decision on Challenge, PCA Case. No. 2011-3/1 (Perm. Ct. Arb. 2011), http://pca-cpa.org/showfile.asp?fil_id=1782.

[32] They include: Judge Rüdiger Wolfrum, a German national, as arbitrator appointed by Mauritius;

elevated the case to a battle about the applicable independence standard for adjudicators in international law, making the case relevant for the investment arbitration framework as well.

Mauritius challenged Judge Greenwood, the arbitrator appointed by the UK, and this challenge was decided by the remaining arbitrators. The challenge was based on four grounds:[33]

> (i) [Judge Greenwood's] involvement with the United Kingdom on legal matters touching directly or indirectly on [the object of the dispute];
> (ii) his involvement with the United Kingdom on the application of the European Convention on Human Rights (the "ECHR") to the Chagos Archipelago or to the British overseas territories;
> (iii) his intention to seek reelection to the International Court of Justice (the "ICJ"); and
> (iv) his service on the Appointments Board for the new Legal Adviser to the Foreign and Commonwealth Office (FCO).

The Republic of Mauritius favored a contextual interpretation of the relevant articles of the Convention that refer to the independence of international arbitrators, whereas it presented a very broad understanding of context with reference to the provisions of other international arbitration rules and treaties and also to domestic case law. Article 2(1) UNCLOS Annex VII reads:

> A list of arbitrators shall be drawn up and maintained by the Secretary-General of the United Nations. Every State Party shall be entitled to nominate four arbitrators, each of whom shall be *a person experienced in maritime affairs and enjoying the highest reputation for fairness, competence and integrity*. The names of the persons so

Judge Sir Christopher Greenwood CMG QC, a British national, as arbitrator appointed by the U.K.; Judge James Kateka, a Tanzanian national, and Judge Albert Hoffmann, a South African national, as arbitrators; and Professor Ivan Shearer, an Australian national, as arbitrator and President of the Tribunal, appointed by the President of the International Tribunal for the Law of the Sea (ITLOS) pursuant to Article 3(e) of Annex VII of UNCLOS. Mauritius was represented, among others, by Professor James Crawford SC, an Australian national and Professor of International Law at the University of Cambridge, who is currently a judge at the International Court of Justice, and Professor Philippe Sands QC, a British national and Professor of International Law at University College London. Judge Thomas Mensah, and Professors George Bermann, Kate Malleson and Yuval Shany also submitted opinions supporting the positions of Mauritius. It is interesting to note that Crawford, Sands, Mensah, Shany and Malleson are members of the International Law Association Study Group on the Practice and Procedure of International Courts and Tribunals which elaborated the "Burgh House Principles," see *supra* note 18, at 1 ("Noting in particular that each court or tribunal has its own characteristics and functions and that in certain instances judges serve on a part-time basis or as *ad hoc* or *ad litem* judges."). Judge Gilbert Guillaume, and former Judge and President of the ICJ and predecessor of Judge Greenwood in the ICJ, Dame Rosalyn Higgins submitted Statements in favor of the position of the U.K.

[33] *Mauritius v. United Kingdom*, PCA Case. No. 2011-3/1, ¶ 10.

nominated shall constitute the list.[34]

The U.K. took a more textual approach. Moreover, its understanding of context was only with reference to the ICJ and ITLOS, which are the other fora that can adjudicate UNCLOS disputes. ICJ, UNCLOS and Annex VII provisions have the common unifying factor that they apply to inter-State disputes.

Additionally, both the U.K. and Judge Greenwood made the case about the difference between inter-State and non-inter-State arbitration, considering that—independent of what applies to the latter—a different standard applies to the former. Namely, the applicable standard is not the role/issue conflict standard of international commercial and Investor-State arbitration but rather the lower "specific prior involvement standard," which calls for previous involvement in the *specific* case. This is the standard that the ICJ applies in disqualification applications before it.[35]

According to Mauritius, the appearance of bias test was satisfied by the "extremely close and longstanding relationship between Judge Greenwood and the United Kingdom."[36] According to the U.K., Judge Greenwood had had no prior involvement in the subject matter of the specific case and thus the challenge should fail.[37] The Tribunal, in agreement with the U.K. and Judge Greenwood, held that principles and rules developed in the context of international commercial and investment arbitration were not applicable to inter-State disputes, such as the dispute in question.[38] "The Tribunal . . . decided that the law applicable to [this] arbitration [was] that to be found in Annex VII of the Convention . . ., supplemented by the law and practice of international courts and tribunals in inter-State cases."[39]

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[34] U.N. Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) (emphasis added); *see also id*. annex VII, art. 3(e) (Arbitration), http://www.un.org/depts/los/convention_agreements/texts/unclos/annex7.htm:

> Unless the parties agree that any appointment under subparagraphs (c) and (d) be made by a person or a third State chosen by the parties, the President of the International Tribunal for the Law of the Sea shall make the necessary appointments. If the President is unable to act under this subparagraph or is a national of one of the parties to the dispute, the appointment shall be made by the next senior member of the International Tribunal for the Law of the Sea who is available and is not a national of one of the parties. The appointments referred to in this subparagraph shall be made from the list referred to in article 2 of this Annex within a period of 30 days of the receipt of the request and in consultation with the parties. The members so appointed shall be of different nationalities and may not be in the service of, ordinarily resident in the territory of, or nationals of, any of the parties to the dispute.

[35] *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 2, 3 (2004); *see also id*. at 7 (Buergenthal, J., dissenting).

[36] *Mauritius v. United Kingdom*, PCA Case No. 2011-3/1, ¶ 72.

[37] *Id*. ¶ 84

[38] *Id*. ¶¶ 165–168.

[39] *Id*. ¶ 165; *see also* the Notes to the PERMANENT COURT OF ARBITRATION, OPTIONAL RULES FOR ARBITRATING DISPUTES BETWEEN TWO STATES, which make clear that the PCA rules include modifica-

Moreover, the Tribunal specifically rejected applying the International Bar Association Guidelines, which have gained great importance in recent years.

Based on this reasoning, the Tribunal concluded that a party challenging an arbitrator must demonstrate that under the standards applicable to inter-State cases there are justifiable grounds for doubting the independence and impartiality of that arbitrator in a particular case.[40] The reason for this is that the "system of inter-[S]tate dispute settlement" is based on the consent of the parties and, more specifically, upon the rules of public international law as laid out in Article 38(1) of the ICJ Statute.[41] The Tribunal further said that since it was undisputed that Judge Greenwood was not involved in the dispute before he was appointed as arbitrator, Article 8(1) of the ITLOS Statute could not serve as a ground for challenge.[42] Regarding the further claim concerning Judge Greenwood's participation on the Board for the Selection of the U.K.'s Foreign & Commonwealth Office Legal Adviser, the Tribunal said it had scrutinized his participation in that process with special care since it occurred "simultaneously" with Judge Greenwood's participation as an arbitrator in the case.[43] Despite this scrutiny, the relationship between Judge Greenwood and the U.K. Government was not found to be "continuing," and as a result Mauritius's challenge against Judge Greenwood was dismissed.

This result is extremely important both because of the subject matters of the dispute and the persons involved. It is expected that the decision will have a major impact on future arbitrator disqualification motions. The first key finding of the Tribunal was that the proper inquiry concerning arbitral independence is not whether *actual* bias or dependence upon a party exists but instead whether there is an *appearance* of bias or lack of independence or impartiality. The Tribunal's second move, to differentiate between inter-State and private-private disputes, was less expected. One would have expected the Tribunal to apply higher standards of judicial independence in inter-State cases, but the Tribunal took a restrictive approach to the so-called "issue-conflict question," partly following the approach of the ICJ statute and precedent. With this decision, the Tribunal has placed a great trust on the power of the states to shape their contractual relationships with other states.

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tions, *inter alia*, "to reflect the public international law character of disputes between States, and diplomatic practice appropriate to such disputes," which reflects the Rules' origins in the UNCITRAL Arbitration Rules.

[40] *Mauritius v. United Kingdom*, PCA Case No. 2011-3/1, ¶ 166.

[41] *Id.* ¶ 167.

[42] *Id.* ¶ 172.

[43] *Id.* ¶ 181.

2. Caratube v. Kazakhstan

Before going into an analysis of the standards of arbitral independence, it is worth looking at one of the most recent decisions on arbitrator disqualification in the international investment law context. This decision epitomizes the state of the art concerning the standard of arbitral independence. *Caratube* gives the arbitral community's stamp of approval to recent doctrinal shifts driven by an interplay between the Chairman of the Administrative Council of ICSID and arbitrators sitting on various tribunals.

The challenge arose out of a dispute between Caratube International Oil Company LLP, a Kazakh company, and Mr. Devincci Salah Hourani, a U.S. national, on the claimant side, and the Republic of Kazakhstan, on the other.[44] The claimants raised their concerns in relation to Bruno Boesch, the arbitrator of the respondent, who had been repeatedly appointed to serve as co-arbitrator by the counsel for the respondent (the law firm Curtis, Mallet-Prevost, Colt & Mosle LLP), including in an UNCITRAL arbitration involving Kazakhstan, *Ruby Roz Agricol v. The Republic of Kazakhstan*. Pursuant to Article 58 of the ICSID Convention and Article 9(4) of the ICSID Arbitration Rules, the unchallenged arbitrators, Laurent Lévy and Laurent Aynès, had to decide on the disqualification.

First, the Tribunal laid out the substantive standard of review. Although not stated in Articles 57 and 14 of the ICSID Convention, it is generally accepted that arbitrators have to be not only independent but also impartial.[45] Concerning the applicable legal standard, the Tribunal explained this is "an 'objective standard based on a reasonable evaluation of the evidence by a third party' or, in other words, on the 'point of view of a reasonable and informed third person'".[46] It then clarified the meaning of the word "manifest" in Article 57 of the ICSID Convention by stating that it "means 'evident' or 'obvious' in that it 'relates to the ease with which the alleged

[44] *Caratube Int'l Oil Co. LLP*, ICSID Case No. ARB/13/13, ¶¶ 1–2.

[45] *Id.* ¶ 52,which cites to some of the most recently decided cases, namely: Abaclat & Others v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on the Proposal to Disqualify a Majority of the Tribunal, ¶ 74 (Feb. 4, 2014), http://www.italaw.com/sites/default/files/case-documents/italaw3057.pdf; Burlington Resources, Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, ¶ 65 (Dec. 13, 2013), http://www.italaw.com/sites/default/files/case-documents/italaw3028.pdf; Repsol S.A. v. Argentine Republic, ICSID Case No. ARB/01/8, Decision on the Proposal for Disqualification of Francisco Orrego Vicuña and Claus von Wobeser, ¶ 70 (Dec. 13, 2013), http://www.italaw.com/sites/default/files/case-documents/italaw3033.pdf; Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venez., ICSID Case No. ARB/12/20, Decision on the Parties' Proposal to Disqualify a Majority of the Tribunal, ¶ 58 (Nov. 12, 2013), http://www.italaw.com/sites/default/files/case-documents/italaw3009.pdf.

[46] *Caratube Int'l Oil Co. LLP*, ICSID Case No. ARB/13/13, ¶ 54 (quoting *Blue Bank International & Trust (Barbados) Ltd*, ICSID Case No. ARB/12/20, ¶ 60).

lack of [independence or impartiality] can be perceived.'"[47] The Tribunal explained that the lack of independence and impartiality is "evident" or "obvious," and therefore "manifest," if it can be "discerned with little effort and without deeper analysis."[48]

As to the burden of proof, the parties even further divided and the Tribunal offered more precise reasoning.[49] The claimants argued that the arbitrators must be disqualified if it is shown that there are "reasonable doubts" as to their independence or impartiality. The respondent submitted that the existence of reasonable doubts is not enough, and instead, the claimants must submit clear evidence of the arbitrators' lack of impartiality and independence. The *Caratube* Tribunal, composed of the unchallenged arbitrators, followed recent case law on this point as shaped by the Chairman of the ICSID Administrative Council, Kim Yong Kim. The first relevant ICSID case was *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, which was followed as precedent by *Burlington Resources, Inc. v. Republic of Ecuador*, *Repsol S.A. & Repsol Butano S.A. v. Republic of Argentina*, & *Abaclat & Others v. Argentine Republic*. In these cases, the Chairman of the ICSID Administrative Council found that "Articles 57 and 14(1) of the ICSID Convention do not require proof of actual dependence or bias; rather it is sufficient to establish the appearance of dependence or bias."[50]

The *Caratube* Tribunal crystallizes the emerging new standard for arbitrator disqualification, but it does more, too. For the first time in investor-State arbitration history, the unchallenged arbitrators, after discussing different claims made by the claimants, found that the claimants had demonstrated that a third party would have found that there was an evident or obvious appearance of a lack of impartiality or independence based on a reasonable evaluation of the facts and that, therefore, Mr. Boesch manifestly lacked one of the qualities required by Article 14(1) of the ICSID Convention in this particular case and thus had to be disqualified.

B. A Global Standard of International Adjudicator's Independence?

Independence is a defining feature of every dispute resolution system. In the sections to follow, we will trace the variable of adjudicator independ-

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[47] *Id.* ¶ 55 (quoting *Blue Bank International & Trust (Barbados) Ltd*., ICSID Case No. ARB/12/20, ¶ 61).

[48] *Id*. (quoting EDF International S.A. v. Argentine Republic, ICSID Case No. ARB/03/23, Challenge Decision Regarding Professor Gabrielle Kaufmann-Kohler, ¶ 68 (June 25, 2008), http://www.italaw.com/sites/default/files/case-documents/ita0262.pdf).

[49] *Id*. ¶¶ 56–57.

[50] *Id.* ¶ 57; *Blue Bank International & Trust (Barbados) Ltd.*, ICSID Case No. ARB/12/20, ¶ 59; *Burlington Resources, Inc.*, ICSID Case No. ARB/08/5, ¶ 66; *Repsol S.A.*, ICSID Case No. ARB/01/8, ¶ 71; *Abaclat & Others*, ARB/07/5, ¶ 76.

ence in legal texts, decisions, and studies of domestic and primarily international courts and tribunals. The standards which make up the judicial function vis-à-vis independence and impartiality are basically the same for national and international tribunals.[51] Moreover, all international courts and tribunals use a fairly similar legal standard of independence, including the elements of independence, impartiality, and avoidance of the appearance of bias.[52] Comparisons between these standards will help us forge the necessary links between international investment arbitration and other international adjudication fora.[53]

1. Independence Guarantees of Domestic and International Judges

What does it mean to be an independent judge in the domestic setting? According to a short meta-analysis conducted by the World Bank, a truly independent judiciary has three characteristics:[54] (a) it is independent in the strict sense, meaning that there is no interference from the parties to the relevant disputes or other branches of government; (b) it is impartial, meaning that its decisions are not influenced by the personal interest of the judge in the outcome of the case; and (c) its decisions are enforced, meaning that a court's decision should be implemented, either in a voluntary or coerced manner.

Empirical research in the field identifies similar characteristics of judicial independence. The comparative empirical work of Feld and Voigt, for example, identifies variables of judicial independence and distinguishes and measures de jure and de facto judicial independence.[55] The study is based on a questionnaire that has been sent to academics and practitioners in countries all over the world. Their variables of de jure judicial independence are: (a) whether the highest courts are anchored in the constitution; (b) how difficult is it to amend the constitution; (c) appointment procedures of judges; (d) the length of tenure of judges; (e) whether there is a fixed re-

[51] Karin Oellers-Frahm, *International Courts and Tribunals, Judges and Arbitrators*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 1 (Rüdiger Wolfrum ed., 2013), http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e45.

[52] *Id.* ¶¶ 8, 30. According to Oellers-Frahm, these principles may even be considered as customary international law. *Id.* ¶¶ 24, 30. The standards of all international courts and tribunals including the ICSID provisions are largely based on the example of the Permanent Court of International Justice and the ICJ. *Id.* ¶ 7.

[53] According to Rogers, using the judicial standard as a referent for the definition of arbitrator independence and impartiality is misleading. Rogers, *supra* note 22, at 67–71, 81.

[54] MATTHEW STEPHENSON, JUDICIAL INDEPENDENCE: WHAT IT IS, HOW IT CAN BE MEASURED, WHY IT OCCURS 1, http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/JudicialIndependence.pdf (last visited Jan. 29, 2016); *cf. also, e.g.*, G.A. Res. 40/32 (Nov. 29, 1985) and G.A. Res. 40/146 (Dec. 13, 1985), Basic Principles on the Independence of the Judiciary.

[55] Lars P. Feld & Stefan Voigt, *Economic Growth and Judicial Independence: Cross-Country Evidence Using a New Set of Indicators*, 19 EUR. J. POL. ECON. 497, 498 (2003).

tirement age of judges in the court; (f) removal procedures; (g) whether re-election of judges is possible; (h) protection and adequacy of the salary of judges; (i) accessibility to the highest court; (j) procedure for the allocation of cases in court; (k) judicial review powers; and (l) transparency of the court. The variables of de facto judicial independence are: (a) average length of tenure; (b) deviation of average length of tenure from de jure prescription; (c) number of judges removed from office; (d) frequency of changes in the number of judges in the court; (e) real salary of judges; (f) real court's budget; (g) number of constitutional changes in the relevant articles; and (h) compliance by other branches with court rulings.

Due to the different setting in which they operate, international courts sometimes present different questions with regard to the nature of judicial independence in comparison to domestic courts.[56] At the same time, if international courts intend to exert more influence, they must be expected to establish a reputation for neutrality and objectivity.[57] For this reason, judicial independence guarantees for international judges are largely the same as those for domestic judges. Similar provisions are included in the statutes of all four international courts with universal jurisdiction that are the subject of our study, namely the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS), the International Criminal Court, and the World Trade Organization Appellate Body (WTO AB).[58]

Following Feld and Voigt, we can break down the judicial independ-

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[56] For example, in the international setting, independence may refer primarily to possible influence from governments, but also from multinational enterprises and non-governmental organizations.

[57] Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CALIF. L. REV. 1, 21 (2005).

[58] *See generally* INDÉPENDANCE ET IMPARTIALITÉ DES JUGES INTERNATIONAUX [INDEPENDENCE AND FAIRNESS OF INTERNATIONAL JUDGES] (Hélène Ruiz Fabri & Jean-Marc Sorel eds., 2010); L.E. Petteti, *Independence of International Judges*, *in* JUDICIAL INDEPENDENCE: THE CONTEMPORARY DEBATE 496 (Shimon Shetreet & Jules Deschenes eds., 1985); Voeten, *supra* note 27; DOMINIK ZIMMERMANN, THE INDEPENDENCE OF INTERNATIONAL COURTS: THE ADHERENCE OF THE INTERNATIONAL JUDICIARY TO A FUNDAMENTAL VALUE OF THE ADMINISTRATION OF JUSTICE (2014); Chester Brown, *The Evolution and Application of Rules Concerning Independence of the "International Judiciary,"* 2 L. & PRAC. INT'L CTS & TRIBUNALS 63, 65 (2003); Eyal Benvenisti & George W. Downs, *Prospects for the Increased Independence of International Tribunals*, 12 GERMAN L.J. 1057 (2011); Ruth Mackenzie & Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 HARV. INT'L L.J. 271 (2003); Theodor Meron, *Judicial Independence and Impartiality in International Criminal Tribunals*, 99 AM. J. INT'L L. 359 (2005); Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CALIF. L. REV. 899 (2005); Yuval Shany & Sigall Horovitz, *Judicial Independence in The Hague and Freetown: A Tale of Two Cities*, 21 LEIDEN J. INT'L L. 113 (2008); *see also* Steve Charnovitz, *Judicial Independence in the World Trade Organization*, *in* INTERNATIONAL ORGANIZATIONS AND INTERNATIONAL DISPUTE SETTLEMENT: TRENDS AND PERSPECTIVES 219 (Laurence Boisson de Chazournes et al. eds., 2002) (on judicial independence the WTO); Erik Voeten, *The Impartiality of International Judges: Evidence from the European Court of Human Rights*, 102 AM. POL. SCI. REV. 417 (2008) (on judicial independence in the European Court of Human Rights).

ence guarantees into several subcategories. Qualitative analysis of the different provisions may lead us to a further distinction between two types of judicial independence guarantees: they can be divided into functional/ personal guarantees and organizational guarantees. Functional independence guarantees refer to the function of decisionmaking and are addressed to the person of the judge. They include primarily the "qualifications" of judges.[59] According to Article 2 of the ICJ Statute, for example, "the Court shall be composed of a body of independent judges." Further functional independence guarantees are, using the terms of Feld and Voigt, "conflict of interest rules,"[60] "rules on disclosure of conflicts of interest,"[61] "challenge" or "disqualification" rules,[62] and "immunities."[63]

Organizational guarantees refer to organizational safeguards in the statutes of the courts dealing with the institutional separation of judges from other branches of government, the parties, and in some cases other divisions of the same or another court[64] Typical organizational guarantees are, in Feld and Voigt terms, "whether the courts are anchored in the international treaty," "how difficult it is to amend the court statute,"[65] "appointment procedures of the judges,"[66] "secure judicial tenure with fixed terms,"[67] "fixed retirement age of the judges in the court," "existence of process for removal

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[59] *See* Rome Statute of the International Criminal Court arts. 36, 40, 45, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute]; DSU, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, annex 2, Apr. 14, 1994, 1869 U.N.T.S. 401, 33 I.L.M. 1226 [hereinafter DSU]; Statute of the International Tribunal for the Law of the Sea arts. 2, 11, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 561 [hereinafter ITLOS Statute]; Statute of the International Court of Justice arts. 2, 20, *opened for signature* June 26, 1945, 59 Stat. 1051, 33 U.N.T.S. 933 [hereinafter ICJ Statute].

[60] *See* ICJ Statute, *supra* note 59, arts. 16–17; ITLOS Statute, *supra* note 59, arts. 7–8; Rome Statute, *supra* note 59, art. 41; World Trade Organization, *Working Procedures for Appellate Review*, annex 2, WTO Doc. WT/AB/WP/6 (adopted Aug. 16, 2010).

[61] *See* ITLOS Statute, *supra* note 59, art. 8(2); ICJ Statute, *supra* note 59, art. 24; International Criminal Court, Rules of Procedure and Evidence, Rule 33, ICC-ASP/1/3 (1994); World Trade Organization, *supra* note 61.

[62] *See* Rome Statute, *supra* note 59, art. 40(4); ITLOS Statute, *supra* note 59, arts. 8, 18; ICJ Statute, *supra* note 59, arts. 14, 24, 34; World Trade Organization, *supra* note 61.

[63] Rome Statute, *supra* note 59, art. 48(2); ITLOS Statute, *supra* note 59, art. 10 (*see also* Agreement on the Privileges and Immunities of the International Tribunal for the Law of the Sea, May 19–23, 1997, U.N. Doc. SPLOS/25); ICJ Statute, *supra* note 59, art. 19; World Trade Organization, *Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes*, arts. II–III, VI, WT/DSB/RC/1 (Dec. 11, 1996).

[64] The organizational guarantees could be further divided into "core organizational issues," "financial guarantees," and "compliance provisions."

[65] *See* ITLOS Statute, *supra* note 59, art. 41; ICJ Statute, *supra* note 59, arts. 69–70.

[66] *See* ICJ Statute, *supra* note 59, art. 4; Rome Statute, *supra* note 59, art. 36; ITLOS Statute, *supra* note 59, art. 4.

[67] *See, e.g.*, Rome Statute, *supra* note 59, art. 36(9)(a); ITLOS Statute, *supra* note 59, art. 15(1); ICJ Statute, *supra* note 59 art. 13(1).

from office,"[68] "re-election possibility,"[69] "protection and adequacy of the salary of the judges,"[70] "accessibility to the court,"[71] "procedure for allocation of cases in the court,"[72] "judicial review powers," "transparency of the court,"[73] and "compliance provisions."[74]

There are no major differences in the functional independence guarantees in the four universal courts, and there are also many common features in their organizational guarantees. The ICJ has relatively average organizational safeguards compared to the other courts, whereas it has the poorest compliance provisions. ITLOS, despite having been established in 1996, draws heavily on the provisions of the ICJ embodying the previous consensus on what was necessary for independence. The International Criminal Court has some of the most up-to-date provisions for judicial independence including non-renewable terms to insulate judges from possible political influence.[75] The WTO AB has, compared to the other courts, the lowest safeguards in several categories including: "length of tenure," having only four-year terms compared to nine-year terms for the other courts; "protection and adequacy of salary"; and "publication of decision and dissent," being the only court where dissents are usually not made public.[76] In the WTO AB, there is also no "process for removal from office," which might allow for some political influence from WTO members if such a question arises.[77] But at the same time, it is also the only court that has a concrete "procedure for the allocation of cases," and includes "the fullest set of guarantees to assure compliance with its decisions."

The distinctions will become very helpful in the analysis of arbitral independence since they can help us understand what parts of the legal safeguards are missing and in what ways the arbitration community has managed to strike a balance between the absence of legal rules and the

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[68] *See* Rome Statute, *supra* note 59, art. 46; ITLOS Statute, *supra* note 59, arts. 7, 9; ICJ Statute, *supra* note 59, art. 18.

[69] *See* Rome Statute, *supra* note 59, arts. 35, 36.

[70] *See, e.g.*, Rome Statute, *supra* note 59, art. 49; DSU, *supra* note 59, art. 17; ITLOS Statute, *supra* note 59, art. 18(1), (5); ICJ Statute, *supra* note 59, art. 32(5), (8).

[71] *See* Rome Statute, *supra* note 59, art. 1; DSU, s*upra* note 59, art. 17; ITLOS Statute, *supra* note 59, arts. 20, 21; ICJ Statute, *supra* note 59, arts. 34, 35(1), 36.

[72] *See* World Trade Organization, *Working Procedures for Appellate Review*, annex 2*,* Rules 3, 4, 5, WTO Doc. WT/AB/WP/6 (adopted Aug. 16, 2010).

[73] Rome Statute, *supra* note 59, arts. 56, 57, 58; DSU, *supra* note 59, art. 18; ITLOS Statute, *supra* note 59, arts. 50, 74, 83; Rome Statute, *supra* note 59, arts. 17, 18.

[74] *See* Rome Statute, *supra* note 59, pts. 9, 10; DSU, *supra* note 59, arts. 17, 19, 22; ITLOS, *supra* note 59, art. 33.

[75] *See* Rome Statute, *supra* note 59, art. 36(9)(a).

[76] *See* Meredith Kolsky Lewis, *The Lack of Dissent in WTO Dispute Settlement*, 9 J. INT'L ECON. L. 895, 905–20 (2006).

[77] *See also* TOMER BROUDE, INTERNATIONAL GOVERNANCE IN THE WTO: JUDICIAL BOUNDARIES AND POLITICAL CAPITULATION 167 (2004).

introduction of its own rules.

2. Appearance of Bias and Absolute Limits

Beyond the features of judicial independence that refer to the institutional design of the courts and tribunals, there are also substantive standards of judicial independence. The very well-known *dictum* of Lord Chief Justice Hewart that "justice must be done and be seen to be done" is considered the touchstone substantive standard of judicial independence for domestic judges.[78] Supported also by Article 6 European Convention of Human Rights case law, the "appearance of bias" test can be considered the worldwide standard of judicial independence.[79] According to Professors Shany and Horovitz, the "reasonable appearance of bias" standard as reflected in Principles 9.2 and 12.1 of the non-mandatory Burgh House Principles reflects *lex lata* since it is practiced both in international and domestic courts.[80] As we shall see in the following sections, this is also the generally applicable standard in international arbitration.

Next to the appearance of bias test, the principles *audi alteram partem* and *nemo iudex in causa sua* pose the absolute limits of functional and organizational independence.[81]

C. Independence in International Investment Arbitration

After having discussed different aspects of adjudicator independence in domestic and international dispute resolution systems, this section focuses on the independence guarantees and the applicable standard in investment arbitration. A study of the relevant documents and case law reveals some striking similarities, so that we are able to speak of a *common law of international arbitration*, but also some striking differences between arbitral common law and the ICSID framework, at least on the face of it. This discussion is preceded by an outlook on the nature of investor-State arbitration as reflected in the most recent discussions of international arbitration scholars.

1. Between Two Worlds

An important current question in investment law and arbitration con-

[78] R v. Sussex Justices, *ex parte* McCarthy [1924] 1 KB 356, 259.

[79] *See generally* Brekoulakis, *supra* note 5, at 7–8.

[80] Shany & Horovitz, *supra* note 58, at 122. As we also saw in the *Mauritius v. United Kingdom* award, it seems that the ICJ Statute in some respects sets the bar to prove the dependence of the judges higher than other courts and the Burgh House Principles. *Compare, e.g.*, ICJ Statute, *supra* note 59, arts. 16, 17(2), *with* Burgh House Principles, *supra* note 18, arts. 8–11.

[81] *See infra* Part III.B.

cerns the applicable paradigm.[82] The two different paradigms in international investment arbitration supposedly clash. Some scholars view investor-State arbitration as a species of commercial arbitration; others view it as a dispute settlement mechanism of (traditional) public (international) law.[83] The question arises because investor-State arbitration is situated between two worlds—it departs substantially from traditional public international law and from commercial arbitration.

International investment arbitration has an undoubtedly "public character."[84] It is usually based on international treaties, which are sources of public international law. The parties in a dispute are always a state-defendant and an investor-claimant. Disputes also have a public character since they involve claims by individuals against governments in relation to the exercise of public power in disputes that could be considered constitutional or administrative in nature. Moreover, disputes are decided at first and last instance.

On the other side, even treaty-based arbitration has an ad hoc and non-hierarchical character based on case-specific mandates.[85] International investment tribunals are not international courts.[86] They are modeled largely on commercial arbitration tribunals, not on court adjudication, and a large part of the body of arbitrators comes from commercial arbitration. Additionally, they have compulsory jurisdiction against states which is a feature that many international courts, including the ICJ, do not enjoy.

Accepting one approach to international investment law and arbitration has consequences for the interpretation of Bilateral Investment Treaties

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[82] *See generally* Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT'L L. 45 (2013). These paradigms do not refer to the question of the reasons of the adoption of BITs, including investment arbitration. *See* Lauge N. Skovgaard Poulsen, *Bounded Rationality and the Diffusion of Modern Investment Treaties*, 58 INT'L STUD. Q. 1, 1 (2014) (adding the "bounded rational competition model" to the "rational competition," and the "emulation model").

[83] *See generally* Roberts, *supra* note 82 (with further differentiations); INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 1, 8 (Stephan W. Schill ed., 2010); GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW (2007); Stephan Schill, *W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law*, 22 EUR. J. INT'L L. 875 (2011); Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT'L L. 121 (2006) (on the public law paradigm).

[84] W. Michael Reisman, *'Case Specific Mandates' versus 'Systemic Implications': How Should Investment*
Tribunals Decide? The Freshfields Arbitration Lecture, 29 ARB. INT'L 131, 138 (2013).

[85] *Id.* at 137.

[86] International arbitral tribunals do not meet the standards Cesare Romano uses to define international courts. According to Romano, international judicial bodies are permanent institutions that are: established by an international legal instrument (usually a treaty); rely on international law so as to resolve cases; follow set rules of procedure; and issue legally binding judgments. 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, 713–14 (1999).

(BITs), arbitral awards, and also possible proposals for institutional reforms.[87] Introducing concepts familiar to other more established fields of law might help in the development of international investment law and arbitration but could just as easily hinder its development because these concepts are still foreign to this field. For example, one strand of the literature supporting the public character of investor-State arbitration argues that the traditional public international law approach is not sufficient to describe its nature, and proposes understanding investor-State arbitration as a field of public law in broader terms including public international law, classical public law, and comparative public law.[88] This understanding of investor-State arbitration frequently leads to the interpretation of arbitral review as judicial review in domestic courts. But, the concept of public law is accompanied by further concepts that may be old-fashioned even for the description of domestic legal orders, like hierarchy, command-and-control, and strict separation of powers. This may hinder the adoption of new principles and ideas in the field.

The question of the applicable paradigm in international investment law and arbitration spills over into the understanding of the independence of investment arbitrators. Stephan Schill, for example, transposes the frame of separation of powers as the relevant frame for the independence of arbitrators.[89] But, arbitrators don't operate in the same environment as judges. As we shall see, international arbitration, and investor-State arbitration more specifically, have their own mechanisms for the promotion of the independence of the arbitrators. Moreover, even domestic systems have moved away from the traditional understanding of an absolute independence of judges with the introduction of mechanisms of judicial accountability.[90]

As we saw in *Mauritius v. U.K.*, international law might even be suggesting lower independence standards for investor-State arbitration than the common law of international arbitration. As further discussed in *Caratube v. Kazakhstan*, international investment arbitration is producing its own understanding of independence. This Article proposes to take an approach that respects the hybrid nature of international investment law and arbitration.[91] International investment tribunals stand in the middle between (internation-

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[87] *See also* Roberts, *supra* note 82, at 46–47; Catherine A. Rogers, *The Politics of International Investment Arbitrators*, 12 SANTA CLARA J. INT'L L. 223, 229 (2013).

[88] Gus Van Harten, *Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law*, *in* INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 627 (Stephan W. Schill ed., 2010).

[89] Stephan W. Schill, *Deference in Investment Treaty Arbitration: Re-conceptualizing the Standard of Review*, 3 J. INT'L DISP. SETTLEMENT 577, 580 (2012).

[90] *See, e.g.*, INDEPENDENCE, ACCOUNTABILITY, AND THE JUDICIARY *passim* (Guy Canivet, Mads Andenas & Duncan Fairgrieve eds., 2006).

[91] *See generally* Joost Pauwelyn, *At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, How it Emerged and How it Can be Reformed*, 29 ICSID REV. 371 (2014).

al and domestic) courts and more typical forms of arbitral tribunals.[92] The suggested approach has an effect on both the proposed standard of independence[93] and the proposed system of control in international arbitration.[94]

2. Features of the Common Law of Arbitral Independence

Independence and impartiality of arbitrators is of great importance and is commonly found in most arbitration rules and laws.[95] A study of the provisions of international arbitration documents, relevant case law and literature reveals some common features of independence in international arbitration. In the view of many commentators and arbitral case law, the different independence standards employed by investment-related fora, such as the ICSID, the United Nations Commission on International Trade Law (UNCITRAL) Rules, the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), and the Stockholm Chamber of Commerce (SCC), are roughly the same despite slight textual differences.[96] At the same time, the International Bar Associations' Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines) are increasingly considered to be best practice in arbitration[97] and reflecting the general standard of international arbitrator independence, conflict of interest avoidance, and disclosure. The relevant issues on arbitrator independence can be broken down into a structured discussion of: (a) independence and impartiality; (b) the different types of provisions that constitute the independence standard; and, eventually, (c) the applicable standard used in the assessment of arbitrator independence.

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[92] *See also* Leon E. Trakman, *The ICSID Under Siege*, 45 CORNELL INT'L L.J. 603, 660 (2012) (saying that investor-State arbitration has both a public and a commercial nature).

[93] *See infra* Part II.C.2 and 3.

[94] *See infra* Part IV.

[95] CLYDE CROFT, CHRISTOPHER KEE & JEFF WAINCYMER, A GUIDE TO THE UNICITRAL ARBITRATION RULES 130 (2013). Croft, Kee and Waincymer even raise arbitral independence to the status of an international principle. *Id.*

[96] Park, *supra* note 5, at 670–73. In addition, Rubins & Lauterburg, *supra* note 5, at 161, cited to several arbitral awards—both commercial and investment—including the following ICSID cases: EDF International S.A., SAUR International S.A. & León Participaciones S.A. v. Republic of Argentina, ICSID Case No. ARB/03/23, Challenge Decision Regarding Professor Gabrielle Kaufmann-Kohler, ¶ 74 (June 25, 2008) ("As explained above, the leading international arbitration rules are broadly similar. Despite slight textual differences, tribunals have not tended to give them markedly different effect. To justify the removal of an arbitrator, the petitioner's doubts must be justifiable on some objective basis, reasonable by the standard of a fair minded, rational, objective observer."). *See also* Bernasconi-Osterwalder et al., *supra* note 5, at 5 ("As this note explains, however, notwithstanding the different language used in the arbitration rules, the standards that have emerged for judging arbitrator challenges are today rather uniform. The textual variations are not the source of the problem.").

[97] Audley Sheppard, *Arbitrator Independence In ICSID Arbitration*, *in* INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 131, 136 (Christina Binder et al. eds., 2009).

(a) Independence and impartiality: The first point of the arbitral common law of independence refers to the distinction between independence and impartiality. According to *Suez et al. v. Argentina* "independence relates to the lack of relations with a party that might influence an arbitrator's decision. Impartiality, on the other hand, concerns the absence of bias or predisposition toward one of the parties."[98] The Tribunal reflects a common perception in international arbitration and in domestic and international case law and practice. The two notions, commonly collectively referred to as "bias,"[99] are considered to constitute one standard that has to be read into texts, like that of the ICSID, where both notions are not written down *expressis verbis*. The ICSID tribunals have consistently followed this approach.[100]

There are three possible grounds of dependence and partiality of an arbitrator and accordingly three general grounds to challenge an arbitrator that will not be discussed further here: (i) a personal, professional, or financial relationship between an arbitrator and a party; (ii) a similar relationship between arbitrator and counsel; and (iii) issue and subject-matter conflicts.[101]

b. Three types of provisions: Second, the independence standard has to be distilled from three different types of provisions in the relevant arbitration rules. In all arbitration rules, there are provisions and rules regarding: (1) the qualifications of arbitrators, which refers to the obligation of independence and impartiality of the arbitrators described in the previous paragraphs;[102] (ii) disclosure (and investigation), primarily concerning possible

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[98] Suez, Sociedad General de Aguas de Barcelona S.A., InterAguas Servicios Integrales del Agua S.A. v. Republic of Argentina, ICSID Case No. ARB/03/17, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal, and AWG Group Limited v. Republic of Argentina (UNCITRAL Arbitration), ¶ 28 (May 12, 2008), http://www.italaw.com/sites/default/files/case-documents/ita0812.pdf; Suez, Sociedad General de Aguas de Barcelona S.A., & Vivendi Universal S.A. v. Republic of Argentina, ICSID Case No. ARB/03/17, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal (Oct. 22, 2007), http://www.italaw.com/sites/default/files/case-documents/ita0811_0.pdf; *see also* Sheppard, *supra* note 97, at 133 ("The terms 'independent' and 'impartial' are not synonymous. In broad terms, the former refers to the lack of connection with a particular party whilst the latter refers to a predisposition or favouritism").

[99] *See generally* Brekoulakis, *supra* note 5 (discussing questions of implicit and systemic bias beyond apparent bias of individual adjudicators).

[100] *See* Burlington Resources, Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, ¶¶ 65–66 (Dec. 13, 2013), http://www.italaw.com/sites/default/files/case-documents/italaw3028.pdf.

[101] Sheppard, *supra* note 96, at 138 *passim*; Federica Cristani, *Challenge and Disqualification of Arbitrators in International Investment Arbitration: An Overview*, 13 LAW & PRAC. INT'L CTS & TRIBUNALS 153, 154 (2014).

[102] *Qualifications rules:* ICSID Convention, *supra* note 8, art. 14(a); UNCITRAL Arbitration Rules, G.A. Res. 65/22, U.N. GAOR 65th Sess., U.N. Doc. A/65/465, art. 11 (Dec. 6, 2010) [hereinafter UNCITRAL Arbitration Rules]; PERMANENT COURT OF ARBITRATION, RULES, art. 6(3) (Dec. 17, 2012), http://www.pca-cpa.org/PCA%20Arbitration%20Rules%202012_20130804%20Enga61a.pdf?fil_id=2309 (issued pur-

conflicts of interest; [103] and (iii) challenge.[104] These three different types of provisions give an overall understanding of the legal framework for the independence of the arbitrator and have to be read as a whole with a view to the applicable independence standard.

c. The applicable standard: Third, one common test of the independence of international arbitrators seems to prevail across the arbitral fora. Trying to distil a standard of review for the independence of international arbitrators, the following pattern of analysis has been identified in the relevant documents, case law and literature:

- *Standard:* What is the appropriate standard of independence?
- *Intensity:* What is the intensity of the standard?
- *Point of view:* Based on the understanding of whom?

Based on this pattern, the test concerning the independence of international arbitrators proposed by the majority of the arbitration community and relevant scholarship is:

- *Standard:* "appearance of bias"
- *Intensity:* mere possibility of bias
- *Point of view:* "reasonable and informed observer/third party" (objective)

The usual basis for a review of independence in the arbitral common law is the appearance of bias test which refers to the reasonable apprehension of bias by the judging authority.[105] The appearance of bias is not the

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suant to Hague Convention for the Pacific Settlement of International Disputes, July 19, 1899, 36 Stat. 2199 and Convention for the Pacific Settlement of International Disputes, Oct. 18, 1907, 36 Stat. 2199) [hereinafter PCA ARBITRATION RULES]; INTERNATIONAL CHAMBER OF COMMERCE, ARBITRATION RULES, arts. 11(1), 15(2) (Jan. 1, 2012), http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/ [hereinafter ICC ARBITRATION RULES]; STOCKHOLM CHAMBER OF COMMERCE, ARBITRATION RULES, art. 14(1) (Jan. 1, 2010), http://sccinstitute.com/media/40120/arbitrationrules_eng_webbversion.pdf [hereinafter SCC ARBITRATION RULES]; LONDON COURT OF INTERNATIONAL ARBITRATION, RULES, art. 14.1 (2014), http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx [hereinafter LCIA RULES]; *see also* IBA Guidelines, *supra* note 17, General Principle 1; *cf. also* U.N. COMM. ON INT'L TRADE LAW, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 1985 WITH AMENDMENTS AS AMENDED IN 2006, arts. 11.5, 12, U.N. Sales No. E.08.V.4 (2006).

[103] *Disclosure rules:* ICSID Arbitration Rules, *supra* note 102, art. 6(2); UNCITRAL Arbitration Rules, *supra* note 102, art. 11; PCA ARBITRATION RULES, *supra* note 102, art. 11; ICC ARBITRATION Rules, *supra* note 102, arts. 11(2), (3); SCC ARBITRATION RULES, *supra* note 102, arts. 14(2), (3); LCIA RULES, *supra* note 102, art. 5.3; *see also* IBA Guidelines, *supra* note 17, General Standards 3, 7; *cf. also* UNCITRAL MODEL LAW, art. 12(1). The IBA Guidelines are the only international arbitration document to deal that extensively with conflicts of interest.

[104] *Challenge rules:* ICSID Convention, *supra* note 8, arts. 57, 58; UNCITRAL Arbitration Rules, *supra* note 102, arts. 12, 13; PCA ARBITRATION RULES, *supra* note 102, art. 12; ICC ARBITRATION Rules, *supra* note 102, art. 14; SCC ARBITRATION RULES, *supra* note 102, art. 15; LCIA RULES, *supra* note 102, art. 10; *cf. also* UNCITRAL MODEL LAW, art. 12(1).

[105] Appearance of bias is different from actual bias. According to Van Harten, actual bias in international investment arbitration is "whether arbitrators individually or as a group are influenced by inappropriate factors in the resolution of legal issues or disputes." Gus Van Harten, *Contributions and Limi-*

same as actual bias. The question that has to be asked is whether there are justifiable doubts as to the independence and impartiality of an arbitrator. The application of the appearance of bias test by international investment arbitration tribunals brings international arbitration closer to a judicial process and makes the arbitration process compatible with generally acceptable independence standards like that of Article 6 of the European Convention of Human Rights.[106]

A recent decision referred to the Permanent Court of Arbitration Secretary-General Christiaan Kröner—which, in contrast to many previous decisions, was made public—shows how the relevant standard has started to be applied in international investment law.[107] In *Perenco v. Ecuador*, the parties had assented to a special Agreement that the Secretary-General of the PCA would resolve any arbitrator challenges.[108] Additionally, for the first time in an investment case, the parties had agreed that the applicable law would be the IBA Guidelines.[109] The issue arose out of a published interview of the claimants' arbitrator, Judge Charles Brower. In this interview, Judge Brower made comments about Ecuador and about the pending ICSID proceedings. The respondents filed the disqualification request based on these comments. From the outset, the Tribunal made clear what the standard of review was: "The relevant question in resolving this challenge under the IBA Guidelines is whether the interview comments constitute circumstances that, 'from a reasonable third person's point of view having knowledge of the relevant facts, give rise to justifiable doubts as to the arbitrator's impartiality or independence.'"[110] In applying this standard, the PCA Secretary-General said that the combination of the words chosen by Judge Brower—especially the word "recalcitrant"—and the context in which he used the words, would give a reasonable and informed third party justifiable doubts as to Judge Brower's impartiality towards Ecuador;[111] the same applied to the further claim on the risk of prejudgment concerning Judge Brower's view on whether Ecuador's actions constitute an expropria-

tations of Empirical Research on Independence and Impartiality in International Investment Arbitration, 1 OÑATI SOCIO-LEGAL SERIES, no. 4, 2011, at 1, 5.

[106] COTTON, *supra* note 5, at 1 (citing to British case law).

[107] In the Matter of a Challenge to be Decided by The Secretary-General of the Permanent Court Of Arbitration Pursuant to an Agreement Concluded on October 2, 2008, PCA Case No. IR-2009/1 (Perm. Ct. Arb. 2009), *appealing by agreement from* Perenco Ecuador Ltd. v. The Republic Of Ecuador & Empresa Estatal Pertoleos Del Ecuador ("Petroecuador"), ICSID Case No. ARB/08/6, Decision On Challenge To Arbitrator (Dec. 8, 2009), http://www.italaw.com/documents/PerencovEcuador-Challenge.pdf [hereinafter *Peru v. Ecuador*].

[108] *See generally* Andrea Martignoni, Louise Jenkins & Hop Dang, *Focus: ICSID Arbitrator Disqualified For Comments in Media*, ALLENS LINKLATERS: ARBITRATION (Mar. 2, 2010), http://www.allens.com.au/pubs/arb/foarb2mar10.htm.

[109] *Perenco v. Ecuador*, PCA Case No. IR-2009/1, ¶ 2.

[110] *Id.* ¶ 4.

[111] *Id.* ¶¶ 48–53.

tion.[112]

3. The Peculiarities of the ICSID Framework

A similar pattern of analysis and standard of independence applies also to ICSID arbitration.[113] However, the language of some ICSID Convention causes some confusion since there seems to be a deviation in several important respects from the common standard and test described above.

(a) The text of the ICSID Convention and beyond

a. Independence and impartiality: With regard to independence and impartiality, there is no mention of impartiality in the English or French versions of the ICSID Convention. Nonetheless, *"imparcialidad de juicio"* is mentioned in the Spanish version of Article 14 of the ICSID Convention. This is one of the reasons that ICSID case law, beginning with the *Suez et al. v. Argentina* award mentioned earlier, reads the impartiality standard in the text of the ICSID Convention.[114]

b. Three types of provisions: The same set of independence and impartiality guarantees that has been identified in other fields of international arbitration can be also traced here. Concerning the qualifications of ICSID arbitrators, Article 14 of the ICSID Convention provides:

> [P]ersons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.[115]

An additional independence guarantee, which is a peculiarity of ICSID vis-à-vis many international courts, is the provision on the nationality of ar-

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[112] *Id.* ¶¶ 54–58.

[113] LUTTRELL, BIAS CHALLENGES IN INVESTOR-STATE ARBITRATION, *supra* note 5, at 475 ("One of the things that the members of the relatively small pool of ICSID arbitrators have in common is that they either used to (or still) serve as arbitrators in strictly private international commercial disputes. They therefore carry the customs of ICA, which include the 'justifiable doubts' (or 'reasonable apprehension,' as it is usually read) standard, in their briefcases when they cross over into ISA.").

[114] *See, e.g.,* Compañía de Aguas del Aconquija S. A. & Vivendi Universal v. Argentina, ICSID Case No. ARB/97/3, Decision on the Challenge to the President of the Committee (Oct. 3 2001), ¶ 14, http://www.italaw.com/sites/default/files/case-documents/ita0208.pdf.

[115] *See also* ICSID REGULATIONS AND RULES, *supra* note 8, art. 14(2) ("The Chairman, in designating persons to serve on the Panels, shall in addition pay due regard to the importance of assuring representation on the Panels of the principal legal systems of the world and of the main forms of economic activity."); ICSID REGULATIONS AND RULES, *supra* note 8, Rules of Procedure for Arbitration Proceedings, Rule 6(2).

bitrators. In contrast, for example to the ICJ, ITLOS and other international tribunals' provisions, no arbitrators that have the same nationality as the parties are allowed on the tribunal.[116]

The disclosure rule of Article 6(2) ICSID Arbitration Rules does not present any major differences in comparison to the rules of the other arbitral fora since it includes the standard arbitrator declaration of independence. The challenge rule of the ICSID Convention is laid out in Article 57:

> A party may propose to a Commission or Tribunal the disqualification of any of its members on account of *any fact indicating* a *manifest lack* of the qualities required by paragraph (1) of Article 14. A party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV.[117]

Article 57 mentions the need for the existence of "facts," in contrast to "appearances" or "circumstances," indicating a manifest lack, in contrast to reasonable lack, of the qualities of an arbitrator. Here we see the major difference, at least textually, between the ICSID and the other arbitration rules. There seems to be in ICSID a higher threshold for a successful challenge than under alternative regimes.[118] The question is whether "manifest" describes how seriously an arbitrator lacks one of the necessary qualities or whether it describes standard of proof to which the lack must be established.[119]

In ICSID, a proposal for disqualification by one of the parties shall take place "promptly," and in any event, before a proceeding is declared closed.[120] The rules of the other arbitration fora set specific limits, like the thirty-day rule under the International Chamber of Commerce Rules[121] and

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[116] There is a similar provision in Article 13(5) of the International Chamber of Commerce arbitration rules, which provides that "the sole arbitrator or the chairman of the Arbitral Tribunal shall be of a nationality other than those of the parties." Nathan, *supra* note 5, at 19 ("the rationale for the ICSID Rule and the ICC Rule (to a lesser extent) in regard to nationalities of arbitrators is unclear to me in this age of mass migrations, involuntary transfers of peoples, and political and economic refugees because nationality can often be a matter of accident and convenience than choice."). *See generally* Ilhyung Lee, *Practice and Predicament: The Nationality of the International Arbitrator*, 31 FORDHAM INT'L L.J. 603 (2008).

[117] ICSID REGULATIONS AND RULES, *supra* note 8, art. 57 (emphasis added); *see also id.*, art. 58.

[118] Crawford, *supra* note 5, at 1.

[119] *Id.* at 2 ("But even if we accept this second approach, there remains a further question: the meaning of 'manifest'. Some tribunals have considered the pertinent inquiry to be whether the *evidence* of unreliability is manifest, meaning that it is *clear*. Others have considered the inquiry to be whether the *degree* of the unreliability is manifest: here 'manifest' means *serious*.").

[120] ICSID REGULATIONS AND RULES, *supra* note 8, Rules of Procedure for Arbitration Proceedings, Rule 9(1).

[121] ICC ARBITRATION RULES, *supra* note 102, art. 14(2).

the IBA Guidelines[122] and the fifteen-day rule (counting from the date when the parties learned of the potential conflict of interest) under the UNCITRAL[123] and SCC[124] Rules.

A further peculiarity of the ICSID framework is that independence and impartiality may constitute a ground for annulment by the ad hoc committees.[125] Additionally, in contrast to other arbitral rules[126] which provide that a challenge shall be determined by the appointing authority, the ICSID rules provide that disqualification proposals are decided by the unchallenged arbitrators, and by the Chairman of the ICSID Administrative Council in the case of their disagreement.[127]

The applicable standard: The peculiarities of the ICSID arbitration framework created problems regarding the applicable test and standard for the evaluation of the independence of ICSID arbitrators. The language of Article 57 of the ICSID Convention creates the impression that it establishes a less strict test than the common "appearance of bias" test identified above.[128] According to Luttrell: "The ICSID test for bias is therefore unique: the inter-operation of Articles 14(1) and 57 produce a rule that an ICSID arbitrator may only be challenged for bias where he or she manifestly lacks the capacity to exercise independent judgment. As far as I am aware, no other arbitral institution or law uses this test."[129]

(b) The Recent Case Law

As Judge James Crawford rightly observes, there are two lines of case law in ICSID arbitration.[130] One line of case law begins with the first *Suez* decision in 2007 and seems to be closer to the letter of the ICSID Conven-

[122] IBA Guidelines, *supra* note 17, General Standards Regarding Impartiality, Independence and Disclosure 4(a).

[123] U.N. COMM. ON INT'L TRADE LAW, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 1985 WITH AMENDMENTS AS AMENDED IN 2006, art. 13(1), U.N. Sales No. E.08.V.4 (2006).

[124] SCC ARBITRATION RULES, *supra* note 102, art.15(2).

[125] *See* ICSID, BACKGROUND PAPER ON ANNULMENT FOR THE ADMINISTRATIVE COUNCIL OF ICSID 447 (2012). According to Luttrell, "[i]n an ICSID proceeding, the only post-award opportunity to plead bias is by motion for annulment under Article 52(1)(d)." Luttrell, *Bias Challenges in Investor-State Arbitration*, *supra* note 5, at 457. According to Pinsole, at least three of the five grounds of Article 52(1)—(a), (c) and (d)—can be used to raise issues of independence and impartiality of the members of an arbitral tribunal. Philippe Pinsole, *The Challenge of Awards Rendered by Biased Arbitrators – Do Not Lose Your Rights*, 4 TRANSNAT'L DISP. MGMT. (2008).

[126] *See, e.g.*, UNCITRAL Arbitration Rules, *supra* note 102, art. 12.

[127] ICSID Convention, *supra* note 8, art. 58.

[128] See *supra* Section I.B.2.

[129] Luttrell, *Bias Challenges in Investor-State Arbitration*, *supra* note 5, at 458; *see also* CHRISTOPH H. SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY 1201–02 (2d ed. 2009); Sheppard, *supra* note 97, at 132.

[130] Crawford, *supra* note 5.

tion.[131] This case law is in contrast to the earlier line of case law, first decided by the unchallenged arbitrators of an ad hoc Committee, that follows a modified appearance of bias test beyond the strict letter of the ICSID Convention—[132] which is the common standard for the assessment of independence in international arbitration. Most cases since 2012 have not followed the *Suez* approach. Applying the scheme of analysis described above, the *Suez* case law is based on the following test:

- *Standard of review:* manifest lack
- *Intensity:* high probability of bias based on facts
- *Point of view:* reasonable observer/third party (objective)

The ICSID independence test based on the separate line of case law can be simplified as follows:

- *Standard of review:* appearance of bias
- *Intensity:* manifest lack of bias ("obvious" or "evident")
- *Point of view:* reasonable observer/third party (objective)

In order to distill the current status of interpretation of the ICSID independence standard, the present study presents some data on ICSID disqualification cases, focusing primarily on cases from 2012 to 2014 not previously considered by other authors.[133] In the 2012 to 2014 period we observe an explosion of cases,[134] changes on the deciding authorities, and increases in

[131] Suez, Sociedad General de Aguas de Barcelona S.A., InterAguas Servicios Integrales del Agua S.A. v. Republic of Argentina, ICSID Case No. ARB/03/17, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal, and AWG Group Limited v. Republic of Argentina (UNCITRAL Arbitration), ¶ 28 (May 12, 2008), http://www.italaw.com/sites/default/files/case-documents/ita0812.pdf; Suez, Sociedad General de Aguas de Barcelona S.A. & Vivendi Universal S.A. v. Republic of Argentina, ICSID Case No. ARB/03/17, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal (Oct. 22, 2007), http://www.italaw.com/sites/default/files/case-documents/ita0811_0.pdf; *see also* Nations Energy Corporation, Electric Machinery Enterprises Inc. &Jamie Jurado v. The Republic of Panama, ICSID Case No. ARB/06/19, Challenge to Dr. Stanimir A. Alexandrov (on the Annulment Committee) (Sept. 7, 2011), http://www.italaw.com/sites/default/files/case-documents/ita0561.pdf; ConocoPhillips Company et al. v. The 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), http://www.italaw.com/sites/default/files/case-documents/ita0223.pdf.

[132] Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. The Republic of Argentina, ICSID Case No. ARB/97/3, Decision on the Challenge to the President of the Committee (Oct. 3, 2001), http://www.italaw.com/sites/default/files/case-documents/ita0208.pdf; Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, Decision on Claimant's Proposal to Disqualify Arbitrator (Dec. 19, 2002), 8 ICSID Rep. 398 (2005). This line is followed by most decisions on disqualification proposals since 2012, including *Caratube Int'l Oil Co. LLP*, *supra* note 25, and RSM Production Corp. v. Saint Lucia, Decision on Claimant's Proposal for the Disqualification of Dr. Gavan Griffith QC, ICSID Case No. ARB/12/10 (Oct. 23, 2014), http://www.italaw.com/sites/default/files/case-documents/italaw4062.pdf.

[133] DAELE, *supra* note 10.

[134] In total there are 15 cases—2 in 2012, 5 in 2013 and 8 in 2014. Cases from ICSID Tribunals in the years 2012, 2013 and 2014 that are not included in Daele's study. From 2012:

1. *ConocoPhillips Company et al.*, ICSID Case No. ARB/07/30;
2. Getma International et al. v. Republic of Guinea, Décision sur la Demande en Récusation de

disqualification proposals being upheld.[135]

Monsieur Bernardo M. Cremades, Arbitre, ICSID Case No. ARB/11/29 (June 28, 2012), http://www.italaw.com/sites/default/files/case-documents/ita1068.pdf;

From 2013:

3. Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela, Decision on Claimant's Proposal to Disqualify Mr. Gabriel Bottini, ICSID Case No. ARB/12/13 (Feb. 27, 2013), http://www.italaw.com/sites/default/files/case-documents/italaw1311.pdf;
4. Rusoro Mining Ltd. v. The Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/12/5 (not published, reported June 14, 2013);
5. Blue Bank International & Trust (Barbados) Ltd. v. The Bolivarian Republic of Venezuela, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, ICSID Case No. ARB 12/20 (Nov. 12, 2013), http://www.italaw.com/sites/default/files/case-documents/italaw3009.pdf;
6. Burlington Resources, Inc. v. Republic of Ecuador, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, ICSID Case No. ARB/08/5 (formerly Burlington Resources Inc. & others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)) (Dec. 14, 2013), http://www.italaw.com/sites/default/files/case-documents/ita0106.pdf;
7. Repsol, S.A. & Repsol Butano, S.A. v. The Argentine Republic, Decisión Sobre la Propuesta de Recusación a la Mayoría del Tribunal [Decision on the Disqualification Proposal of the Majority of the Tribunal], ICSID Case No. ARB/12/38 (Dec. 13, 2013), http://www.italaw.com/sites/default/files/case-documents/italaw3033.pdf.

From 2014:

8. Victor Pey Casado & President Allende Foundation v. Republic of Chile, ICSID Case No. ARB/98/2, Resignation of Professor Philippe Sands (Jan. 10, 2014), http://www.italaw.com/sites/default/files/case-documents/italaw3045.pdf;
9. Abaclat & Others v. The Argentine Republic, Decision on the Proposal to Disqualify a Majority of the Tribunal, ICSID Case No. ARB/07/5 (formerly Giovanna a Beccara & Others v. The Argentine Republic) (Feb. 4, 2014), http://www.italaw.com/sites/default/files/case-documents/italaw3057.pdf;
10. Koch Minerals Sàrl & Koch Nitrogen International Sàrl v. The Bolivarian Republic of Venezuela, Decision on Respondent's Challenge to Judge Florentino Feliciano, ICSID Case No. ARB/11/19 (not published, reported Feb. 24, 2014);
11. Caratube Int'l Oil Co. LLP & Mr. Devincci Salah Hourani v. Republic of Kazakhstan, Decision on the Proposal for Disqualification of Mr. Bruno Boesch, ICSID Case No. ARB/13/13 (Mar. 20, 2014), http://www.italaw.com/sites/default/files/case-documents/italaw3133.pdf;
12. ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. & ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela, Decision on the Proposal to Disqualify a Majority of the Tribunal, ICSID Case No. ARB/07/30 (May 5, 2014), http://www.italaw.com/sites/default/files/case-documents/italaw3162.pdf.pdf;
13. Transban Investments Corp. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/24 (not published, reported May 13, 2014);
14. İçkale İnşaat Limited Şirketi v. Turkmenistan, Decision on Claimant's Proposal to Disqualify Professor Philippe Sands, ICSID Case No. ARB/10/24 (July 11, 2014), http://www.italaw.com/sites/default/files/case-documents/italaw3260.pdf;
15. RSM Production Corporation v. Saint Lucia, Decision on Claimant's Proposal for the Disqualification of Dr. Gavan Griffith QC, ICSID Case No. ARB/12/10 (Oct. 23, 2014), http://www.italaw.com/sites/default/files/case-documents/italaw4062.pdf.

[135] Moreover, there is at least one reported UNCITRAL disqualification award that upholds a disqualification challenge during 2013–2014, namely CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited & Telcom Devas Mauritius Limited v. The Republic of India, UNCITRAL, Deci-

There have been fifty disqualification cases in ICSID since 1982,[136] fourteen of which occurred during the studied period from the end of 2012 until 2014. This accounts for 28% of the cases. These cases concern a total of sixty-eight arbitrators; twenty-two arbitrators, i.e., more than 32%, were challenged during this period. The interesting shift in the discussed period takes place with regard to the deciding authority. From the three deciding authorities of the ICSID framework, the unchallenged arbitrators have decided in the final instance twenty-four cases in total, of which six occurred from late 2012 until the end of 2014. During these years, the Chairman of the ICSID Administrative Council decided the majority of cases, constituting nine of the fourteen cases he has decided since 1982.[137] Moreover, there have been eleven resignations in the history of ICSID arbitration, with two arbitrators resigning between 2013 and 2014.

Figure 1 presents the described results, based on data gathered by Karel Daele until 2012[138] and data gathered by the author from late 2012 through 2014:

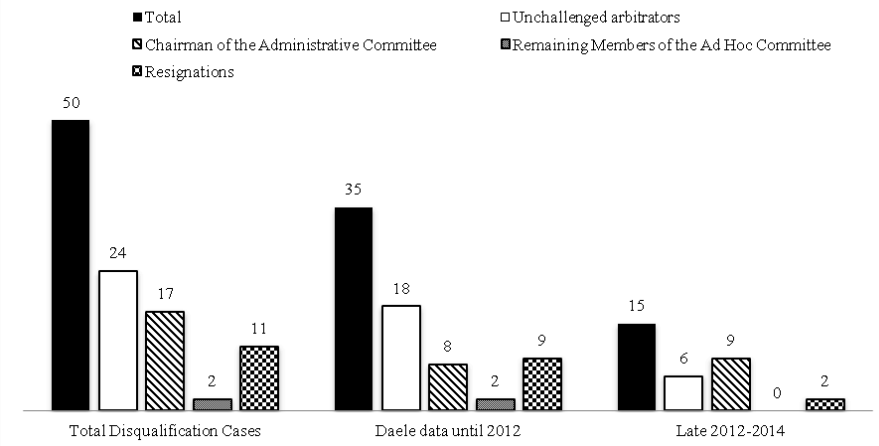
sion on the Respondent's Challenge to the Hon. Marc Lalonde as Presiding Arbitrator and Prof. Francisco Orrego Vicuna as Co-Arbitrator, PCA Case No. 2013-09 (Sept. 30, 2013) (sustaining the challenge brought against the arbitrator appointed by the claimant, Francisco Orrego Vicuña, and dismissing the challenge of the Chairperson, Marc Lalonde); the decision in the case was taken by the President of the ICJ, Judge Peter Tomka.

[136] The first one was in the case Amco Asia Corp. v. Republic of Indonesia, ICSID Case ARB/81/1, Decision on the Proposal to Disqualify an Arbitrator (not published, reported June 24, 1982).

[137] The remaining members of the ad hoc Committee have rendered two decisions in total, none of which occurred in the last two years.

[138] DAELE, *supra* note 10, 455.

FIGURE 1: ICSID DISQUALIFICATION CASES



A constant decisional pattern can be observed until 2012. The unchallenged arbitrators decided disqualification challenges against twenty-two arbitrators. They rejected the claims for eighteen arbitrators, whereas they disqualified no fellow arbitrator. The cases against four arbitrators were equally decided and then sent to the Chairman of the ICSID Administrative Council. The Chairman of the ICSID Administrative Council has dismissed nine disqualification motions, whereas he disqualified one arbitrator.

This pattern changes in the studied period. Respondents challenged fifteen times and claimants challenged seven times. Chairpersons have been challenged four times, whereas three arbitrators in total were disqualified. The high rate of challenges by the claimants is a recent development. It was originally hypothesized in international investment arbitration that respondents would have the tendency to challenge an arbitrator for the purpose of delaying the proceeding and final award, but claimants would have the general tendency to try and avoid challenges to reduce costs and increase the speed of arriving to a result.[139] The recent developments have also put this

[139] *See* Rosenberg, *supra* note 6, at 506. It is not common for parties to challenge the arbitrator that they have appointed; there are at least two exceptions prior to 2012: Tanzania Electric Supply Co. Ltd. v. Independent Power Tanzania Ltd., ICSID Case No. ARB/98/8 (July 20, 2001); Walter Bau AG (In Liquidation) v. The Kingdom of Thailand, UNCITRAL Arbitration, Award (July 1, 2009), ¶¶ 1.36–1.42, http://opil.ouplaw.com/view/10.1093/law:iic/429-2009.case.1/IIC429(2009)D.pdf. In both cases, the arbitrators resigned voluntarily after the challenge. Rosenberg, *supra* note 6, at 510 n.42. The Chairman of ICSID Administrative Council rejected recently a challenge by Venezuela against its party-appointed

assumption to test.

TABLE 1: DISQUALIFICATION PROPOSALS 2012–2014

	v. Chairperson	v. C-Arbitrator	v. R-Arbitrator	Total
Respondent	4	10	1	15
Claimant	0	0	7	7
Total	4	10	8	

Table 1 shows the disqualification proposals filed in the studied period late 2012–2014 by respondents and claimants. "v. Chairperson" indicates that the proposal has been filed against the Chairperson of a Tribunal. "v. C-Arbitrator" indicates that the proposal has been filed against the arbitrator appointed by the claimant; "v. R-arbitrator" indicates that the proposal has been filed against the arbitrator appointed by the respondent

Except for the two resignations during 2013–2014, the unchallenged arbitrators have decided far fewer cases than in the past. Given that the arbitrators are members of the same community, it has recently become very difficult for members of the same panel to decide the cases against their fellow arbitrators. Five out of six challenges decided by the co-arbitrators were rejected and three equally decided. But, very importantly the two remaining co-arbitrators of the *Caratube* Tribunal upheld—for the first time in the history of international investment arbitration—the disqualification of a third arbitrator.[140] In *Caratube*, the unchallenged arbitrators disqualified the arbitrator of the respondent state since he was sitting in different but similar cases and might have acquired knowledge of facts of the case.[141]

It seems improbable that this result would have been achieved without the previous decisions of the Chairman of the ICSID Administrative Council. Recent cases verify the trend in ICSID towards outsourcing the decisions to disqualify to neutral institutions like the Chairman of the Administrative Council of ICSID, i.e., the President of the World Bank, from whom a case may be further referred to other deciding authorities. A case may be referred to a different deciding authority than the remaining arbitrators either if the parties agree or if the unchallenged arbitrators could not reach a commonly agreed decision.[142] Even though not legally obliged, when the

arbitrator in *Koch v. Venezuela*, *supra* note 131.

[140] *See* Chiara Giorgetti, *Caratube v. Kazakhstan: For the First Time Two ICSID Arbitrators Uphold Disqualification of Third Arbitrator*, AM. SOC'Y INT'L L. (Sept. 29, 2014), http://www.asil.org/insights/volume/18/issue/22/caratube-v-kazakhstan-first-time-two-icsid-arbitrators-uphold (last visited Jan. 30, 2015).

[141] Caratube Int'l Oil Co. LLP & Mr. Devincci Salah Hourani v. Republic of Kazakhstan, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch (Mar. 20, 2014), ¶¶ 71–91, 109–10, http://www.italaw.com/sites/default/files/case-documents/italaw3133.pdf.

[142] *See* ICSID Convention, *supra* note 8, art. 58. From the sample in late 2012–2014, the unchal-

Chairman does not consider it appropriate to make the decision on his own or just to seek recommendation by the ICSID Secretary General,[143] he will usually refer the issue to the Secretary General of the Permanent Court of Arbitration, beyond the text of the ICSID Convention.[144] The Chairman of the Administrative Council of ICSID, Jim Yong Kim, decided the majority of the fourteen disqualification proposals in the relevant period. The Chairman dismissed twelve challenges and upheld two.[145]

As a result of the efforts of the arbitration community to establish a high substantive standard of independence in its interface with other actors involved in international investment arbitration, an independence and impartiality standard for international investment arbitrators coalesced in the case law over the last two years. According to the new rule from *Caratube v. Kazakhstan*, the claimants must show that a *third party* would find that there is *an evident or obvious appearance of lack of impartiality or independence* based on a *reasonable evaluation* of the facts of the case.[146] This is a new standard beyond Articles 57 and 14 ICSID Convention, but also beyond appearance of bias as applied in the other fora. The tribunals have rejected the need to prove an actual dependence or bias of the arbitrators, but at the same time, and in contrast to the common appearance of bias test, they have set a higher burden of proof in that the appearances have to be manifest, i.e., evident, or obvious.[147]

As we shall see in the following section, this approach is an aspect of the constructed development of international investment law and arbitration. The whole field is being constructed through a process of communication within the arbitration community that applies the relevant law with the other actors that are involved in the field.

III. CONSTRUCTING AN INDEPENDENCE STANDARD FOR INTERNATIONAL INVESTMENT ARBITRATION

International courts and arbitral tribunals have a different design. What is the difference between the safeguards of international courts and the

lenged arbitrators could not reach a commonly agreed decision in *Getma v. Guinea*, *Burlington v. Ecuador*, and *Koch v. Venezuela*.

[143] DAELE, *supra* note 10, at 176.

[144] *See* Rubins & Lauterburg, *supra* note 5, at 162; DAELE, *supra* note 10, at 176.

[145] In one case, the proposal to disqualify was rejected based on the condition that the arbitrator, Mr. Bottini, completes, signs, and transmits to the ICSID Secretary-General a new Declaration under Rule 6 of ICSID Arbitration Rules. *See Saint-Gobain v. Venezuela*, *supra* note 131.

[146] Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela, Decision on Claimant's Proposal to Disqualify Mr. Gabriel Bottini, ICSID Case No. ARB/12/13 (Feb. 27, 2013), ¶ 57, http://www.italaw.com/sites/default/files/case-documents/italaw1311.pdf.

[147] Also according to Schreuer, the term "manifest" in Article 57 of the ICSID Convention imposes "a relatively heavy burden on the party making the proposal." *See* SCHREUER ET AL., *supra* note 129, at 1202 .

safeguards of international arbitral tribunals? In order to understand this question better, the distinction between organizational and functional guarantees that was drawn in Part II.B.1 is useful. This analysis showed that in comparison to other international adjudication bodies, ICSID and other investment tribunals are constituted under lower formal guarantees of independence than international courts. International courts are standing courts with (a majority of) permanent judges. The arbitral tribunals are not standing and are composed of individuals with different backgrounds that compete for the same positions on a global arbitrators market.[148]

Within the arbitral tribunals, there are largely the same personal guarantees of independence. Typical functional guarantees are qualifications of the adjudicators, challenge rules, and rules on disclosure (and investigation), primarily concerning possible conflicts of interest.[149] On the other side, there are no organizational safeguards of independence in the arbitration tribunals.[150] This is probably why the ICSID Convention focuses on independent *decision making* and not generically on independence: Article 14(1) (and Article 40) of the ICSID Convention speaks about "independent judgment" of the persons designated to serve on the Panels and not about the independence of the arbitral tribunal. The focus is thus on the functional, rather than organizational, guarantees of arbitrators' independence.

But, the differentiation between organizational and functional guarantees of judicial independence, while uncommon in arbitration tribunals, is not unique to international investment arbitration. In international law, there is not a single model for the "international judge."[151] As will be explained in this section, party-appointment is a feature of the design of adjudication fora that is largely shared by international courts and international arbitral tribunals.[152] The only difference between the two types of dispute resolution fora is the number of the party-appointed adjudicators. The party-appointed adjudicators bring their specific knowledge of the case, the facts, and in-

[148] *See also* Anja Seibert-Fohr, *International Judicial Ethics*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 757, 761–62 (Cesare P.R. Romano, Karen J. Alter & Yuval Shany eds., 2014) (citing Karl N. Llewellyn, *A Realistic Jurisprudence – The Next Step*, 30 COLUM. L. REV. 431 (1930)); Rubins & Lauterburg, *supra* note 5, at 179.

[149] Repeating what has been presented in previous Sections, the provisions comparable to Article 14 of the ICSID Convention are: Rome Statute, *supra* note 59, art. 40(1); DSU, *supra* note 59, art. 8(2); ITLOS Statute, *supra* note 59, art. 2(1); ICJ Statute, *supra* note 59, art. 2.

[150] *Cf. also* Van Harten, *supra* note 105, at 3–4; Gus Van Harten, *Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration* 9 (Osgoode Hall Law Sch. Comp. Res. in Law & Pol. Econ., Research Paper No. 41, 2012) (citing Frank B. Cross & Dain C. Donelson, Creating Quality Courts, 7 J. EMPIRICAL LEGAL STUD. 490, 498 (2010) and Rogers, *supra* note 22, at 56–57).

[151] *See* Erik Voeten, *International Judicial Behavior*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 550, 560 (Cesare P.R. Romano, Karen J. Alter & Yuval Shany eds., 2014).

[152] *See, e.g.*, the judges ad hoc of Article 31(2) of the ICJ Statute.

deed the overall situation of the party into the dispute resolution process and are an invaluable feature of international law. The right to an independent adjudicator is accompanied in international law by the right to a "case-sensitive adjudicator."[153]

Overall, only some of the judicial independence variables that were presented above are applicable to arbitral tribunals. Still, international investment tribunals apply the same substantive standard of independence as domestic and international courts. This section deals with the question of how this result has been achieved in the absence of organizational rules of independence. As we shall see, this is largely the result of an interplay between the rules established by the arbitration community, their *de facto* influence, and their institutionalization.

A. Interplay Between Legal and Societal Rules: A Race to the Top

1. The Ethics of Independence and the International Arbitration Community

According to Professors Yves Dezalay and Bryant Garth, there is an important convergence among the individuals in the system of international business transactions and commercial arbitration that refers to the identity of the key players, the definition of international commercial arbitration, and how it has changed in the past.[154] The development of the high standard of arbitral independence can be understood as a transition from old to new forms of international arbitration.[155] Dezalay and Garth describe the changes in international commercial arbitration as a conflict between two generations of arbitrators: "grand old men" versus "technocrats."[156] Their conflict and "symbolic battle" is complemented by that between academics and practitioners in the field.[157] The shift from one generation to the other also signifies a shift from "relatively informal arbitration" into "offshore litigation."[158] According to Dezalay and Garth, the practice of international arbi-

[153] *See also* Voeten, *supra* note 151, at 554 ("Still, the home-state bias is manageable and may be outweighed by the benefits of expertise and languages abilities such judges bring to the table. How this trade-off works out depends on the institutional insulation of judges and the context of each court.").

[154] Yves Dezalay & Bryant Garth, *Merchants of Law as Moral Entrepreneurs: Constructing International Justice from the Competition for Transnational Business Disputes*, 29 LAW & SOC'Y REV. 27, 33 (1995).

[155] *See* DEZALAY & GARTH, DEALING IN VIRTUE, *supra* note 15, at 3–30 (describing the evolution of the international arbitration community); *see also* Yves Dezalay & Bryan Garth, *Dealing in Virtue*, *in* CONDUCTING LAW AND SOCIAL RESEARCH: REFLECTIONS ON METHODS AND PRACTICES 200 (Simon Halliday & Patrick Schmidt eds., 2009); Catherine A. Rogers, *The Vocation Of The International Arbitrator*, 20 AM. U. INT'L L. REV. 957 (2005).

[156] DEZALAY & GARTH, DEALING IN VIRTUE, *supra* note 15, at 34–41.

[157] *Id.* at 41–42.

[158] *Id.* at 54–57.

tration is based on the characteristics of the generation of arbitrators that dominated arbitration during this period[159] with consequences for the applicable independence standard.[160]

Arbitration was the dispute resolution mechanism of the medieval Law Merchant of traders (*lex mercatoria*). In medieval times, arbitrators were not expected to be independent or impartial.[161] During the late 19th and early 20th century, arbitration was inherited as a practice by the European higher classes. These grand, old men were primarily senior European professors imbued with the traditional values of the European legal elites. They considered that arbitration could not be regarded as a profession. In the late 1970s, there was a change in the persons who acted as arbitrators and, consequently, in the nature of the practice.[162] Increased competition among arbitrators led to the professionalization of arbitration. These trends have also led to an increasing emphasis on independence and impartiality.

The change of persons was coupled with some institutional changes. The partial change in the persons of arbitrators was first accompanied by the appearance and gradual increase in arbitration houses. The arbitral institutions and their dispute resolution fora have a long history beginning at the end of the 19th century. For example, the London Court of International Arbitration (under its previous name) was created in 1892,[163] the International Chamber of Commerce Court of Arbitration in 1923,[164] and the Arbitration Institute of the Stockholm Chamber of Commerce in 1917.[165] The International Chamber of Commerce Rules of 1923 and 1955 contained no mention of either independence or impartiality, nor did they contain provisions for the challenge of an arbitrator. The multiplication and diversification of places and institutions for arbitrations led to further competition.[166] The arbitral institutions adapted to increased competition by introducing independence and impartiality into the arbitral rules. In 1975, the requirement that "every arbitrator must be and remain 'independent' of 'the parties involved in the arbitration'" was added to Article 7(1) of the International Chamber of Commerce Rules.[167] In 2012, the International Chamber of

[159] *Id.* at 34.

[160] *Id.* at 48–51.

[161] Alec Stone Sweet, *Islands of Transnational Governance*, *in* ON LAW, POLITICS AND JUDICIALIZATION 323, 330 (Martin Shapiro & Alec Stone Sweet eds., 2002).

[162] DEZALAY & GARTH, DEALING IN VIRTUE, *supra* note 15, at 39–40.

[163] *History*, LONDON CT. INT'L ARB., http://www.lcia.org/LCIA/history.aspx (last visited Jan. 30, 2015).

[164] *The Merchants of Peace*, INT'L CHAMBER OF COMMERCE, http://www.iccwbo.org/about-icc/history/the-merchants-of-peace/ (last visited Jan. 30, 2015).

[165] *About the SCC*, ARB. INST. OF THE STOCKHOLM CHAMBER OF COMMERCE, http://www.sccinstitute.com/about-the-scc/ (last visited Jan. 30, 2015).

[166] DEZALAY & GARTH, DEALING IN VIRTUE, *supra* note 15, at 44.

[167] YVES DERAINS & ERIC A SCHWARTZ, A GUIDE TO THE ICC RULES OF ARBITRATION 117 (2d ed. 2005).

Commerce again changed its rules to include both independence and impartiality in Articles 11 and 14(1) of its Rules.[168]

A further institutional variable in this development is the entrance into the market, predominantly in the late 1970s, of the more commercial Anglo-American law firms with their adversarial style of litigation.[169] This change had a great effect on the understanding of the independence of international arbitrators. The right to an independent and impartial judge is a basic principle of due process in common law, and U.S. litigators are very well-trained in raising it.[170] The European Convention of Human Rights of 1950 must have also had a similar influence on European lawyers.

In a continuous race to the top, the most complete manifestation of the willingness of the arbitration community to be and appear to be independent are the International Bar Association's "Guidelines on Conflicts of Interest in International Arbitration,"[171] which are practically identical on the issues of functional independence and impartiality to the statutes of international courts and "The Burgh House Principles on the Independence of the International Judiciary."[172]

2. Arbitration Between Sovereigns and Migration to Investment Arbitration

The history of the development of international commercial arbitration and the international arbitration community is just the one side of the story of achieving the personal independence of international investment arbitrators since there have always been two types of international arbitration. Apart from commercial arbitration between private parties, international arbitration has always existed as a mechanism to resolve disputes between sovereigns.[173] The Jay Treaty of 1794 can be considered as establishing modern arbitration between sovereigns.[174]

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[168] Richard Power, *Briefing Note on ICC Rule Changes*, KLUWER ARBITRATION BLOG (Oct. 6, 2011) http://kluwerarbitrationblog.com/blog/2011/10/06/briefing-note-on-icc-rule-changes/.

[169] DEZALAY & GARTH, DEALING IN VIRTUE, *supra* note 15, at 54–57.

[170] *See* Luttrell, *Bias Challenges in Investor-State Arbitration, supra* note 5, at 445.

[171] INT'L BAR ASS'N, *supra* note 17.

[172] Burgh House Principles, *supra* note 18.

[173] *See* Brown, *supra* note 58, at 66–86; *see generally* David W. Rivkin, *The Impact of International Arbitration on the Rule of Law – The 2012 Clayton Utz/University of Sydney International Arbitration Lecture*, 29 ARB. INT'L 327 (2013).

[174] Rivkin, *supra* note 173, at 334–36; *see also* Christine Grey & Benedict Kingsbury, *Inter-State Arbitration Since 1945: Overview and Evaluation*, *in* INTERNATIONAL COURTS FOR THE TWENTY-FIRST CENTURY 55, 57 (Mark W. Janis ed., 1992); Posner & Yoo, *supra* note 57, at 30–33 (using data from A.M. STUYT, SURVEY OF INTERNATIONAL ARBITRATIONS, 1794–1989 (3d ed. 1990) on arbitration between sovereigns). According to Posner and Yoo, the pattern that emerges from the study of the data of the period from 1794 (when the Jay Treaty was signed) until 1970 (when international courts started proliferating) shows that large countries and Latin American countries used arbitration more frequently.

Adapted to the needs of the international legal order of the time, this type of public international arbitration had a more diplomatic and political than judicial nature.[175] Just like commercial arbitration, neither the Convention for the Pacific Settlement of Disputes of 1899 that established the Permanent Court of Arbitration nor the Convention of 1907 contained express provisions on independence or impartiality. Article 23 of the 1899 Treaty simply introduced the list system that was inherited by the ICSID Convention and included a provision similar to the requirements provisions that are included in current treaties and arbitration rules.[176]

The International Convention for the Settlement of Investment Disputes of 1966 brings the two traditions of international arbitration together.[177] The same applies to the independence guarantee. Drawing inspiration from provisions in the World Court statute,[178] the introduction of a standard of independence in Articles 14 and 57 ICSID Convention was a step towards recognizing independent arbitration internationally. At the same time, the contracting states went about independence in a very modest way. As explained above, they only refer to independence as opposed to "independence and impartiality," which is the usual standard of judicial independence.[179] Additionally, the text of Article 57 of the ICSID Convention does not provide for the appearance of bias test, but only for the "manifest lack" test.

A sociological analysis of international investment arbitration helps us reconsider the independence standard,[180] and better understand why the appearance of bias test has been established in the frame of international investment arbitration including ICSID tribunals beyond the text of Article 57. The ICSID Convention is an international treaty established by states. Yet, it is not the states that apply the treaty, but the international arbitration

"Commissions" were usually used for civil insurrections, war damages, and personal claims, while "Heads of State" usually decided on arbitrary acts and maritime seizures. *Id.* at 32.

[175] Brown, *supra* note 58, at 65.

[176] In accordance with Article 3 ICSID Convention, ICSID maintains a list of arbitrators consisting of two parts: Part I consists of designations by the Chairman of the Administrative Council of ICSID according to Article 13(2) ICSID Convention), and Part II consisting of designations by Contracting States according to Article 13(1) ICSID Convention. The list is not closed and the Convention parties are free to appoint arbitrators from outside the list.

[177] *See generally* ANTONIO R. PARRA, THE HISTORY OF ICSID (2012).

[178] The independence standards of all international courts and tribunals, including the ICSID provisions, are largely based on the example of the Permanent Court of International Justice and the ICJ; *see* Oellers-Frahm, *supra* note 51, at 7; *see also* Brown, *supra* note 58, at 66–86

[179] *See supra* Section I.B.

[180] *Cf. also* Moshe Hirsch, *The Sociology of International Investment Law*, *in* THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW: BRINGING THEORY INTO PRACTICE 143 (Zachary Douglas et al. eds., 2014); Moshe Hirsch, *The Interaction between International Investment Law and Human Rights Treaties: A Sociological Perspective*, *in* MULTI-SOURCED EQUIVALENT NORMS IN INTERNATIONAL LAW 211 (Tomer Broude & Yuval Shany eds., 2011); *see also* Reisman, *supra* note 84 (discussing international investment arbitration as a "system").

community. Table 2 presents the nationalities of arbitrators based on a dataset on international investment arbitration gathered by Professor Alec Stone Sweet et al. including data until December 31, 2013.[181] It shows that Western Europeans, especially Swiss and French arbitrators, dominate the field of international investment arbitration, followed by U.S. Americans.[182]

TABLE 2: ARBITRATOR NATIONALITY

	Total	Western Europeans	Swiss	French	U.S. Americans
ICSID Arbitrators	272	118	15	30	47
Cases Chaired	249	128	30	25	15

It is largely the same community of people that deals with international investment cases in the international investment fora as in commercial arbitration. First, the international arbitration community evolves over the years in the frame of international commercial arbitration. Then, it migrates to investment arbitration. The individuals of this community have transposed their ethos and professional practices onto the investment law regime and arbitration.[183] The international arbitration community in the search for legitimacy and maximization of profits applies the higher standard of arbitral independence also to international investment arbitration,[184] despite the lack of international rules on organizational independence of arbitrators and beyond the text of Article 14.[185]

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[181] Dataset on file with the author.

[182] Arbitrators with dual citizenship are double-counted.

[183] *See also* Luttrell, *Bias Challenges in Investor-State Arbitration*, *supra* note 5, at 475 ("One of the things that the members of the relatively small pool of ICSID arbitrators have in common is that they either used to (or still) serve as arbitrators in strictly private international commercial disputes. They therefore carry the customs of ICA, which include the 'justifiable doubts' (or 'reasonable apprehension', as it is usually read) standard, in their briefcases when they cross over into ISA.").

[184] *See also* Jan Paulsson, *Ethics, Elitism, Eligibility*, 14 J. INT'L ARB. 13, 16 (1997) (exploring the connection between independence and impartiality, on the one side, and legitimacy in arbitration, on the other).

[185] *See* Hrvatska Elektroprivreda v. Slovenia, ICSID Case No. ARB/05/24, Order Concerning the Participation of a Counsel, ¶ 30 (May 6, 2008), which is very typical also concerning the standard of Article 14, but with the note that the case refers to the challenge of counsel:

> The Tribunal [was] concerned – indeed, compelled – to preserve the integrity of the proceedings and ultimately, its Award. Undoubtedly, one of the 'fundamental rules of procedure' referred to in Article 52 (1) (d) of the ICSID Convention is that the proceedings should not be tainted by any justifiable doubt as to the impartiality or independence of any Tribunal member. The Parties agree that the relevant perspective in that inquiry is that of a reasonable independent observer. . .[The challenged counsel's] continued participation in the proceedings could indeed lead a reasonable observer to form such a justifiable doubt in the present circumstance.

Arbitral independence in international investment arbitration is only partially a result of legal rules. It is rather more the effect of the process of the formation of the community of international arbitrators and its migration to international investment arbitration.[186] Arbitral independence in investment law is a societal construct.

Additionally, in the volatile and uncertain world of international law,[187] international courts have had a hard time adapting to the changes of a globalized world. The more flexible nature of international arbitration tribunals is probably one of the reasons that international investment arbitration has been so successful in recent years, especially in the late 1990s.[188] International investment tribunals operate as functional equivalents to courts in international law. For this reason, and under the guidance of the arbitration community, investor-State tribunals had to operate under similar independence standards as international courts, in order to achieve a high standard of legitimacy in the eyes of the international community.[189]

In the field of investment law, the construction of the independence standard for arbitrators is the result of a "process of communication"[190] and interaction between the members of the international arbitration community, states, international organizations, arbitration houses, and international courts. This makes it extremely volatile and subject to changes depending on the stage of development of the communication process. We have cur-

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Id.

[186] *Cf.* Antonin Cohen & Antoine Vauchez, *The Social Construction of Law: The European Court of Justice and Its Legal Revolution Revisited*, 7 ANN. REV. LAW SOC. SCI. 417 (2011) (concerning the societal evolution of the European Union legal order, and the role of the Court of Justice of the EU). This goes back to an understanding of international law as (also) a process and not (only) as a condition; *see* Myres S. McDougal & Harold D. Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT'L L. 1, 9 (1959). *See generally* CARLO FOCARELLI, INTERNATIONAL LAW AS SOCIAL CONSTRUCT (2012) (re-interpreting international law as a socially constructed field).

[187] Reisman, *supra* note 3, at 87–94.

[188] *See* ICSID, *supra* note 9.

[189] *But see* James Crawford & Joe McIntyre, *The Independence and Impartiality of the "International Judiciary," in* THE CULTURE OF JUDICIAL INDEPENDENCE: CONCEPTUAL FOUNDATIONS AND PRACTICAL CHALLENGES 189, 203 (Shimon Shetreet & Christopher Forsyth eds., 2012). According to James Crawford—one of the actors involved in the *Mauritius v. United Kingdom*—and Joe McIntyre:

> There are no doubt analogous considerations concerning the exercise of an arbitral function, but there are also core differences in function. The increased role of party consent and the discrete and largely private character of the proceedings fundamentally affect not only the applicable standards, but the underlying objectives as well, particularly with regards to the diminished importance of public confidence. The judicial function imposes stricter considerations of independence and impartiality than is demanded of arbitral functions.

Id.

[190] *See* Reisman, *supra* note 14. According to Reisman the legal process comprises three communicative streams: policy content, authority signal, control intention. *Id.* at 113. *See also* McDougal & Lasswell, *supra* note 186, at 9 (defining legal process as the "making of authoritative and controlling decisions").

rently reached a stage where a higher standard of review is starting to crystallize in international investment arbitration, including ICSID arbitration. The next subsection describes the standard of review in ICSID arbitration and makes a proposal for a further differentiation in the standard of review in order to compromise current adjudication practice of the arbitration community with the textual interpretation of Article 57.

B. The Independence Standard(s) of International Investment Arbitrators: Status and Policy

How many standards of review are there in investor-State arbitration? The provisional answer is that there are at least three: there is one in all arbitration fora and two in the ICSID framework. Through the interplay of the arbitration community with other actors of the international community that are involved in the field, a unique ICSID standard has been constructed. In the following paragraphs, I will clarify some open issues on the standard of independence in international investment arbitration and propose some corrections from a policy perspective: first, with regard to the chairpersons given their method of appointment and their special position in the arbitration process; second, concerning the recurring issue of the standard of review in inter-State arbitration; and third, with regard to the "person" of the reasonable observer in investment arbitration.

Arbitrators are only part-time adjudicators and part of their full-time job may be to write academic articles and notes on arbitration.[191] Moreover, the interconnectedness of arbitrators, counsel, and businesspeople is unavoidable in a globalized world.[192] According to one arbitrator, "if arbitrators must be completely sanitized from all possible external influences on their decisions, only the most naïve or incompetent would be available."[193]

In contrast to domestic and in most cases also international courts, and similar to international commercial arbitration, the appointment process is what appears to be making the difference in international investment arbitration and creating confusion with regard to the standard of independence

[191] Urbaser S.A. & Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic, ICSID Case No. ARB/07/26, Decision on Claimant's Proposal to Disqualify Professor Campbell MacLachlan, ¶ 46 (Aug. 12, 2010), http://www.italaw.com/sites/default/files/case-documents/ita0887.pdf ("[T]he mere fact of having made known an opinion on an issue relevant in an arbitration would have the effect of allowing a challenge for lack of independence or impartiality. Such a position, however, would have effects reaching far beyond what Claimants seem to sustain, and incompatible with the proper functioning of the arbitral system under the ICSID Convention.").

[192] Ahmed S. El-Kosheri & Karim Y. Youssef, *The Independence of International Arbitrators: An Arbitrator's Perspective*, ICC INTL. COURT OF ARB. BULL., 2007 Special Supplement, ICC Pub. 690 (2008), 48; *see also* Nathan, *supra* note 5, at 18 ("Although arbitral institutions make a fuss about the relationships with the parties, in practice none of them actually seriously review their relationships and take appropriate action except on a selective basis.").

[193] Park, *supra* note 5, at 635.

of investor-State arbitrators both in relevant case law and scholarship.[194] The coexistence of provisions for the independence and the appointment of arbitrators indeed creates an inherent tension in the provisions of the ICSID, and indeed any arbitration statute.

In order to resolve the tension, we need to distinguish between appointment by the parties to the dispute, on the one side, and appointment by other agents, or appointment by consent of the parties or fellow arbitrators, on the other side. The fact that arbitrators are appointed either by the parties, or by "appointing authorities" and consent, raises different questions concerning their independence.[195] A noted arbitration scholar, Professor Catherine Rogers, for example, believes that according to the current system of international investment arbitration, the party-appointed and the non-party-appointed arbitrators are supposed to be different.[196] Professor Yuval Shany contends that for party-appointed judges and arbitrators a consensually agreed deviation from the normal standard of judicial independence applies since the parties exchange expertise and influence for independence and impartiality in order to resort more often to adjudication.[197]

This distinction between party-appointed and non-party-appointed arbitrators places a great burden on the chairperson. In investor-State arbitration, the chairperson has an elevated role. This can be deduced from three types of special provisions. First, from the specific way in which they are appointed, namely by consent of the parties, the party-appointed arbitrators'

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[194] Similar questions arise also in the ICJ with the "part-time," and in other international courts with *ad hoc*, part-time, and *ad litem* judges. Ruth Mackenzie & Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 HARV. INT'L L.J. 271, 278 (2003) ("It would be unreasonable to expect that a nominating or appointing state would not put forward as a candidate a person who shares (in general terms) the value systems of the nominating state."); *id.* at 283 ("Part-time and *ad litem* judges clearly cannot be subject to the same constraints on outside activities as full-time judges, which raises questions as to *which* activities are appropriate."); *see generally* Yuval Shany, *Squaring the Circle? Independence and Impartiality of Party-Appointed Adjudicators in International Legal Proceedings*, 30 LOY. L.A. INT'L & COMP. L. REV. 473 (2008) (arguing that it is a mistake to apply the same test for judicial independence and impartiality that applies to permanent domestic and international judges, and non-party-appointed arbitrators to party-appointed judges and arbitrators); *but see* the Preamble of the Burgh House Principles, *supra* note 18; Shany & Horovitz, *supra* note 58, at 120 (criticizing as anachronistic the provisions dealing with the appointment of judges bearing the nationality of litigant states, with particular deference to Article 31 of the ICJ Statute and Article 27(2) of the ECHR statute).

[195] Bernasconi-Osterwalder et al., *supra* note 5, at 1; *cf. also* Erik Voeten, *The Politics of International Judicial Appointments*, 9 CHI. J. INT'L L. 387, 403 (2009) ("The precise institutional mechanisms that govern the appointment and retention process greatly influence the ability of governments to affect judicial behavior.").

[196] Rogers, *supra* note 87, at 246 ("They [party-appointed arbitrators] represent one party's preference for a decision-maker and are selected based on a careful assessment. If party-appointed arbitrators were, with any degree of regularity, writing dissenting opinions in favor of an opposing party, it would mean that parties were doing an exceptionally poor job of identifying party-appointed arbitrators.") (internal citations omitted).

[197] Shany, supra note 194, *passim*.

consent, or by a neutral organization. Second, the chairperson's elevated role is reflected in different provisions concerning the nationality of arbitrators. In investment arbitration, Article 9(5) International Chamber of Commerce Rules, which specifies the special requirement that the sole arbitrator or the chairperson of the arbitral tribunal shall be of a nationality other than those of the parties, has a special role given that states and foreign nationals are involved in the dispute. Third, the special position of the chairpersons can also be deduced directly from the special powers they have in the arbitration process.[198] For example, pursuant to Article 58 of the ICSID Convention, in the case of a proposal to disqualify a sole arbitrator, or a majority of arbitrators, the chairperson shall take this decision.[199]

For these reasons, the common independence standard should apply to chairpersons independent of the arbitration forum. I propose that for all the arbitral fora the common standard should apply. Based on what has been described above, I then propose two standards for international investment arbitrators operating under the ICSID framework: one for the chairperson, and one for the party-appointed arbitrators. For the chairperson of the arbitral tribunal, the common test that applies across investment arbitration, and arbitration generally, should apply:

- *Standard:* "justifiable doubts" – "appearance of bias"
- *Intensity:* mere possibility of bias
- *Point of view:* "reasonable observer/third party" (objective)

For the party-appointed arbitrators, the test as developed by recent ICSID case law should apply:

- *Standard:* "justifiable doubts" – "appearance of bias"
- *Intensity:* "manifest lack" of bias (high probability of bias)[200]
- *Point of view:* "reasonable observer/third party" (objective)

In order to illustrate the differences, the non-corrected ICSID standard

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[198] *See, e.g.*, PCA ARBITRATION RULES, *supra* note 102, art. 33(2) ("In the case of questions of procedure, when there is no majority or when the arbitral tribunal so authorizes, the presiding arbitrator may decide alone, subject to revision, if any, by the arbitral tribunal.").

[199] *See also* ICSID Regulations and Rules, *supra* note 8, Rules of Procedure for Arbitration Proceedings, Rule 9(4); Piero Bernardini, *ICSID versus non-ICSID Investment Treaty Arbitration*, *in* LIBER AMICORUM BERNARDO CREMADES 159 (David Arias & Miguel Ángel Fernández-Ballesteros eds., 2010).

[200] The intensity standard of "high probability" of dependence and partiality is to be deduced from a systematic interpretation of the highly raised bar of the burden of proof as set out in Articles 14 and 57 and from ICSID case law. *See* Suez, Sociedad General de Aguas de Barcelona S.A. &Vivendi Universal S.A. v. Republic of Argentina, ICSID Case No. ARB/03/17, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, ¶ 29 (Oct. 22, 2007), http://www.italaw.com/sites/default/files/case-documents/ita0811_0.pdf (citing Amco Asia Corp. v. Indonesia, ICSID Case No. ARB/81/1, Decision on the Proposal to Disqualify an Arbitrator (unpublished, reported June 24, 1982); Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, Decision on Claimant's Proposal to Disqualify Arbitrator (Dec. 19, 2002), 8 ICSID Rep. 398 (2005)).

for both the chairperson and the party-appointed arbitrators would have been the following:

- *Standard:* "manifest lack"
- *Intensity:* high probability of bias based on facts
- *Point of view:* unclear, but probably "reasonable observer/third party" (objective)

At the same time, accepting a lower standard of independence for party-appointed arbitrators might create perverse incentives for them, and give the wrong signals to the parties as to the level of their independence. How is this problem to be solved? From a policy-perspective, the need to respect the decisions of the parties and the need to provide for justice in international arbitration can be resolved with recourse to the standard of review. As a basis for the assessment, the deciding authorities could use the relevant case law concerning the self-judging clauses.[201] The International Court of Justice, the World Trade Organization Appellate Body, and some investment tribunals apply a separate standard of review with regard to the self-judging exception clauses. They apply a good faith review, instead of a full substantive review of whether a measure meets the requirements of an exception clause. One could apply this solution to the assessment of arbitral independence. The difference between the two standards is one of the burden of proof on the side of the challenging party[202] and of the disqualification standard of review on the decision of the deciding authority. The challenging party has to pass a higher bar in order to prove dependence or partiality of the party-appointed arbitrator, in comparison to the chairperson of the tribunal; the deciding authority, either the unchallenged arbitrators or the Chairperson of the Administrative Council of ICSID, should apply a good faith review in the case of the party-appointed arbitrators rather than a full substantive review in the case of the chairperson.

The question of differentiated standards of review exists both in domestic and international law. The standard of review determines how far an authority can go in reconsidering another authority's decision. In the United States, for example, a standard of review is usually the measure of deference an appellate court gives to the rulings of a lower court.[203] Very common standards of review are "clear error," which is used when the appellate court reviews a trial court's findings of fact, "de novo review," used when reviewing questions of law, and "abuse of discretion," used when reviewing decisions that are left to the discretion of trial courts.[204] The intensity of re-

[201] *See generally* Stephan Schill & Robyn Briese, *"If the State Considers": Self-Judging Clauses in International Dispute Settlement*, *in* 13 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 61 (Armin von Bogdandy & Rüdiger Wolfrum eds., 2009).

[202] *See* Part II.C.3.b. and cases cited *supra* note 200.

[203] *See generally* Thomas W. Merrill, *The Origins of American-Style Judicial Review*, *in* COMPARATIVE ADMINISTRATIVE LAW (Susan Rose-Ackerman & Peter L. Lindseth eds., 2010).

[204] *Id*.

view can be understood as a continuum with clear error at the one end of the spectrum and de novo review at the other. Clear error is highly deferential, and abuse of discretion is deferential, while de novo review is non-deferential. In international law, different standards of review appear in how far international courts and tribunals can go when reconsidering a domestic authority's decision.[205] Also in international economic law, and international investment law more specifically, the standard of review plays an extremely important role as to the degree of deference on the side of the investment tribunals towards decisions of domestic authorities, and the regulatory discretion of domestic authorities.[206] Similarly, the need to respect the decisions of the parties that have selected the specific composition of an arbitral tribunal and the need to provide for justice in international investment arbitration can be addressed by the standard of review. In the above described continuum, full substantive review comes closer to de novo review, while good faith review comes closer to clear error.

Three principles have also to be borne in mind in this respect: the principle *de minimis non curat lex* should find application here,[207] and the absolute limits of every system of adjudication, namely the principles *audi alteram partem* and *nemo judex in causa sua*.[208] Procedural safeguards generally should be respected. In any case of a clear violation of disclosure rules, the arbitrator should be considered to be biased and as a result be disqualified.[209]

The same should also apply in inter-State arbitration. As we have seen, the courts and tribunals largely apply the same standard of independence for their adjudicators. In *Mauritius v. U.K.* we saw the Tribunal, composed of a majority of international judges, declare a differentiated standard of independence in the case of inter-State conflicts,[210] including cases before courts

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[205] *See generally* DEFERENCE IN INTERNATIONAL COURTS AND TRIBUNALS: STANDARD OF REVIEW AND MARGIN OF APPRECIATION (Lukasz Gruszczynski & Wouter Werner eds., 2014).

[206] *See, e.g.*, Schill, supra note 89; *see generally* Caroline Henckels, *Balancing Investment Protection and the Public Interest: The Role of the Standard of Review and the Importance of Deference in Investor-State Arbitration*, 4 J. INT'L DISP. SETTLEMENT 197 (2013); Valentina Vadi & Lukasz Gruszczynski, *Standards of Review in International Investment Law and Arbitration: Multilevel Governance and the Commonweal*, 16 J. INT'L ECON. L. 613 (2013).

[207] *See* Luttrell, *Bias Challenges in Investor-State Arbitration*, supra note 5, at 462.

[208] *See* Giacinto della Cananea, Due Process for Foreign Investors: Trans-national Standards of Procedural Fairness (draft, on file with the author); Buechel, *supra* note 5, at 243 ("Arbitrators are often closely involved in the market that appoints them, which arise the issues of them being partial, biased, pre-disposed and being interested in the outcome of arbitration. The long-standing norms that no one should be a judge in his own cause and that justice should be seen to be done apply equally to international arbitration."); *see also* Luttrell, *Bias Challenges in Investor-State Arbitration*, *supra* note 5, at 462.

[209] *See also* Rogers, *supra* note 22, at 111–12.

[210] *See also* Meron, *supra* note 58, at 368; *but see* Shany & Horovitz, *supra* note 58, at 128–29; Seibert-Fohr, *supra* note 148, at 771 (for a critique of the relevant practice).

and arbitral tribunals, in comparison to private-State, or private-private conflicts. The higher disqualification standard of review as described in the previous paragraphs should apply also for the chairperson in inter-State investment cases.

For both tests, there has to be a further adaptation to investor-State arbitration requirements. The special character of investment law and arbitration speaks for a specific interpretation of the "reasonable observer," or "third party." Given the public character of international investment arbitration, there is a need to define the third party in a different way than in other fields of arbitration. A large part of the imaginary observer should be constituted from the population of the host country.[211] Through this clause, the law and practice of international investment arbitration can respond to the global and domestic public interest.[212] A step in this direction is to be found in the "UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration."[213] They specify in Article 1(4)(a) that where the arbitral tribunal is exercising a discretion to decide on the transparency of the proceedings, the tribunal should take into account both the public interest in transparency in treaty-based investor-State arbitration and the disputing parties' interest in a fair and efficient resolution of their dispute.

IV. CONTROL MECHANISMS IN INTERNATIONAL INVESTMENT ARBITRATION

As a response to dissatisfaction among some participants and observers with the overall structure of the investor-State arbitration system and the results it produces,[214] several proposals have been suggested as alternatives to the current system.[215] Some of these proposals include a fundamental reshaping of the current system, while others propose the introduction of control systems. Five major proposals will be presented briefly here: (1) the abolishment of party-appointed arbitrators; (2) the introduction of an appeal mechanism; (3) the establishment of an international investment court; (4)

[211] Rubins & Lauterburg, *supra* note 5, at 165 (with reference to ,EDF International S.A. v. Argentine Republic, ICSID Case No. ARB/03/23, Challenge Decision Regarding Professor Gabrielle Kaufmann-Kohler, ¶ 74 (June 25, 2008), http://www.italaw.com/sites/default/files/case-documents/ita0262.pdf) ("Focusing primarily on the parties to the dispute, the Orange List disregards a key stakeholder in the investment arbitration process: the host state's populace. Otherwise stated, who is the "reasonable observer" against whose views the arbitrator's apparent independence is to be measured?"); *see also id.* at 171–75.

[212] *Cf. also* Luttrell*, Bias Challenges in Investor-State Arbitration*, *supra* note 5, at 475.

[213] The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration are effective from April 1, 2014.

[214] *See generally* Brower & Blanchard, *supra* note 19.

[215] *See supra* note 20 and accompanying text; *see generally* THE EVOLVING INTERNATIONAL INVESTMENT REGIME: EXPECTATIONS, REALITIES, OPTIONS (Jose E. Alvarez, Karl P. Sauvant, Kamil Girard Ahmed & Gabriela P. Vizcaino eds., 2011).

the introduction of binding codes of conduct; and (5) the resort to the old means of diplomacy and dispute resolution through domestic courts. With the exception of the fourth proposal, the proposed reforms go either in the direction of a further judicialization of investment arbitration, or returning to the old status quo with the hope that this time it will work.

After discussing these proposals, I will then put forward my suggestion for the improvement of the current system so that arbitration remains an effective alternative to the courts. A system of market-based regulation focusing on the arbitration community and the person of the arbitrator could be a solution to the balancing of independence and control beyond any major institutional reform.

A. The Need for Accountability Mechanisms

As in the field of international courts, the increasing judicialization and independence moves of the international investment tribunals leads to an increased need for accountability[216] or control mechanisms:[217]

"To say that judges should be independent, that they should base their decisions on the facts of individual cases rather than in response to outside pressure is one thing. But to say that courts in general should not be held accountable by the public and by the other branches is to ask for a protection no democratic society should grant."[218]

The same applies to international investment arbitration.[219]

Controls over decisions are a prerequisite for international third party decision-making.[220] If the control and accountability mechanisms of the ad-

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[216] *See generally* Paul Mahoney, *The International Judiciary – Independence and Accountability*, 7 L. & PRAC. INT'L CTS. & TRIBUNALS 313 (2008); Dinah Shelton, *Legal Norms to Promote the Independence and Accountability of International Tribunals*, 2 L. & PRAC. INT'L CTS. & TRIBUNALS 27 (2003); Ronli Sifris, *Weighing Judicial Independence against Judicial Accountability: Do the Scales of the International Criminal Court Balance?*, 8 CHI.-KENT J. INT'L & COMP. L. 88 (2008).

[217] *See* sources cited *supra* note 21; *see also* Laurence R. Helfer & Graeme B. Dinwoodie, *Designing Non-National Systems: The Case of the Uniform Domain Name Dispute Resolution Policy*, 43 WM. & MARY L. REV. 141 (2001).

[218] Charles H. Franklin, *Behavioral Factors Affecting Judicial Independence*, JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH 148, 150 (Stephen B. Burbank & Barry Friedman eds., 2002).

[219] REISMAN, SYSTEMS OF CONTROL, *supra* note 21, at 1 ("Arbitration is a delegated and restricted power to make certain types of decisions in certain prescribed ways. Any restricted delegation of power must have some system of control. Controls are techniques or mechanisms in engineered artifacts, whether physical or social, whose function is to ensure that an artifact works the way it was designed to work. In social and legal arrangements in which a limited power is delegated, control systems are essential; without them the putative restrictions disappear and the limited power may become absolute . . . . Nor should controls be conceived in a negative sense. Controls are necessary not only for efficient operation. Effective controls are the only assurance of limited government. In this sense controls are a sine qua non of liberty.").

[220] *Id.* at 2.

judication bodies fail, then many actors may refrain from using the system.[221] This might explain why states resort less often than expected to international courts. For this reason, controls in international adjudication and arbitration are not only conditions for the efficient functioning of the system, but "conditions of operation."[222] In the same way as appearance of bias operates with regard to judicial independence, at least an "appearance of accountability" has to be present in international arbitration. Mechanisms need to be developed that will bring an equilibrium between independence, control and accountability. These new mechanisms will attract more actors that until now have chosen not to participate in the system, such as Brazil, into investment arbitration, and they will reverse the recent trend of abandoning investment arbitration.

The new system should achieve a new "degree of independence",[223] or what Professors Helfer and Slaughter call "constrained independence".[224] The difficult part of the institutional design for international arbitration is that constrained independence has to be achieved in a market-context, on the one side, and in a field of increased political sensitivity and significant economic importance, on the other. In the words of Yuval Shany, referring generally to international adjudication:

> The focus of our attention should therefore shift from discussing the existence and desirability of an 'ideal type' of judicial independence—a discussion premised on a monolithic understating of the international judicial function, to a study of the nuts and bolts of the constraints put on international courts in the unique institutional and normative environments in which they operate.[225]

A further judicialization step in the field of international investment arbitration might undermine the existence of the field itself.[226] Even if this might not be a negative evolution as such, it might undermine the investment regime as a whole, and thus have detrimental effects on countries in need of capital inflows from foreign investors. Moreover, with the rise of

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[221] *Id*.

[222] *Id*.

[223] Owen M. Fiss, *The Right Degree of Independence*, *in* TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY 55 (Irwin Stotzky ed., 1993); *see also* Owen M. Fiss, *Judicial Independence*, *in* ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION (Leonard Levy and Kenneth Karst eds., 2nd ed. 2000) (both on the idea of the "degree of independence" of judges).

[224] Helfer & Slaughter, *supra* note 58, at 44–56; Shany, *supra* note 2, at 261–67; *see generally* Tom Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, 45 VA. J. INT'L L. 631 (2005) (discussing "bounded discretion"); Richard H. Steinberg*, Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 A.J.I.L. 247 (elucidating the concept of "strategic space").

[225] Shany, *supra* note 2, at 262–63.

[226] *See* Gerald F. Phillips, *Is Creeping Legalism Infecting Arbitration?*, DISP. RESOL. J., Feb.–Apr. 2003, at 37, 38 (2003); Park, *supra* note 5, at 693–94.

the BRICS and other (former) developing countries, developed countries could also benefit from capital inflows. In addition, even if the system does not collapse, it is not certain that the next step in its development will necessarily be positive. Investors may either resort to domestic courts, or other means of alternative dispute resolution.[227] The success of the first possible exit from the system is dependent on the quality of the domestic courts. The second possible exit might lead to opposite results from that which even the proponents of the public law judicialization of investment arbitration would want; namely to less juridified and judicialized dispute resolution by means of conciliation or mediation. This has happened in other fields, and in domestic law, and may also happen in investment arbitration. So, more (law) could mean less (law). Moreover, according to Stavros Brekoulakis, if some of the proposals such as the abolishment of party-appointment or the establishment of a standing international investment court are adopted, there is a great danger that the "pluralistic, diverse and democratic *potential* of international arbitration" will be undermined.[228] Given the current structure of the system, reforms in arbitration would rather need to enhance ideological pluralism and prevent homogeneity.[229]

B. Alternatives to the Current System

Recently, there have been proposals by very eminent and highly influential arbitration practitioners and scholars proposing the reform of investor-State dispute resolution.[230] Similar proposals have also been formulated by international organizations like the United Nations Conference on Trade and Development (UNCTAD).[231] The different proposals range from increasing transparency of the investor-arbitration system[232] to introducing new institutional mechanisms like a system of preliminary rulings in inter-

[227] See also Henckels, *supra* note 206, at 199 (2013) ("If adjudicators employ overly strict standards of review, this may give rise to compliance issues, reform of relevant legal instruments to curtail adjudicative discretion, or withdrawal of states from the court or tribunal's jurisdiction—all of which are situations that have arisen in international investment law.").

[228] Brekoulakis, *supra* note 5, at 557.

[229] *Id*. at 582. As examples of this kind Professor Brekoulakis mentions the increase of the number of arbitrators sitting in a case from one or three to five, the enlargement of the pool and cultural diversity of potential arbitrators and capacity-building programs.

[230] *See generally* Andrew P. Tuck, *Investor-State Arbitration Revised: A Critical Analysis of the Revisions and Proposed Reforms to the ICSID and UNCITRAL Arbitration Rules*, 13 L. & BUS. REV. AM. 885 (2007).

[231] *See* UNCTAD, *supra* note 20.

[232] *See* United Nations Commission on International Trade Law, Rules on Transparency in Treaty-Based Investor-State Arbitration, U.N. G.A. Res. 68/109 (Dec. 16, 2013); Mauritius Convention on Transparency, *opened for signature* Mar. 17, 2015, 54 I.L.M. 747, http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf.

national investment arbitration.[233] This subsection discusses some of these proposals.

1. Abolishment of Party-Appointed Arbitrators

For reasons that become clear after an analysis of the (lack of) institutional guarantees in international investment arbitration in contrast to international courts, prominent international arbitration practitioners and scholars like Jan Paulsson and Jan van den Berg have proposed the abolishment of the system of party-appointment in international investment arbitration.[234] It has been suggested instead that all members of an arbitral tribunal should be appointed by arbitral institutions. The institutional selection of arbitrators would allow for more transparency in the appointing process and better control of the quality of the appointed arbitrators.

Despite the possible merits of this system with regard to enhanced institutional independence, the adoption of this proposal would mean that the international investment system would lose many of its positive aspects. The tribunals would lose the ability to glean major insights into the facts of each case and the specificities of each individual party that can be provided by party-appointed arbitrators. Losing the power to appoint an arbitrator, the actors may moreover stop resorting to arbitration overall.

2. Appeal Mechanism

One of the most popular ideas put forward for reform is to introduce a second instance or appellate body, like the WTO Appellate Body.[235] An ap-

[233] *See generally* Christoph H. Schreuer, *Preliminary Rulings in Investment Arbitration*, *in* APPEALS MECHANISMS IN INTERNATIONAL INVESTMENT DISPUTES 207 (Karl P. Sauvant ed., 2008).

[234] 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 (Mahnoush Arsanjani et al. eds., 2011); *see generally* Jan Paulsson, Moral Hazard in International Dispute Resolution: Inaugural Lecture as Holder of the Michael R. Klein Distinguished Scholar Chair Before the University of Miami Law School, *in* 25 ICSID INVESTMENT L.J. 339 (2010); Hans Smit, *The Pernicious Institution of the Party-Appointed Arbitrator*, COLUM. FDI PERSP., no. 33 (Dec. 14, 2010), http://ccsi.columbia.edu/files/2014/01/FDI_33.pdf ; *but see* Charles N. Brower & Charles B. Rosenberg, *The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded*, GLOBAL ARB. REV. (2012), http://www.globalarbitrationreview.com/cdn/files/gar/articles/Charles_Brower_The_Death_of_the_Two-Headed_Nightingale_Speech_2.pdf ; Giorgio Sacerdoti, *Is the Party Appointed Arbitrator a "Pernicious Institution"? A Reply to Professor Hans Smit*, COLUM. FDI PERSP., no. 35 (Apr. 15, 2011), http://ccsi.columbia.edu/files/2014/01/FDI_35.pdf. *See also* Trakman, *supra* note 92, at 660 (on the introduction of standing panels).

[235] APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES (Karl P. Sauvant eds., 2008); Johanna Kalb, *Creating an ICSID Appellate Body*, 10 UCLA J. INT'L L. & FOREIGN AFF. 179 (2005); Andrea K. Bjorklund, *The Continuing Appeal of Annulment: Lessons from Amco Asia and CME*, *in*

peal mechanism has the advantage of keeping the basic structure of the system untouched, while introducing an additional review layer in order to increase consistency in awards. Another major advantage of this proposal is that it could help investment arbitration develop in a more transparent way, given that, one way or another, annulment has in practice started playing the role of appeal with the ICSID ad hoc committees interpreting the annulment grounds very expansively.

This institutional development might be a necessary step in ICSID arbitration, given that it is the arbitration system where controls, international or domestic, are least effective. An appeal mechanism, though, will not create the necessary incentives for further improvements in the direction of encouraging new arbitrators to enter the market. An appellate stage might also increase the costs and time involved for the resolution of investment disputes.[236]

3. Standing International Investment Court

The proposal involving the most rigorous reshaping of dispute resolution in the international investment regime has been put forward by Professor Gus Van Harten.[237] Van Harten proposes to replace investment arbitration with a permanent international investment court with tenured judges subject to the supervision of national courts or an appellate body, because private arbitrators are allegedly not in the position to resolve public law is-

INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW 471, 479 (Todd Weiler ed., 2005); David A. Gantz, *An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges*, 39 Vand. J. Transnat'l L. 39, 43–44 (2006); Christian J. Tams, *An Appealing Option? The Debate about an ICSID Appellate Structure*, ESSAYS TRANSNAT'L ECON. L., June 2006, at 57; *see also* Trakman, *supra* note 92, at 662 ("Seventeenth, the ICSID needs an appellate body with jurisdiction beyond annulment proceedings, including expanded grounds of appeal and remedies. Such an appellate body can also help render ICSID jurisprudence more consistent."); Bottini, *supra* note 5, at 365–66. The European Commission is also currently working on this idea. *See* EUROPEAN COMM'N, FACT SHEET: INVESTMENT PROTECTION AND INVESTOR-TO-STATE DISPUTE SETTLEMENT IN EU AGREEMENTS 9 (Nov. 23, 2013). *See generally* Noemi Gal-Or, *The Concept of Appeal in International Dispute Settlement*, 19 EUR. J. INT'L L. 43 (2008).

[236] UNCTAD, *supra* note 20, at 8.

[237] *See* VAN HARTEN, *supra* note 29, at 180–84; Gus Van Harten, A Case for an International Investment Court (June 30, 2008), Society of International Economic Law (SIEL) Inaugural Conference 2008, http://ssrn.com/abstract=1153424 [hereinafter Van Harten, International Investment Court]; Van Harten, *supra* note 88, at 627; Gus Van Harten, *Perceived Bias in Investment Treaty Arbitration*, *in* THE BACKLASH AGAINST INVESTMENT ARBITRATION 175–84 (Michael Waibel et al. eds, 2010); *see also* Alec Stone Sweet & Florian Grisel, *Transnational Investment Arbitration: From Delegation to Constitutionalization?*, *in* HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 135, 118–36 (Pierre-Marie Dupuy et al. eds., 2009); Andreas Bucher, *Is there a Need to Establish a Permanent Review Body?*, 6 REV. INT'L ARBITRAL AWARDS 285 (2010).

sues.[238] This goes together with an understanding that international courts are the best adjudication fora for international disputes. The tenure of judges of a permanent court would lead to an increase in the independence and impartiality of the adjudicators since tenured judges would not have any potential future appointments in mind as arguably arbitrators do.

This proposal speaks for a complete departure from the current system and is worth consideration by any person interested in the values of adjudicator independence and accountability. The users of arbitration, including developing and developed states and investors would then have to decide whether they prefer the virtues of arbitration despite its vices. In view of the general global trend to Alternative Dispute Resolution (ADR) instead of courts, appointing tenured judges cannot be viewed as a viable solution. Given that both states and investors will always have exit options through recourse to the traditional international law dispute resolution mechanisms, we might end up with a court similar to the ICJ.

4. Codes of Conduct

Given the current partial collapse of control systems in international arbitration, the European Commission has also put forward its own proposal for reform of international investment arbitration, or "investor-state dispute settlement" (ISDS).[239] The European Union is the largest economy in the world and the Lisbon Treaty of 2008 made negotiating investment agreements an EU competence.[240] It is expected that changes in the EU systems of control will have a systemic impact on international investment arbitration overall.

The European Commission proposes changes to improve both investment protection rules and dispute settlement.[241] Major concerns with regard to dispute settlement are "conflicts of interests" and "consistency of arbitral awards."[242] The EU has drafted a code of conduct with specific obligations for arbitrators which is supposed to be introduced in future trade and investment agreements of the EU with its partners.[243] The code already forms part of the negotiated agreement of the EU with Canada. According to European Commission reports, as the code has not yet been made public, it includes provisions on conflicts of interests and broader questions on the eth-

[238] Van Harten, International Investment Court, *supra* note 237.

[239] EUROPEAN COMM'N, *supra* note 235.

[240] *See* Regulation 1219/2012, of the European Parliament and of the Council of 12 December 2012 Establishing Transitional Arrangements for Bilateral Investment Agreements Between Member States and Third Countries, 2012 O.J. (L 351/40)

[241] EUROPEAN COMM'N, *supra* note 235, 7.

[242] *Id.* at 9.

[243] *Cf. also* Rogers, *supra* note 22, 110–12 (on the adoption of codes of conduct for international arbitrators).

ics and conduct of arbitrators.[244]

This effort to regulate the conduct of arbitrators is accompanied by the introduction of a list of individuals who can act as arbitrators in a particular dispute, an approach also found in the ICSID Convention. This "list approach" has the major difference in the case of the EU-Canada free trade agreement (CETA) in comparison to the ICSID in that the individuals on the list will have to be chosen by both the EU and Canada on the basis of expertise, and there will be an obligation for them to comply with the code of conduct.

The system proposed by the EU includes very interesting elements for the future regulation of international investment arbitration because it addresses the arbitration community as such. I believe that this mode of arbitrator regulation could develop within a system of co-regulation, as will be described later in the text, which would be greeted with much more acceptance by the arbitration community.

5. Going Back: Diplomacy and Domestic Courts

Currently, there are even some proposals to go back to the traditional means of solving international disputes. In every international dispute involving foreign nationals, the traditional way of resolving investor-State disputes has been diplomacy.[245] Some current proposals include a return to diplomatic protection in international investment law.[246] Moreover, diplomacy has recently made a come-back with a more modern face. UNCTAD, for example, has elaborated a toolkit for dispute resolution using the means of classical international law—negotiation, conciliation and mediation or other managed conflict prevention measures like good offices and enquiry—in a more structured way within the BITs.[247]

These measures may end up being ineffective by causing delays to dispute resolution instead of offering solutions.[248] The measures are more geared towards dispute prevention and avoidance rather than dispute resolution. Even though it is preferable for states to resolve their disputes in a

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[244] *See* EUROPEAN COMM'N, INVESTMENT PROVISIONS IN THE EU-CANADA FREE TRADE AGREEMENT (CETA) 3 (Sept. 26, 2014); Regulation 1219/2012, 2012 O.J. (L 351/40) 9.

[245] *See* O. Thomas Johnson, Jr. & Jonathan Gimblett, *From Gunboats to BITs: The Evolution of Modern International Investment Law*, *in* Y.B. INT'L INV. L. & POL'Y 649–92 (Karl P. Sauvant ed., 2010–2011).

[246] M. Sornarajah, *Starting Anew in International Investment Law*, COLUM. FDI PERSP., no. 74 (July 16, 2012), http://ccsi.columbia.edu/files/2014/01/FDI_74.pdf.

[247] UNCTAD, INVESTOR-STATE DISPUTES: PREVENTION AND ALTERNATIVES TO ARBITRATION, U.N. Doc. UNCTAD/DIAE/IA/2009/11, U.N. Sales No. E.10.II.D.11 (2010); *see also* Trakman, *supra* note 92, at 657–59.

[248] Trackman, *supra* note 92, at 658 (citing Colin Picker, *International Investment Law: Some Legal Cultural Insights*, *in* REGIONALISM IN INTERNATIONAL INVESTMENT LAW 27 (Leon Trakman & Nick Ranieri eds. 2013)).

friendly way, there is no assurance that they will not resort to litigation.[249] Moreover, the tripartite quasi-judicial structure of investor-State arbitration may then be restructured into two politicized bipartite ones. The investors, who had in the beginning to deal only with the foreign bureaucracy, would then have to deal with the bureaucracy of their country of origin too. As a result, the introduction of these measures can cut both ways.[250]

A further proposal, partly in response to the withdrawal of Australia from international investment arbitration, has been recently again put on the table to go back to the system of domestic courts deciding on investor-State issues.[251] The basic argument in favor of domestic courts is that foreign and domestic investors should be granted the same treatment.[252] But, if we view investment law as an international regime and "if domestic courts have the final word on state-investment arbitration, domestic laws and interests are likely to further dilute international investment law and practice."[253] Eventually, the success of a broad re-introduction of domestic courts in the resolution of international investment disputes will be highly dependent on the quality of domestic courts.[254]

C. Adaptation to the Constructed Standards

1. Co-regulation

The reform proposals that have been described above are suggestions for an institutional reshaping of international investment arbitration; each one of a different degree of intensity. Consistent with the analysis on the construction of arbitral independence, the best way to improve the overall system is by focusing on the arbitration community, the arbitrators, and

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[249] *See* Mark Kantor, *Negotiated Settlement of Public Infrastructure Disputes*, *in* NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW: IN MEMORIAM THOMAS WÄLDE 199–222 (Todd Weiler & Freya Baetens eds., 2011).

[250] *See* Trakman, *supra* note 92, at 659.

At their best, these dispute prevention and avoidance mechanisms may discourage parties from resorting to fractious, costly, and disruptive arbitration or litigation. At their worst, however, they may protract investor-state conflict, delay dispute resolution, and increase its costs. Institutionalized dispute resolution options that are incorporated into bilateral investment treaties may avert litigation or arbitration, or they may simply delay it. Conciliation may fail because one party objects to the appointment of a facilitator; or, on appointment, that facilitator may fail to secure investor-state cooperation in managing a conflict, such as one party declining to allow consultation with non-governmental agencies.

Id.

[251] *See* Leon E. Trakman, *Investor State Arbitration or Local Courts: Will Australia Set a New Trend?*, 46 J. WORLD TRADE 83 (2012); Leon E. Trakman, *Foreign Direct Investment: An Australian Perspective*, 13 INT'L TRADE & BUS L. REV. 31, 48–53 (2010); Trakman, *supra* note 92, at 648–57.

[252] David Schneiderman, CONSTITUTIONALIZING ECONOMIC GLOBALIZATION: INVESTMENT RULES AND DEMOCRACY'S PROMISE 59 (2008).

[253] Trakman, *supra* note 92, at 605.

[254] *Cf. also id.* at 652.

their qualities rather than on any major institutional reform. A solution cannot include fundamental changes to the legal and institutional framework if it is to be at all viable and accepted by all players in the field. The proposal put forward in this Article is to regulate investor-State arbitration; yet, in a completely different way than the alternatives proposed so far. The system proposed here shifts the focus from the institutions to the arbitration community and the person of the arbitrator.[255]

In order to draw ideas on how to regulate arbitrators, one could look at the toolkit of theories of regulation. The good news is that scholars working in other fields of ADR like mediation have already worked out solutions and can provide some guidance in this effort. As for the person of the arbitrator, similar to mediators, there are four possible ways to regulate them based on a different degree of intensity of the regulatory intervention:[256] (a) a license system as with the liberal professions; (b) a system of recognition of pre-existent private systems as in the Austrian *Zivilrechts-Mediations-Gesetz* (ZivMediatG);[257] (c) a quality mark system; or (d) no regulation such as is the current system for international commercial and investment arbitration.

Looking at the different systems, one should try to think of ways to make the appointment of arbitrators more objective, keeping in mind at the same time the need for the market to define some of the features of arbitration. The appropriate institutional design would be best chosen based on the existing characteristics of the investor-State arbitration system, namely the existence of an arbitration community, the lack of organizational guarantees of independence, and the operation of the arbitrators in a market for arbitrators. The market should bring its own accountability mechanisms to international investment arbitration.

My proposal is to respect both the basic structure of international investment arbitration and the propensity of the arbitration community towards self-regulation[258] and introduce a system adapted to these conditions. I propose, combining systems (b) and (c) that were presented in the previous paragraph through the introduction of a *certification system* in the field

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[255] *See also* Rogers, *supra* note 22, at 121 (calling on arbitral institutions to "engage in more active, rigorous, and transparent . . . oversight of arbitrator conduct.").

[256] *See* Gerhard Wagner, *Grundstrukturen eines deutschen Mediationsgesetzes* [*The Basic Structure of a German Mediation Act*], 74 RABELS ZEITSCHRIFT 794, 825 (2010).

[257] Bundesgesetz über Mediation in Zivilrechtssachen [Federal Act on Mediation in Civil Matters], June 6, 2003, BGBL I at 123, no. 29 (Ger.).

[258] See Dezalay & Garth, *supra* note 154, at 47 ("The system of selection and self-regulation of arbitrators created by the pioneers and resembling a 'club' is still quite essential to the prosperity of international commercial arbitration. Despite the conflicts and differing positions taken with respect to the conduct of arbitration, the participants in the debates are still in key respects members of a common community.").

of international investment arbitration.[259] The arbitration market has already created such a system in other fields, like commercial arbitration, and mediation has a relatively advanced global market-based quality assessment system.

This system could help improve openness and transparency of the market by allowing more certified arbitrators to become eligible for selection. It would also cope with the problem of lack of information and information asymmetries in the arbitration market,[260] without simultaneously creating a bureaucratic institution for its management.[261] As an institutional guarantee for the quality of certifications, ICSID could perform the role of the manager of the system. This method of governance is usually called "co-regulation" or "collaborative governance" in the theory of regulation.[262] The "List" system currently provided for in the ICSID Convention could evolve into a certification system.[263]

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[259] This proposal is based on a similar evolution observed in the field of product safety, where certification and accreditation developed in the market as market instruments and the system has then been adopted by the WTO TBT Agreement and the European Union. At the international level, the Kyoto Protocol also uses a similar system in order to measure emission reductions by private certification bodies. *See* GEORGIOS DIMITROPOULOS, ZERTIFIZIERUNG UND AKKREDITIERUNG IM INTERNATIONALEN VERWALTUNGSVERBUND (2012); *see also* Rogers, *supra* note 22, at 121 (with further references) ("Finally, as some have already suggested for the domestic context, perhaps the time has come for licensing or certification procedures to regulate arbitrator conduct. These steps are inevitable as the pool of international arbitrators transforms from being an ad hoc collection of highly talented independent contractors into a fully formed profession.").

[260] ROGERS, *supra* note 26, at 338–39.

[261] Catherine Rogers proposes the establishment of a new "Arbitrator Intelligence" (AI) as a private regulator that will create an information resource about arbitrators. *Id.* at 340–42.

[262] *See, e.g.*, Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997–1998); Philip J. Harter, *Collaboration: The Future of Governance*, 2009 J. DISP. RES. 411 (2009).

[263] *See* Posner & Yoo, *supra* note 57, at 21 (describing the pros and cons of the "list system"):

> This forces states to incur the additional cost of establishing new rules for each dispute and creates unpredictability. Some international tribunals reflect an effort to solve this problem without adopting all of the features of true courts. The Permanent Court of Arbitration (PCA), for example, was, in essence, a pool of arbitrators-in waiting. In theory, the PCA, by providing a ready pool of arbitrators, made arbitration more attractive. But while the pool reduces the transaction costs of finding a generally able and reputable arbitrator, the states do not necessarily have a guarantee that any particular arbitrator will be able or willing to maximize the ex ante value of the agreement between them. The transaction costs of finding an arbitrator are a relatively small deterrent compared with the risk of selecting a biased or incompetent one. And because each dispute involves a unique combination of interests, facts, and treaty provisions, expertise cannot be generalized. Confidence can come only as the parties repeatedly and successfully use a particular arbitrator or the pool. But why should the states repeatedly take this risk rather than rely on their own information to select an arbitrator? This reluctance to "enter the pool" prevents resources such as the PCA from being successful. A coherent jurisprudence can only arise when states are required to use the same body for dispute resolution.

Id. *See also* Rogers, *The Politics*, *supra* note 87, at 253 (mentioning the partial failure of the List of Ar-

2. Certification in Alternative Dispute Resolution

Systems of "certification" and "accreditation" in Alternative Dispute Resolution are quality assurance mechanisms of a person's competence.[264] The system of certification is used primarily in mediation.[265] There are national and international attempts to regulate certification of mediators.[266] The general tendency of the different systems is to "license" training/certification organizations, which on their part conduct training sessions and certify mediators. The licensing bodies may be public or private institutions. The training/certification providers may be public, private, or academic bodies—like Colorado State, Harvard, Northwestern, and Pepperdine Universities in the United States. The international and domestic systems usually sustain public registers of certified mediators in order to make mediation activities more transparent.

International attempts to regulate mediation might be interesting for our purposes. The Centre for Effective Dispute Resolution (CEDR) and the International Mediation Institute (IMI) are two of the most famous attempts by private global organizations to regulate the field.

CEDR, a London-based private mediation body, offers mediation training courses internationally.[267] The trainers may be lawyers, accountants, business professionals, HR professionals, architects, teachers or even public sector officials. Candidates are eligible to be awarded a "Certificate of Accreditation" or CEDR Accreditation and thus become "CEDR Accred-

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bitrators system given that despite having urged by ICSID, less half of the parties to the ICSID Convention and very few from among the developing countries have made use of the right to make nominations to the List).

[264] The notions "certification" and "accreditation" in ADR are usually used interchangeably catering for some obscurity in the systems used. The proposal elaborated in this Article uses "certification" and "accreditation" for different functions in the system.

[265] Only in rare occasions are certification schemes to be found in other ADR fields like arbitration—for arbitration, there are a few schemes in the US, and South Africa is also preparing one. *See* Judith Meyer, *Mediators' Alert: Now, Certification Goes Global*, 26 ALTERNATIVES 57, 65 (2008) (citing the Federal Arbitration Act of 1925 and the National Labor Relations Act of 1935).

[266] *See* Kelly Austin et al., *Mediator Certification: What Are the Practitioners Afraid of?,* 26 ALTERNATIVES 188 (2008); Conrad C. Daly, *Accreditation: Mediation's Path to Professionalism*, 4 AM. J. MEDIATION 39 (2010); W. Lee Dobbins, *The Debate over Mediator Qualifications: Can They Satisfy the Growing Need to Measure Competence Without Barring Entry into the Market?*, 7 U. FLA. J.L. & PUB. POL'Y 95 (1995); Stephanie A. Henning, *A Framework for Developing Mediator Certification Programs*, 4 HARV. NEGOT. L. REV. 189 (1999); David A. Hoffman, *Certifying ADR Providers*, 40 APR BOST. B.J. 9 (1996); Donald T. Weckstein, *Mediator Certification: Why and How*, 30 U.S.F. L. REV. 757 (1996); Meyer, *supra* note 265; Tony Willis, *Mediator Accreditation: Is It a Risk? Or Quality Enhancement?*, 26 ALTERNATIVES 165 (2008); Mandy Zhang, *To Certify, or Not to Certify: A Comparison of Australia and the U.S. in Achieving National Mediator Certification*, 8 PEPP. DISP. RESOL. L.J. 307 (2008).

[267] *Negotiation and Leadership Academy*, CEDR, http://www.cedr.com/skills/certificate/ (last visited Jan. 30, 2015).

ited Mediators" after training, which includes mock disputes and a three-part written assignment, while the "Foundation Course in Mediation Skills Certificate" is given to acknowledge the participation to those who do not achieve accreditation. According to CEDR, this program seeks to develop relationship, process, and content skills.[268]

Corporate users of mediation, organized under the auspices of the International Mediation Institute (IMI), have also created a further initiative to certify mediators.[269] IMI is a nonprofit public-interest foundation established in The Hague and is a joint initiative of the American Arbitration Association, the Netherlands Mediation Institute and the Singapore Mediation Centre/Singapore International Arbitration Centre. In order to become an IMI Certified Mediator, the candidate must first be qualified for IMI Certification by a Qualifying Assessment Program (QAP) that has been approved by an IMI Independent Standards Commission (ISC).[270]

3. The Proposed System

The idea to certify mediators did not arise from the governments; it originated in the market and has been taken up by public and private regulators. I propose a similar system for international investment law to the one described above. As for the mediators, the system would not be established as a license system, and certification would not be an obligatory requirement to practice as an investor-State arbitrator. Rather, an opt-in voluntary system is envisaged, where nobody would be obliged to apply for certification. The objective is not to close, but to open access to a larger pool of arbitrators for investor-State arbitration. In this way, a counter network of arbitrators who have other credentials than the current ones would form and compete network-to-network with the existent network. The proposed system of control could create the right interplay between arbitral independence and accountability.

ICSID should have a central role in the shaping of the system. ICSID could be responsible for creating a market for certified arbitrators within the market for investment arbitrators by, for example, improving the current "List" system. More concretely, the ICSID Secretariat could "accredit" the certifiers. "Accreditation" should be used for the licensing of training and certification centers by ICSID. A different approach favoring decentralization in investor-State arbitration could also be taken. The states could be responsible for the accreditation of the certifiers. "Certification" would then be the actual act of certifying the arbitrator based on which the arbitrator

[268] *Id.*

[269] INTERNATIONAL MEDIATION INSTITUTE, https://imimediation.org/ (last visited Jan. 30, 2015).

[270] *IMI Mediation Advocacy Competency Certification*, INT'L MEDIATION INST., https://imimediation.org/imi-mediation-advocacy-competency-certification (last visited Jan. 31, 2016).

becomes an "ICSID certified arbitrator."

The ICSID Secretariat would also be responsible for the development of the standards, first, against which the arbitrators will be evaluated, and second, defining the certification procedure. This is easier than it may first sound, since there are already ISO and other standards for the provision of similar services[271] that could be used by ICSID. Additionally, through this co-/self-regulatory approach, the arbitrator community should be involved in the stipulation of the standards of conduct in the form of a "code of conduct." Instead of having an external institution elaborating the standards, as proposed by the European Commission, a code of conduct could be evolved by the arbitration community itself within reasonable time and then adopted by ICSID.

It is expected that the arbitrators might oppose the introduction of the proposed system.[272] In mediation, one of the major concerns is that certification will affect diversity among mediators,[273] which will lead to less flexibility and innovation in the market of mediators.[274] Both concerns are not a problem in the current structure of the system of investment arbitration; the market as it is now structured faces the exact opposite problems with a largely homogeneous group of people dominating the field.[275] From the point of view of the users, in mediation, one further concern is that it could increase the costs of hiring mediators.[276] This is again not a problem in investment arbitration since arbitrator remunerations are already high[277] and recourse to arbitration is obligatory under International Investment Agreements. If newcomers enter the market based on the proposed system, the costs might even decrease in the long run.

Certification should lead then to an overall standardization of international investment arbitration. At the same time, it should also lead to a further "professionalization" of international investment arbitrators, in the sense of creating a profession similar to doctors or lawyers.[278] As observed above, professionalization is already a trend within the arbitration commu-

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[271] *See* ISO/IEC 17024:2012, Conformity assessment – General requirements for bodies operating certification of persons.

[272] Meyer, *supra* note 265, at 65 (for similar reactions in the field of mediation).

[273] KHAMISI GRACE, ABA SECTION OF DISPUTE RESOLUTION, CERTIFICATION: DISASTER FOR DIVERSITY? WHAT IMPACT, IF ANY, WOULD REQUISITE CERTIFICATION HAVE ON DIVERSITY AMONG MEDIATOR PRACTITIONERS? 2 (2011), http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.201.264&rep=rep1&type=pdf).

[274] Dobbins, *supra* note 266, at 97.

[275] *See also supra* Part III.A.1.

[276] Dobbins, *supra* note 266, at 98.

[277] DIANA ROSERT, INT'L INST. SUSTAINABLE DEV., THE STAKES ARE HIGH: A REVIEW OF THE FINANCIAL COSTS OF INVESTMENT TREATY ARBITRATION, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT 10-11 (2014), https://www.iisd.org/sites/default/files/publications/stakes-are-high-review-financial-costs-investment-treaty-arbitration.pdf.

[278] Daly, *supra* note 266, at 51.

nity and has been since at least the 1980s. Further professionalization will increase arbitrators' duty to investigate and disclose significant relationships that might call into question their independence[279] and might lead arbitrators to step down voluntarily in cases of conflicts of interest. More broadly, it will reduce the dangers of moral hazard that are created by the closed nature of the community and the absence of mechanisms of professional discipline.[280]

Market information can affect arbitrator selection and reappointment to arbitration tribunals and hence have an impact on their behavior.[281] Professor Rogers has made the point that it is necessary to create a system that will be in the position to manage and better disseminate information on arbitrators. In order to achieve this, she has proposed the creation of a new private regulator to manage the information system.[282] Certification could achieve the same or even better results without the need to create additional institutional structures. International investment arbitrators are "intermediaries of law."[283] They structure information. For this reason, it is important to build the new information system around them and not around a bureaucratic institution. Certification would partially replace reputation and word-of-mouth recommendation of arbitrators. It is thus expected that the introduction of certification will boost the dissemination of information across the system. Additionally, arbitrators could be obliged to make information available online regarding their arbitration-related and other work.

Finally, the proposed system would open the door to new arbitrators without closing it to the current ones. While the number of arbitrators has increased in the past, the market is still relatively closed,[284] and there are only very few arbitrators from developing countries[285] and women arbitrators.[286] If appointments were not only based on reputation, but also on a

[279] *See* Park, *supra* note 5, at 654–55; *see generally* Rubins & Lauterburg, *supra* note 5 (on the duty to disclose in investor-State arbitration).

[280] *See* ROGERS, *supra* note 26, at 341–42.

[281] See Carole Silver, Models of Quality for Third Parties in Alternative Dispute Resolution, 12 OHIO ST. J. ON DISP. RESOL. 37, 83 (1996).

[282] ROGERS, at *supra* note 26, at 340–42.

[283] DROIT ET RÉGULATIONS DES ACTIVITÉS ÉCONOMIQUES ET INSTITUTIONALISTES [LAW AND REGULATIONS OF ECONOMIC ACTIVITIES AND INSTITUTIONS] (Christian Bessy, Thierry Delpeuch & Jerôme Pélisse eds., 2011); Christian Bessy, *Law, Forms of Organization and the Market for Legal Services*, ECON. SOC., Nov. 2012, at 20 (commenting both on the notion of intermediaries of law), http://econsoc.mpifg.de/archive/econ_soc_14-2.pdf.

[284] ROGERS, *supra* note 26, at 967–69 (concerning commercial arbitration).

[285] Nathan, *supra* note 5, at 19 ("Unfortunately, this rule [Rule 1 ICSID Arbitration Rules] has effectively put arbitrators from the developing countries out of ICSID arbitrations because arbitrators from developing countries are rarely known outside their own countries and state parties in ICSID arbitrations are all developing countries except for the anomaly in Mobil Corporation and others v New Zealand Government (ICSID Case No ARB/87/2).").

[286] *See* Gus Van Harten, *The (Lack of) Women Arbitrators in Investment Treaty Arbitration*, COLUMBIA FDI PERSPECTIVES, no. 59, at 1 (Feb. 6, 2012), http://www.vcc.columbia.edu/content/lack-

formal assurance of competence, and if information was better disseminated on the arbitration market, newcomers from the developing and developed world would have more chances to enter the market.

Standardization, professionalization, and transparency could thus lead to an overall better legitimization of the investment arbitration system.[287] More legitimacy of the system would eventually lead to the withholding of the "backlash" against investor-State arbitration[288] and eventually to attracting more and more states to the system.

V. CONCLUSION

This Article proposes understanding arbitral independence in investment arbitration as a construct of the international arbitration community in its interplay with further actors in the field and the historical evolution of international arbitration. This can serve as a tool to better explain the current legal status quo, make proposals for systemic reforms, and make predictions for the future.

In the different fora of investment arbitration, a common standard of arbitrator independence has been developed by the arbitration community itself. The arbitration community, in the search for legitimacy and maximization of profits, has gradually adopted a standard for commercial and investment arbitration that is similar to, and sometimes even higher than, the judicial independence standard. Based on the understanding that investor-State arbitration is a unique creature of international law beyond commercial arbitration and public law adjudication, a situationally adapted standard of arbitral independence has been developed in this Article that leads to a distinction of the disqualification standard of review for party-appointed and non-party-appointed arbitrators in ICSID.

Moreover, the understanding of investor-State arbitration as a constructed field led to the proposal of introducing certification as a control system for the improvement of the current regime. Overall, according to the proposal, the system of investor-State arbitration should move towards a system of co-regulation, combining elements from both government regulation and market self-regulation. In comparison to other proposals, it is much easier to implement since it focuses on the community of arbitrators and does not involve any major institutional reform.

Concerning the future development of the independence standard in investment arbitration, it could be predicted that arbitrators will have the tendency to avoid taking decisions concerning their fellow arbitrators. Re-

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women-arbitrators-investment-treaty-arbitration.

[287] *Cf.* Daly, *supra* note 266, at 50–54 (concerning mediators).

[288] *See generally* THE BACKLASH AGAINST INVESTMENT ARBITRATION (Michael Waibel, Asha Kaushal, Kyo-Hwa Chung & Claire Balchin eds., 2010).

ferrals to other bodies will remain steady. When these bodies are administrative officials in ICSID arbitration, I would expect that they apply the letter of Article 14 of the ICSID Convention [289] and the appearance of bias test when they are judges. At the same time, when arbitrators are ready to overcome the community spirit and disqualify the proposal, I expect them to also apply the higher standard that they have themselves societally shaped in the different international arbitral fora. In the long run, it may yet be that this exceedingly high standard of independence will be corrected in favor of a less demanding standard when the international arbitration community achieves a greater level of legitimacy within the international community.

[289] *E.g.*, *Burlington Resources, Inc.*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, ¶¶ 65–66 (Dec. 13, 2013), http://www.italaw.com/sites/default/files/case-documents/italaw3028.pdf.