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## The Ideal Arbitrator: Does One Size Fit All?

James Crawford

University of Cambridge, [jrc1000@cam.ac.uk](mailto:jrc1000@cam.ac.uk)

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# THE IDEAL ARBITRATOR: DOES ONE SIZE FIT ALL?

JAMES CRAWFORD AC\*

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## I. INTRODUCTION

Arbitrators are diverse, independent, and hold resolutely different opinions, but in the world of investor-State disputes arbitrators are often viewed as a kind of closet oligarchy, a conclave of the powerful concealing their power under the veil of practice and the modalities of an arbitral profession that is actually of rather recent origin. The growth of investment treaty arbitration in recent decades has been met with a wave of criticism, calling into question not only the arbitrator's technical abilities but also his or her ethics. The criticisms levelled against arbitrators in investor-State disputes are not made against arbitrators in international commercial arbitration, or at least not with the same frequency and vigor. There are suggestions, for example, that it is unethical to act both as arbitrator and counsel, even in unrelated investment disputes. This proposition does not seem to trouble international commercial arbitrators and, if taken literally, would make it more difficult to create the second generation of investment arbitrators. There are also cries for

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\* Judge, International Court of Justice; Whewell Professor Emeritus, University of Cambridge. My thanks to my University Trainee, Harry Aitken, for his considerable help with this paper. Needless to say, all views expressed are my own.

transparency and greater publicity, including third party intervention: again, this is not a critique made of international commercial arbitrators. Further, there are demands for appellate mechanisms and for an international investment court system (with its own court of appeal). In contrast, finality is seen as a core attribute of international commercial arbitration.

This outpouring of concern over the arbitrator has not been, for the most part, triggered by the performance of arbitrators in any given case. It is not a consequence of malfeasance. Rather it has been a reaction to a perceived lack of accountability associated with an exaggerated image of the arbitrator's decisional power. Many are uncomfortable that investors can sue States on matters implicating the public interest and that States' liabilities are determined by party-appointed arbitrators pursuant to secretive rules imported from international contract disputes.

This sentiment was captured by Joost Pauwelyn:

ISDS is in a state of crisis in many parts of the world, and much of the criticism is focused precisely on who is deciding ISDS cases. The investment regime is said to be governed by arbitrators, rather than states. Arbitrators are labelled as "private judges" operating in secrecy, biased in favor of large multinationals, without regard to conflicts of interest and issuing inconsistent decisions. . .the world investment regime seems, at present, to have too much rule of lawyers and not enough rule of law.<sup>1</sup>

This article will focus on the expansion of expectations of the arbitrator in the cognate fields of international commercial arbitration and investment treaty arbitration. The false premise that there is an ideal arbitrator for all situations – a sort of "perfect arbitral being" – provides a launching pad to discuss what skills and qualities are demanded of the arbitrator in the more or less contentious arena of international arbitration, and for exploring current proposals, such as the European Union's (EU) investment court system.

Before proceeding, it is helpful to briefly revisit what is meant by "international commercial arbitration" on the one hand and "investment treaty arbitration" on the other. International commercial

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1. Joost Pauwelyn, *The Rule of Law Without the Rule of Lawyers? Why Investment Arbitrators are from Mars, Trade Adjudicators are from Venus*, 109(4) AM. J. INT'L L. 761, 764 (2015).

arbitration is conducted between parties from different States, usually private parties, usually pursuant to arbitral rules incorporated into a prior contract between the parties.<sup>2</sup> Investment arbitration is conducted between a foreign investor and a host State in which the investment is located, usually pursuant to a dispute resolution clause in a bilateral or multilateral investment treaty, with the claimant's choice of forum being made *ad hoc*, after the underlying dispute has arisen.<sup>3</sup> The two fields overlap and have always overlapped. Commercial arbitrators pioneered the investment arbitration system at a point in time when it was thought that most disputes would arise under contracts between investors and governments, rather than under multilateral or bilateral treaties. And commercial arbitrators remain among the ranks of the leading investment treaty arbitrators.

The notion of the "ideal arbitrator" draws inspiration from Yves Dezalay and Bryant Garth's historical conception of commercial arbitrators as a closed group of "Grand Old Men"<sup>4</sup> – lawyers of distinction, trusted for their wisdom and judgment, although not arbitration specialists. Dezalay and Garth pinpointed a second generation of arbitrators, who they rather unhappily labelled the "Technocrats."<sup>5</sup> These were expert arbitration practitioners who had spent their entire careers working in the field. In 2012, Thomas Schultz and Robert Kovacs revisited Dezalay and Garth's sociological study and added a third generation of arbitrators, whom they called the "Managers."<sup>6</sup> These were arbitrators highly skilled at managing proceedings, deliberations and the organisation of tribunal work.<sup>7</sup>

These generations raise three potential dimensions of the ideal

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2. See *General Principles of Law in International Commercial Arbitration*, 101 HARV. L. REV. 1816, 1816-17 (1987-88).

3. JAMES CRAWFORD, *BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 741 (8th ed. 2012).

4. YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* 34 (1996).

5. *Id.* at 34, 36.

6. Thomas Schultz & Robert Kovacs, *The Rise of a Third Generation of Arbitrators? Fifteen Years After Dezalay and Garth*, 28 ARBITRATION INT'L 161, 170-71 (2012) (describing the results of a study that revealed strong management abilities to be the "single most important attribute" in appointing an arbitrator).

7. See *id.*

arbitrator on which this article will focus – first, impartiality and independence; second, technical expertise; and third, procedural and managerial expertise.

## II. THE GRAND OLD MEN

The first thing to note about the Grand Old Men is that the use of “men” in the descriptor was not a sexist slip by Dezalay and Garth. This generation of arbitrators were all men and unfortunately things have not improved much in this regard.<sup>8</sup> In 2014, the number of women appointed in London Court of International Arbitration (LCIA) disputes was 13 percent; only 5.6 percent of the International Centre for Settlement of Investment Disputes (ICSID) appointees were female.<sup>9</sup>

In the commercial arbitration context, the Grand Old Men were those who had risen to the top of their domestic legal professions, but who had not specialised in arbitration. They included leading professors, judges of superior courts, senior barristers, and certain heads of major law firms.<sup>10</sup> The unifying characteristic of the Grand Old Men was that they had “symbolic capital:”<sup>11</sup> their professional office, political standing, and social prestige served as a guarantee of their independence and impartiality. Nowadays, in both investment treaty arbitration and international commercial arbitration, this guarantee vests less in the arbitrator’s personal reputation and more in the applicable arbitration rules.

The standard language in arbitration rules is that of “independence” and “impartiality”. This language was originally included in the United Nations Commission on International Trade Law (UNCITRAL) Rules<sup>12</sup> and has now made its way into the arbitration rules of the LCIA,<sup>13</sup> the International Chamber of

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8. See NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 249 n.61 (6th ed. 2015) (highlighting the dearth of women among the ranks of international arbitrators).

9. *Id.*

10. See DEZALAY & GARTH, *supra* note 4, at 18-19.

11. *Id.*

12. UNCITRAL Arbitration Rules, G.A. Res. 31/98, art. 10, U.N. Doc. A/31/17 (Dec. 15, 1976) [hereinafter 1976 UNCITRAL Arbitration Rules].

13. London Court of International Arbitration Rules, art. 5.3 (2014) [hereinafter LCIA Rules].

Commerce (ICC),<sup>14</sup> the Stockholm Chamber of Commerce (SCC)<sup>15</sup> and the American Arbitration Association (AAA),<sup>16</sup> among others. It should be noted that the situation in the international rules of the AAA is quite different from that in the domestic rules, under which parties may agree that party-appointed arbitrators be non-neutral.<sup>17</sup> As for the ICSID Convention, it requires arbitrators who, among other things “may be relied upon to exercise independent judgment.”<sup>18</sup> The Convention makes no mention of the word “impartial.” However, ICSID does list a set of additional considerations for selecting arbitrators on its website, one of which is the “[a]bsence of a conflict of interest.”<sup>19</sup>

What do the terms “independence” and “impartiality” mean in the context of arbitration? The rules provide limited guidance. In Article 5.3 of the LCIA Rules, the stipulation that arbitrators be independent and impartial is followed by the words “and none shall act in the arbitration as advocate for or representative of any party.”<sup>20</sup> These two concepts are separated by a semicolon, suggesting that acting as an advocate or representative of a party would be an incidence of non-independence or partiality. The final sentence of Article 5.3 stipulates that “[n]o arbitrator shall advise any party on the parties’ dispute or the outcome of the arbitration.”<sup>21</sup> Similarly, Article 13(6) of the AAA Rules forbids *ex parte* communication between the arbitrator and his or her appointing party in relation to the case.<sup>22</sup> In

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14. International Chamber of Commerce Rules of Arbitration, art. 11(1) (2012) [hereinafter ICC Rules].

15. Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, art. 18(1) (2017) [hereinafter 2017 SCC Rules].

16. American Arbitration Association International Arbitration Rules, art. 13(1) (2014) [hereinafter AAA Int’l Rules].

17. American Arbitration Association Commercial Arbitration Rules and Mediation Procedures, Rule 18(b) (2013) [hereinafter AAA Domestic Rules].

18. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, art. 14(1), 40(2), Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

19. *Selection and Appointment of Tribunal Members - Additional Facility Arbitration*, ICSID, [https://icsid.worldbank.org/en/Pages/process/Selection-and-Appointment-of-Tribunal-Members-\(Additional-Facility-Arbitration\).aspx](https://icsid.worldbank.org/en/Pages/process/Selection-and-Appointment-of-Tribunal-Members-(Additional-Facility-Arbitration).aspx) (last visited Mar. 9, 2017) [hereinafter *Selection and Appointment of Tribunal Members*].

20. LCIA Rules, *supra* note 13, art 5.3.

21. *Id.*

22. AAA Int’l Rules, art. 13(6) (providing only a narrow allowance for

sum, the only guidance provided by the rules is that arbitrators shall not assume the role of counsel or adviser for a party, which one would have thought was fairly self-evident.

Some guidance on the meaning of “impartiality” and “independence” may be found in the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration, which are aimed at both international commercial arbitrators and investment treaty arbitrators.<sup>23</sup> Helpfully, the guidelines provide some practical examples of potential conflicts, which are attributed a red, orange, or green colour tag based on their level of severity and whether or not they are able to be waived by the agreement of the parties.<sup>24</sup> An example from the Red List is where “the arbitrator or his or her firm regularly advises the party, or an affiliate of the party, and the arbitrator or his or her firm derives significant financial income therefrom.”<sup>25</sup> Cases on the Orange List include circumstances where “the arbitrator has, within the past three years, served as counsel against one of the parties, or an affiliate of one of the parties, in an unrelated matter”, or where “[e]nimity exists between an arbitrator and counsel appearing in the arbitration.”<sup>26</sup> An example from the Green List is where “the arbitrator has previously expressed a legal opinion (such as in a law review article or public lecture) concerning an issue that also arises in the arbitration (but this opinion is not focused on the case).”<sup>27</sup>

Of equal importance to the meaning of “independence” and “impartiality” is the threshold for disqualification and the standard of proof that needs to be met by the party complaining of bias. Under the UNCITRAL Rules and the rules of the LCIA, SCC, and AAA, parties are permitted to challenge the appointment of an arbitrator where “circumstances exist that give rise to justifiable doubts as to that arbitrator’s impartiality or independence.”<sup>28</sup> Article 57 of the

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communications regarding the general nature of the case and the individual’s qualifications to serve on the panel).

23. International Bar Association Guidelines on Conflicts of Interest in International Arbitration, Introduction, (2014) [hereinafter IBA Guidelines].

24. *Id.* at Part II, ¶¶ 1-3, 7.

25. *Id.* at Part II, §1, ¶ 1.4.

26. *Id.* at Part II, §3, ¶¶ 3.1.2, 3.3.7.

27. *Id.* at Part II, §4, ¶ 4.1.1.

28. U.N. Commission on International Trade Law Arbitration Rules, G.A. Res. 68/109, art. 12, ¶ 1, U.N. Doc. A/68/462 (Dec. 16, 2013) [hereinafter 2013

ICSID Convention, by contrast, only allows for disqualification “on account of any fact indicating a manifest lack of the qualities required by paragraph 1 of Article 14,” which includes reliability “to exercise independent judgment.”<sup>29</sup> The relationship between Articles 57 and 14 has generated some uncertainty as to the applicable test in ICSID disqualification proceedings. Will an arbitrator be disqualified if there is reasonable doubt as to his or her independence, or does there need to be a manifest lack of independence? Does “manifest” mean that there must be clear evidence of impropriety or does it go to the degree of the arbitrator’s reliability to act independently? Rule 6(2) of the ICSID Rules, which requires an arbitrator to sign a declaration setting out any “circumstance that might cause [his or her] reliability for independent judgment to be questioned by a party,” might be invoked in support of the idea that a “reasonable doubt” test would be appropriate.<sup>30</sup> So too might the IBA’s Guidelines, which insist that in all arbitrations there should be an appearance test based on justifiable doubts as to the impartiality or independence of the arbitrator.<sup>31</sup> The Guidelines hold that:

Doubts are justifiable if a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.<sup>32</sup>

However, ICSID tribunals have adopted a stricter standard, moving away from a “reasonable doubt” test and towards a higher threshold “obvious appearance of bias” test. In the disqualification decision in *Caratube International Oil Company v. Kazakhstan* the remaining members upheld a disqualification claim against the arbitrator appointed by the Respondent.<sup>33</sup> They did so because they were satisfied “that a third party would find that there is an evident

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UNCITRAL Rules]; 2017 SCC Rules, art. 19(1); LCIA Rules, *supra* note 13, art. 10.1; AAA Int’l Rules, art. 14(1).

29. ICSID Convention, art. 14, 57.

30. International Center for Settlement of Investment Disputes Rules for Arbitration Proceedings, art. 6(2) [hereinafter 2006 ICSID Rules].

31. IBA Guidelines, at Part I, § 2(b).

32. *Id.* at Part I § 2(c).

33. *Caratube Int’l Oil Co. & Devinicci Salah Hourani v. Rep. of Kazakhstan*, ICSID Case No. ARB/13/13, Award (Mar. 20, 2014).



or obvious appearance of lack of impartiality or independence based on a reasonable evaluation of the facts in the present case.”<sup>34</sup>

While the rules seemingly give the ICSID arbitrator more leeway to be partial and dependent, a tribunal operating under the auspices of ICSID is in practice unlikely to be any less independent than a tribunal convened under another regime. An explanation for this is perhaps that the impartiality of party-appointed arbitrators is, to an extent, self-regulating.<sup>35</sup> If arbitrators suspect a fellow arbitrator of being partisan, they are likely to receive their opinions in deliberations with suspicion and skepticism.<sup>36</sup> Well-advised litigants are aware of this and tend to avoid the appointment of arbitrators with an obvious connection or who have strongly expressed preferences on matters that align with the party’s case. This means that arbitrators should avoid pigeonholing themselves on particular issues through their publications or aligning themselves too closely with one class of claimant. To do so could reduce an arbitrator’s prospects of appointment, or provide the other side with fodder in disqualification proceedings.<sup>37</sup>

The rules and the jurisprudence discussed thus far apply equally to tribunal chairs, appointed by agreement or by an institution, and party-appointed arbitrators. There are of course practical differences in the expectations of the chair as opposed to the party-appointed arbitrator, which merit attention. These differences have come to light in cases before the Iran-United States Claims Tribunal in The Hague. Each of the panels in the Tribunal comprise a U.S. national, an Iranian national, and a chairman from a third country.<sup>38</sup> Many

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34. *Id.* at 57.

35. See Catherine A. Rogers, *Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct*, 41 STAN. J. INT’L L. 53, 57 (2005) (referring to the earlier regime of arbitration when impartiality and independence was largely self-regulating).

36. See Dominique Hascher, *Independence and Impartiality of Arbitrators: 3 Issues*, 27:4 AM. U. INT’L. L. REV. 789, 795-96 (2012) (explaining that when choosing an arbitrator, it is in the interest of each party to choose an arbitrator with the greatest predisposition towards the party, with the minimal outward appearance of bias).

37. See 2006 ICSID Rules, at Rule 9.

38. Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of American and the Government of the Islamic republic of Iran (Claims Settlement Declaration) art. III, Jan. 19 1981, [http://www.iusct.net/General%](http://www.iusct.net/General%20Declaration%20of%20the%20Government%20of%20the%20Democratic%20and%20Popular%20Republic%20of%20Algeria%20concerning%20the%20Settlement%20of%20Claims%20by%20the%20Government%20of%20the%20United%20States%20of%20America%20and%20the%20Government%20of%20the%20Islamic%20Republic%20of%20Iran)

litigants have adopted a shorthand for referring to the third-country chairmen as “the neutrals.”<sup>39</sup> The implication this holds for the U.S. and Iranian nationals has been known to raise the ire of U.S. arbitrators, who consider themselves to be fully neutral, despite their nomination by the United States.

Nevertheless, in some respects, I think it is useful to adopt different phraseology for the purpose of distinguishing between the expectations of the party-appointed arbitrator and the chair. In international commercial arbitration, the party-appointed arbitrator may serve as a translator of the legal culture, and occasionally the law itself, of the appointing party.<sup>40</sup> This means that, within the bounds of the requirements of impartiality and independence, the party appointed arbitrator should not play a merely static role in the decision making process.<sup>41</sup> He or she should not be biased or prejudiced in any way, but may be sympathetic to the arguments of the party that appointed him or her and may take steps to ensure that those arguments are fully understood and duly considered by the other tribunal members.<sup>42</sup> In some respects, the role is not dissimilar to that of the judge *ad hoc* in proceedings before the ICJ. So long as any shared legal or cultural background with the appointing party does not override the arbitrator’s professional judgment, there can be no charge of partiality or dependence.

In light of the foregoing, is it possible for today’s arbitrator to fill the shoes of the Grand Old Men? Is it a realistic proposition that an arbitrator could be considered independent and impartial by all observers in all fora? I think the answer is yes for the depleting minority, but no for the expanding majority. There still exists a small group, who rose to the top of their professions without specializing in arbitration, and who now serve as tribunal presidents on a part-time basis.<sup>43</sup> To call them a mafia would be an exaggeration, but for these

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20Documents/2-Claims%20Settlement%20Declaration.pdf [hereinafter Claims Settlement Declaration].

39. RAHMATULLAH KHAN, THE IRAN-UNITED STATES CLAIMS TRIBUNAL: CONTROVERSIES, CASES, AND CONTRIBUTION 259-60 (1990).

40. Andreas F. Lowenfeld, *The Party-Appointed Arbitrator in International Controversies: Some Reflections*, 30 TEX. INT’L L.J. 65 (1995).

41. *Id.* at 68.

42. *Id.* at 65.

43. DEZALAY & GARTH, *supra* note 4, at 21-22.

“neutrals,” there is little risk that their independence or impartiality will be jeopardized.

For most practitioners, it is not so straightforward. It may only be possible to be impartial and independent when arbitrating for certain parties on specific cases. Arbitrators have to make their name in a competitive market, which involves developing an expertise and building a specific client base.<sup>44</sup> The modern practitioner might one day act as counsel for a party in relation to a problem, the next day present an expert opinion on the same point, and the day after sit as an arbitrator in a case which raises the same issue. On day three, not only will the arbitrator be exhausted, but they may also fall foul of the applicable rules on independence and impartiality. These conflicts are part of the business of being a full time arbitrator, but they are not insuperable. For the contemporary arbitrator who seeks a diversity of work, one of the great challenges will be how to attract appointments from parties who want a sympathetic ear while not becoming typecast such that there exist doubts regarding impartiality or independence in particular types of dispute.

### III. THE TECHNOCRATS

The second generation of arbitrators is known as the “Technocrats.” These are professional arbitrators who have dedicated most or all of their careers to the pursuit of arbitration in its various forms. The arrival of the technocrats was documented, somewhat critically, by Jan Paulsson in 1985, who said:

The age of innocence has come to an end. . . the subject has inevitably lost some of its charm. Once the delightful discipline of a handful of academic aficionados on the fringe of international law, it has become a matter of serious concern for great numbers of professionals determined to master a process because it is essential to their business. They labor, but not for love.<sup>45</sup>

Garth and Dezalay also describe the technocrats in somewhat unromantic terms – they are depicted as a fairly homogenous crowd who studied their art in institutions like the ICC or in dedicated

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44. *Id.* at 21-25 (explaining the various types of professionals who become arbitrators).

45. Jan Paulsson, Introduction, 1 ARBITRATION INT'L 1, 2 (1985).

practice groups in major law firms.<sup>46</sup> These comments were made approximately 30 and 20 years ago respectively, and one would think today that the group of professional commercial arbitrators is more diverse, owing to the need to compete in particular sectors, such as construction, services, finance or insurance. Dezalay and Garth also perhaps incorrectly assume that three-person tribunals in commercial arbitrations will exclusively comprise specialised lawyers. However, provided the chair is a lawyer, and hence able to drive the process from a procedural perspective, and assuming the legal questions are not overly complex, the remaining members need not be lawyers. We can draw from the example of WTO panellists, almost half of whom do not have law degrees.<sup>47</sup>

The notion of the technocrat might not be transferrable to the investment treaty sphere – not least because the areas of legal knowledge required of the arbitrator are the subject of debate. At the time the ICSID Convention was being drafted, it was contemplated that causes of actions in disputes between investors and States would arise under contracts rather than treaties. Hence commercial arbitrators' knowledge of how to set up and run *ad hoc* tribunals for sophisticated international contracts was foundational. It was not until the landmark ICSID decisions in *Southern Pacific Properties v. Egypt*<sup>48</sup> in 1988 and *Asian Agricultural Products v. Sri Lanka*<sup>49</sup> in 1990 that investors started to access ISDS mechanisms through bilateral treaties. Since that time, more than 600 investor-State treaty arbitrations have been filed and more than 3,000 investment treaties are in force.<sup>50</sup> As a consequence, the focus of the tribunal in investor-

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46. See DEZALAY & GARTH, *supra* note 4, at 35-36 (describing the distinct professional characteristics of the “old guard” vis-à-vis the newcomers).

47. See Pauwelyn, *supra* note 1, at 763 (“[The WTO’s panelists are] predominantly diplomats or ex-diplomats, often without law degrees and mostly with relatively little experience.”).

48. See *S. Pac. Props. (Middle East) Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, ¶ 1 (May, 20 1992) [hereinafter *Middle East Ltd. v. Egypt*].

49. See *Asian Agric. Prods. Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, ¶ 1 (June 27, 1990) [hereinafter *APPL v. Sri Lanka*].

50. E.g., *Investor-to-State Dispute Settlement (ISDS): Some facts and figures*, EUR. COMM’N 3-5 (Mar. 12, 2015), [http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc\\_153046.pdf](http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153046.pdf) [hereinafter *ISDS Facts and Figures*] (acknowledging that more than three thousand international investment agreements containing investor-to-state dispute settlement provisions exist today).

State arbitrations has shifted from contract to treaty interpretation.<sup>51</sup>

The historical trend towards the international lawyer can also be gleaned from treaty language. The 1965 ICSID Convention requires arbitrators to have “recognized competence in the fields of law, commerce, industry or finance”<sup>52</sup> while the EU-Canada Comprehensive Economic and Trade Agreement (CETA) requires arbitrators to have “demonstrated expertise in public international law” with a preference for expertise in “international investment law, in international trade law and the resolution of disputes arising under international investment or international trade agreements.”<sup>53</sup>

The transition from private to public disputes does not mean, and should not mean, that the skills of international commercial arbitrators are no longer required. Investment arbitration is a hybrid. Generally public international law governs the dispute and provides the applicable law.<sup>54</sup> On the other hand, the procedural law derives predominantly from international commercial arbitration, which has been profoundly influenced by the principles of equality of arms and procedural fairness.<sup>55</sup> There has in this sense been a grafting of both regimes. In Anthea Roberts’ words:

The unique marriage of public international law as the applicable law with dispute resolution rules resembling those in international commercial arbitration means that the field was historically populated by two very different professional communities: one from the side of public international law and interstate dispute resolution, and the other from the side of private law and commercial arbitration.<sup>56</sup>

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51. *E.g., id.* at 6 (listing the sixty cases of the Energy Charter Treaty, the fifty-three cases with the North American Free Trade Agreement, and the seventeen cases with the Argentina-US Bilateral Investment Treaty).

52. ICSID Convention, art. 14.

53. Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, OJ L 11, 14.1.2017, pp. 23–1079 [hereinafter CETA].

54. *See, e.g.,* Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT’L L. 45, 45 (2013) (observing that investment treaties are creatures of public international law, and are substantively governed by public international law).

55. *See id.* at 55 (citing Wälde’s conclusion that the international commercial arbitration approach to the treatment of state prevails because equality of arms is a foundational principle of investment arbitration procedure).

56. *Id.* at 54.

While the two fields do co-exist in some tension, even to the point of an occasional skirmish, I would not go so far as to call it a “veritable culture clash.”<sup>57</sup> Lawyers operate across a spectrum, and that is true of international commercial arbitrators, as it is of public international lawyers. Public international lawyers need above all to be flexible, and to incorporate the learning of private international lawyers in their own field, just as the reverse may be true. Differences in approach arise not only because commercial arbitrators and international lawyers draw from different sources of law, but also because their training and experience give them a different outlook on the role of the actors in a dispute.<sup>58</sup> A commercial arbitration approach to investment disputes, pursuant to the equality of arms principle, conceives of the investor and State as equal disputing parties.<sup>59</sup> A public international law approach looks first and foremost to the relationship of the States party to the treaty as the principal subjects of international law.<sup>60</sup> This approach was evident in *Loewen Group v. United States*,<sup>61</sup> in which the tribunal viewed the position of the claimant as being in some respects derivative of the State in which it was incorporated. While there is an apparent clash of paradigms, it can be resolved if arbitrators distinguish between the substantive regulatory interests involved and the procedural rights of the parties. Investment arbitration allows for insights from the two fields to be combined and we should be open to this mixing of ideas rather than treating it as a source of chaos or division.

One area in which there has been something of a philosophical clash between the public and the private conception of the State

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57. *See id.* (explaining the two historically different professional communities populating the international commercial arbitration field resulting in the culture clash).

58. *Id.*, at 54 (noting the difference in approach, simplification, and stereotyping involved in generalizations influenced by arbitrators’ backgrounds, training, and interests).

59. *See id.* at 55 (recognizing that an approach to treatment of states in international arbitration is equality of arms, and that tribunals should not give defer to states’ preferences unless clearly required by the governing law).

60. *See id.* at 54 (analyzing the public international law paradigm’s focus on treaty bias as “putting the treaty parties in a position of relative superiority to both investors”).

61. ICSID Case No. ARB/98/3, Award, ¶ 233 (June 26, 2003), <http://www.italaw.com/sites/default/files/case-documents/ita0470.pdf>.

concerns the degree of deference that should be afforded to a host State. In the *SD Myers*<sup>62</sup> arbitration the tribunal resolved that Canada had failed to accord the claimant fair and equitable treatment under Article 1105 of NAFTA by banning the export of waste products to the U.S. for disposal. In so doing, the tribunal noted that it had considered “the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.”<sup>63</sup> The acceptance of a standard of review in *SD Myers* was relied upon by the U.S. in the *Glamis Gold*<sup>64</sup> arbitration to defend claims that it had denied the claimant fair and equitable treatment of its gold mine in California. The tribunal “disagree[d] that domestic deference in national court systems is necessarily applicable to international tribunals”<sup>65</sup> and said that the idea of deference is already found in the customary international law minimum standard of treatment codified in Article 1105, which requires a gross denial of justice or manifest arbitrariness.<sup>66</sup>

The melting pot of legal influences in investment treaty arbitration has been the subject of criticism on the grounds that it results in inconsistent case law; a fragmentation of the system.<sup>67</sup> But each case is decided on its own merits; while it is possible to find inconsistencies between some cases, this is not unusual in the discipline of law. Integration is a concept taken from domestic legal systems and improperly imposed in the international sphere. It presupposes that one particular legal paradigm is the right way to determine investment treaty disputes, whereas arbitrators may need to look for different techniques for different sorts of cases. The field is relatively new and is still working out the best approaches to particular problems. To yield to the pressure of the integrationists

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62. *S.D. Myers, Inc. v. Canada*, Partial Award (NAFTA Arb. 2000), <http://www.italaw.com/sites/default/files/case-documents/ita0747.pdf>.

63. *Id.* ¶ 263.

64. *Glamis Gold, Ltd. v. United States*, ICSID, Award (June 8, 2009), <http://www.italaw.com/sites/default/files/case-documents/ita0378.pdf>.

65. *Id.* ¶ 617.

66. *Id.* ¶¶ 616.

67. See, e.g., Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 *FORDHAM L. REV.* 1521, 1546 (2005) (“The increase in the number of investment arbitrations and the tactical structuring of investments to create claims under multiple investment treaties increased the likelihood of inconsistent decisions.”).

would be to prefer one approach and to disregard other competing ideas. At this point in the lifecycle of investment arbitration the integrationist approach risks damaging the development of the field.<sup>68</sup>

For these reasons, there can be no ideal arbitrator. To the contrary, tribunals that comprise a diversity of legal backgrounds – appropriate to the nature of the dispute – will tend to produce better-reasoned decisions. I think there are lessons to be learnt from the way private parties might construct a bespoke panel based on the nature of their dispute. Investor-State parties should give thought to whether a tribunal constituted of arbitrators with different legal backgrounds might be better suited to the resolution of their dispute rather than a straight hand of commercial arbitrators or a single species of international lawyer.

#### IV. THE MANAGERS

In 2012, Schultz and Kovacs<sup>69</sup> sought to introduce a third generation of arbitrators – the “Managers.” Under this banner, they grouped three sets of capabilities – the management of proceedings, the management of deliberations of the tribunal, and the management of the organisation of the work within the tribunal.<sup>70</sup> These all imply a fairly high measure of delegation,<sup>71</sup> something which was previously regarded as being somewhat improper. It is unsurprising that management skills are an important factor in the appointment of arbitrators; but it might be going too far to suggest that the present generation of arbitrators is defined by this unifying characteristic. Management abilities are an important part of any arbitrator’s arsenal, but it would be a sad indictment on the profession if they were the distinguishing feature; the mark that separated the arbitrator from his or her contemporaries.

That said, the importance of management skills to clients in private disputes does highlight a gap – hopefully, a closing one – between how commercial arbitrators and international lawyers

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68. James Crawford, *Treaty and Contract in Investment Arbitration*, 24 ARB. INT’L 351 (2014).

69. Schultz & Kovacs, *supra* note 6.

70. *Id.* at 170.

71. *Id.*



manage the procedural side of investment treaty arbitrations. In my experience, commercial arbitrators are better at managing the discovery process – including challenges to the adequacy of discovery and requests for the further production of documents. They are more practised at dealing with requests for confidentiality orders. And, unlike some international lawyers who adhere to the maxim *judex non calculate*, they are also more comfortable engaging with the quantification of damages, including supervising the cross-examination of quantum experts.

It should also be noted that the quality of an arbitrator lies not just in his or her capacity to do these things, but in being able to strike the right balance of robustly addressing unnecessary procedural diversions while ensuring the arbitral process delivers a fair result to the parties.

## V. THE MANAGED

This section considers the European Commission's proposal for an international investment court system.<sup>72</sup> The proposal suffered a setback when negotiations of the Transatlantic Trade and Investment Partnership (TTIP) – which was to contain the lodestar for the investment court proposal – was described as “de facto dead” by Germany's Economy Minister in late 2016.<sup>73</sup> Whilst the TTIP might be dead, the same cannot be said for the investment court proposal. The Commission is introducing facets of its proposal into free trade agreements – including CETA, which was signed on 30 October 2016 – as stepping-stones towards the establishment of a permanent multilateral investment court.

- The features of the proposed permanent investment court remain somewhat vague, but clues are apparent from the architecture of new bilateral tribunals in CETA and TTIP.<sup>74</sup> The features

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72. See *The Multilateral Investment Court Project*, EUROPEAN COMM'N (Dec. 21, 2016), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608>.

73. *EU-U.S. Trade Talks Seem Unbalanced, May Need Pause: Belgian PM*, REUTERS (Sept. 3, 2016, 9:54 AM), <http://www.reuters.com/article/us-eu-usa-trade-belgium-idUSKCN1190L0> (reporting that the French trade minister Matthias Fekl requested to halt talks at a European Union trade ministers meeting after the German economy minister Sigmar Gabriel declared the talks to be “de facto dead”).

74. Transatlantic Trade and Investment Partnership, E.U.-U.S., art. 9, *draft of*

include:the pre-appointment of 15 arbitrators for multi-year year terms,<sup>75</sup> comprising one third EU nationals, one third U.S. or Canadian nationals, and one third nationals of other States.<sup>76</sup> Appointees are required to “possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognised competence.”<sup>77</sup> Appointees must have a “demonstrated expertise in public international law” and it is desirable that they have expertise “in international investment law, international trade law and the resolution of disputes arising under international investment or international trade agreements;”<sup>78</sup>

- the establishment of an appellate tribunal, with power to uphold, modify, or reverse decisions by the first instance tribunal for errors of law and manifest errors of fact;<sup>79</sup>
- the ability for States to recommend agreed interpretations on CETA or TTIP, which are binding on the tribunal, even in respect of ongoing cases;<sup>80</sup> and
- codes of conduct for arbitrators, including rules to guarantee impartiality and independence that are stricter than those found in the UNCITRAL Rules or the ICSID Convention or Rules. This includes a series of rules proscribing members from incurring an obligation or benefit, or from entering into a relationship or acquiring a financial benefit, that would interfere with their duties or which might reasonably create an appearance of bias.<sup>81</sup>

In my view, this structure risks turning the “Managers” of today into the “Managed” of tomorrow. First, the structure entirely

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*agreement*, July 31, 2015, [http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc\\_153669.pdf](http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153669.pdf) [hereinafter *TTIP Working Draft*] (establishing the responsibilities of the tribunal created by Article 6 of the TTIP).

75. See CETA, art. 8.27(5) (establishing five year terms for the 15 member tribunal); see also TTIP Working Draft, §3(4) art. 9 (stating the terms of the 15 appointed judges to be six years).

76. CETA, art. 8.27(2); TTIP Working Draft, §3(4) art. 9(2); TTIP Working Draft, *supra* note 74, §3(4) art. 9(2).

77. CETA, art. 8.27(4); TTIP Working Draft, §3(4) art. 9(4).

78. CETA, art. 8.27(4); TTIP Working Draft, §3(4) art. 9(4).

79. CETA, art. 8.28(2); TTIP Working Draft, §3(4) art. 10.

80. CETA, art. 8.31(3); TTIP Working Draft, §3(5) art. 13(5).

81. CETA, Annex 29B, Code of Conduct, art. 12 & 15; TTIP Working Draft, Annex II, Code of Conduct, art. 5.

removes powers of appointment from investors. Instead, States will unilaterally appoint their own arbitrators in the same way that executive governments appoint national judges in most domestic legal systems. This is something the international lawyer could be comfortable with, as we are used to lobbying for the support of governments, but it might not sit so easily with the commercial arbitrator. While a number of European States, including France and Germany, have been flexible in reforming their domestic legal systems to allow for the interaction of commercial arbitration tribunals and municipal courts, the EU's approach to the investment court has clearly been one of more rigidity. As the disputes before the investment court will involve substantive claims against governments, the EU and the US and Canada are more cautious to exercise control over the type of decision-maker appointed and have unsurprisingly mandated the selection of arbitrators with qualities and qualifications that the States know and trust. As observed by Pauwelyn, the same sensitivities have driven States to appoint WTO panellists from among former diplomats, which is another group that is understood and deemed reliable by governments.<sup>82</sup> But while this approach may be appropriate in the WTO context, which addresses inter-State disputes concerning systemic problems in the flow of trade, it does not follow that it should be transplanted to disputes between investors and States, which largely relate to the State's treatment of a private actor.

Removing the agency of the investor from the appointment of arbitrators could pose challenges to the independence of arbitrators in favour of the State. The judicial criteria exacerbate this risk. The majority of ICSID investment treaty arbitrators come from private law firms.<sup>83</sup> Yet if we look at the types of people appointed as judges across both civil and common law systems, they do not tend to be partners in firms – rather, they are prominent counsel, government lawyers or career judges.<sup>84</sup> Imposing such criteria will exclude a

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82. Pauwelyn, *supra* note 1, at 772 (observing 57 percent of panelists were Geneva-based diplomats at some point in their career).

83. See José Augusto Fontoura Costa, *Comparing WTO Panelists and ICSID Arbitrators: The Creation of International Legal Fields*, 1(4) OÑATI SOCIO-LEGAL SERIES 1, 23 (2011) (explaining that in ICSID the most common background is private sector (76%) followed by academia and in third place government service).

84. *See id.*

proportion of investment arbitrators from consideration. Those excluded will include lawyers from the ranks of the Grand Old Men, the Technocrats, and the Managers. Thus, while the judicial criteria will no doubt result in the appointment of strong decision-makers, it may result in tribunals of monochromatic experience and uniform views.

Second, the power of States to impose binding interpretations on treaty provisions – even mid-dispute – increases the risk that arbitrators will preference legal principles familiar or favourable to States.<sup>85</sup> The pressure this power imposes on the arbitrator largely obviates impartiality protections like fixed terms or disclosure requirements.

Third, the appointment criteria restrict candidates to those with an expertise in public international law, with a preference for a specialisation in one of a number of relevant areas.<sup>86</sup> This criterion is short-sighted for two principal reasons. First, it offers no guarantee of diversity within the corpus of public international lawyers. Hypothetically, every appointee could be a trade lawyer with no expertise in investment law. It also excludes arbitrators with experience in different legal areas, like commercial arbitration and public law. Investor-State arbitration is a relatively new phenomenon and, like all goods and services, it benefits from a free market of competing ideas. The investment court proposal risks marginalising valuable ideas from different systems of law.

Finally, the code of conduct, while a good idea in principle, risks excluding a number of candidates who, by virtue of their practice, may be deemed to have too many potential conflicts of interest.<sup>87</sup>

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85. See CETA, art. 8.31(3) (“An interpretation adopted by the CETA Joint Committee shall be binding on the Tribunal established under this Section.”); see also TTIP Working Draft, §3(5) art. 13(5) (stating the Committee may adopt decisions interpreting the related provisions of the Agreement, and such interpretation is binding on the Tribunal and Appeal Tribunal).

86. See CETA, art. 8.27(4) (stating members of the tribunal shall be public international law experts); see also TTIP Working Draft, §3(4), art. 9(4) (asserting judges shall possess expertise in public international law).

87. See CETA, Annex 29B, Code of Conduct, arts. 12 & 15 (requiring arbitrators to remain independent and impartial, and avoid entering into relationships, incurring benefits, obligations, or any financial interests that would adversely interfere or influence with her or his proper performance of duties or impartiality); see also TTIP Working Draft, Annex II, Code of Conduct, art. 5

While impartiality and independence requirements prevent practitioners from participating in *ad hoc* arbitrations from time to time, in the context of a permanent tribunal, designed to operate to the exclusion of *ad hoc* arbitrations for EU States, the consequences are much more severe.

The consequences of the EU investment court proposal remain to be seen. CETA has been concluded but is yet to enter into force. It is for investors to decide whether suits will be brought before an investment court, not States. It may well be that the investment court is brought into existence, but that investors opt to use other forums open to them, including *ad hoc* tribunals.

This article addresses the ways in which the field of arbitrators has become more diversified. The investment court proposal deliberately attempts to reverse this trend, based on perceived shortcomings in the current investment treaty arbitration system. Offering a quasi-judicial alternative to arbitration is not necessarily negative – but replacing it entirely for EU States risks narrowing the field of potential arbitrators to the detriment of the enterprise. The fallacy underlying the EU proposal is that it assumes not only that there is an ideal arbitrator, but that each State has five of them.