A COMPARATIVE STUDY OF JUDICIAL SAFEGUARDS IN RELATION TO INVESTOR-STATE DISPUTE SETTLEMENT

PAVLA KŘÍSTKOVÁ

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Abstract

ISDS is a relatively young and dynamic regime. It faces challenges for which other adjudicative systems, after centuries of development, have found solutions. In ISDS, fair rules and procedures are essential since ISDS is an adjudicative regime said to be based on the rule of law. The importance of complex and carefully crafted rules and procedural safeguards is underscored by the impact of ISDS on a wide array of parties and interests and by its encroachment on the powers of sovereign states affecting their populations. Yet ISDS is criticized as unfair and open to unacceptable appearances of bias due to a lack of institutional safeguards.

In this thesis, I assess whether these criticisms are compelling. Considering their prevalence in the debates about ISDS, I focus on issues of neutrality and fairness and, in particular, on two core values: (1) adjudicative independence and impartiality; and (2) the right of standing. I do so by examining institutional measures adopted to safeguard these values. These include: a) methods of appointment and case assignment; b) protections of the independence of individual adjudicators in the form of tenure and financial security; and c) guaranteed standing for parties with a legal interest.

The goal of the thesis is to evaluate institutional safeguards of these values in ISDS through the method of a comparative study of adjudicative bodies in various contexts and to map the spectrum of safeguards used by other forums based on their common comparisons and similarities with ISDS.

The results of the research highlight that, although ISDS has been lauded for its perceived neutrality and as a system superior to domestic courts, it is the regime with the weakest safeguards among all comparators, while domestic courts employ the strongest institutional safeguards.

The central conclusion is that ISDS has systemic flaws and failures because it lacks mechanisms to safeguard the examined values, thus substantiating the relevant concerns about the institutional design of ISDS. To safeguard these essential values, it appears unavoidable that ISDS must be rejected in its current form.

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Table of Abbreviations

AB	Appellate Body
ACTA	Anti-Counterfeiting Trade Agreement
ADR	Alternative Dispute Resolution
AFR	Additional Facility Rules
AGICOA	Association of International Collective Management of Audiovisual Works
BIT	Bilateral Investment Treaty
CCR	Co-ordinating Committee on Remuneration
CETA	Comprehensive Economic and Trade Agreement
CHF	Swiss francs
CJEU	Court of Justice of European Union
CofJ	Court of Justice
CPR	Civil Procedure Rules
CRA	Constitutional Reform Act
CSR	Corporate Social Responsibility
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ECT	Energy Charter Treaty
ENCJ	European Networks of Councils for the Judiciary
EU	European Union
EUR	Euro
FAA	Federal Arbitration Act
FAQ	Frequently Asked Questions
FINRA	Financial Industry Regulatory Agency
FRCP	Federal Rules of Civil Procedure
FTA	Free Trade Agreement
FTC	Free Trade Commission
GBP	British pound sterling
GC	General Court
IBA	International Bar Association
ICA	International Court of Arbitration
ICC	International Chamber of Commerce
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICS	Investment Court System
ICSID	International Centre for Settlement of Investment Disputes
IGA	Investment Guarantee Agreements
IIA	International Investment Agreement
IPA	Investment Partnership Agreement
IRA	Individual Retirement Account
ISDS	Investor-State Dispute Settlement
JAC	Judicial Appointments Commission
JEEPA	Japan–European Union Economic Partnership Agreement
LCIA	London Court of International Arbitration
MERCOSUR	Mercado Commercial del Sur (Trade Market of the South)
MIA	Multilateral Investment Agreements
NAC	National Adjudicatory Council
NAFTA	North American Free Trade Agreement

NAMC	National Arbitration and Mediation Committee
NASD	National Association of Securities Dealers
NGO	Non-governmental Organization
NLSS	Neutral List Selection System
NYSE	New York Stock Exchange
OECD	Organization for Economic Cooperation and Development
PCA	Permanent Court of Arbitration
PD	Practice Directions
RIA	Regional Investment Agreements
SCC	Stockholm Chamber of Commerce
SEC	Securities and Exchange Commission
SJC	Senate Judiciary Committee
SSRB	Senior Salaries Review Body
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TTIP	Transatlantic Trade and Investment Partnership
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNCITRAL	UN Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
US	Unites States
USC	Unites States Code
USMCA	United States-Mexico-Canada Agreement
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization
WTO AB	World Trade Organization Appellate Body
WIPO	World Intellectual Property Organization

Chapter 1: Introduction*

My interest in international investment law has developed through a series of unrelated events. I heard about international investment arbitration for the first time when my home country sought to defend two controversial arbitral lawsuits, *Lauder*[1] and *CME*.[2] These two cases are controversial because they effectively involved the same parties and dealt with the same facts. Troublingly, the two tribunals reached opposite conclusions. In one case the claim by the foreign investor was dismissed, whereas in the other the investor was awarded damages of $270 million plus 10% interest. Thus, the state lost after being sued twice for the same issue and after winning the first case. At that time, the whole world of international investment arbitration remained a mystery to me. In my quest for more understanding, I found that not only these two cases but all of international investment law and its investor-state dispute settlement (ISDS) mechanism are subject to intensive debate. Yet these two cases remained the key motivation for me to study international investment law. One feature that struck me most clearly in my studies was the fact that, in comparison to other legal regimes, this was the only one that appeared to be somewhat incomplete. This feature appeared to explain many of its controversies and in turn promised a rich space for discovery and potential development. Around this time, the scholarly debates and public outcry about ISDS in then-proposed treaties were flourishing.[3]

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* Excerpts of this thesis were submitted to the UNCITRAL Working Group III process in Gus Van Harten & Pavla Křístková, "Comments on Judicial Independence and Impartiality in ISDS: A Paper Prepared for the UNCITRAL Working Group III" (2018), online: *SSRN* <papers.ssrn.com/abstract=3323010>.

[1] *Ronald S Lauder v The Czech Republic*, Final Award (2001), 9 ICSID 62 [*Lauder*].
[2] *CME Czech Republic BV (The Netherlands) v The Czech Republic* (2001), Partial Award, 9 ICSID 121 (ICSID) [*CME*]; *Ibid*, (2003), Final Award, 9 ICSID 264 (ICSID).
[3] For example, see debates surrounding inclusion of ISDS in the *Comprehensive Economic and Trade Agreement (CETA) Between Canada, of the One Part, and the European Union and its Member States, of the Other Part*, 14 September 2016 [*CETA*]; and the later discontinued negotiation of the Transatlantic Trade and Investment Partnership (TTIP) between 2013 and 2016; See: "Transatlantic Trade and Investment Partnership (TTIP) - Trade - European Commission" (14 July 2016), online: *European Commission* <ec.europa.eu/trade/policy/in-focus/ttip/>.

The issues of neutrality and fairness have been heavily debated with respect to ISDS. Proponents of ISDS frequently present it as neutral, free from bias, apolitical, protected by institutional safeguards found in systems like US courts[4] and thus a better option in comparison to domestic courts.[5] Considering institutional safeguards, they point to the parties' right to challenge arbitrators if they are concerned that their independence or impartiality has been compromised as well as the "multiple control mechanisms to police the procedural fairness of the award rendered."[6] Yet none of the control mechanisms they enlist - annulment mechanisms and awards being subject to review and enforcement under the New York Convention - is related to initial stages of the proceedings, where the appointing and case assigning powers operate. In contrast, critics of ISDS argue that public courts, domestic and international, use richer protections than those ISDS can offer. They maintain that ISDS is inherently unfair, even absurd,[7] and for some a regime that should be removed in its entirety.[8] In fact, over one hundred US academics claim that "ISDS proceedings lack many of the basic protections and procedures of the justice system normally available in a

[4] "An open letter about investor-state dispute settlement (April 2015)" (7 April 2015), online: *McGill* <www.mcgill.ca/fortier-chair/isds-open-letter> at 3.
[5] The Honorable 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" (2014) 52:3 Colum J Transnat'l L 689 at 695–696; "Investor-to-State Dispute Settlement (ISDS) Some facts and figures" (12 March 2015), online: *European Commission* <trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153046.pdf> at 3; "ISDS: Important Questions and Answers" (March 2015), online (blog): *Tradewinds: The Official Blog of the United States Trade Representative* <ustr.gov/about-us/policy-offices/press-office/blog/2015/march/isds-important-questions-and-answers-0>; Pia Eberhardt & Cecilia Olivet, *Profiting from injustice: how law firms, arbitrators and financiers are fueling an investment arbitration boom* (Brussels: Corporate Europe Observatory: Transnational Institute, 2012) at 36, 45–46.
[6] *Supra* note 4 at 3–4.
[7] Phil Levy, "Critique Of NAFTA Provision Highlights Team Trump's Misconceptions On Investment Abroad" (23 October 2017), online: *Forbes* <www.forbes.com/sites/phillevy/2017/10/23/should-team-trump-encourage-investment-in-mexico/> quoting U.S. Trade Representative Robert Lighthizer.
[8] Ji-hye Shin, "Revised FTA to curb overuse of legal dispute by foreign investors" (4 September 2018), online: *The Korea Herald* <www.koreaherald.com/view.php?ud=20180904000761>.

court of law"[9] while at the same time over one hundred EU academics claim that ISDS lacks rule of law safeguards and is systemically biased in favor of investors.[10]

These debates contributed to reform initiatives. For instance, some states have withdrawn from the International Centre for Settlement of Investment Disputes (ICSID),[11] while others have renegotiated their old international investment agreements (IIAs) and negotiated new ones with revised terms.[12] Recently, the North American Free Trade Agreement (NAFTA)[13] has been renegotiated and partially replaced with the new United States-Mexico-Canada Agreement (USMCA),[14] where ISDS will be phased out between the United States and Canada.[15] Further, the US and South Korea, in their free trade agreement (FTA), added clauses to strengthen the right to regulate and protect legitimate public welfare objectives.[16] Other examples of major changes to

[9] Letter from over 100 US academics (11 March 2015), online: *Alliance for Justice* <www.afj.org/wp-content/uploads/2015/03/ISDS-Letter-3.11.pdf>.
[10] "Law professors say ISDS is incompatible with EU law" (17 October 2016), online: *ClientEarth* <www.clientearth.org/101-law-professors-say-isds-is-incompatible-with-eu-law/>; "Legality of investor-state dispute settlement (ISDS) under EU law" (22 October 2015), online: *ClientEarth* <www.documents.clientearth.org/wp-content/uploads/library/2015-10-15-legality-of-isds-under-eu-law-ce-en.pdf>; Pia Eberhardt & Cecilia Olivet, *supra* note 5 at 8, 35–37.
[11] *List of Contracting States and Other Signatories of the Convention (as of April 12, 2019)* (ICSID/3), online: *ICSID* <icsid.worldbank.org/en/Pages/icsiddocs/List-of-Member-States.aspx>.
[12] I do not cover these reforms in depth since IIAs reforms thus far have hardly touched the procedures I examine, making them outside of the scope of my thesis. Instead of concentrating on IIAs and their reform, therefore, I predominantly review various adjudicative bodies, their institutional design, and how they formulate procedures for dispute settlement.
[13] *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, art 1122 (2)(a) (entered into force 1 January 1994) [NAFTA].
[14] Executive Office of the President, "United States-Mexico-Canada Agreement" (30 November 2018), online: *Office of the United States Trade Representative* </trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement>.
[15] Alison Ross, "New NAFTA curbs ISDS" (30 September 2018), online: *Global Arbitration Review* <globalarbitrationreview.com/article/1175101/new-nafta-curbs-isds>; "NAFTA 2.0 finalized, announced as USMCA: Mexico, United States agree to limit ISDS clause; Canada to pull out of ISDS after a three-year window" (17 October 2018), online: *International Institute for Sustainable Development* <www.iisd.org/itn/2018/10/17/nafta-2-0-finalized-announced-as-usmca-mexico-united-states-agree-to-limit-isds-clause-canada-to-pull-out-of-isds-after-a-three-year-window/>.
[16] Executive Office of the President, Press Release, "Protocol Between the Government of the Republic of Korea and the Government of the United States of America Amending the February 10, 2011 Exchange of Letters" (3 September 2018), online: *Office of the United States Trade Representative* <ustr.gov/about-us/policy-offices/press-office/press-releases/2018/september/ustr-publishes-agreed-outcomes-us> para 4 (a) and (d).

ISDS can be found in recent negotiations by the EU with various other countries. Since 2015, the EU has concluded IIAs that include a permanent Investment Court System (ICS) with Canada, Singapore and Vietnam[17] and has reached an agreement in principle that includes the ICS with Mexico.[18] In contrast, the Japan–European Union Economic Partnership Agreement (JEEPA) leaves ISDS out.[19] Interestingly, in response to public outcry, the EU's original proposals for the EU-Canada Comprehensive Economic and Trade Agreement (CETA) and EU-Vietnam FTA both also had provisions protecting third parties' rights, but these provisions were later removed.[20] In 2017, the EU opened negotiations for a Convention establishing a multilateral court for the

[17] "The EU and Vietnam finalise landmark trade deal" (2 December 2015), online: *European Commission* <trade.ec.europa.eu/doclib/press/index.cfm?id=1409>; "EU-Vietnam trade and investment agreements" (24 September 2018), online: *European Commission* <trade.ec.europa.eu/doclib/press/index.cfm?id=1437>: See Trade Agreement, art 15.23 and Investment Protection Agreement, art 3.23; "EU-Singapore trade and investment agreements" (last modified March 2019), online: *European Commission* <trade.ec.europa.eu/doclib/press/index.cfm?id=961>: See Free Trade Agreement, art 14.20; *CETA*, *supra* note 3, art 29.8; "EU-Canada trade agreement: Council adopts decision to sign CETA - Consilium" (28 October 2016), online: *European Council | Council of the European Union* <www.consilium.europa.eu/en/press/press-releases/2016/10/28/eu-canada-trade-agreement/>.

[18] "Key features of the EU-Mexico trade agreement" (21 April 2018), online: *European Commission* <trade.ec.europa.eu/doclib/press/index.cfm?id=1831> at para 7; "New EU-Mexico agreement: The Agreement in Principle and its texts" (26 April 2018), online: *European Commission* <trade.ec.europa.eu/doclib/press/index.cfm?id=1833>: see Dispute Settlement, art X.6.

[19] "Update on EU trade and investment negotiations: Japan, Vietnam, Australia, New Zealand, Mexico – Investment Treaty News" (30 July 2018), online: *International Institute for Sustainable Development* <www.iisd.org/itn/2018/07/30/update-on-eu-trade-and-investment-negotiations-japan-vietnam-australia-new-zealand-mexico/>.

[20] Draft Consolidated Text: *Canada-EU Comprehensive Economic and Trade Agreement*, 13 January 2010, art X.28, online: *Bilaterals.org* <www.bilaterals.org/?eu-canada-fta-draft-consolidated>; European Union's proposal in the stopped negotiation of: *Transatlantic Trade and Investment Partnership*, 12 November 2015 [*TTIP*] s 3, arts 22–23, online: *European Commission* <trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf>. See also "EU-Vietnam trade and investment agreements" (24 September 2018), online: *European Commission* <trade.ec.europa.eu/doclib/press/index.cfm?id=1437>: *EU-Vitnam* FTA (1 February 2016), Chapter 8: Trade in Services, Investment and E-Commerce, art 25 online: *European Commission* <trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154210.pdf> [perma.cc/S8TG-UWG4]: While the *EU-Vietnam* FTA does not contain provisions related to third parties' *amicus* and non-disputing parties, the *EU-Vietnam Investment Partnership Agreement* (IPA) arts 3.51(2) and 3.8(6), and Annex 7, rs 40–42 does. The reason for the removal of these provisions is an issue of inter-state negotiations that has not been discussed publicly by relevant officials. See also *EU-Singapore* FTA and IPA: They both contain provisions related to third parties' *amicus* and non-disputing parties; See "EU-Singapore trade and investment agreements" (last modified March 2019), online: *European Commission* <trade.ec.europa.eu/doclib/press/index.cfm?id=961>: *EU–Singapore* FTA, art 14.17, and Annex 14–A, rs 42–44; *EU–Singapore* IPA, arts 3.17 and 3.41, and Annex 8, arts 1 and 3.

settlement of investment disputes.[21] Similarly, ICSID, the PCA-UNCITRAL, and the ICC have introduced various changes to incorporate some public concerns - transparency, inclusion of the rules governing the non-party participation, etc. Moreover, to reform ISDS,[22] the UNCITRAL has set up a working group that concentrates on various issues including values of independence and impartiality.

Despite the serious considerations reflected in these various initiatives ISDS remains substantially unchanged. This is because these initiatives have a limited effect since most of them only reform individual agreements out of over 3000 existing IIAs. Even initiatives that aim to reach a broader audience - multilateral treaties, the ICS - reach only a portion of all potential disputes. Similarly, reforms of ISDS by arbitral administering forums have been too modest to dispel concerns related to its fairness and neutrality. As such, it is no surprise that several years on those initiatives and these raging debates are still present. In fact, due to the large number of old IIAs in force, ISDS will most likely continue to be fiercely debated for the foreseeable future, unless a more substantial reform of ISDS is undertaken by its administering bodies.

The wide-ranging ISDS crisis, and in some instances the lack of in-depth study into aspects of the crisis, led me to give ISDS a thorough academic evaluation in the form of a comparative study of key issues. Considering their prevalence in the debates, I decided to focus on two core values that are closely related to neutrality and fairness of adjudication: (1) adjudicative independence and

[21] "Multilateral investment court: Council gives mandate to the Commission to open negotiations - Consilium" (20 March 2018), online: *European Council | Council of the European Union* <www.consilium.europa.eu/en/press/press-releases/2018/03/20/multilateral-investment-court-council-gives-mandate-to-the-commission-to-open-negotiations/>; "A future multilateral investment court" (13 December 2016), online: *European Commission* <europa.eu/rapid/press-release_MEMO-16-4350_en.htm>.
[22] UNCITRAL, 50th Sess, *Possible future work in the field of dispute settlement: Reforms of investor-State dispute settlement (ISDS)* A/CN.9/917 (2017) at paras 11 and 16.

impartiality and (2) right of standing. Since my focus is not on substantive outcomes of IIAs but on procedures that safeguard these core values (IIAs mostly do not deal with either), I decided to assess rules of procedures designed by ISDS administering houses.

For my comparative analysis, I sought a range of adjudicative bodies in various contexts in order to compare major ISDS administering organizations with their institutional safeguards. I compared procedural rules of the major international arbitral organizations - the International Centre for Settlement of Investment Disputes (ICSID), the Permanent Court of Arbitration (PCA), and the International Chamber of Commerce (ICC) – to adjudicative bodies in the following four groups. With these four characteristics in mind I selected: (1) domestic courts - the Senior Courts of England and Wales and the US Supreme Court; (2) European courts - the European Court of Human Rights (ECHR) and the Court of Justice of the European Union (CJEU); (3) international judicial and quasi-judicial bodies - the International Court of Justice (ICJ) and the World Trade Organization (WTO); (4) domestic and international arbitral tribunals - the Financial Industry Regulatory Agency (FINRA) in the US and the World Intellectual Property Organization (WIPO). Within each group, I examined individual bodies and analyzed their protections and compared such findings with the findings for the ISDS administering bodies.

Treaty-based ISDS has four main characteristics: (1) it is arbitration (instead of litigation), (2) based on treaties (as opposed to contractual agreements), (3) with functions similar to judicial review, and (4) parties with a vertical relationship. Each forum reflects an adjudicative regime that is comparable to ISDS. Critically, no perfect comparators exist due to ISDS' unique adjudicative features. Accordingly, I did not seek perfect ones but rather a sample of comparators found within

a variety of public and private regulatory systems of adjudication with close connections and/ or similarities. It is impossible to say which group is further afield from ISDS as it depends on the point of reference. Interestingly, it appears that FINRA and WIPO have the least similarities and that European courts have the most, although it obviously depends on what aspects are compared.

Considering neutrality and so the values of adjudicative independence and impartiality, I examined separation of powers and its checks and balances. I proceeded by examining safeguards of these values, *Table 1*, in two distinct steps. First, I examined appointment and methods of case assignment, Chapter 4. In examination of these two processes, I focused on the separation of the adjudicative branch from external influence (other branches of government, parties' freedom to choose their adjudicator, etc.), separation of powers to appoint to various steps (nomination, selection, and appointment) with a variety of decision-makers, and separation of the two processes (appointment from case assignment) as well as on freedom of individual adjudicators from coercion from within the adjudicative branch (objective methods of case assignment). Second, I analyzed elements of the personal security of adjudicators - security of tenure and methods of remuneration that provide freedom from external pressure and financial repercussions and uncertainties[23] (a set of stable and repetitive incomes that does not turn on the peculiarities of individual cases over the term of tenure), Chapter 5.

Considering the right of standing, in Chapter 6, I examined whether these parties have been provided right of standing to the extent of their interest, *Table 2*. I mapped the spectrum of standing rights of several adjudicative bodies with a special focus on the rights of non-disputing parties.

[23] *Ibid* at paras 78–80.

Once I collected all data, I analyzed them and compared findings of individual forums with the findings for the ISDS administering bodies and concluded the article by commenting and analyzing all findings.

Table 1: Safeguards of Adjudicative Independence & Impartiality

Comparator / Default procedures versus parties' choice	**Standing**	**Security of tenure**	**Financial security**	**Selection**	**Separation of powers to appoint**	**Separation of process of appointment from case assignment**	**Case assignment within adjudicative branch**	**Objective case assignment**	**Evenly assigned***	**External influence**
Courts	Default	Yes	Yes / Set of monthly salaries + Pension	From tenured members	Yes / Separate stages: nomination, selection and appointment	Yes	Yes	Yes / E.g. algorithms, rotation, etc.	Yes	No
WTO AB	Default	Yes	Yes / Retainer	From tenured members	Yes / Separate stages: nomination, selection and appointment	Yes	Yes	Yes / Rotation	Yes	No
WTO panels	Parties' choice	No	No / *Ad hoc* income	*ad hoc*	No	No	No / Parties involved	No	No	Yes
FINRA[24]	Default	No	No / *Ad hoc* income	*ad hoc*	Yes / An elaborate mechanism of appointment	Yes	Yes	Yes / Neutral selection	No	Yes / Parties' preferences
	Parties' choice	No	No / *Ad hoc* income	*ad hoc*	No	No	No / Parties involved	No	No	Yes
WIPO	Parties' choice	No	No / *Ad hoc* income	*ad hoc*	No	No	No / Parties involved	No	No	Yes
	Default**	No	No / *Ad hoc* income	*ad hoc*	Yes	Yes	Yes	Yes / List-procedure	No	Yes / Parties' preferences
ISDS bodies	Parties' choice	No	No / *Ad hoc* income	*ad hoc*	No	No	No / Parties involved	No	No	Yes
	Default**	No	No / *Ad hoc* income	*ad hoc*	Yes	Yes	Yes	Yes / List-procedure	No	Yes / Parties' preferences

*No possibility that some adjudicators are never assigned a case. Whether workload is evenly distributed or not typically Depends on whether parties have ability to choose or not. **Default applies when parties cannot agree or failed to appoint - WIPO Arbitration Rules, Article 19.

[24] FINRA, *Code of Arbitration Procedure for Customer Disputes* (2007), rs 12401, 12402, and 12800 [*Customer Code*]; *Code of Arbitration Procedure for Industry Disputes* (2007), rs 13401, 13402, 13406(c), and 13800 [*Industry Code*].

Table 2: Fairness of the System - Right of Standing

Standing / Comparator	Full right of standing to those who satisfy		Intervention with the same rights as parties		Limited participation known as *amicus*	
			As of right	***Discretionary****	***As of right***	***Discretionary*** **
UK courts	A "sufficient" interest test		Anyone directly affected			Yes Cases of public interest
US Supreme Court	A "substantial" interest test		Granted by a federal statute or having with an interest in the subject matter of the action (Must satisfy the "substantial" interest test)	Granted by a federal statute or having a claim or defense that shares with the main action a common question of law or fact. (Must satisfy the "substantial" interest test)	Granted by a federal statute or having with an interest in the subject matter of the action To support existing parties (Standing not required)	Yes To support existing parties (Standing not required)
ECHR	A "victim" of a violating measure test		A person with a sufficient interest may pursue the claim on behalf of a deceased		Yes State Parties, The Council of Europe Commissioner for Human Rights	Yes Any person concerned
CJEU	Privileged Semi-privileged Non-privileged	The member states, etc. The Court of Auditors, etc. An addressee of an act The act is of direct and individual concern Directly concerned by a regulatory act that does not entail implementing measures	Anyone who was not heard, and the judgment is prejudicial to the applicant's rights		Yes Member states, Institution of the EU***	Yes Anyone with an interest in the case - private or public
ICJ	Reserved to states only e.g. member states of the UN et al.	Having an injury to direct or indirect interests No special interest required in *erga omnes partes* Having the right to initiate diplomatic protections e.g. to protect own nationals	Initiate new ordinary compulsory proceedings All parties must agree	Joinder All parties must agree	Yes Parties in multilateral treaties of which construction is questioned	Yes A party must have an interest of a legal nature which may be affected by the decision in the case
WTO AB	Appeals from panels	Reserved to only to disputing member states			Parties that participated at the panel stage	States that did not participate in panel proceedings, NGOs, trade associations and interested individuals
WTO panels	Violations of the WTO Agreement, no need to have a "legal interest"	Member states only	Directly affected states can: Become co-complainants; Initiate lawsuits against a respondent regarding matters already decided at panel stage before the original panel.		Indirectly affected states must: Have a substantial interest in the matter or; Invoke a systemic interest	Panels may accept non-requested briefs from NGOs, trade associations and interested individuals
FINRA	Consensual****	FINRA members and associated persons FINRA members and their customers	No	Joinder Only on request of one of the parties	No	Yes
WIPO	Consensual****		No	Joinder Only on request of one of the parties	No	Yes
ICSID	ISDS reserved to qualified investors and a host state****		No	No joinder but tribunals' have broad discretionary powers	No	Yes Must have a significant interest. No parties' consent needed, but parties may object
PCA	ISDS reserved to qualified investors and a host state*****		No	Joinder Only parties to an arbitration agreement - Not applicable in ISDS	No However, under the PCA Arbitration Rules, contemplated under the Hague Convention in disputes related to the interpretation of multilateral treaties.	Yes After consulting parties
ICC	ISDS reserved to qualified investors and a host state*****		No	Joinder Only parties to an arbitration agreement - Not applicable in ISDS	No	Yes After consulting parties

*At the discretion of the adjudicative body, with parties' consent or on one of the party's request. **At discretion of the adjudicative body or with the parties' consent. ***Intervention should be typically allowed by the decision of the President, except where parties identified confidential information of which revelation to the intervenor could be prejudicial to these parties. ****Between two or more private parties with an agreement to arbitrate. *****Treaty-based - governed by individual IIAs.

The central conclusion of this evaluation is that the institutional design of ISDS lacks mechanisms to safeguard both of these values. This conclusion arises from a comparative study of how these shared values are safeguarded in other adjudicative contexts. It was found that ISDS has the weakest safeguards. Not only does ISDS lack the institutional safeguards; it appears to be unique in this respect. Compared to domestic courts, which ISDS proponents frequently criticize as potentially biased, ISDS not only has far weaker safeguards; in fact, it sits on the opposite end of the spectrum of institutional safeguards. In other words, while ISDS has the weakest institutional safeguards, the purportedly inadequate domestic courts are among those with the most robust.

With respect to independence and impartiality, ISDS lacks mechanisms for the separation of powers as well as personal protections for adjudicators. Separation of powers is crucial to ensure adjudicative independence and impartiality, yet ISDS allows some private parties to circumvent domestic courts and challenge the regulatory space of the state with only a fraction of the safeguards that are typically present in courts. For example, ISDS administering bodies have no permanent adjudicators but rather indicative lists of untenured individuals. Appointments to these lists may proceed through distinct stages of nomination to the list, selection for the list, and appointment to specific cases, yet the method for assigning an arbitrator to a case allows parties to skip the list entirely by choosing their own arbitrator from wherever they wish, thus leaving a possibility for a direct link between a disputing party and the adjudicator. This arrangement is problematic not only because case assignment is subjective - in that a party may choose an adjudicator with favourable views of the party's position - but it gives the party a chance to influence the adjudicator's financial position. Since ISDS is based on unevenly-spread appointments, workload, and remuneration, the arbitrators, unlike judges, are under pressure to

protect their reputation in order to get appointed. What kind of reputation is desirable in this respect and from what point of view? In fact, the practice of ISDS appears to have divided arbitrators into an "elite" and the rest. Similarly, the availability of income based on appointments creates financial insecurity, incentives to get appointed, and undesirable competitive pressure among adjudicators.

In terms of its fairness, ISDS lacks provisions to guarantee the right of standing for all parties with a legal interest. Indeed, it sits again at the least fair end of the spectrum. Thus, IIAs limit the range of possible complainants because citizens and domestic investors are not allowed to bring claims. Moreover, the ISDS rules further restrict any other possibility for other parties to join or intervene in the lawsuit. In fact, although an ISDS lawsuit might be prejudicial to other parties' rights, they have no way to protect their interests in the proceedings. Instead, their rights are left effectively to the priorities of the disputing parties and how they argue their own case. How can tribunals exercise fair judgment if they base their decisions on representation that is inadequate or even completely absent and so leading to insufficient facts and evidence? Other interested parties can thus be harmed by the original disputed conduct of an investor or government and then again by the dispute settlement process itself. It should be said in this respect that, although all ISDS arbitral bodies follow similar rules, there are important distinctions. Interestingly, ICSID, which specializes in ISDS, is the only body that does not provide for joinder. All of the others - FINRA, WIPO, the PCA-UNCITRAL and the ICC - allow joinder at the request of one of the original parties. However, because such joinder is in disputes based on consensual agreements, unlike IIAs, the arbitration rules of these other bodies typically require the joining party to be a party to an arbitration agreement. While this requirement might be acceptable or even desired in purely commercial and so consensual disputes - FINRA and WIPO - it is worrisome in the treaty-based

arbitration (the core focus of my research) administered by ICSID, the PCA-UNCITRAL and the ICC.

The years that I have spent studying ISDS helped me to develop a clearer and more extensive understanding of this regime. Similarly, my thesis may inform others and contribute to the discussion of how to strengthen the methods for protecting fundamental values in ISDS by understanding how other adjudicative regimes achieve this goal. Since I examine shared values across many contexts, various decision-makers – such as reformers, IIAs negotiators, and the designers of the ICS and multilateral treaties – can benefit from the compiled dataset by learning from other time-tested systems. My work may be helpful to open minds, inspire, and encourage thinking, to provide examples to copy or avoid, to help adjust existing processes, or to contribute entirely new projects. In other words, the thesis shows where ISDS contrasts with other forums and may help to explain why there are the sometimes "odd" outcomes in ISDS.

After this initial overview, I proceed with the basic structure of my thesis. In chapter 2, I discuss the theoretical insight about values shared universally - independence and impartiality separately from fairness in terms of participation or fair representation (I use them interchangeably) and illustrate their shared nature. In this undertaking, I review the party autonomy principle, its limits, and its relation to sovereign powers and these shared values. Next, I describe my methodology and the analytical framework in chapter 3, where I introduce the significance of institutional design and processes in achieving procedural fairness. Further, I cite the theory behind a comparative study to enlighten the reasons for my research and introduce the scope, individual comparators and grounds for their selection, structure, and framework of this thesis. I cover the substantive

comparison in chapters 4-6. In each chapter, I introduce the value discussed, then examine the safeguards of each comparator and conclude by assessing all comparators. Then, in chapters 4 and 5, I explore adjudicative independence and impartiality: respectively, I investigate mechanisms of adjudicative appointment and methods of case assignment; I deal with personal protection, security of tenure and remuneration as forms of financial security. Next, in chapter 6, I concentrate on fairness from the point of view of fair representation with a special focus on the right to standing by third parties with a legal interest. I conclude my comparative study by evaluating all the findings in chapter 7.

Chapter 2: ISDS and Shared Values

Introduction

ISDS has been a subject of debate for its lack of neutrality and fairness. Considering these concerns and in fairness to ISDS, I decided to explore its safeguards of fairness and adjudicative independence and impartiality - as widely shared values of the rule of law. Debates about values in adjudication tend to focus on whether the adjudicative system has a public or private function. In ISDS, the public/ private dichotomy, and the question of its appropriate label, has been extensively discussed.[25] Some commentators, however, question the utility of this public/ private divide and argue that it is more constructive to focus on values that are common to both legal regimes rather than on their differences. Since the values that I examine are widely-shared or universal, for the question of their role in ISDS I find this public/ private debate distracting (I do not question this debate in general) because it turns our focus away from the shared values ISDS ought to safeguard regardless of the label it receives. Therefore, as it is not essential for my project, I do not dwell on this public/ private divide and focus instead on these shared values of the rule of law that are relevant to both public law and private law.

[25] For the private view see, for example: Barton Legum, "Investment Treaty Arbitration's Contribution to International Commercial Arbitration" (2005) 60:3 Disp Resol J 70 at 73; Jan Paulsson, "International Arbitration Is Not Arbitration" (2009) 2008:2 SIAR 1 at 4; Charles N Brower, "W(h)ither International Commercial Arbitration?: The Goff Lecture 2007" (2008) 24:2 Arb Intl 181 at 190; Anne van Aaken, "International Investment Law Between Commitment and Flexibility: A Contract Theory Analysis" (2009) 12:2 J Intl Econ L 507 (analysis of investment law regime through the lens of private contract law); For the public law view see: Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford: Oxford University Press, 2008) at 59; Stephan W Schill, "Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach" (2011) 52:1 Va J Intl L 57 at 67; David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (Cambridge, UK: Cambridge University Press, 2008) at 3; Andreas Kulick, *Global Public Interest in International Investment Law* (Cambridge, UK: Cambridge University Press, 2012) at 94–95; Chester Brown, "Procedure in Investment Treaty Arbitration and the Relevance of Comparative Public Law" in Stephan W Schill, ed, *International Investment Law and Comparative Public Law* (Oxford; Toronto: Oxford University Press, 2010) 659 at 659; Valentina Vadi, *Public Health in International Investment Law and Arbitration*, 1st ed (New York: Routledge, 2013) at 23.

As a starting point, I draw on Oliver's argument that control of the use of power and protection of essential individual and public interests are values of public and private law.[26] Private law is not strictly private but, like public law, it frequently regulates legal relationships beyond the parties to the dispute and it protects a variety of vital interests, such as public policies, third parties' rights, community values and norms, the right to a fair trial, etc. To support this argument, I discuss insights by scholars who acknowledge that various public values are not limited to public law but are similarly applied in the private law domestically and at the international level.

Equally, ISDS, whatever label is given to it, has implications and effects for a wide array of parties and interests reaching beyond the two immediate parties to the dispute: the host state and a foreign investor. In practice, the interests of various other parties - individuals, local communities and even the entire host state population - are frequently affected in potentially adverse ways. Arbitral bodies, by the administration of ISDS, exercise extensive powers. They control the use of state powers, preclude their abuse, and protect individual and public rights and interests. These powers come with duties to resolve disputes fairly and in doing so to consider the competing interests of all affected parties. Yet fairness can only be achieved if all stakeholders have the right to fair representation (also known as the right to standing) to the extent of their interest before an independent and impartial adjudicator - these values are recognized as attributes of a fair proceeding.[27]

[26] Dawn Oliver, *Common Values and the Public-Private Divide* (London: Butterworths, 1999).
[27] Austl, Commonwealth, Australian Law Reform Commission, *Traditional Rights and Freedoms - Encroachments by Laws: Final Report* (ALRC Report 129) (Sydney: Australian Law Reform Commission, 2015) at para 8.20.

Proponents of the view of ISDS as private law argue for the supremacy of the principle of party autonomy over other values. Yet party autonomy is not an unfettered principle. There are other values, and rights of other parties, that need to be considered and that justify limits to party autonomy. I analyze party autonomy and its limitations in the context of social goals, the source of ISDS authority, and the shared values. On the basis that no party can override or disregard principles like public policy, mandatory rules, rights guaranteed by a higher source of law, state sovereignty, etc., I argue that party autonomy is not an overriding principle that trumps the role of other values in ISDS.

States in their sovereign capacities have negotiated terms of international investment agreements (IIAs) and chosen arbitration as the applicable means of dispute settlement. There could be a consequent inference that states, by agreeing to this unique regulatory system, intended to override or even discard judicially-cultivated fundamental values. Yet there is no supporting evidence that states chose to do so. Most obviously, the treaties are silent on this point. In the absence of other evidence, mere silence cannot be construed as an intention to override fundamental values and establish party autonomy as a supreme principle.

1. Values

The word "values" has several closely related meanings. For example: "[p]rinciples or standards of behaviour" or "[t]he regard that something is held to deserve; the importance, worth."[28] Since values are part of the "background" in which judges operate,[29] they help us to understand the meaning of values in adjudication. Legal systems need to abide by fundamental values as they are

[28] "Values" (last visited 17 June 2019), online: *Lexico* <www.lexico.com/en/definition/value>.
[29] Oliver, *supra* note 26 at 59.

"important" for them to function fairly. Values form a foundation or, in other words, standards on which legal systems are based.

Values are often regarded as public or private: openness, fairness, and impartiality are commonly viewed as public values, whereas trust, confidence, reliability, and good faith tend to be private law alternatives.[30] However, some scholars explore values transcending this public/ private division.[31] For instance, Oliver maintains that it is more constructive to concentrate on values that public and private legal regimes have in common.[32] Along similar lines, Shetreet argues that values, such as procedural fairness, public confidence in the courts, efficiency, access to justice, and judicial independence are fundamental to the judicial system in general.[33] In his evaluation of fundamental values, he does not distinguish between public and private justice systems but maintains that "[a] proper legal system is one which advances each of these values."[34] These viewpoints suggest that there are values that are shared by both legal regimes, though their number is limited.

The public/ private labels may help to navigate legal concepts in some contexts, but my focus in the present study makes them less useful. My goal is not to question or contribute to a debate about whether ISDS reflects a predominantly public law, private law, or hybrid arrangement. Instead, following from Oliver and Shetreet, I focus on a limited number of values that public and private law both share. As a result, it is not essential for my research to determine whether ISDS is best

[30] *Ibid* at 55.
[31] Duncan Kennedy, "The Stages of the Decline of the Public/Private Distinction" (1982) 130:6 U Pa L Rev 1349; Oliver, *supra* note 26.
[32] Oliver, *supra* note 26 at 11.
[33] Shimon Shetreet, "Fundamental Values of the Justice System" (2012) 23:1 Eur Bus L Rev 61 at 61.
[34] *Ibid* at 62.

regarded as public or private law. I have touched on this distinction merely because of the ongoing debate, which I now put aside to focus on shared values and ISDS.

a) Shared Values

According to Oliver, shared values are substantive as well as procedural and they are concerned with the "control of power" and with protecting "certain vital interests of individuals and public interests" "against abuses of power" from the public as well as private bodies. She argues that "similar theories of government, democracy, and citizenship underpin these roles of the courts in controlling power and protecting individual and public interest."[35] In other words, common values touch on the role of public and private law courts to control powers exercised by the state or a private entity and to protect vital interests. Oliver's examples of parallels between public and private law arise in trusts, contracts, employment law, and family relationships.[36]

By implication, courts and tribunals are empowered to control the use of power by other entities and to protect the vital interests of individuals and the public. In the exercise of their authority, adjudicative bodies should not only protect these values against other institutions, but also employ mechanisms themselves which guarantee the protections internally. Mechanisms safeguarding these values promote public confidence in systemic fairness to check potential misuse of adjudicative powers. These mechanisms are related to the institutional design of adjudicative bodies, an issue discussed in Chapter 3.

[35] Oliver, *supra* note 26 at 1, 11.
[36] *Ibid* at 2; Also, Uglješa Grušić, *The International Employment Contract* (PhD thesis, The London School of Economics and Political Science (LSE), 2012) [unpublished] at II argues that public/ private distinction has faded away. To support his claim, he uses European Private International Employment law.

There are various values to be found under Oliver's overarching powers, yet there is no need to dwell on those that are peripheral to the present study. My focus is on values linked to procedural fairness,[37] also known as due process of law,[38] a vital interest that needs protection. Procedural fairness embodies rules and values, such as notice, disclosure, the opportunity to present one's case, the opportunity to respond, the duty to consider all the evidence, the right to counsel, the right to an interpreter, legitimate expectations, the right to an impartial decision-maker and freedom from bias, institutional independence the requirement that the person who hears the case must decide, concerns related to delay, and the right to reasons.[39] I concentrate on two core aspects of these procedural fairness values: the right to participate when one's rights or interests are affected and adjudicative independence and impartiality.[40]

Even if not all public values are present in private law, public and private law nevertheless share a fundamental respect for the right of participation and adjudicative independence and impartiality. The significance of these values lies in the ability of adversely affected parties to be heard by non-partisan adjudicators. In private law, participation as an element of procedural fairness has instrumental value.[41] The ability to participate enables adjudicators to conduct informed decision-

[37] According to the Government of Canada, ["Citizenship: Natural justice and procedural fairness" (3 July 2015), online: *Government of Canada* <www.cic.gc.ca/english/resources/tools/cit/admin/decision/natural.asp>] "[t]he principles of natural justice and procedural fairness are based on the theory that the substance of a decision is more likely to be fair if the procedure through which that decision was made has been just."
[38] Jeffrey Lehman & Shirelle Phelps, "Due Process of Law" in *West's Encyclopedia of American Law*, 2nd ed (Detroit: Thomson/Gale, 2005): In the US "[a] fundamental, constitutional guarantee that all legal proceedings will be fair and that one will be given notice of the proceedings and an opportunity to be heard before the government acts to take away one's life, liberty, or property. Also, a constitutional guarantee that a law shall not be unreasonable, arbitrary, or capricious."; Frederick F Shauer, "English Natural Justice and American Due Process: An Analytical Comparison" (1976) 18:1 Wm & Mary L Rev 47 at 48: In England known as natural justice consisting of two concepts "[t]he first, *audi alteram partem,* relates to the right to be heard; the second, *nemo debet esse judex in propria sua causa* or *nemo judex in re sua,* establishes the right to an unbiased tribunal."
[39] Government of Canada, *supra* note 37.
[40] Shauer, *supra* note 38 at 48: He sees these values as the most fundamental values of natural justice and as an equivalent of procedural process.
[41] Oliver, *supra* note 26 at 96.

making based on relevant facts. Adjudicators, judges and arbitrators, play a key role as guardians of these values and regulators of the stakeholders' interplay. They must be impartial and independent to fulfill guardian duties, while the public needs to have confidence that adjudicators are acting in this manner. Upholding impartiality and independence in practice is insufficient if the public does not perceive it to be so. Traditionally, organizations seeking to achieve public confidence use institutional mechanisms that safeguard these shared values.

Adjudication is an exercise of the power to decide the fate of another person who is, in Oliver's words, a "victim" of the decision.[42] Participation in proceedings enables adjudicators to reach a fair outcome since it provides an ability to the affected party to influence the decision that directly affects this party.[43] In turn, the lack of participation is unfair for those to whom the decision relates but who could not argue their case. This participation may take various forms, ranging from the full and guaranteed legal right of standing[44] to limited modes of intervention granted at the discretion of the court. The exercise of the courts' powers includes their ability to grant or refuse participation. Adjudication is fair only if its processes ensure that the right to participate is guaranteed to all affected stakeholders to the extent of their interest and is assessed by objective tools. Procedural fairness thus falls squarely under the rubric of controls on the use of power, preclusion of its abuse, and protection of vital interests.

[42] *Ibid*.
[43] *Ibid*.
[44] Jeffrey Lehman & Shirelle Phelps, "Standing" in *West's Encyclopedia of American Law*, 2nd ed (Detroit: Thomson/Gale, 2005): the right of standing is "[t]he legally protectible stake or interest that an individual has in a dispute that entitles him to bring the controversy before the court to obtain judicial relief."; Legal Information Institute (LII), "Standing" (6 August 2007), online: *Cornell Law School* < www.law.cornell.edu/wex/standing>: "Standing, or locus standi, is capacity of a party to bring suit in court."

Procedural fairness leads to openness that is in turn linked to the value of accountability.[45] This openness as the mechanism of accountability also serves as a protection for individuals against ill-conceived decisions.[46] The underlying rationale of procedural fairness is to give protection to a broad range of interests. According to Oliver, safeguarding this protection sometimes requires "altruism or disinterestedness on the part of the decision-maker."[47] This contention implies the need for an independent and impartial adjudicator. In domestic legal settings where courts are the ultimate decision-makers, requirements of adjudicative independence and impartiality are applied to all judges regardless of whether they decide private or public law disputes.[48] Generally, there are no different criteria that public, as opposed to private, law judges must satisfy since they are all appointed through the same procedures and governed by the same provisions. In other words, adjudicative independence and impartiality both operate as underlying values in private as well as public law.[49]

It is therefore fair to say that these public values are embedded in private law even though the ways in which the values are recognized and implemented vary. There is a spectrum of approaches. Despite differences in methods and approaches, though, the values remain indispensable for achieving fairness in any legal system including ISDS. Yet some commentators claim that in ISDS

[45] Oliver, *supra* note 26 at 97–98.
[46] *Ibid*.
[47] *Ibid* at 98.
[48] Examples are found in common law and civil law jurisdictions. Respectively, for instance, in the UK, judges are required to be independent with no distinction whether they decide public or private law. Independence is guaranteed by the *Constitutional Reform Act 2005* (UK), ss 3–4. In the Czech Republic requirements for judges are applicable to all courts and governed by §§ 79–80 Act No 6/2002 Coll on Courts and Judges (the Czech Republic), and § 4 Constitutional Court Act No 182/1993 (the Czech Republic).
[49] The International Bar Association, *IBA Guidelines on Conflicts of Interest in International Arbitration*, (London, UK: International Bar Association, 2014) art 1: The independence and impartiality principles are equally recognized as values and basic requirements of a fair hearing in commercial arbitration.

party autonomy is a supreme or overriding principle.[50] This view creates controversy as it implies that even fundamental and constitutionally guaranteed values can be overridden by parties based on party autonomy. Considering the gravity of this issue, the interaction between party autonomy and the shared values of the rule of law requires a close assessment, which I provide later in this chapter.

b) Values and the Not so Strictly Private Law

How is it that public and private law share values? The sharing stems from the fact that both are anchored in the same overarching social goals and values. In this section, I provide several examples of how private law, while balancing other competing needs and interests, still delivers shared values.

Private law is embedded in overarching social values. As Sweet and Grisel argue, no private law is strictly "private" because it was substantiated by state actors exercising public authority.[51] Similarly, Collins in his elaboration of contract law characterizes private law as an instrument of governance having the ability to achieve "the social goals of the community."[52] Private law promotes the state's values and for that it cannot be independent of the state.[53] In countries, like Canada and Germany, the relationship between the state's constitutional values and private law

[50] L Yves Fortier, "Delimiting the Spheres of Judicial and Arbitral Power: Beware, my Lord, of Jealousy" (2001) 80:1 & 2 Can Bar Rev 143 at 148–149; Yas Banifatemi, "The Law Applicable in Investment Treaty Arbitration" in K Yannaca-Small, ed, *Arbitration under international investment agreements: a guide to the key issues* (Oxford: Oxford University Press, 2010) 191 at 192.
[51] Alec Stone Sweet & Florian Grisel, "The Evolution of International Arbitration: Delegation, Judicialization, Governance" in Walter Mattli & Thomas Dietz, eds, *International Arbitration and Global Governance: Contending Theories and Evidence* (Oxford: Oxford University Press, 2014) 22 at 22 and 32.
[52] Hugh Collins, "Regulating Contract Law" in Christine Parker et al, eds, *Regulating Law* (Oxford: Oxford University Press, 2004) 13 at 31.
[53] Hanoch Dagan, "The Limited Autonomy of Private Law" (2008) 56:3 Am J Comp L 809 at 812.

requires that no rule of the latter conflicts with the former values.[54] As Sternlight puts it, "due process protections are a matter of constitutional right."[55] With respect to binding arbitration, he points out that a lack of adequate procedural protections may make arbitration unconstitutional.[56] Constitutional values define the conduct of the state and influence private law in general. Along similar lines, Dagan argues that many so-called public values should and in fact do inform private law.[57] He contends that private law is somewhere in between two opposing theories: instrumentalist - private law as a form of regulation, and autonomist - no social purpose or social value can legitimately inform private law.[58] He maintains that private law values are born from and influenced by public values and thus should be responsive to them.[59] Therefore, there are limits to private dealings as measured by social and political goals and higher laws.

Regulatory Function

Private domestic law, according to Hedley, is used by public authorities like courts as a technique or instrument of government.[60] Collins likewise points out that private law "is perceived increasingly as another arm of the regulatory state" instead of being "guided exclusively by the standards of corrective justice"[61] and argues that "the general law of contract should be regarded as a governance mechanism and a part of the state's regulatory structure."[62] Along similar lines,

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[54] Lorraine E Weinrib & Ernest J Weinrib, "Constitutional Values and Private Law in Canada" in Dan Friedmann & Daphne Barak-Erez, eds, *Human Rights in Private Law*, 1st ed (Oxford-Portland Oregon: Hart Publishing, 2001) 43 at 44.
[55] Jean R Sternlight, "Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns" (1997) 72:1 Tul L Rev 1 at 81.
[56] *Ibid.* She argues that some widespread uses of arbitration can be unconstitutional.
[57] Dagan, *supra* note 53 at 812.
[58] *Ibid* at 811–812.
[59] *Ibid* at 811.
[60] Steve Hedley, "Courts as public authorities, private law as instrument of government" in Kit Barker & Darryn Jensen, eds, *Private Law: Key Encounters with Public Law* (Cambridge: Cambridge University Press, 2013) 89.
[61] Hugh Collins, "The Impact of Human Rights Law on Contract Law In Europe" (2011) 22:4 Eur Bus L Rev 425 at 426.
[62] Collins, *supra* note 52 at 14.

Harlow argues that "[b]y presenting administrative law principles as constitutional values to which the private law system is also subject, control over privatized entities could be maintained."[63] According to Wai, contract law has a regulatory function since it does not solely govern the contractual relationship between the parties but goes beyond them.[64] This private law regulation is reflected, for instance, in the protection of social and political goals as well as weaker parties: consumers in contract law, employees in employment law, and third parties in tort law.[65] Wai argues further that this traditional regulatory role of private law has been, due to globalization, shifted to private international law.[66]

Freeman describes this regulatory development in private law settings in terms of a "publicization".[67] She argues that the government in this way expands its reach.[68] In the process of "publicization", private actors exercise goals that are traditionally public through budgeting, regulation, and contract.[69] In doing so, she explains that "[t]he state can exact concessions - in the form of adherence to public norms - in exchange for contracting out its work."[70] Hodges similarly describes publicization as a mechanism by which private actors deliver public functions.[71]

[63] Carol Harlow, "Global Administrative Law: The Quest for Principles and Values" (2006) 17:1 Eur J Int Law 187 at 194.
[64] Robert Wai, "Transnational Liftoff and Juridicial Touchdown: The Regulatory Function of Private International Law in an Era of Globalization" (2002) 40:2 Colum J Transnat'l L 209.
[65] *Ibid*; *Donoghue v Stevenson* 1932 SC (HL) 31, [1932] UKHL 100, which is an example of imposed product liability in tort law.
[66] Wai, *supra* note 64.
[67] Jody Freeman, "Extending Public Law Norms through Privatization Symposium: Public Values in an Era of Privatization" (2003) 116:5 Harv L Rev 1285 at 1285.
[68] *Ibid*.
[69] *Ibid*.
[70] *Ibid*.
[71] Christopher Hodges, *Law and Corporate Behaviour: Integrating Theories of Regulation, Enforcement, Compliance and Ethics* (Hart Publishing, 2015) at 501.

The protection of third parties' interests is another example of private law's regulatory function. Oliver comments that "courts do impose duties and obligations of consideration towards others in private law."[72] For instance, Lord Denning in various cases imposed administrative law duties that relate to a third party's protection, fairness and reasonableness, on private parties.[73] In doing so, he applied administrative duties to private bodies and decision-makers on both a contractual and a non-contractual basis.[74] The duties effectively limited the activities and autonomy of private parties.

Another aspect of private law's protections of third parties' interests is the common law concept of "collectivity" described, according to Collins, as "public policy", "the public interest" or moral principles.[75] Along these lines, Collins notes that national private law judges generally respond to social concerns by seeking to integrate collective voices in private law proceedings[76] even though this "collectivity" has no formal legal personality and does not acquire private law rights.[77] In turn, these collective voices enable the courts to control the exercise of private law rights.[78] He maintains that the use of this proceduralism in private law may mirror public law.[79]

[72] Oliver, *supra* note 26 at 167.
[73] Dawn Oliver, "Lord Denning & the Public/Private Divide" (1999) 14 Denning LJ 71 at 73–74.
[74] *Ibid*.
[75] Hugh Collins, "The Voice of the Community in Private Law Discourse" (1997) 3:4 Eur LJ 407 at 412.
[76] *Ibid* at abstract, 418–419.
[77] *Ibid* at 414.
[78] *Ibid* at 419.
[79] *Ibid*.

Rule of Law

The rule of law, according to Dyzenhaus, applies to public as well as private law.[80] Similarly, Lucy contends that "the rule of law and private law are not strangers" since "they protect against the same ill—arbitrariness—maintain the same conditions, and serve the same values."[81] Values of the rule of law, despite the fuzziness of the term, are generality, clarity, publicity, stability, predictability, an independent judiciary, a right to participate, etc.[82] According to Harlow, every Western administrative system including the European Union is founded on the rule of law,[83] which in summary depends on fairness, legality, consistency, rationality, and impartiality as well as participation and openness.[84] Aronson, Dyer, and Groves add the values of access to judicial and non-judicial grievance procedures, legality, and consistency.[85] Despite some variation, most of these commentators also list participation before an independent adjudicator as a rule of law value; otherwise, it may be said to be implicit in other values, such as fairness.

For instance, European law is based on the rule of law despite different historical developments and understandings of the law in individual European states, which represent both the common law tradition in the United Kingdom, Ireland, etc. and the civil law tradition in France, Germany, Poland, etc. Yet all EU states and all signatories to the European Human Rights Convention

[80] David Dyzenhaus, "Liberty and Legal Form" in Lisa M Austin & Dennis Klimchuk, eds, *Private Law and the Rule of Law* (Oxford: Oxford University Press, 2014) 92 at 97–99.
[81] William Lucy, "The Rule of Law and Private Law" in Lisa M Austin & Dennis Klimchuk, eds, *Private Law and the Rule of Law* (Oxford: Oxford University Press, 2014) 41 at 66.
[82] Jeremy Waldron, "The Rule of Law" (22 June 2016), online: *Stanford Encyclopedia of Philosophy Archive* <plato.stanford.edu/archives/fall2016/entries/rule-of-law/#ValuUndeRuleLaw>.
[83] Harlow, *supra* note 63 at 190.
[84] *Ibid* at 193.
[85] Mark I Aronson, Bruce Dyer & Matthew Groves, *Judicial review of administrative action*, 3rd ed (Pyrmont, NSW: Lawbook Co, 2004).

recognize the underlying values of fairness, participation, independence, and impartiality.[86] For private regulation within the EU, Micklitz, for instance, states that "it seems … necessary to underline that the principles of transparency, participation, accountability and judicial review should apply equally to all forms of private regulation, whatever the subject matter might be."[87] This conclusion supports further the view that these values are not exclusive to public law and have a place in private law too.

c) Summary

Private law thus emerges as a tool that delivers public values and goals and that balances the need for other competing values along a spectrum of means. States use private law to regulate social affairs and interactions reaching well beyond the agreements of private parties. Likewise, international private law, where ISDS operates to some degree, also recognizes and delivers such values. The function of private law cannot be reduced to mere facilitation of a contractual relationship between two parties. While some commentators argue for the supremacy of party autonomy over other values in ISDS, the embeddedness of private law in shared values and its regulatory function means that party autonomy has important limits.

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[86] Daniel Smilov, "EU Enlargement and the Constitutional Principle of Judicial Independence" in Wojciech Sadurski, Adam Czarnota & Martin Krygier, eds, *Spreading Democracy and the Rule of Law?: The Impact of EU Enlargemente for the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders* (Dordrecht: Springer, 2006) 313 at 314; *Treaty on European Union*, European Union, 17 December 2007, art 2 (entered into force 1 December 2009) [*Lisbon Treaty*]: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.These values are common to the Member States …".

[87] Hans-W Micklitz, "The Visible Hand of European Regulatory Private Law (ERPL): The Transformation from Autonomy to Functionalism in Competition and Regulation" (last visited 16 May 2019), online (blog): *EUI Blogs* <blogs.eui.eu/erc-erpl/project-description/>.

2. Party Autonomy

The debates about the supremacy of party autonomy in ISDS raise important questions. Is party autonomy a competing or even an overriding principle in comparison to shared and fundamental values of the rule of law including procedural fairness in terms of standing and adjudicative independence and impartiality? Are parties free to opt out of these fundamental values? In this section, I seek to find answers to these questions and to explore the meaning of this principle, how it interacts with the values of the rule of law, and whether it has supremacy over these values.

Party autonomy, also framed as freedom of contract, is a principle of private law recognized at the domestic and international level.[88] According to this principle, parties are free to choose the forum (any particular jurisdiction, court or arbitration)[89] and the law applicable to the substance of the dispute.[90] Choice of law is recognized, for instance, in the US under § 187(2)(b) of the Restatement (second) of Conflict of Laws. In Canada, following *Vita Food Products Inc v Unus Shipping Co Ltd*,[91] parties can decide which law will govern their contract. In the European Union, the choice of law is permitted under the Rome I and Rome II Regulations governing contractual and non-

[88] Stefan Grundmann, "Information, Party Autonomy and Economic Agents in European Contract Law" (2002) 39:2 CML Rev 269 at 269.
[89] Nick Kangles & Theresa Kim, "Governing Law and Choice of Forum Clauses Explained" (last visited 16 May 2019), online: *LexisNexis* <www.lexisnexis.ca/en-ca/ihc/2017-03/governing-law-and-choice-of-forum-clauses-explained.page>.
[90] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, art V(1)(a) (entered into force 7 June 1959) [*New York Convention*]; Nigel Blackaby et al, *Redfern and Hunter on International Arbitration*, 5th ed (Oxford: Oxford University Press, 2009) at 3.94–3.100; Alec Stone Sweet & Florian Grisel, *supra* note 51 at 41.
[91] [1939] UKPC 7, 2 DLR 1 (JCPC).

contractual obligations respectively.[92] In arbitration agreements, party autonomy is recognized under the New York Convention.[93]

If parties may choose their laws, are they also free to decide the procedures that will govern the proceedings? Courts, in general, use their own procedural rules. In domestic contexts, these rules are subject to constitutional norms and values and any relevant national laws.[94] The court's internal procedures are, in the hierarchy, subsidiary to the latter two.[95] Courts ordinarily prescribe the sets of permissible actions from which private parties can choose and thus limit parties' freedom of contract.[96] Likewise, international courts and arbitral organizations have their own procedural rules but are subject to treaties.[97] Speaking of ISDS, international investment treaties (IIAs) generally define the venues and set of rules from which foreign investors can select to bring a claim, thus allowing venue shopping.[98] Similarly, ISDS administering organizations define the sets of rules

[92] *Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)*, [2008] OJ, L 177/6 [*Rome I Regulation*]; EC, *Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)*, [2007] OJ, L 199/40, 2007 [*Rome II Regulation*].
[93] *New York Convention*, art II.
[94] See, for example, in the UK, the *Courts Act 2003* (UK); the *Constitutional Reform Act 2005* (UK); *Civil Procedure Rules* (CPR) 1998, *Practice Directions* (PD), pt 54; in the US, *Rules of the Supreme Court of the United States*, r 4; Jessica Freiheit, "Choice of Law Issues: Selecting the Appropriate Law" in *Proskauer on International Litigation and Arbitration: Managing, Resolving, and Avoiding Cross-Border Business or Regulatory Disputes* (online: Proskauer Rose LLP, 2016), ch 7 online: *Proskauer* <www.proskauerguide.com/litigation/7/VI>.
[95] Robert G Bone, "Party Rulemaking: Making Procedural Rules through Party Choice" (2012) 90:6 Tex L Rev 1329 at 1337.
[96] *Ibid* at 1338–1339.
[97] See, for example, the ICJ *Practice Directions* (As amended on 20 January 2009 and 21 March 2013); the ECHR *Rules of Court* (1 August 2018); the CJEU *Rules of Procedure of the Court of Justice*, [2012] OJ, L 265/1; *Rules of Procedure of the General Court*, [2015] OJ, L 105/1; the WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes* (1994) (entered into force 1 January 1995) [*DSU*]; WTO, *Working Procedures for Appellate Review*, 16 August 2010, WTO doc WT/AB/WP/7, online: *WTO* <docsonline.wto.org> [*Working Procedures for AB*].
[98] See, for example, *2012 US Model Bilateral Investment Treaty*, art 24 s 3: "a claimant may submit a claim…: (a) under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the respondent and the non-disputing Party are parties to the ICSID Convention; (b) under the ICSID Additional Facility Rules, provided that either the respondent or the non-disputing Party is a party to the ICSID Convention; (c) under the UNCITRAL Arbitration Rules; or (d) if the claimant and respondent agree, to any other arbitration institution or under any other arbitration rules."; *German Model Treaty -2008* art 10 s 2: "…The two Contracting States hereby declare that they unreservedly and bindingly consent to the dispute being submitted to one of the following dispute

from which parties - here, again, usually the investor when bringing the claim - can elect.[99] Further, some IIAs allow the disputing parties to draft their procedures[100] but this *ad hoc* option seems rare.[101] Despite having the ability to choose the forum and procedural rules,[102] parties have their freedom restricted by the limits imposed by conventions and procedural rules to ensure, among other things, fairness in the conduct of these proceedings.[103]

For example, the North American Free Trade Agreement (NAFTA)[104] limits parties' autonomy by giving third parties the right to intervene without the parties' consent as long as the intervening party informs the disputing parties and as long as its intervention concerns interpretation of the NAFTA.[105] Additionally, confidentiality, a closely related principle to party autonomy, in ISDS under the NAFTA has its limits; for example, it needs to be balanced against the public interest in disclosure.[106] In *Methanex Corporation v United States of America*, the tribunal, while considering

settlement mechanisms of the investor's choosing: 1. arbitration under the auspices of the International Centre for Settlement of Investment Disputes pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (ICSID) …, or 3. an individual arbitrator or an ad-hoc arbitral tribunal which is established in accordance with the rules of the United Nations Commission on International Trade Law (UNCITRAL) as in force at the commencement of the proceedings, or 4. an arbitral tribunal which is established pursuant to the Dispute Resolution Rules of the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA) or the Arbitration Institute of the Stockholm Chamber of Commerce, or 5. any other form of dispute settlement agreed by the parties to the dispute."

[99] For instance, the Permanent Court of Arbitration administers two sets of rules: the *PCA Arbitration Rules* and the *UNCITRAL Arbitration Rules*.

[100] *UNCITRAL Model Law on International Commercial Arbitration* art 19 (1) sets forth the following provisions on party autonomy: "Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings".

[101] UNCTAD, "Recent Developments in Investor-State Dispute Settlement (ISDS) Updated for the Multilateral Dialogue on Investment" (2013) IIA Issues Note, No1 (UNCTAD/WEB/DIAE/PCB/2013/3), online: *UNCTAD* <unctad.org>.

[102] Blackaby et al, *supra* note 90 at para 6.01.

[103] *New York Convention*, arts V 2(a)–(b); Blackaby et al, *supra* note 90 at paras 6.03, and 6.10–6.19.

[104] On 30 November 2018, the United States and Canada agreed to replace *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can TS 1994 No 2 (entered into force 1 January 1994) [NAFTA] by the *United States-Mexico-Canada Agreement*, 30 November 2018, (as of June 2019 not in force) [USMCA].

[105] NAFTA, art 1128; Olivia Bennaim-Selvi, "Third Parties in International Investment Arbitrations: A Trend in Motion" (2005) 6:5 J World Investment & Trade 773 at 789.

[106] Blackaby et al, *supra* note 90 at para 2.165; Monique Pongracic-Speier, "Confidentiality and the Public Interest Exception - Considerations for Mixed International Arbitration" (2002) 3:2 J World Investment & Trade 231.

the submission for *amici* briefs, noted that "the [NAFTA] Chapter 11 arbitral process could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive."[107] Along similar lines, in 2014, the United Nations Commission on International Trade Law (UNCITRAL) enhanced the transparency of ISDS by adopting new Rules on Transparency in Treaty-based Investor-State Arbitration. These new rules, narrow the scope of the principle of confidentiality by facilitating public access to ISDS cases and acknowledging the need to balance public and private interests,[108] yet since they are mainly applicable to new treaties rather than new cases under existing ones - a condition imposed to limit the degree of transparency in ISDS, its reach remains very limited. These examples are reminders that party autonomy must sometimes be reconciled with other values.

In summary, the view of party autonomy as a supreme principle clashes with procedural rules of domestic and international courts, where private parties cannot draft their own procedural rules or select their judges. Outside of the courts, party autonomy can overcome some requirements and principles traditionally applied within the court system, but this ability also has its limits. In the following sections, I discuss party autonomy and its limitations in the context of domestic law, the source of ISDS authority, and the shared values.

[107] *Methanex Corporation v United States of America* (2005), Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae" as of 15 January 2001 at para 49 (ICSID) [*Methanex*].
[108] *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration* 2013 (effective date 1 April 2014) [*UNCITRAL Rules on Transparency 2013*].

a) Limits to Party Autonomy

Party autonomy itself stems from social values that it ought to represent.[109] There are various social goals and fundamental values, like autonomy, dignity and respect, status, and security, and since no value trumps the others in all circumstances they "need to be balanced against one another".[110] This balancing corresponds with the notion that one person's freedom should not interfere with another person's freedom. This notion of non-interference, together with a requirement to respect the general welfare, has been recognized in the Universal Declaration of Human Rights (UDHR):

> In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.[111]

The general welfare, according to Collins, requires the demands of private autonomy to "be reconciled with the need to support social solidarity"[112] and to illustrate this point he notes the protection of weaker parties in contract law.[113] Other goals connected to broad public values may include protection of the environment, public health and safety, and the rights and interests of third parties.

To balance competing values, social norms and interests, domestic laws ordinarily limit the validity and enforceability of party autonomy. Generally, parties cannot derogate from various

[109] Dagan, *supra* note 53 at 809–818.
[110] Oliver, *supra* note 26 at 64.
[111] *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) art 29(2) [*UDHR*].
[112] Collins, *supra* note 52 at 30.
[113] *Ibid* at 19.

mandatory rules or agree to contracts that are illegal[114] or contrary to public policy.[115] The purpose of these rules and public policy is to protect the public interest of the state.[116] It is natural, as Fry notes, that "social norms of a state shift over time, so too will a State's notion of public policy."[117] The prerogatives of a state define what constitutes its public policy and limit the range of rules from which parties can derogate. For illustration, under the EU Rome I and II Regulations, parties cannot derogate from provisions related to the protection of weaker parties[118] and the rights of third parties.[119] Considering the legality of agreements, an English court, for instance, refused to enforce an illegal contract in *Soleimany v Soleimany* where the parties, a father and son, breached Iranian law by smuggling carpets out of Iran.[120] By refusing to enforce this contract to engage in illegal activity, the court sought to "preserve the integrity of its process, and to see that it is not abused."[121] The Court of Justice of the European Union (CJEU)[122] found as contrary to public policy a non-compliance with the EU competition law. Also, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards[123] recognizes domestic mandatory rules and public policy as legal limits on parties' freedom to contract. Thus, being contrary to public

[114] Barry Leon & Graham Reynolds, "A Canadian Perspective: Choice of Law and Choice of Forum" (2005) 18:2 Intl L Practicum 130.
[115] Blackaby et al, *supra* note 90 at paras 3.101–3.103, 6.03, and 11.104.
[116] James D Fry, "Désordre Public International under the New York Convention: Wither Truly International Public Policy" (2009) 8:1 Chinese J Intl L 81 at 86.
[117] *Ibid* at 90, citing Julian D M Lew et al, *Comparative International Commercial Arbitration* (Hague: Kluwer Law International BV, 2003).
[118] *Rome II Regulation*, recital para 31.
[119] *Ibid* art 14 s 1.
[120] Blackaby et al, *supra* note 90 at paras 3.101–103, 11.04; *Soleimany v Soleimany*, [1999] QB 785; [1998] WLR 811; [1999] 3 All ER 847.
[121] Blackaby et al, *supra* note 90 at para 3.102.
[122] Before the *Lisbon Treaty*, *supra* note 86, the court was called the ECJ and that name is still in use; however, this thesis will use the new version CJEU.
[123] *New York Convention*, art V 2(a)–(b).

policy is a reason for invalidating and declining to enforce the agreement under the New York Convention.[124]

Likewise, in international transactions the most important limit to party autonomy, according to the tribunal in *Niko v Bangladesh*,[125] is international public policy.[126] Arbitrators cannot give effect to contracts that conflict with it. This international public policy, a term lacking precise definition,[127] is in fact a domestic public policy applied to foreign awards.[128] Thus, international arbitration is not independent of, but has its ties to, national laws and public policies.

A "truly" international public policy, also called "transnational public policy" is, in contrast, "quasi-universal in nature" and thus goes beyond domestic public policy.[129] Lalive conceptualized this transnational public policy as a set of general principles that prevail over all other domestic and international norms.[130]Among these principles are, for example, "the prohibition of corruption, slavery, drug trade, terrorism, genocide, the regulation of the trade of organs and weapons."[131] Also, the tribunal in *World Duty Free v Kenya* distinguished international public policy from transnational public policy[132] and defined the latter as "signifying an international consensus as to

[124] Giuditta Cordero-Moss, "Limits to Party Autonomy in International Commercial Arbitration" (2014) 1 Oslo L Rev 47 at 49–51. See the court's decision in *Eco Swiss China Time Ltd v Benetton International NV*, C-126/97, [1999] ECR I-3055.
[125] *Niko Resources (Bangladesh) Ltd v People's Republic of Bangladesh et al*, Decision on Jurisdiction (2013) Case Nos ARB/10/11 and ARB/10/18, at para 434 (ICSID) [*Niko v Bangladesh*].
[126] Alec Stone Sweet & Florian Grisel, *supra* note 51 at 41–42.
[127] Pierre Lalive, "Transnational (or Truly International) Public Policy and International Arbitration" in Pieter Sanders & T M C Asser Institute, eds, *Comparative Arbitration Practice and Public Policy in Arbitration*, ICCA congress series no 3 (Deventer: Kluwer Law and Taxation Publishers, 1987) 257 at 272.
[128] Alec Stone Sweet & Florian Grisel, *supra* note 51 at 40; Fry, *supra* note 116 at 87–88, 98; *World Duty Free Co Ltd v Republic of Kenya* (2006), Case No Arb/00/7, IIC 277 at para 138 (ICSID) [*World Duty Free*].
[129] Fry, *supra* note 116 at 88–89; Alec Stone Sweet & Florian Grisel, *supra* note 51 at 40; *World Duty Free*, *supra* note 128 at para 139.
[130] Lalive, *supra* note 127 at 286.
[131] Alec Stone Sweet & Florian Grisel, *supra* note 51 at 39; Lalive, *supra* note 127 at 286–295.
[132] *World Duty Free*, *supra* note 128 at paras 138–139; Alec Stone Sweet & Florian Grisel, *supra* note 51 at 40.

universal standards and accepted norms of conduct that must be applied in all fora."[133] For Sweet and Grisel this transnational public policy is a result of "judicialization" of international arbitration, both commercial and treaty-based, with signs of "constitutionalization".[134] They describe this judicialization as a form of governance by tribunals "in the name of a larger, transnational community" and not just dyadic disputes.[135] Thus, in their decision-making, arbitrators, instead of focusing solely on the interests of the disputing parties, are obliged to take into account the interests of the wider society.[136] Under the next constitutionalization model, the arbitrator is "an Agent of a wider international legal order",[137] meaning the norms and practices that are shared among national, treaty-based and transnational legal systems and that are binding on all international judges as well as arbitrators.[138]

In sum, parties to a dispute can make choices but they must be bona fide, legal, and subject to the domestic mandatory rules and to domestic, international, and transnational public policy. Party autonomy is not an unrestricted principle and is always limited by higher laws and norms, social values, and goals.[139]

[133] *World Duty Free*, *supra* note 128 at para 139.
[134] Alec Stone Sweet & Florian Grisel, *supra* note 51 at 42.
[135] *Ibid* at para 2.2.
[136] *Ibid*.
[137] *Ibid* at 34.
[138] *Ibid* at 24.
[139] Blackaby et al, *supra* note 90 at paras 3.101–3.103, and 11.104; Dagmar Coester-Waltjen, "Constitutional Aspects of Party Autonomy and Its Limits – The Perspective of Law" in Stefan Grundmann, Wolfgang Kerber & Stephen Weatherill, eds, *Party Autonomy and the Role of Information in the Internal Market* (Walter de Gruyter, 2001) 41 at 42.

b) Party Autonomy versus Sovereignty

Proponents of party autonomy as the supreme principle in ISDS deem the disputing parties to be the source of the authority to arbitrate. Unquestionably, states like foreign investors can and frequently do act in a commercial capacity. However, treaty-based ISDS is not founded on agreements of two commercial parties seeking to achieve their business interests. On the contrary, ISDS stems from IIAs that are negotiated by states in their sovereign capacities.[140] Thus, ISDS derives its authority from the state and deals with acts or inaction of the state in its sovereign capacity.[141] Moreover, in ISDS, parties act in asymmetric roles unlike in commercial relations. In practice, this asymmetry means that the investor as a private party enjoys the right to sue the host state with generally no attached duties, whereas the state acts as a sovereign entity that has obligations toward the investor but cannot initiate the lawsuit.[142]

Along these lines, Bjorklund maintains that in the context of ISDS "states have voluntarily given more rights to individuals, including the ability, in some instances, to press their own claims."[143] Her assertion goes further by claiming that ISDS includes some abrogation of states'

[140] Anthea Roberts, "Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System" (2013) 107:1 AJIL 45 at 58.
[141] Van Harten, *supra* note 25 at 60; Hong-Lin Yu & Laurence Shore, "Independence, Impartiality, and Immunity of Arbitrators - US and English Perspectives" (2003) 52 ICLQ 935 at 965–7; Alan Scott Rau, "Integrity in Private Judging" (1997) 38:2 S Tex L Rev 485 at 486–7; Anthea Roberts, "Divergence between Investment and Commercial Arbitration" (2012) 106 Am Soc'y Intl L Proc 297 at 298.
[142] Jan Ole Voss, *The Impact of Investment Treaties on Contracts Between Host States and Foreign Investors* (Leiden: Martinus Nijhoff Publishers, 2010) at 77; Lon L Fuller, "The Forms and Limits of Adjudication" (1978) 92:2 Harv L Rev 353 at 392–3; Van Harten, *supra* note 25 at 60; Yu & Shore, *supra* note 141 at 965–7; Rau, *supra* note 141 at 486–7; Gus Van Harten, "Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration" (2012) 50:1 Osgoode Hall LJ 211 at 217.
[143] Andrea K Bjorklund, "Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims" (2005) 45:4 Va J Intl L 809 at 885–886 noting Pasquale Fiore, *International law codified and its legal sanction, or, The legal organization of the society of states*, translated by Edwin Borchard (New York: Baker, Voorhis and Co, 1918) at 30–31.

sovereignty.[144] Yet states have by no means, by signing their treaties, given up their sovereign rights or duties and there is more to sovereignty than Bjorklund's position suggests.

Sovereignty has been cultivated for centuries and is a defining characteristic of the state.[145] According to Raustiala, "[s]overeignty is often defined as supreme and independent power or authority in government as possessed or claimed by a state or community in a defined territory."[146] Takeshita, in his analysis, notes Zitelmann's assertion "that rights are derived only from the sovereign power of states and that only a state can formulate, change or make extinct a right through a legal order."[147] Equally, in the investor-state relations, it is the host state that in its sovereign capacity grants foreign investors the right to sue. Correspondingly, it is the sovereign that negotiates the treaty's terms, its subsequent changes, and its potential termination. Thus, in the same capacity in which the state grants rights to be sued, it can also revoke, terminate or constrain these rights, both explicitly and implicitly. In the context of IIAs, Alvarez states that some states "are re-asserting their sovereign rights vis-à-vis foreign investors."[148] He notes that many states exercise "some of their exit and voice options."[149] Further, he claims that some other states employ more updated model treaties, like the 2004 US Model BIT, that grant foreign investors fewer rights and at the same time afford the host state more room to maneuver.[150] These

[144] Bjorklund, *supra* note 143 at 886 and 895.
[145] David Held, "Law of States, Law of Peoples: Three Models of Sovereignty" (2002) 8:1 Leg Theory 1 at 3.
[146] Kal Raustiala, "Rethinking The Sovereignty Debate In International Economic Law" (2003) 6:4 J Intl Econ L 841 at 842; Also, see Held, *supra* note 145 at 3.
[147] Keisuke Takeshita, "Critical Analysis of Party Autonomy: From a Theoretical Perspective" (2015) 58 Japanese YB Intl L 196 at 215 referred to Ernst Zitelmann, *Internationales Privatrecht* (Liepzig: Verlag Von Duncker & Humblot, 1897) Volume 1 at 55.
[148] José E Alvarez, "The Return of the State" (2011) 20:2 Minn J Intl L 223 at 234.
[149] *Ibid*.
[150] *Ibid* at 235.

observations reflect the fact, that when states decide to re-assert their sovereign rights, they can do so.

Further, party autonomy itself can only derive a supreme quality from a sovereign that has the authority and intention to grant it. The asserted supremacy thus implies that states intended this result. By implication, it suggests that states chose to move away from their established judicial practice and all of the corresponding values by enabling parties to override fundamental rights and values that are guaranteed constitutionally and recognized as human rights. In a situation like this, foreign investors could disregard other parties' rights, whereas host states could potentially opt out of some of their responsibilities to their citizens. This assertion is dubious.

If sovereign states intended to give party autonomy a supreme status and thus radically override established judicial practice, one could rightly anticipate that they would make their intentions clear. Yet IIAs are silent on the point. In the absence of evidence of explicit intention, the question arises whether the intention may be implied. For it to be so, IIAs' interpretation should follow the

rules of the Vienna Convention on the Law of Treaties (VCLT)[151] that codifies the general rules of the international law of treaty interpretation and reflects customary international law.[152]

According to the VCLT, textual silence warrants recourse to the treaty context, purpose, objective, any relevant rules of international law,[153] and to supplementary means of interpretation like the preparatory work.[154] Thus, adjudicators in interpreting IIAs should observe the context in which they were signed,[155] respect their purpose and objective, and consider any relevant rules of international law applicable in the relations between the signatory parties.[156] Concerning the IIAs' overarching purpose and goals, IIAs were created to protect foreign investors and level the playing field with domestic investors through provisions like National Treatment. The alleged supremacy of party autonomy, and with it the ability to disregard higher laws instead of leveling the playing field (given that domestic investors do not have these ISDS powers), favors foreign investors over

[151] Arts 31–32 (entered into force 27 January 1980): art 31 - General Rule Of Interpretation: "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) Any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended."; art 32 - Supplementary Means Of Interpretation: "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable."

[152] Some commentators oppose the applicability of the VCLT in the context of ISDS, arguing that IIAs should be interpreted according to their specific subject applying special rules instead of the VCLT general rules of interpretation. However, this departure does not seem substantiated. Along these lines, Arato claims that this departure from the general rules to special rules based on the treaty subject matter or purpose is unsatisfactory. Julian Arato, "Accounting for Difference in Treaty Interpretation Over Time" in Andrea Bianchi, Daniel Peat & Matthew Windsor, eds, *Interpretation in International Law* (Oxford: OUP Oxford, 2015) 205 at 205–212.

[153] Arts 31–32.

[154] See, for example, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, [1951] ICJ Rep 15 at 22–30.

[155] Art 31.

[156] Art 31(3)(c).

domestic ones. The claim that parties have these supreme powers, thus, refutes the purpose of IIAs since these powers hinder any prospect of equal footing. For other relevant rules, values of adjudicative independence, impartiality, and fairness are all recognized in public and private law domestically as well as in international law and in commercial arbitration. They are generally applicable in the relations between the treaty signatories. Moreover, IIAs, by giving foreign investors the right to choose from sets of laws and rules, show the intent to restrict parties' freedom. Further, it is questionable whether discarding these fundamental values, explicitly or implicitly, could ever be a legitimate act. The context, objective, and purpose of IIAs, though a bit simplified here, make it difficult to infer that states intended that fundamental values should give way to party autonomy.

If an act that overrides fundamental values is likely illegitimate, why would states intend to do it? Poulsen considers the reasons why developing countries signed "largely identical treaties, which significantly constrained their sovereignty" and concludes that treaty drafters often acted irrationally.[157] According to him, "many treaty drafters did not appreciate BITs' far-reaching repercussions and overestimated their benefits."[158] He describes this poor awareness as part of the "political realities of the treaty-making process"[159] and claims that, as developing countries lacked expertise and experience in negotiation, they relied on templates of other states.[160] Although Poulsen did not focus on developed states, one could assume that these political realities are not limited to developing nations.

[157] Lauge N Skovgaard Poulsen, *Bounded rationality and economic diplomacy: The Politics of Investment Treaties in Developing Countries* (Cambridge, UK: Cambridge University Press, 2015) at 5.
[158] *Ibid* at 193.
[159] *Ibid*.
[160] *Ibid* at 45–46.

In the absence of other evidence from the text or negotiations, silence seems to suggest that drafters did not consider that there is an issue or that they ignored it. In turn, ignorance points to poor preparation or a possibility that negotiators did not require any changes to proposed treaty models. While ignorance may not be a legitimate defense, it can help, when an express text is missing, to discern the intentions of these states.[161] Since there is no other compelling evidence that states intended to give parties' the power to override shared values, it seems that some commentators assign properties to IIAs that were never intended or expected. In other words, interpretative techniques that construe the party autonomy as the supreme principle bring unintended but far-reaching consequences.

It is also contentious whether the interpretation of states' intentions that attributes to party autonomy this sweeping supremacy could ever be a legitimate act. Sovereign powers are intertwined with duties to citizens. As Held puts it, "states remain of the utmost importance to the protection and maintenance of the security and welfare of their citizens."[162] Along these lines, Held claims that "[l]egitimate authority has become linked, in moral and legal terms, with the maintenance of human rights values and democratic standards."[163] Since the right to a fair trial, including all its associated values, belongs among these rights, it is the role of the state to protect that right.[164] Thus, Bjorklund's contention of state abrogation of some of its sovereign rights implies that the state has also given up some of its duties to protect its citizens. Although the state

[161] *Ibid* at 193.
[162] Held, *supra* note 145 at 14; President Franco Frattini, *Responsibility to Protect or Duty to Protect? New Perspectives on UN Humanitarian Interventions* presentation delivered at the Reykjavik Congress on Human Rights (12 April 2013), online: *SIOI UNA Italy* <www.sioi.org/responsibility-to-protect-or-duty-to-protect-new-perspectives-on-un-humanitarian-interventions/>.
[163] Held, *supra* note 145 at 17.
[164] *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 art 6 (entered into force 3 September 1953) [*ECHR Convention*].

can delegate some of its rights and duties, the state retains the ultimate responsibility for their application. These actions of the state, including delegation, remain subject to judicial review. While investors do not possess sovereign powers, rights, or duties, the state does and cannot abandon or abrogate them. Correspondingly, without sovereign power to do so, individuals exercising party autonomy cannot override state rights or duties to citizens.

It is also problematic that, by abandoning these values, states would breach not only their moral duties to their citizens but also some of their domestic and international obligations. Considering the former, Dunning in his analysis of Bodin's work maintains that "[t]here are laws in the state which the sovereign cannot touch."[165] Although he notes that Bodin's "allusions to these superior rules are far from clear", he claims that "they seem to indicate a somewhat vague notion in the writer's mind of what we call a constitution."[166] States have international obligations which they cannot unilaterally dispose of and they must abide by their constitutional laws. They all generally respect the values of fairness, independence, and impartiality as indivisible parts of the right to fair trial. Consequently, party autonomy seems unlikely to be the supreme principle in ISDS.

c) Party Autonomy and Shared Values

As noted, shared values of procedural fairness, in terms of standing and independence and impartiality, are recognized in domestic and international law, including commercial arbitration.[167] In the case of independence and impartiality, Fuller, in his assessment of forms and limits of adjudication, examines adjudication in the broadest sense – judicial and arbitral adjudication at the

[165] Wm A Dunning, "Jean Bodin on Sovereignty" (1896) 11:1 Pol Sci Q 82 at 96.
[166] *Ibid.*
[167] *IBA Guidelines*, *supra* note 49, art 1.

domestic and international level – and stresses the importance of impartial adjudicators in the rule of law order.[168] In the case of fairness and the right to be heard, Fellmeth and Horwitz stipulate that *audi alteram partem* - all parties must have an opportunity to be heard - applies to international tribunals.[169] In this subsection, I discuss these values in relation to party autonomy.

Independence and Impartiality

The requirements that a court must be independent and impartial are attributes of procedural fairness. Both attributes are fundamental to the rule of law. The right to an unbiased tribunal has been established by the principle of Natural Justice - *nemo debet esse judex in propria sua causa* or *nemo judex in re sua* - meaning that "no one should be judge of his or her own cause."[170] Independence refers to freedom from improper influence, whereas impartiality relates to freedom from bias or favoritism. The same principles of adjudicative independence and impartiality, though all typically related to criminal law, can be found, for example, in the bills of rights and human rights statutes in the United Kingdom,[171] Canada,[172] New Zealand,[173] and Australia.[174] Although corporations can typically invoke only some charter rights and freedoms and not others, they may demonstrate that a law breaching charter rights is unconstitutional.[175] According to the Australian Law Reform Commission, "[t]he elements of a fair trial appear to be related to the defining or

[168] Fuller, *supra* note 142 at 353–354, 365, and 391.
[169] Aaron X Fellmeth & Maurice Horwitz, *Guide to Latin in International Law* (Oxford: Oxford University Press, 2009) at 41.
[170] Shauer, *supra* note 38.
[171] *Human Rights Act 1998* (UK), art 6(1) [*HRA 1998*].
[172] *Canadian Charter of Rights and Freedoms*, s 11(d), Part I of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*CCRF*].
[173] *New Zealand Bill of Rights Act 1990* (NZ), 1990/109, s 25(a).
[174] Principles of a fair trial are set out in the *Charter of Human Rights and Responsibilities Act 2006* (Austl), 2006/43, s 24(1); *Human Rights Act 2004* (ACT), A2004/5, s 21(1).
[175] Alberta Civil Liberties Research Centre, "Who can make a Charter claim?" (last visited 17 September 2019), online: *ACLRC* <www.aclrc.com/who-can-make-a-charter-claim>.

essential characteristics of a court."[176] These elements include "the reality and appearance of the court's independence and its impartiality [and] the application of procedural fairness."[177] In *Cojocaru v BC British Columbia Women's Hospital & Health Center*,[178] the Supreme Court of Canada was asked to decide whether the process by which the trial judge reached his decision was procedurally fair. The court stated that "[a] fair process requires not only that the parties be allowed to submit evidence and arguments to the judge, but that the judge decide the issues independently and impartially as the judge is sworn to do."[179] In sum, judicial independence and impartiality are fundamental values for the process by which a fair decision is reached. It is of such importance that restraints are placed on judges to maintain public confidence in their integrity. In this vein, the Canadian Judicial Council, while considering whether judges can publicly participate in controversial political discussions, maintains that "the office of judge imposes restraints that are necessary to maintain public confidence in the impartiality and independence of the judiciary."[180]

As noted, Fuller takes the position that restraints that go with judicial office are also applicable to arbitrators.[181] Similarly, Sheppard argues that principles of independence and impartiality are both "fundamental to due process and confidence in investment treaty arbitration."[182] Sheppard examines the requirements of these two principles in a range of sources: the ICSID Rules, the PCA Rules, the IBA Guidelines, the Statute of the ICJ, national arbitral laws (including Dutch law,

[176] Commonwealth, Australian Law Reform Commission, *supra* note 27 at para 8.21.
[177] *Ibid*.
[178] 2013 SCC 30 at para 12, [2013] 2 SCR 357.
[179] *Ibid*.
[180] Canadian Judicial Council, *Ethical Principles for Judges* (Ottawa: Canadian Judicial Council, 2004) at 41, para D.5.
[181] Fuller, *supra* note 142 at 396–397.
[182] Audley Sheppard, "Arbitrator Independence in ICSID Arbitration" in Christina Binder et al, eds, *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford: Oxford University Press, 2009) 131 at 131.

Swiss law, English law, and United States law), and the European Convention of Human Rights (ECHR) art 6(1) in civil rights and criminal cases. Considering the ECHR, Sheppard notes that, although the Convention is "not directly applicable to private arbitration, national courts have sought to apply a test for arbitrator bias which is consistent with Article 6(1)."[183] He notes that the principles of independence and impartiality are required by "the UNCITRAL, the SCC, and other procedural rules, national laws and good practice."[184] Although under the Swiss Private International Law Act[185] parties may only challenge the independence of the adjudicator, the Swiss Constitution guarantees the right to an impartial judge.[186] In contrast, the ICSID Convention[187] requires the arbitrator to exercise only independent judgment,[188] whereas the English Arbitration Act 1996 requires only impartiality.[189] In the U.S., the Federal Arbitration Act (FAA)[190] is silent on this point and leaves the issue to individual states, where only the State of California expressly provides for challenges of arbitrators for justifiable doubts of their independence and impartiality. Thus, the fact that most of the forums that Sheppard examined provide a right to challenge an arbitrator for the lack of these two principles signifies their importance.

In the context of ISDS, domestic courts are often claimed to be biased in favor of their state.[191] In contrast, ISDS is frequently promoted as neutral and bias-free.[192] Accordingly, one may reasonably

[183] *Ibid* at 138.
[184] *Ibid*.
[185] Art 180(1)(c).
[186] The Swiss *Federal Constitution 1999*, art 30(1), provides that all legal disputes will be heard by an independent and impartial court; Sheppard, *supra* note 182 at 136.
[187] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (entered into force 14 October 1966) [*ICSID Convention*] complemented by *ICSID Regulations and Rules* (2006), ICSID/15.
[188] *Ibid*, art 14(1).
[189] *Arbitration Act 1996* (UK), ss 1(a), 24(1)(a), 33(1)(a); Sheppard, *supra* note 182 at 137.
[190] *United States Arbitration Act 1925*, 9 USC (2017) [*FAA*].
[191] Eberhardt & Olivet, *supra* note 5 at 11.
[192] *Ibid* at 34–55.

expect that ISDS provides a means of fair dispute resolution that even sophisticated domestic legal systems with multiple appellate mechanisms cannot achieve. As noted, for fair and unbiased adjudication, the principle of independence and impartiality is of the essence. Yet ISDS faces accusations of systemic bias and its protection of these values is a subject of concern and debate.[193] These claims are linked to a lack of institutional tools safeguarding these values and to perceived pro-investor bias since arbitrators appear to be financially interested in the outcome of the cases as well as in the "boom" of the industry.[194]

On the lack of institutional safeguards, the special concern is, for illustration, with the lack of security of tenure, an objective method of case assignment, and prohibitions on outside remuneration.[195] These concerns are linked with the fact that arbitrators can act in different capacities (as arbitrators and as counsel)[196] and are selected typically by parties on a case-by-case basis. Further, critics argue that there is a possibility that arbitrators may behave in a pro-investor manner not only to support the boom of the industry but also to secure future appointments.[197] All these concerns have been regarded as at least problematic.

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[193] Stavros Brekoulakis, "Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making" (2013) 4:3 J Intl Disp Settlement 553.

[194] Steffen Hindelang & Markus Krajewski, "Conclusion and Outlook: Whither International Investment Law?" in Steffen Hindelang & Markus Krajewski, eds, *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (Oxford: Oxford University Press, 2016) 377 at 387; Gus Van Harten, "Pro-Investor or Pro-State Bias in Investment-Treaty Arbitration? Forthcoming Study Gives Cause for Concern" (13 April 2012), online: *International Institute for Sustainable Development* <www.iisd.org/itn/2012/04/13/pro-investor-or-pro-state-bias-in-investment-treaty-arbitration-forthcoming-study-gives-cause-for-concern/>; For the claim of "financial interest" see: Eberhardt & Olivet, *supra* note 5 at 38.

[195] Arseni Matveev, "Investor-State Dispute Settlement: The Evolving Balance between Investor Protection and State Sovereignty" (2015) 40:1 UWA L Rev 348 at 351; Gus Van Harten, "Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law" in Stephan W Schill, ed, *International investment law and comparative public law* (Oxford: Oxford University Press, 2010) 627 at 627–628.

[196] Joost Pauwelyn, "The Rule of Law Without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators from Venus" (2015) 109:4 AJIL 761 at 783.

[197] M Sornarajah, "The clash of globalizations and the international law on foreign investment [The Simon Reisman Lecture in International Trade Policy]" (2003) 10:2 Can Foreign Pol'y 1 at 9; Muthucumaraswamy Sornarajah, "Mutations of Neo-Liberalism in International Investment Law Special Issue: Third World Approaches to International Law" (2011) 3:1 Trade L & Dev 203 at 214; Van Harten, *supra* note 195 at 627–628; Kate Miles,

The financial interest debate stems from the systemic design of ISDS arbitrators' *ad hoc* remuneration, generally with no set monthly salaries or caps on remuneration.[198] Thus, it is of concern that the motives of ISDS arbitrators in their decision-making may be compromised because they have a direct financial interest in the frequency and duration of claims.[199] Regarding the industry's "boom", some ISDS opponents argue that adjudicators may themselves support its growth by favoring investors. Along these lines, Bolivia accused ICSID of "favoring multinational companies in its rulings"[200] and Venezuela saw an arbitration as biased in favor of corporations.[201] In 2007, Bolivia denounced the ICSID Convention, followed in 2010 and 2012 by Ecuador and Venezuela respectively.[202] This kind of profiting, although indirect, is against the principle of *nemo judex in parte sua*, i.e. that the judge of a case should have no personal interest in its outcome.[203]

Commentators opposing claims of bias in ISDS maintain that they are not substantiated, as it is difficult empirically to prove or disprove the existence of actual bias in the mind of any adjudicator.[204] However, even if there is no actual bias, the mere suspicion or appearance of bias

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"Reconceptualising international investment law: bringing the public interest into private business" in Meredith Kolsky Lewis & Susy Frankel, eds, *International Economic Law and National Autonomy* (Cambridge, UK: Cambridge University Press, 2010) at 309.

[198] Eberhardt & Olivet, *supra* note 5 at 34–55.

[199] Gus Van Harten, "The European Union's Emerging Approach to ISDS: A Review of the Canada-Europe CETA, Europe-Singapore FTA, and European-Vietnam FTA" (2016) 1:1 U Bologna L Rev 138 at 144.

[200] "Telecom Italia wants arbitration over Bolivian firm" (23 October 2007), online: *Reuters* <www.reuters.com/article/bolivia-telecom-italy-idUSN2331222920071023>; Fernando Cabrera Diaz, "Pan American Energy takes Bolivia to ICSID over nationalization of Chaco Petroleum – Investment Treaty News" (11 May 2010), online: *IISD* <www.iisd.org/itn/2010/05/11/pan-american-energy-takes-bolivia-to-icsid-over-nationalization-of-chaco-petroleum/>.

[201] Sergey Ripinsky, "Venezuela's Withdrawal From ICSID: What it Does and Does Not Achieve – Investment Treaty News" (13 April 2012), online: *IISD* <www.iisd.org/itn/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve/>; Brekoulakis, *supra* note 193 at 555.

[202] *List of Contracting States and Other Signatories of the Convention (as of April 12, 2019)* (ICSID/3) at 5 online: *ICSID* <icsid.worldbank.org/en/Pages/icsiddocs/List-of-Member-States.aspx>.

[203] David Robertson, *A Dictionary of Modern Politics*, 3rd ed (London, UK: Europa Publications, 2002), sub verbo "Natural Justice".

[204] William W Park, "Arbitrator Integrity" in Michael Waibel et al, eds, *The Backlash Against Investment Arbitration: Perceptions and Reality* (Austin, Tex: Wolters Kluwer Law & Business, 2010) 189 at 213–216.

is problematic if it undermines public confidence in the adjudication.[205] This appearance of systemic fairness (includes impartial and unbiased adjudication) is important to preserve due process.[206] Adjudicative impartiality and independence, while being upheld, thus also need to be seen to be upheld for the public to make an informed opinion and build trust in the fairness of the adjudicative processes.[207] According to Neudorf, measures of judicial independence create the necessary space between the judiciary and sources of undue influence to ensure confidence in impartial adjudication.[208] What matters is whether the adjudicative system appears fair or not.

Additionally, if party autonomy is the supreme principle, one would assume that ISDS tribunals will respect its supremacy. However, tribunals take approaches that are far from unified since there are instances where they appear to use their interpretative powers to disregard the parties' choices. For illustration, in *CME v Czech Republic*[209] the tribunal, in delivering its Partial Award, rejected the use of domestic law of the host state as the applicable law even though the Bilateral Investment Agreement so specified.[210] Moreover, this rejection is in striking contrast to the tribunal's application of the host state's domestic law in the Final Award. In this vein, Van Harten maintains

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[205] Steffen Hindelang, "Study on Investor-State Dispute Settlement ('ISDS') and Alternatives of Dispute Resolution in International Investment Law" (last visited 16 May 2019), online: *Europäischer Salon* <publixphere.net/i/salon/page/study_on_investorstate_dispute_settlement_isds_and_alternatives_of_dispute_resolution_in_international_investment_law_by_prof_dr_steffen_hindelang_llm_1.html> at para 1.3.3; Gus Van Harten, "Perceived Bias in Investment Treaty Arbitration" in Michael Waibel et al, eds, *The Backlash Against Investment Arbitration: Perceptions and Reality* (Austin, Tex: Wolters Kluwer Law & Business, 2010) 433; Van Harten, *supra* note 194.

[206] Sternlight, *supra* note 55 at 87–89.

[207] Jonathan Soeharno, *The Integrity of the Judge: A Philosophical Inquiry* (Farnham, England: Ashgate, 2009) at 104.

[208] Lorne Neudorf, "Judicial Independence: The Judge as a Third Party to the Dispute Attitudes" (2012) 2 Revista Forumul Judecatorilor 28 at 62–65.

[209] *CME Czech Republic BV (The Netherlands) v The Czech Republic* (2001), Partial Award, 9 ICSID 121 (ICSID) (UNCITRAL (1976)).

[210] Christoph Schreuer, "Failure to Apply the Governing Law in International Investment Arbitration" (2002) 7 Aus Rev Intl & Eur L 147; *Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic*, 29 April 1991, art 8(6) (entered into force 1 October 1992) [*Czech Republic - Netherlands BIT (1991)*].

that tribunals in numerous cases declined "to yield to contractually-agreed dispute settlement provisions."[211] For example, he observes that in *Sempra v Argentina* case,[212] "the tribunal de-emphasized … principles of party autonomy and sanctity of contract in situation where these principles supported restraint".[213] These approaches indicate that various ISDS tribunals do not regard party autonomy as the highest principle, a fact that suggests that respect for party autonomy is qualified and has limits.

Once again, principles of independence and impartiality have been recognized as values of a fair adjudication shared by private and public law. Although ISDS is often presented as superior to domestic courts, it appears to have its own issues with bias as it lacks systemic safeguards that guarantee adjudicative independence and impartiality and ensure the appearance of fairness in adjudication. Above all, the system creates opportunities for actual bias by its inadequate mechanisms of appointment and remuneration, leaving arbitrators financially interested in the outcomes of cases and dependent on future re-appointments. This practice undermines public trust in the system and its fairness. Thus, it is questionable how much respect the design of ISDS shows to these shared values.

Fair representation

Proponents of party autonomy as a supreme principle characterize ISDS as a binary dispute between a foreign investor and the host state, both acting in a private capacity. This view implies

[211] Gus Van Harten, "The Boom in Parallel Claims in Investment Treaty Arbitration" (19 January 2014), online: *IISD* <www.iisd.org/itn/2014/01/19/the-boom-in-parallel-claims-in-investment-treaty-arbitration/>.
[212] *Sempra Energy International v The Argentine Republic* (2005), Decision on Objections to Jurisdiction, Case No ARB/02/16) at para 123 (ICSID) [*Sempra v Argentina*].
[213] Gus Van Harten, *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration*, 1st ed (Oxford, UK: Oxford University Press, 2013) at 144; Van Harten, *supra* note 211.

that no interest of other parties is at stake and that there is a limited or no place for public objectives unless the parties provide their consent. Yet ISDS is not a binary dispute resolution forum - ISDS deals with the host state's actions and inactions, and it is not uncommon for other adversely affected stakeholders to be involved and the forum influences, directly or indirectly, the welfare of the host state's citizens, making its decisions of public concern.

In domestic civil adjudication, the interests of other affected parties, as well as non-parties, have been commonly considered and protected. According to Fuller, participation is "the very core of adjudication."[214] This principle of participation requires that civil law procedures are structured in such a way that they provide "each interested party with a right to adequate participation."[215] Since fair procedures are in the interest of the entire society,[216] states do not confine this recognition, that another party may have an interest in other parties' lawsuit, to administrative cases but apply it also in private disputes. Thus, in the court setting, the procedural law generally authorizes persons directly or indirectly affected by a lawsuit "to intervene in the pending lawsuit if their own claim has a sufficiently close connection in law or fact."[217] Thus, adequate participation can be understood as a fundamental principle.

Despite its fundamental importance, there may be instances when participation can be found problematic.[218] According to Fuller, some issues are unsuitable for adjudication due to their unpredictable and far-reaching effects on a large and unknown number of affected persons like in

[214] Fuller, *supra* note 142 at 396.
[215] Lawrence B Solum, "Procedural Justice" (2004) 78 Cal L Rev 181 at 321.
[216] John K Morris, "Nonparties and Preclusion by Judgment: The Privity Rule Reconsidered" (1968) 56:4 Cal L Rev 1098 at 1100: He notes that "justice can only prevail with a balancing of competing interests."
[217] Stephen C Yeazell et al, "Procedural law" (20 January 2017), online: *Encyclopedia Britannica* <www.britannica.com/topic/procedural-law>.
[218] Fuller, *supra* note 142 at 394–404.

polycentric (many centered) disputes.[219] In polycentric disputes, a fundamental issue is "that each of the various forms that award might take … would have a different set of repercussions and might require in each instance a redefinition of the "parties affected"."[220] In other words, it is impossible with any precision to identify the persons affected. He explains this issue as a spider's web where a pull on one strand distributes tensions throughout the whole web and, thus, affects other parts of the web.[221] He notes that doubling the original pull "will rather create a different complicated pattern of tensions" instead of doubling the original tension.[222] The number of affected participants is typically large and unknown and, thus, these disputes suffer from inadequate participation that leads to an inadequately informed adjudicator and, hence, a decision based on insufficient facts. Since participation by those affected is limited, the court is unable to know the extent of potential or actual repercussions.[223] For all these issues, instead of adjudication, he suggests "managerial direction" or "contract" as better solutions to these polycentric disputes.[224]

ISDS itself displays features of polycentric dispute resolution. Its awards have far-reaching and unpredictable effects typically on many stakeholders. Yet no party other than the disputing ones can participate; ISDS has no procedures enabling these other affected parties to protect their interests as of right. Further, while the number of other affected parties is often large, these individuals typically are unknown. Based on their lack of participation, ISDS tribunals are inadequately equipped to reach fair decisions. Hence, it is questionable whether ISDS in its current

[219] *Ibid*.
[220] *Ibid* at 395.
[221] *Ibid*.
[222] *Ibid*.
[223] J W F Allison, "Fuller's Analysis of Polycentric Disputes and the Limits of Adjudication" (1994) 53:2 Cambridge LJ 367 at 372.
[224] Fuller, *supra* note 142 at 398.

form is suitable to resolve investor-state disputes, even if, finding the best solution for investor-state dispute resolution is beyond the scope of the present research.

Despite the traditional rule that persons, to be bound by a judgment, should have their "day in court", there are limits to the right to participate.[225] For instance, parties may be precluded from participating in class actions or may be restricted by *res judicata*.[226] In turn, courts devised various solutions, like representation, to overcome these preclusions in the aim to protect those who cannot participate.[227] In the US, for instance, the requirements of due process that are linked to other parties are set in *Hansberry v Lee*.[228] The other parties must be given "notice and [an] opportunity to be heard."[229] Hence, procedures must fairly ensure they protect the interests of absent parties[230] and, if other parties are represented, this representation must be adequate "by parties who are present."[231] These requirements generally mean that non-parties are not bound when the representation of their interests is inadequate.[232]

The right to participate is a mechanism that enables affected parties to be heard. In the context of ISDS, states recognize that other parties may have an interest in the lawsuit, yet their participation generally is not guaranteed. In IIAs, states cover other parties' interests in provisions related to so-called "non-disputing parties" (the other signatory states to a treaty) and "non-parties" (all other

[225] Morris, *supra* note 216 at 1101–1104; Solum, *supra* note 215.
[226] Morris, *supra* note 216 at 1104–1105; Janet Walker, "Recognizing Multijurisdiction Class Action Judgments within Canada: Key Questions—Suggested Answers" (2008) 46:3 Can Bus LJ 450 at 452.
[227] Morris, *supra* note 216 at 1104–1105; Walker, *supra* note 226 at 452.
[228] *Hansberry v Lee*, 311 US 32 (1940), 61 S Ct 115; Morris, *supra* note 216 at 1103.
[229] *Hansberry v Lee*, *supra* note 228 at 40; Morris, *supra* note 216 at 1103 (note 37): "The opportunity to be heard does not mean that the person to be bound must control the action but only that he be able to participate."
[230] *Hansberry v Lee*, *supra* note 228 at 42.
[231] *Ibid* at 43.
[232] *Ibid*; Also, Morris, *supra* note 216 at 1105.

persons or entities).[233] Treaties commonly limit participation to parties having a significant interest and to submissions in the written or oral form, called *amicus curiae* briefs, so long as they do not disrupt the proceedings or unduly burden or unfairly prejudice the disputing parties.

The purpose of *amicus curiae* - translated as "friend of the court" - is to assist the court by supporting a claim of one of the disputing parties.[234] Its role is ancillary in that the parties that intervene as *amici* do not pursue their own claims. Accordingly, *amicus* briefs serve well parties like NGOs that want to support some underlying concepts of the dispute, but not other affected parties that want to protect their direct and legally protectable stake in the resolution of the claim. Further, *amicus* is typically not guaranteed as of right and other parties therefore can only file their submissions if the tribunal so allows.

An exemplary case of the significance of participatory rights and its inadequate protection in ISDS is *Chevron v Ecuador*.[235] In a separate and unrelated dispute, Ecuadorian citizens obtained a legal decision against Chevron that obliged Chevron to pay US$ 18 billion for environmental and other harms. Chevron used the ISDS arbitral tribunal to seek to escape this obligation by stripping that

[233] For example, *Comprehensive Economic and Trade Agreement (CETA) Between Canada, of the One Part, and the European Union and its Member States, of the Other Part*, 14 September 2016, art 29 (entered into force 1 October 2014) [*CETA*]; *Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments*, 9 September 2012, art 29 (entered into force 1 October 2014) [*Canada-China FIPA*]; *Agreement Between Canada and the Czech Republic for the Promotion and Protection of Investments*, 6 May 2009, Annex B s b(2) (entered into force 22 January 2012) [*Canada-Czech Republic BIT*]; *Treaty Between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment*, 19 February 2008, art 28 (entered into force 1 January 2012) [*USA-Rwanda BIT*]; *2012 US Model Bilateral Investment Treaty*, art 28(3).
[234] Yeazell et al, *supra* note 217.
[235] *Chevron Corporation and Texaco Petroleum Corporation v The Republic of Ecuador* (___), Case No 2009-23 (PCA) (UNCITRAL (1976)) [*Chevron v Ecuador*].

award from the Ecuadorians.[236] Hence, the ISDS action posed a serious threat to the direct interest of Ecuadorian plaintiffs.[237] In February 2012, Chevron succeeded and the arbitral tribunal made a non-monetary order requiring the Ecuadorian government "to take all measures necessary to suspend or cause to be suspended the enforcement and recognition … of any judgments" pronounced in favor of the Ecuadorians and against Chevron.[238] Notably, despite that, this order denied the Ecuadorian plaintiffs standing (they were "non-parties") and also denied them the right to defend their legal interests.

Bernhard von Pezold and others v Zimbabwe[239] is another example of an ISDS case where the rights of other parties were affected. The tribunal made a non-monetary order for restitution of title to an expropriated land. Yet the land was occupied by four indigenous Chimanimani communities, the Chikukwa, Ngorima, Chinyai, and Nyaruwa peoples,[240] the leaders of which submitted a joint petition.[241] Even though these parties were recognized as potentially adversely affected, they did not have the right to participate in the dispute. Similarly, in *Border Timbers Limited and others v Republic of Zimbabwe*,[242] an issue related to other parties' rights was discussed. In both cases, the

[236] *Ibid* Second Interim Award (2012), para 3; Lise Johnson, "Case Note: How Chevron v Ecuador is Pushing the Boundaries of Arbitral Authority – Investment Treaty News" (13 April 2012), online: *IISD* <www.iisd.org/itn/2012/04/13/case-note-how-chevron-v-ecuador-is-pushing-the-boundaries-of-arbitral-authority/>.
[237] *Request for Precautionary Measures* (9 February 2012) at 1, online: <chevroninecuador.org/assets/docs/2012-02-09-IACHR-req-for-precautionary-measures.pdf>: submitted on behalf of Ecuadorian plaintiffs to the Inter-American Commission on Human Rights.
[238] *Chevron v Ecuador*, Second Interim Award (2012), para 3; Johnson, *supra* note 236.
[239] *Bernhard von Pezold and Others v Republic of Zimbabwe*, Case No ARB/10/15 (ICSID) [*Bernhard von Pezold v Zimbabwe*]; and related *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co (Private) Limited v Republic of Zimbabwe* (2012), Procedural order No 2, Case No ARB/10/25 (ICSID) [*Border Timbers v Zimbabwe*].
[240] *Bernhard von Pezold v Zimbabwe*, *supra* note 239; *Border Timbers v Zimbabwe*, *supra* note 239 at para 18.
[241] "Human Rights Inapplicable in International Investment Arbitration?" (June 2012), online: *European Center for Constitutional and Human Rights* <www.ecchr.eu/en/case/>.
[242] *Border Timbers v Zimbabwe*, *supra* note 239.

tribunal refused to hear the *amici curiae* briefs from indigenous communities, even though the tribunal acknowledged that the proceedings could impact their rights.[243]

Another example of a case of the interest of a local community is *Clayton/ Bilcon v Canada*,[244] where the foreign investor's business had an impact on the local environment and community values, but the local community had no guaranteed participation in this dispute. A similar issue arose in a case scheduled for an arbitral hearing in 2019[245] involving a mining project run by Gabriel Resources. The mining company sought a license to mine gold in Romania in a place called Rosia Montana. The mining project would uproot Rosia Montana's population and override property owners' interests. After public protests, the Romanian government withdrew its support for the mining project and Gabriel Resources, the company, brought a claim to an ISDS arbitral tribunal, claiming $4.4 billion in damages. Facing this threat of arbitration, the Romanian government withdrew Rosia Montana from an application to list it as a UNESCO World Heritage site and seems to want to settle with the company.[246] If the project goes ahead, Rosia Montana's population and property owners will be ousted. If the government goes to arbitration, the owners, like in all other ISDS cases, will have no right of standing to defend their rights.

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[243] European Center for Constitutional and Human Rights, supra note 241; Examples of additional cases dealing with *amicus curiae* briefs are: *Glamis Gold, Ltd v The United States of America* (2009), Award (ICSID) (UNCITRAL (1976)) [*Glamis Gold v United States*]; *Methanex, supra* note 107.

[244] *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware v Government of Canada* (___), Case No 2009-04 (PCA) [*Clayton and Bilcon v Canada*].

[245] Cecilia Jamasmie, "Romania says Gabriel Resources $4.4bn lawsuit over halted project can't be heard by arbitrators" (14 June 2018), online: *ID Platform* <isds.bilaterals.org/?romania-says-gabriel-resources-4>.

[246] "Take Rosia Montana back to the streets! UNESCO file stopped by Romanian government" (6 June 2018), online: *Rosia Montana* <www.rosiamontana.org/content/take-rosia-montana-back-streets-unesco-file-stopped-romanian-government?language=en>.

These examples show the importance of guaranteed participation. Alongside the interests of individuals, there are broad societal needs that require protection, but *amici* are seen as too restrictive. For instance, the European Commission, due to the need to protect consistency of EU law, has been seeking a "more effective legal recourse" than *amici*.[247] Although *amicus* is from its very nature a highly restricted form of participation, arbitrators frequently reject *amici* submissions even when the applicants are directly affected.[248] For their inability to influence the outcome of a case that directly affects them, the rejected petitioners become the real victims of a decision. Thus, it is questionable whether this limited recognition of other parties' rights is sustainable and whether *amici* can ever be considered a suitable mechanism to protect rights of adversely affected stakeholders.

Although *amicus* is an insufficient tool to guarantee participation to other affected parties, proponents of party autonomy in ISDS still regard it as an unacceptable interference with the parties' freedom of contract. One argument, for instance, suggests that *amici* briefs restrain party autonomy and undermine parties' arbitral strategies.[249] Ishikawa rebuts this argument by maintaining that the need to respect these strategies "is not a legitimate reason to oppose the acceptance of *amicus curiae* submissions."[250] The rights of other parties to protect their interests deserve to be respected even in private disputes. On another note, Viñuales argues that introducing a public aspect in the form of *amici* may "erode the traditional basis of arbitral proceedings" [251]

[247] Eugenia Levine, "Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation" (2011) 29:1 BJIL 200 at 214–216.
[248] See for example: *Bernhard von Pezold v Zimbabwe*, *supra* note 239; *Border Timbers v Zimbabwe*, *supra* note 239; *Chevron v Ecuador*, *supra* note 235; *Glamis Gold v United States*, *supra* note 243; *Methanex*, *supra* note 107.
[249] Tomoko Ishikawa, "Third Party Participation in Investment Treaty Arbitration" (2010) 59:2 ICLQ 373 at 398 citing Jorge E Viñuales, "Amicus Intervention in Investor-State Arbitration" (2006) 61:4 Disp Resol J 72 at 75.
[250] Ishikawa, *supra* note 249 at 398.
[251] Viñuales, *supra* note 249 at 75.

since parties did not provide their consent to the third parties to intervene as required under the party autonomy principle. Yet in the treaty-based ISDS, a non-binary form of dispute resolution, there is no reason that parties' consent should be required.

The right to a fair trial is a fundamental right in domestic and international law, recognized as a human right and guaranteed by all general universal and regional human rights instruments as well as in various national constitutions.[252] Attributes of a fair trial can be found, for example, in the *International Covenant on Civil and Political Rights* (ICCPR).[253] In Europe, the European Convention of Human Rights stipulates that parties should be given adequate notice and an opportunity to be heard.[254] Other examples are the UK Human Rights Act 1998 and the US Due Process clause in the 14th Amendment to the US Constitution. The lack of this right of participation violates the principle of natural justice - *audi alteram partem*[255] - as a fundamental rule of fairness that requires allowing other parties to be heard.[256] According to Solum, the "right to be notified and given an opportunity to be heard are prerequisites for a procedure to be considered fair."[257] The right to a fair hearing applies to all affected parties despite being branded

[252] See, for instance: *ECHR Convention*, *supra* note 164; *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 art 14 (entered into force 23 March 1976) [*ICCPR*]; *UDHR*, *supra* note 111; African Commission on Human & Peoples' Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, 2003; In civil, criminal and administrative proceedings: Office of the High Commissioner for Human Rights, *Human Rights in the Administration of Justice: A manual and facilitator's guide on human rights for judges, prosecutors and lawyers* (New York: United Nations, 2003) at para 4.1; ECHR, *Guide on Article 6 of the European Convention on Human Rights: Right to A Fair Trial (civil limb)* (Council of Europe/European Court of Human Rights, 2018); See also, Christos Rozakis, "The Right to a Fair Trial in Civil Cases" 4:2 Jud Stud Inst J 96 at 96–97; In respect of all civil proceedings see also, *Apeh Üldözötteinek Szövetsége and Others v Hungary*, No 32367/96 (5 October 2000) ECHR.
[253] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 art 14 (entered into force 23 March 1976) [*ICCPR*].
[254] *ECHR Convention*, art 6(3).
[255] Fellmeth & Horwitz, *supra* note 169.
[256] Robertson, *supra* note 203; Gus Van Harten, *Sold Down the Yangtze: Canada's lopsided investment deal with China* (Toronto: James Lorimer & Company, 2015) at 82.
[257] Solum, *supra* note 215 at 191.

as “non-parties” since the failure to facilitate their meaningful participation poses a threat to their rights to a fair hearing.

One of the purposes of IIAs was to treat foreign investors fairly and equally to domestic ones by creating a level playing field.[258] Now, foreign investors can sue their host states directly under an IIA instead of using diplomatic avenues.[259] More, the system gives them rights that none of the domestic investors or ordinary citizens in any other field of law can enjoy, whereas other affected stakeholders are discriminated against since the system does not provide suitable mechanisms by which to protect their interests. Instead of leveling the playing field, this system provides preferential treatment to foreign investors at the expense of other stakeholders, resulting in another form of unfairness.

To sum up, a guaranteed right of standing is a mechanism by which parties can influence the outcome of the dispute. Participants submit relevant facts to enable adjudicators to exercise fair decision-making. It is inadequate to use *amicus curiae* as the only avenue in ISDS for other affected stakeholders to influence adjudicators’ decision-making because *amicus* falls short of the right of standing to protect one’s legal rights and interests. This inbuilt unfairness from the systemic failure to balance interests among all directly affected stakeholders is pushed further by the claim that party autonomy is a supreme principle in ISDS. Party autonomy thus underscores the preferential treatment enjoyed by a limited group of individuals over other stakeholders. Accordingly, the lacuna of participatory rights undermines public trust in the procedural fairness of ISDS.

[258] Through principles like the National Treatment (NT) and the Most Favored Nation (MFN).
[259] Voss, *supra* note 142 at 332.

3. Conclusion

Private and public laws are both anchored in the same underlying social values and goals and thus both share some values, interests, and principles. I based my analysis on this view and used it as the overarching theme to evaluate mechanisms that safeguard a range of shared values in a range of adjudicative forums. Even if not all values are shared, procedural fairness surely is. Since procedural fairness encompasses a long list of important rights, I selected values linked to the right to a fair hearing: participation (with a special focus on third parties) and adjudicative independence and impartiality. Considering their shared nature, these values have a place in ISDS. While some commentators argue that, among all values, party autonomy should prevail, I argue that party autonomy must yield to "higher laws" and is not an unfettered principle. Private parties cannot agree to override important values emerging from public policy, mandatory rules, fairness, rights guaranteed by a higher source of law, etc. The range of these limits depends on underlying social goals and values that the law is set to promote. Since these limits apply in domestic and international private law and in commercial arbitration, there is no sound reason why they should not apply in ISDS. Party autonomy must be reconciled and balanced with other competing interests where the essence of these shared values implies that party autonomy is not the prevailing one.

Moreover, party autonomy could only obtain supremacy from a source that has authority to grant it; typically, a sovereign entity. Thus, states as signatories of IIAs must have intended to confer this status. Yet IIAs are silent on this point and there is no compelling evidence that the intention can be implied. Further, since some values are fundamental and guaranteed constitutionally or as human rights, it is questionable whether states could ever grant parties the power to discard all other values. States, as sovereigns, also have duties they cannot ignore. They must abide by their

constitutions, protect and represent their citizens, and respect domestic and international obligations. Having evaluated shared values in the light of party autonomy principle, I concluded that all of the shared values are generally recognized and protected as fundamental.

From the perspective of fundamental values, ISDS has been a subject of concern and debate. Because of these concerns, the institutional design of ISDS warrants in-depth scrutiny to assess whether its administration of international investment disputes is fair. This scrutiny calls for a comparative study that gathers empirical data on the ways that ISDS safeguards the shared values in comparison to other public, private, and quasi-adjudicative systems. The purpose of this study is to generate material for ongoing efforts to ensure that ISDS is held to standards commensurate with its power. The collected material enables a more careful assessment of the adequacy of measures applied in ISDS and serves as a reference for potential redesign. I discuss the theory behind the comparative study, its framework, and methodology in Chapter 3.

Chapter 3: Analytical Framework and Methodology - Comparative Study

Introduction

In the preceding chapter, I introduced adjudicative independence, impartiality, and fairness as values shared by public and private law, all indispensable in a democratic society and in the administration of law. In this chapter, I discuss the critical role of institutional design and procedural rules to protect these values, a viewpoint that warrants a comparative study of different adjudicative fora. This comparative study is inspired and guided by the assumption that public and private law share these values of the rule of law. There are two core questions. First, what is ISDS's approach to these values? Second, is this approach appropriate in comparison to regimes in other contexts? My core argument is that ISDS forums, out of all comparators, are at the end of the examined spectrum because they use the weakest and most insufficient safeguards of these values. I discuss the reasons for this conclusion in chapters 4 to 6. Here I explain the significance of institutional design and procedures and I introduce the theory of comparative study and its specifics to this research. I provide my methodology, discuss the aim and scope of the comparison, and outline my document survey.

1. Institutional Design and Procedures

What purposes do institutional design and procedural rules serve? Adjudicative independence and impartiality and the right to fair representation are values that are shared universally.[260] They matter since they all support fair adjudication. In turn, the push for fair adjudication is the force behind the design of adjudicative institutions with procedures that safeguard these values.

[260] Shetreet, *supra* note 33 at 1.

According to Arthurs, institutional design should "reflect the special qualities of the specific activity being addressed."[261] ISDS has its origin in commercial arbitration that, from a historical perspective, was designed to serve the needs of private parties.[262] Since ISDS, unlike commercial arbitration, is frequently concerned with issues of public interest, it is important to examine whether its procedures have evolved to capture its unique qualities.

There are substantive and procedural laws. Substantive law deals with the legal relationship between parties - between individuals or between an individual and a state entity - and defines rights and duties of each, whereas procedural law lays down the rules that govern the process by which such rights and duties are enforced.[263] However, in various instances, the division between substantive and procedural may be blurred. Both types of laws determine the level of powers vested in adjudicators. Procedural rules relate to boundaries within which courts and tribunals operate as they lay out the values that adjudicators should pursue and as they provide methods by which to safeguard these accepted values. The role of tribunals, like the courts, is to control the use of power, preclude its abuses and protect vital interests. Equally, the ISDS arbitrators empowered to exercise these functions can be compared to judges. Procedural rules, as an inseparable part of the institutional design, can be described as the rules of a "game".[264] The bodies with powers to prescribe these rules can therefore influence or control the game. Generally, IIAs are vague and deal primarily with substantive law, touching only a limited number of procedures and usually

[261] Harry William Arthurs, *Administrative Justice and Legal Pluralism in Nineteenth-Century England* (Toronto: University of Toronto Press, 1985) at 202.
[262] Blackaby et al, *supra* note 90; Arthurs, *supra* note 261.
[263] "Substantive Law" (last visited 12 May 2019), online: *The Free Dictionary* <legal-dictionary.thefreedictionary.com/Substantive+Law>.
[264] Brian H Bix, "Natural Law: The Modern Tradition" in Jules L Coleman, Kenneth Einar Himma & Scott J Shapiro, eds, *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2004) 61 at 81 (para 1).

only providing a list of the sets of rules from which one or more parties may choose. Due to these limitations, the treaties are silent in general about vital values and their protections, such as fair representation and adjudicative independence and impartiality. The ultimate power to decide whether and how to safeguard these values rests on individual ISDS administering organizations (like ICSID, the PCA, and the ICC) that conduct proceedings according to procedural rules which they themselves design. Generally, each arbitral organization administers ISDS according to its procedural rules unless the disputing parties agree otherwise. Except for ICSID, these organizations specialize in private law disputes. The system is decentralized, having no single supervising body, and is fragmented. Yet by forming their own procedures, ISDS administering organizations shape the whole ISDS industry and thus exercise far-reaching powers.

Procedural rules play an important role in exercising and administrating law. They provide tools and a framework within which all stakeholders - adjudicators, appointing authority, parties, other affected parties, etc. - operate. This role also relates to the fact that "[a]ll legal process both reflects and advances claims to legitimacy, fairness, and accountability."[265] Procedural rules prescribe norms and requirements to follow as well as limits and boundaries. Procedural law lays the path for safeguarding shared values and for identifying the individuals and entities that have guaranteed access to justice and therefore a right to participate in a given dispute. Procedures can secure access to justice before an independent and impartial adjudicator but also hinder it. In this regard, Bix claims that "[c]ertain kinds of evil are arguably less likely when proper procedures are followed" and, as an example, he notes that since judges must give public reasons they more likely deliver

[265] Lorne Sossin, "The Promise of Procedural Justice" (2010) [unpublished], online: *SSRN* <papers.ssrn.com/sol3/papers.cfm?abstract_id=1911499> at 2.

just decisions.[266] Since proper procedures must be fit for the purposes of the industry and reflect the underlying values of the rule of law, they cannot be selected arbitrarily or designed to serve the interests of some while disregarding the interests of others.

The institutional design of the ISDS arbitral organizations should also reflect the purpose behind ISDS - to create a neutral and fair adjudication that is free of bias - and thus adhere to procedures and mechanisms that respect and safeguard the shared values of the rule of law. Fairness in the administration of proceedings depends on their governing rules. Bix notes that not only "playing by the rules of the game" but also "playing the game fairly, is itself an integral part of justice."[267] ISDS administering houses, by drafting and applying procedural rules, may succeed or fail to administer disputes fairly.

With the power to lay down their own procedural rules, ISDS administering houses bear the responsibility to find the right balance between competing interests. However, ISDS faces calls for reforms by critics as well as proponents for the concerns of lack of fairness and therefore of the legitimacy of its systemic design and the adequacy of the form that ISDS takes to safeguard these values. In particular, critics claim that ISDS is biased in favor of investors[268] and its "proceedings lack many of the basic protections and procedures ... normally available in a court of law."[269] In response, Schill argues that these problems of ISDS should not be treated in isolation since solutions and helpful concepts can be drawn from public law regimes. He maintains that

[266] Bix, *supra* note 264 at 82.
[267] *Ibid* at 81 (point 1) noting Lloyd L Weinreb, *Natural Law and Justice* (Cambridge, Mass: Harvard University Press, 1987) at 184–223.
[268] Eberhardt & Olivet, *supra* note 5 at 8, 35–7; Van Harten, *supra* note 194.
[269] Letter from over 100 US academics (11 March 2015), online: *Alliance for Justice* <www.afj.org/wp-content/uploads/2015/03/ISDS-Letter-3.11.pdf>.

comparing ISDS with public law systems can help to approach its problems by learning from "solutions that are tested and accepted in more mature systems of public law and public law dispute resolution."[270] He argues that "drawing on the experience of more advanced and sophisticated systems of public law, provide[s] a perspective ... that is more objective and predictable than solely relying on the judgment of party-appointed arbitrators."[271] To strengthen its legitimacy, ISDS must be responsive to criticism and balance the core values in consideration of demands of the industry and the need for public protection.

Wälde proposes to use international inter-state concepts and advocates for the use of comparative public law as represented at European Union courts, the European Court of Human Rights, administrative law, and the WTO.[272] In doing so, he warns that the context and the purpose of public international law and ISDS are different (ISDS aims to protect investors against State's abuse of power while the former deals with state-state disputes) and that this comparison therefore needs to "be treated with caution."[273] Similarly, Vadi, while noting that it is a frequent practice for arbitrators and scholars to "borrow from the experience of other courts and tribunals," warns to be cautious in ISDS in the use of the comparative law.[274] Despite his views of comparative public law as more appropriate, Wälde also uses concepts of comparative contract law since ISDS, although a species of transnational administrative law, has traits of private law.[275] Along these lines, Watt contends that "one of the most spectacular effects of globalization is to blur the distinction between

[270] Schill, *supra* note 25 at 85–90 and 101.
[271] *Ibid* at 87.
[272] *International Thunderbird Gaming Corporation v The United Mexican States* (2005), Thomas Wälde "Separate Opinion" at paras 26–30 (ICSID).
[273] *Ibid* at 13.
[274] Valentina Vadi, "Critical Comparisons: The Role of Comparative Law in Investment Treaty Arbitration" (2010) 39:1 Denv J Intl L & Pol'y 67 at 100.
[275] *International Thunderbird Gaming Corporation v The United Mexican States*, *supra* note 272 at 24–30.

the public and private spheres."[276] In sum, Wälde, Vadi and Schill are advocates of complex and cautious ISDS comparative analysis. In the words of Park and Walsh, a comparative study can help arbitral bodies to be "more aware of the spectrum of solutions available to address problems common to several legal systems"[277] and as such might help to tackle these issues.

Influenced by these views and by concerns about whether ISDS safeguards shared values, and out of fairness to ISDS, I decided to compare ISDS to a range of other adjudicative systems. I do not limit my study to one area of law but, for its frequent comparison to both private and public law, I include examples from both. The primary concern of my research is the procedural requirements of adjudicative organizations outside of IIAs. This comparison seeks to show variations of existing procedures and uncover if ISDS is truly unique in its lack of institutional safeguards and, if so, whether there is a justification for this absence. This understanding of the mechanisms used by other systems may prove vital in addressing concerns in ISDS. This information should be available before making reforming decisions to understand the kind of reform that is needed. In other words, ISDS can learn from other systems.

I expect the implementation of institutional safeguards to vary across comparators, due to their individual peculiarities. The purpose of this analysis, in fact, is to capture some of these variations. To get a wide spectrum of perspectives, one needs to consider a broad variety of adjudicative contexts. For this reason, I designed a comparative study that would include a variety of

[276] Horatia Muir Watt, "Globalization and Comparative Law" in Mathias Reimann & Reinhard Zimmermann, eds, *The Oxford handbook of comparative law* (Oxford: Oxford University Press, 2006) 583 at 591–592.
[277] William W Park & Thomas W Walsh, "Review Essay: The Uses of Comparative Arbitration Law" (2008) 24:4 Arb Intl 615 at 615, reviewing Jean François Poudret & Sébastien Besson, *Comparative Law of International Arbitration* (2007).

adjudicative systems, even if that choice comes at the cost of in-depth comparison between two or three comparators. I discuss the purpose of the comparative study in the following section and the scope, comparators, and framework in later sections.

2. A Comparative Study

All legal systems, including the most sophisticated ones, should reflect on the needs of the societies from which they stem and whose values they ought to represent. Legal systems can learn from each other, especially when young and rapidly evolving as in the case of ISDS. A cautiously tailored comparative study - described as a method to compare and assess specific legal problems, legal institutions, and entire legal systems at the international and domestic level - can help to achieve this goal. In general, a comparative study provides a basis for empirical observations and insights. The potential types of comparative inquiries, due to the range of viewpoints about comparative legal study and the available approaches, is practically unlimited.[278]

In designing my comparative framework, I turned to scholarly studies on comparative law. For a start, I drew from Lasser who "urges comparatists to adopt a situation-specific approach that fosters detailed, generous, challenging and responsible engagement with the subjects and objects of their comparative analysis."[279] There are many facets - political, social, historical, international, etc. - that influence a given national law. Likewise, international law is a complex expression of

[278] Mitchel de S-O-l'E Lasser, "The Question of Understanding" in Pierre Legrand & Roderick Munday, eds, *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press, 2003) 197 at 221, noting "the comparative possibilities are endless"; Gerhard Danneman, "Comparative Law: Study of Similarities or Differences?" in Mathias Reimann & Reinhard Zimmermann, eds, *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006) 384 at 401, noting "[t]here can be as many purposes of comparative legal enquiries as there are comparative lawyers, or objects of enquiry."
[279] Lasser, *supra* note 278.

an "interdependent transnational legal-pluralist order."[280] Considering this complexity of internal and global factors, Riles argues that a simple comparative study of foreign laws is inadequate.[281] Zumbansen in his elaboration on transnational comparisons notes that we face "hybrid, forms of regulation that can no longer be easily associated with one particular country or, for that matter, one officially mandated rule making authority."[282] ISDS as a species of a transnational legal order is an example of a legal system where a study of foreign laws alone would not suffice. Along similar lines, Watson claims that comparative law goes beyond a study of one foreign system and that one should instead study interrelationships between individual rules or between branches of the law in different legal systems.[283]

Turning to ISDS, Schill argues that "[c]omparative public (administrative, constitutional, and international) law should become part of the standard methodology of thinking about issues in international investment law."[284] Similarly, Vadi describes ISDS as "a sort of melting pot of different legal traditions as it presents mixed characteristics of common law and civil law traditions."[285] Therefore, more complex comparisons seem to be inevitable for studying

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[280] Peer C Zumbansen, "Transnational Comparisons: Theory and Practice of Comparative Law as a Critique of Global Governance" in Maurice Adams and Jacco Bomhoff eds, *Practice and Theory in Comparative Law* (Cambridge, UK: Cambridge University Press, 2012) 186 at 188.

[281] Annelise Riles, "Comparative Law and Socio-legal Studies" in Mathias Reimann & Reinhard Zimmermann, eds, *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006) 776 at 794, claiming: "A simple comparison of 'French Law' with 'American Law', for example, seems inadequate if one accepts that 'French Law' is actually many coexisting, fragmented, sometimes integrated, sometimes conflicting normative orders with different degrees of access to coercive authority and with different kinds of articulations with other cultures and with the global legal arena."

[282] Zumbansen, *supra* note 280 at 189, noting Larry Catá Backer, "Governance without Government: An Overview" in Gunther Handl, Joachim Zekoll & Peer Zumbansen, eds, *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Leiden: Martinus Nijhoff Publishers, 2012) 87; Peer Zumbansen, "Neither 'Public' nor 'Private', 'National' nor 'International': Transnational Corporate Governance from a Legal Pluralist Perspective" (2011) 38:1 JL & Soc'y 50.

[283] Alan Watson, *Legal Transplants: An Approach to Comparative Law*, 2nd ed (Athens: University of Georgia Press, 1993) at 6.

[284] Schill, *supra* note 25 at 86.

[285] Vadi, *supra* note 274 at 99.

interrelationships of different legal systems beyond the states' borders and the traditional comparative perspectives of legal families and foreign laws.[286] In this vein, Riles, in her elaboration on Teubner's work, notes his view that the core differences of comparative work do not lie in the state law's systems, "but rather between the legal orders attached to particular economic sectors (e.g. the private arbitration system for adjudicating disputes … versus the state-based judicial system …)."[287] In other words, comparative lawyers should study differences among sectoral legal systems and trace the interconnections between them.[288] For my own study, the focus is on shared values of the rule of law that can be seen as interconnecting factors of the compared dispute settlement systems.

My approach to the comparative inquiry is "functional". According to Danneman, a functional approach distinguishes "micro-comparison" that focuses on specific legal problems from "macro-comparison" that deals with general questions.[289] The fact that specific legal problems are the core of my research suggests that my work is more in the realm of the micro-comparison. On micro-comparison, Danneman notes that the general expectation is that different legal systems offer similar solutions to similar issues.[290] In his analysis of functionalism, Danneman refers to the claims of Zweigert and Kötz that this expectation of similar solutions applies to legal systems "despite the great differences in their historical development, conceptual structure, and style of

[286] Watt, *supra* note 276 at 591–592; Gunther Teubner, "Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences" (1998) 61:1 Mod L Rev 11 at 16 quoting Watson, *supra* note 283 at 6; Zumbansen, *supra* note 280 at 188–192, where he provides examples of corporate governance, human rights, administrative law, constitutional law as "...evidence of an emerging transnational regulatory landscape, which cannot exhaustively be explained from a traditional comparative perspective."
[287] Riles, *supra* note 281 at 794, elaborates on Teubner, *supra* note 286.
[288] Riles, *supra* note 281 at 794.
[289] Danneman, *supra* note 278 at 387–388.
[290] *Ibid*.

operation."[291] In other words, different legal systems face similar issues.[292] Danneman also recalls Ancel's view that "comparing radically different legal systems might yield more significant results than comparing similar legal systems."[293] These views suggest that it is not necessary to limit one's research to perfect comparators. Indeed, perfect comparators simply may not exist.

There are three possible modes to examine similarities and differences, distinguished by its focus on prevailing similarities, prevailing differences, or the balance of both.[294] Danneman notes that whether the emphasis is on similarities or differences "depends on the purpose of comparative enquiry."[295] There are techniques used to safeguard values of procedural fairness and adjudicative independence and impartiality. Similarities and differences between comparators are both invaluable for understanding the use of these techniques in the whole context, including the role of distinguishing and interconnecting features. In my research, I seek differences in the approaches taken by ISDS administering bodies compared to other adjudicative bodies, but I also look for patterns and similarities.

I expect that the understanding and applicability of the core values will vary among the comparators. This varied understanding and application stems from the difference in the values that these systems traditionally serve and in the functions of compared modes of adjudication: public law versus private law, arbitration versus litigation, domestic versus international. Also, globalization has an impact on the understanding of norms and values. Along these lines, Wiener

[291] *Ibid* at 388, elaborating on Konrad Zweigert & Hein Kötz, *An Introduction to Comparative Law: The institutions of private law*, 3rd ed, translated by Tony Weir (Oxford: Clarendon Press, 1998).
[292] Danneman, *supra* note 278 at 403.
[293] *Ibid* at 389, noting Marc Ancel, Utilité et méthodes du droit comparé: Eléments d'introduction générale à l'étude comparative \ des droits (1971) 67.
[294] *Ibid* at 384 and 391.
[295] *Ibid* at 385.

claims that, "[i]n light of moving processes, practices, and principles of governance out of the modern state context, the contested quality of normative meaning is enhanced and differences in the interpretation of norms and their meanings are expected as a rule rather than as an exception." Wiener further observes that the same norms or values may have a different connotation for different actors, although they all agree on them.[296] Since the whole context plays an important role, it is understandable that values that are shared by public and private law, when presented in various settings, will also be perceived differently. For illustration, the party autonomy principle has greater force in FINRA or WIPO that both regulate disputes between purely private parties than it does in courts administering judicial review. I anticipate that the study of tools and methods used by individual forums will generate a spectrum of findings with some similarities and differences emerging as more common than others.

3. Scope

My comparative study contrasts procedures of ISDS with international and supranational courts. In the process of comparison, I draw an analogy among four categories of public and private legal systems: domestic courts, European courts, international judicial and quasi-judicial bodies, and international and domestic arbitral tribunals. Each has characteristics and functions comparable to ISDS. My focus is on the procedural rules that these legal systems use to safeguard the core values of fairness and of adjudicative independence and impartiality. Legal regimes in general acknowledge the importance of these shared values and typically employ a range of mechanisms for their effective protection, such as guaranteed participation, security of tenure, objective methods of remuneration, an objective method of case assignment, etc. These mechanisms

[296] Antje Wiener, "Contested meanings of norms: a research framework" (2007) 5:1 Comp Eur Pol 1 at 1–5, concerning constitutional norms based on both cultural and organizational practices.

individually and cumulatively ensure access to a fairly administered law. I seek to understand the kinds of mechanisms used by each forum in order to illuminate whether, how, and to what extent ISDS deviates from practices of these other comparators.

I cover these mechanisms under two overarching umbrellas: 1) adjudicative independence and impartiality, which is divided between a) separation of powers and b) personal security afforded to adjudicators; and 2) fairness. In dealing with the methods of appointment and case assignment, I examine whether these forums separate the powers to nominate, select, and appoint adjudicators; whether they separate the process of appointment from case assignment thus affording another layer of separation; and whether they assign cases to tenured members using objective means to prevent selection based on subjective or personally-linked motives. While analyzing the personal security afforded to adjudicators in each system, I examine two closely connected tools: security of tenure and the method of remuneration. I focus on whether tenure is afforded and accompanied by salaries; whether any remuneration received is objectively assessed, set or capped, and independent from outside sources or peculiarities of proceedings; and whether there is remuneration beyond the term of service. I also analyze fairness in term of standing or fair representation. In this respect, I map parties that are guaranteed the right to standing and examine whether all legally affected parties have a fair and adequate right to representation. All of these individual mechanisms complement each other in the effort to create a fair dispute settlement and help boost public confidence in the adjudicative system.

4. Comparators

a) Selecting Criteria

To gain an adequately large sample of representative data while examining a narrow range of tools, I decided to select a broad pool of comparators that covers a spectrum of adjudicative regimes across different disciplines and borders. At the same time, since it is not feasible to include all adjudicative regimes, I narrowed the list to those that are frequently compared to or share several important similarities with treaty-based ISDS. These similarities I discuss later in this chapter.

In this comparison, I examine four categories of legal forums: domestic courts, European courts, international judicial and quasi-judicial bodies, and international and domestic arbitral tribunals. Each category has characteristics and functions that are similar to those of ISDS. The forums are the core subject of the study. I sought to compare procedural rules of the major international ISDS arbitral organizations - the International Centre for Settlement of Investment Disputes (ICSID), the Permanent Court of Arbitration (PCA), and the International Chamber of Commerce (ICC) - to the remaining four groups. I have represented the other forums as follows: (1) domestic courts - senior courts of England and Wales and the US Supreme Court; (2) European courts - the European Court of Human Rights (ECHR) and the Court of Justice of the European Union (CJEU); (3) international judicial and quasi-judicial bodies - the International Court of Justice (ICJ) and the World Trade Organization (WTO); (4) domestic and international arbitral tribunals - the Financial Industry Regulatory Agency (FINRA) in the US and the World Intellectual Property Organization (WIPO).

In deciding on the comparators, I looked for similarities with the following four characteristics of ISDS: arbitration as the form of dispute settlement; disputes based on transnational agreements, bilateral or multilateral treaties; the ability to exercise judicial review; and a vertical relationship between parties to the dispute. Since no organization shares all four of these characteristics, the order in which I discuss them is arbitrary.

First, I discuss the relationship between the parties to the dispute. In ISDS, the disputing parties have a vertical relationship by which a person can sue governmental or regulatory bodies. About half of all the comparators, domestic and European courts, also administer vertical disputes. However, the vertical relationship in ISDS is at the international level and rather unique; thus, there are no other arbitral bodies to examine in this respect. In contrast, various other comparators operate at a horizontal level. Since investment treaties are negotiated and agreed on among states, while excluding private parties from the negotiating process and emerging as an alternative to diplomatic protection of foreign nationals (exercised exclusively at the state level), it seemed appropriate also to examine state-state dispute resolution at the ICJ and the WTO. The WTO, albeit state-state, is frequently compared to ISDS. Still, some commentators view ISDS as a form of a private settlement and so I also assess private arbitral forums: FINRA[297] and WIPO.[298]

Second, I sought out international organizations that administer disputes based on transnational agreements and thus resemble the origins of treaty-based ISDS. Again, the uniqueness of ISDS makes it impossible to find perfectly matching forums. Here, only the European and international

[297] "About FINRA" (last visited 16 May 2019), online: *Financial Industry Regulatory Authority* <www.finra.org/about>.
[298] "WIPO | Alternative Dispute Resolution" (last visited 14 May 2019), online: *WIPO* <www.wipo.int/amc/en/index.html>.

courts and quasi-adjudicative bodies meet the requirement. The treaty-governed WIPO operates at the international level, but it administers disputes based on private agreements. The other forums operate at the domestic level under the remit of state laws. Despite these similarities, each of these forums lacks other ISDS characteristics.

Third, some commentators characterize the function of ISDS as analogous to judicial review.[299] Judicial review is defined as "the procedure by which individuals seek to challenge the decision, action or failure to act of a public body ... exercising a public law function"[300] or as a "court's authority to examine an executive or legislative act and to invalidate that act if it is contrary to constitutional principles."[301] With this analogy in mind, I focus on forums that exercise similar powers of review. All domestic and European courts do so, whereas the ICJ executes them only occasionally[302] and to the exclusion of other forums.

Finally, since ISDS is arbitration, I assess forums that settle disputes using arbitration. WIPO and FINRA share this characteristic. WIPO, like ISDS, administers cross-border disputes (including domestic ones), while FINRA operates within the US. Unlike ISDS, both WIPO and FINRA deal with private disputes.

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[299] Stephan W Schill, "International Investment Law and Comparative Public Law—an Introduction" in Stephan W Schill, ed, *International Investment Law and Comparative Public Law* (Oxford: Oxford University Press, 2010) 3 at 4; Van Harten, *supra* note 195 at 631.

[300] HM Courts & Tribunal Services, "Judicial review and costs" (last visited 5 October 2017), online: *GOV.UK* <www.justice.gov.uk/courts/rcj-rolls-building/administrative-court/applying-for-judicial-review>.

[301] "Judicial Review" (last visited 17 June 2019), online: *The Free Dictionary* <legal-dictionary.thefreedictionary.com/judicial+review>.

[302] The ICJ has some powers of judicial review with respect to judgments of the Administrative Tribunals of the International Labour Organization (ILO) and the UN; Kaiyan Homi Kaikobad, *The International Court of Justice and Judicial Review: A Study of the Court's Powers with Respect to Judgements of the ILO and UN Administrative Tribunals* (Hague: Brill Nijhoff, 2000).

In sum, each forum reflects an adjudicative regime that is comparable to ISDS. No perfect comparators exist due to ISDS' unique adjudicative features, but as noted, comparative studies do not have to be restricted in this way. Accordingly, I did not seek perfect comparators but rather a sample drawn from a variety of public and private regulatory systems of adjudication, each with close connections or similarities. Each comparator or group of comparators may share a different set of similarities. However, it is impossible to say which group is further afield from ISDS as it depends on the point of reference. From the basic comparison in *Table 3*, it appears that FINRA and WIPO have the least similarities and that European courts have the most, although it obviously depends on what aspects are compared and how they are weighted.

Table 3: Comparators and their Similarities & Differences with ISDS

Comparators		*Basic characteristics of dispute settlement*				*Number of similarities*
ISDS*		*Arbitration*	*Based on treaties*	*Similar to judicial review*	*With parties with a vertical relationship*	4
Domestic courts **		No	No	Yes	Yes	2
European courts*		No	Yes	Yes	Yes	3
International judicial and quasi-judicial bodies	The ICJ	No	Yes	Yes	No	2
	The WTO	Yes	Yes	No	No	2
Domestic and international arbitral tribunals	FINRA	Yes	No	No	No	1
	WIPO	Yes	No****	No	No	1

*All examined ISDS bodies. **All examined domestic courts. ***Applicable to both European courts. ****Although the WIPO is based on treaties, disputes between parties are governed by consensual agreements.

Domestic Courts

This group includes the superior courts of the United Kingdom (the Supreme Court[303] and the Senior Courts for England and Wales)[304] and the Supreme Court of the United States.[305] These states have been major players in commercial dealings. While the UK remains one of the EU Member States, it voted in 2016 to leave the EU.

Judicial review in the UK is "a procedure by which a court can review an administrative action by a public body."[306] The UK lacks constitutional judicial review, yet the courts may hold any unconstitutional law to be void. While judges may review secondary legislative acts, they are unable to review the lawfulness of Acts of Parliament.[307] Despite the 1998 Human Rights Act (HRA) having made access to judicial review easier, it still does not allow the courts to quash legislation. According to this Act,[308] the courts must interpret the law, as far as possible, in a way that is compatible with the European Convention of Human Rights[309] but, if that is impossible, the courts may declare the respective Act of Parliament to be incompatible with the Convention.[310] The power to exercise judicial review and declare incompatibility[311] is afforded to the Senior

[303] It is the final court of appeal for civil cases in the UK, and the final court of appeal for criminal cases from England, Wales and Northern Ireland; see "The Supreme Court" (last visited 13 June 2019), online: *The Supreme Court* <www.supremecourt.uk/>.
[304] *Senior Courts Act 1981* (UK), c 54, s 1: the senior courts include the Court of Appeal (the highest court within the Senior courts of England and Wales) with two divisions: Criminal and Civil; the High Court of Justice which consists of three divisions: The Queen's Bench, the Chancery and the Family divisions; and the Crown Court, but since this latter court is not entitled, according to the *Human Rights Act 1998*, to declare incompatibility of legislative acts and therefore to carry out judicial review, I am not concerned with this Court.
[305] Note, domestic courts in judicial review deal with a variety of issues that are similar to ISDS, for instance, the state's actions related to property expropriation.
[306] "Judicial Review" (last visited 17 June 2019), online: *Lexico* <www.lexico.com/en/definition/judicial_review>.
[307] D Nassimpian, "National legal tradition – United Kingdom" in Susana Galera, ed, *Judicial Review: A Comparative Analysis Inside the European Legal System* (Strasbourg: Council of Europe Pub, 2010) 157 at para 9.1.3.
[308] *Human Rights Act*, *infra* note 51, s 3.
[309] *ECHR Convention*, *supra* note 164.
[310] *Ibid*, s 4(2).
[311] *Human Rights Act 1998* (UK), s 4(5) as substituted by the *Constitutional Reform Act 2005* (UK), (c 4), ss 40, 148, Sch 9 para 66(2) [*CRA 2005*].

Courts (the High Court[312] and the Court of Appeal[313]) and the highest court of the land, the Supreme Court.[314] Judicial review of administrative and executive powers, including decisions of inferior courts,[315] is done by the Administrative Court (part of the High Court).[316] Claimants dissatisfied with the court's decision can apply for permission to appeal to the Court of Appeal (civil cases)[317] or to the Supreme Court (criminal cases).[318]

In the US, the highest court with the power to decide the constitutional validity of a legislative act through the process of judicial review is the Supreme Court. This power was established by the landmark decision of *Marbury v Madison*, where the Supreme Court ruled that "because the Constitution clearly states that it is the supreme law of the land and because it is the province of the judiciary to uphold the law, the courts must declare state laws and even acts of Congress null and void when they are inconsistent with a provision of the Constitution."[319] The same principle applies to executive actions contrary to the Constitution.[320]

European Courts

This group consists of the European Court of Human Rights (ECHR) and the Court of Justice of the European Union (CJEU), consisting of the Court of Justice (CofJ), the General Court (GC),

[312] *Civil Procedure Rules* 54 [*CPR*]; *Civil Procedure Rules Practice Directions* 54A [*CPR PD*].
[313] *CPR* 52; *The Administrative Court: Judicial Review Guide 2018* (Judiciary for England and Wales, 2018) at paras 25.1–25.4 [*The Administrative Court Guide*].
[314] *CRA 2005*, s 23.
[315] Decisions of the Superior Courts (the High Court, the Court of Appeal, and the Supreme Court or the Crown Court), but only when dealing with a trial on indictment as it acts in a Superior Court's function and cannot be subject to judicial review. See *The Administrative Court Guide*, at para 5.3.6.
[316] *CPR* 54; *The Administrative Court Guide*, at para 1.7.
[317] *CPR* 52.8–9; *The Administrative Court Guide*, at paras 25.1–5.4.
[318] *CRA 2005*, s 23; *Senior Courts Act 1981* (UK), s 18(1)(a) [*SCA 1981*]; *Administration of Justice Act 1960* (UK), s 1(2) [*AJA 1960*]; *The Administrative Court Guide*, at para 25.5.
[319] *Marbury v Madison*, 5 US 137, 1 Cranch 137 (1803).
[320] *Ibid*.

and specialized courts (I do not examine the rules of these courts).[321] The CJEU and ECHR have close ties since the CJEU gives decisions of the ECHR "special significance" as a "guiding principle" in its case law. I also included the European courts among the comparators because of the ongoing debate, led by the EU, to establish a multilateral court and Investment Court System (ICS) as alternatives to ISDS.[322] Considering the CJEU and these alternatives, it remains to see what interaction the regimes would have.

The CJEU and ECHR cover horizontal (state-state) as well as vertical (individual-state) relationships.[323] Both exercise regulatory functions including powers of judicial review and both accept cases brought by natural and legal persons. The CJEU can deal with a variety of violations and inactions; the ECHR specializes in breaches of human rights and hears two types of cases: those brought by individuals, companies, or non-governmental organizations (NGO) and those referred by a state party against another state party for an alleged breach of the provisions of the

[321] *Treaty on European Union*, 7 February 1992 (entered into force 1 November 1993): Consolidated version as of 26 October 2012, OJ, C 326/13, [*TEU*].
[322] See e.g. *EU-Vietnam Free Trade Agreement* [*EU-Vietnam FTA*] negotiation concluded in December 2015 and the FTA is expected to be signed in June 2019: see Khanh Vu, "Vietnam expects to sign free trade pact with EU by end-June" (26 April 2019), online: *CNBC* <www.cnbc.com/2019/04/26/reuters-america-vietnam-expects-to-sign-free-trade-pact-with-eu-by-end-june.html>. See also August Reinisch & Lukas Stifter, "CETA's New Take on ISDS: Toward an International Investment Court" (22 June 2016) Investor-State Arbitration Commentary Series No 8, online: *CIGI* <www.cigionline.org/publications/cetas-new-take-isds-toward-international-investment-court>; Gus Van Harten, "Key Flaws in the European Commission's Proposals for Foreign Investor Protection in TTIP" (2016) Osgoode Legal Studies Research Paper Series; "TTIP talks: Transparency call for EU-US trade disputes" (7 July 2015), online: *BBC News* <www.bbc.com/news/world-europe-33422086>; "TTIP trade talks: Germany urges US to let MPs see texts" (13 November 2015), online: *BBC News* <www.bbc.com/news/world-europe-34807494>.
[323] For the CJEU see *TEU*, *supra* note 321, art 19(1); "Court of Justice of the European Union (CJEU)" (16 June 2016), online: *European Union* <europa.eu/european-union/about-eu/institutions-bodies/court-justice_en>; *Consolidated version of the Treaty on the Functioning of the European Union*, 25 March 1957, OJ, C 326/47, arts 259, and 263(4) (entered into force 1 January 1958) [*TFEU*]: *TFEU*, art 259 dealing with state-state relationships while art 263(4) deals with person-state relationship. For the ECHR see *ECHR Convention*, *supra* note 164 as amended by Protocol No 11 (ETS No 155) (entered into force 1 November 1998) and Protocol No 14 (CETS No 194) (entered into force 1 June 2010).

Convention and the Protocols.[324] In my assessment, I have paid special attention to cases brought by individuals since the resolution of such cases resembles ISDS more closely.

International Judicial and Quasi-judicial Bodies

This group includes the International Court of Justice (ICJ) and the World Trade Organization (WTO), a quasi-judicial body. The ICJ is the primary judicial branch of the United Nations (UN).[325] The authority of the Court is twofold. It decides legal disputes between States and submitted by states and it provides advisory opinions on legal questions referred to it by United Nations organs and specialized agencies.[326] Although the Court deals with state-state disputes, it is, like ISDS, an international adjudicative body with no appellate mechanism.[327] Until recently, some sitting ICJ judges frequently sat as arbitrators in ISDS.[328]

For its part, the WTO dispute settlement is a mandatory and binding two-level mechanism, consisting of a panel as the first instance, and the Appellate Body as a second instance. It is the only organization that deals with the rules of trade between states.[329] The WTO has close relations with, and has been frequently compared to ISDS despite the inherent differences: adjudicating

[324] *ECHR Convention*, art 33.
[325] *Charter of the United Nations*, 26 June 1945, ICJ Acts & Doc 6, arts 7, 92 (entered into force 24 October 1945) [*UN Charter*] as amended.
[326] *Ibid*, art 96.
[327] "How the Court Works" (last visited 16 May 2019), online: *ICJ* <www.icj-cij.org/en/how-the-court-works>; Adam M Smith, "Good Fences Make Good Neighbors: The Wall Decision and the Troubling Rise of the ICJ as a Human Rights Court Recent Development" (2005) 18 Harv Hum Rts J 251 at 261.
[328] Nathalie Bernasconi-Osterwalder & Martin Dietrich Brauch, *Commentary: Is "Moonlighting" a Problem? The role of ICJ judges in ISDS* (International Institute for Sustainable Development (IISD), 2017).
[329] WTO has currently 164 members. See: "WTO Members and Observers" (last visited 13 May 2019), online: *WTO* <www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm>.

disputes between parties with unlike relations, two-level versus one-stop mechanism, etc.[330] It is common that WTO adjudicators frequently sit as arbitrators in ISDS cases.

International and Domestic Tribunals

This group consists of the Financial Industry Regulatory Authority (FINRA) and the World Intellectual Property Organization (WIPO). Both are arbitration organizations. As forums administering horizontal disputes, they deal, unlike treaty-based ISDS, with disputes arising from consensual relationships between private parties. FINRA operates domestically, whereas WIPO is an international body.[331]

FINRA is the largest independent self-regulatory body (all US brokers must register with FINRA)[332] authorized by the US Congress to regulate the securities industry.[333] FINRA was created in 2007 through the consolidation of the National Association of Securities Dealers (NASD) and New York Stock Exchange Regulation (NYSE Regulation) to streamline and avoid overlapping regulation of the two former bodies.[334] FINRA prescribes its own procedural rules[335] that must be approved, based on the Securities Exchange Act of 1934, by the US Securities and

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[330] Jürgen Kurtz, "The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents" (2009) 20:3 Eur J Intl L 749.
[331] WIPO, *WIPO intellectual property handbook*, 2nd ed (Geneva: WIPO Publication No 489(E), 2008) at para 4.152 [*WIPO Handbook*]; WIPO, *Guidelines on Developing Intellectual Property Policy: For Universities and R&D Institutions in African Countries* (Geneva: WIPO Publication No 848(E)); WIPO, *A Brochure on Intellectual Property Rights: For Universities and R&D Institutions in African Countries* (Geneva: WIPO Publication No 849(E)).
[332] "What We Do" (last visited 16 May 2019), online: *Financial Industry Regulatory Authority* <www.finra.org/about/what-we-do> [*FINRA*].
[333] "About FINRA" (last visited 16 May 2019), online: *FINRA* <www.finra.org/about>.
[334] The consolidation became effective July 30, 2007; see "NASD and NYSE Member Regulation Combine to Form the Financial Industry Regulatory Authority - FINRA" (30 July 2007), online: *FINRA* <www.finra.org/newsroom/2007/nasd-and-nyse-member-regulation-combine-form-financial-industry-regulatory-authority>.
[335] *Code of Arbitration Procedure for Customer Disputes* (2007), Series 12000 as amended [*Customer Code*]; *Code of Arbitration Procedure for Industry Disputes* (2007), Series 13000 as amended [*Industry Code*].

Exchange Commission (SEC).[336] FINRA has the power to discipline its members and,[337] like ISDS, is dedicated to protecting investors (no membership or arbitration agreement is required to bring a lawsuit) and administers industry-related disputes through arbitration.[338] FINRA, by drafting its own rules, has the power to shape the industry yet is itself immune from liability when breaking these rules.[339]

WIPO is an independent agency, subject to the competence of the United Nations, that provides a global forum to address and resolve domestic or cross-border intellectual property (also a form of investment[340]) and technology disputes.[341] WIPO administers both arbitration and mediation[342] through the WIPO Arbitration and Mediation Center. WIPO's authority is based on 26 multilateral treaties, including the WIPO Convention,[343] and has a membership of 192 states.[344] While the WIPO's primary focus is on disputes about intellectual property rights, its arbitration rules are generally suitable for all types of commercial disputes.[345] WIPO administers disputes under its own WIPO Arbitration Rules and WIPO Expedited Arbitration Rules as well as under the UNCITRAL Arbitration Rules (designed for *ad hoc* arbitration), where the Center acts as the

[336] *Securities Exchange Act 1934*, 48 Stat 881 (codified as amended at 15 USC § 78a) cl 19(b) (2017) [*Exchange Act*].
[337] *Customer Code*, r 12100(q); *Industry Code*, r 13100(q).
[338] FINRA, s*upra* note 332.
[339] George Khoury, "Broker Cannot Sue FINRA for Breaking FINRA Rules" (6 November 2017), online (blog): *Findlaw* <blogs.findlaw.com/eleventh_circuit/2017/11/broker-cannot-sue-finra-for-breaking-finra-rules.html>.
[340] "Intellectual Property Protection as an Investment" (last visited 16 May 2019), online: *WIPO* <www.wipo.int/sme/en/ip_business/ip_asset/ip_investment.htm>.
[341] *WIPO Handbook*, s*upra* note 331 at para 1.12. See *supra* note 298.
[342] *WIPO Handbook*, s*upra* note 331 at para 4.152.
[343] Each treaty has a different number of signatories. See: "WIPO-Administered Treaties" (last visited 16 May 2019), online: *WIPO* <www.wipo.int/treaties/en/index.html>.
[344] "Member States" (last visited 13 May 2019), online: *WIPO* <www.wipo.int/members/en/index.jsp>.
[345] *WIPO Handbook*, *supra* note 331 at para 4.166.

appointing or the administering authority.[346] WIPO, like ISDS, does not require persons wishing to bring a claim to be one of its members but, unlike ISDS, WIPO is open to any consensual dispute including domestic ones.[347]

ISDS Administering Bodies

This group includes some of the most important international arbitral institutions that administer ISDS[348]: the International Centre for Settlement of Investment Disputes (ICSID), the Permanent Court of Arbitration (PCA), and the International Chamber of Commerce (ICC).[349] Each administers disputes and acts as an appointing authority under its own procedural rules as well as a selection of others - for instance, the UN Commission on International Trade Law[350] (UNCITRAL) Arbitration Rules[351] or rules *ad hoc*.

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[346] "Center Services in ad hoc Arbitrations, and in particular, under the UNCITRAL Arbitration Rules" (last visited 29 May 2019), online: *WIPO* <www.wipo.int/amc/en/center/uncitral/index.html> ["Center Services in ad hoc Arbitrations"].
[347] WIPO, *supra* note 298.
[348] In treaty based ISDS, states typically allow investors to choose from among several forums.
[349] UNCTAD, "Latest Developments in Investor-state Dispute Settlement" (2012) IIA Issue Note, No 1 at 2 (UNCTAD/WEB/DIAE/IA/2012/10), online: *UNCTAD* <unctad.org>. According to this report, the majority of known ISDS cases was administered under the ICSID (or under the ICSID Additional Facility) Rules (279 cases) and the UNCITRAL Rules (126 cases) making these two institutions the most important in ISDS. Other venues like the Stockholm Chamber of Commerce (SCC) (21 cases), the International Chamber of Commerce (ICC) (7 cases), the Cairo Regional Centre for International Commercial Arbitration (CRCICA) (1 case), and the London Court of International Arbitration (LCIA) (1 case) were used infrequently. In 2013 and 2014, the distribution of ISDS cases among these venues was similar. Since other venues do not make their cases public, there may be more ISDS cases administered by them. Therefore, the role of these other venues may be more than marginal.; See also, UNCTAD, "Investor-State Dispute Settlement: Review of Developments In 2014" (2015) IIA Issue Note, No 2 at 4 (UNCTAD/WEB/DIAE/PCB/2015/2), online: *UNCTAD* <unctad.org>; UNCTAD, *World Investment Report 2014: Investing in the SDGs: An Action Plan* (New York: UN Publications, 2014) at 125, online: *UNCTAD* <unctad.org> [*World Investment Report 2014*].
[350] The UN Commission on International Trade Law (UNCITRAL) does not administrate disputes but acts as the rules-prescribing body.
[351] The latest revision of the *UNCITRAL Arbitration Rules* was done in 2013. All versions are: UNCITRAL *Arbitration Rules* (2013); UNCITRAL *Rules on Transparency in Treaty-based Investor-State Arbitration* (2013); *UNCITRAL Arbitration Rules* (2010); and *UNCITRAL Arbitration Rules* (1976).

ICSID, a part of the World Bank, has 163 contracting states.[352] It is the only forum that specializes in ISDS (unlike the PCA and ICC) and only one that conducts annulment procedures where applicable.[353] The PCA, although having the word in its title, is not a court but an intergovernmental arbitral organization with 121 contracting parties.[354] The ICC is a world business organization that promotes international trade and provides dispute resolution at the ICC International Court of Arbitration (ICA).[355] The ICC 'Court', like the PCA, does not make formal judgments but supervises arbitral proceedings and makes sure that the ICC Rules are properly applied.[356] Although the ICC specializes in commercial arbitration, it has dealt with a series of ISDS cases.[357]

The ICSID Arbitration Rules[358] are the most frequently used in ISDS, with the UNCITRAL Arbitration Rules currently undergoing reform consultations[359] and the second most-used.[360] The PCA has administered the majority of its 106 registered ISDS cases under the UNCITRAL rules,[361]

[352] *List of Contracting States and Other Signatories of the Convention (as of April 12, 2019)* (ICSID/3), online: *ICSID* <icsid.worldbank.org/en/Pages/icsiddocs/List-of-Member-States.aspx>.
[353] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, arts 50–52 (entered into force 14 October 1966) [*ICSID Convention*]; *ICSID Arbitration Rules* (2006), arts 50–55. See also *Updated Background Paper on Annulment for the Administrative Council of ICSID* (2016), online: *ICSID* <icsid.worldbank.org/en/Pages/resources/Background-Papers.aspx> [*Updated Background Paper*].
[354] "About us" (last visited 13 May 2019), online: *Permanent Court of Arbitration* <pca-cpa.org/en/about/> [*PCA*].
[355] "Who we are" (last visited 13 May 2019), online: *International Chamber of Commerce* <iccwbo.org/about-us/who-we-are/> [*ICC*].
[356] ICC *Arbitration Rules* (2017), art 1(2).
[357] UNCTAD, "Special Update on Investor–State Dispute Settlement: Facts and Figures" (2017) IIA Issue Note, No 3 (UNCTAD/DIAE/PCB/2017/7) at 5, online: *UNCTAD* <unctad.org>. See also UNCTAD, *supra* note 349.
[358] *ICSID Convention*; *ICSID Additional Facility Rules*, 2006 [*ICSID AFR*].
[359] See: UNCITRAL Working Group III: Investor-State Dispute Settlement Reform (last visited 13 May 2019), online: *UN* <uncitral.un.org/en/working_groups/3/investor-state>.
[360] "ISDS: Investor-state dispute settlement Factsheet" (2016), online: *Arbitration Institute of the Stockholm Chamber of Commerce* <sccinstitute.com/about-the-scc/news/2016/what-is-investor-state-dispute-settlement-and-how-does-it-work-new-factsheet-by-the-scc/> at 6. See also, UNCTAD, *World Investment Report 2018: Investment and New Industrial Policies* (New York: UN Publications, 2018) at 19, online: *UNCTAD* <unctad.org>; UNCTAD, *World Investment Report 2013: Global Value Chains: Investment and Trade for Development* (New York: UN Publications, 2013) at 111, online: *UNCTAD* <unctad.org>.
[361] "Cases" (last visited 14 May 2019), online: *PCA* <pca-cpa.org/en/cases/>.

making it their largest administrator.[362] I discuss these rules in connection with this forum. The ICC Rules of Arbitration, although used less frequently, are potentially very important.[363] Since the ICC adheres to the principle of confidentiality, its data are incomplete and so its role may be more significant than generally known. Also, since we live in a climate of procedural reform in ISDS, there is a possibility (underscored by forum shopping) that less frequently used bodies will gain a stronger influence. Accordingly, I included in my research the ICC Court, a forum that does not play a central role yet, but to which parties may turn if, due to reforms, they lose all other convenient options. Put differently, when a favorable organization changes its rules in ways that are less beneficial to investors, the only parties that can initiate ISDS, the arbitrations may shift to more pro-investor forums.

b) Structure

I deal with each group of comparators separately in my examinations in chapters 4 to 6. Within each group, I examine each example individually and compare the findings to the ISDS administering bodies. First, I examine superior domestic courts in the UK and the US. Next, I assess European courts. I continue with international judicial and quasi-judicial bodies. Lastly, I examine domestic and international tribunals. I end the comparison by assessing ISDS administering bodies and then conclude each chapter by commenting and analyzing all of the findings.

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[362] In May 2019, out of 727 of ICSID arbitration cases 16 were administered under UNCITRAL rules; see: "Cases" (last visited 14 May 2019), online: *ICSID* <icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx>; By 2017, the ICC administered 40 ISDS (mostly under the ICC Arbitration Rules): see International Chamber of Commerce, *ICC Dispute Resolution Bulletin* (ICC Publication, 2018) at 56.

[363] UNCTAD, "Latest Developments in Investor-state Dispute Settlement" (2012) IIA Issue Note, No 1 at 2 (UNCTAD/WEB/DIAE/IA/2012/10) at 2, online: *UNCTAD* <unctad.org>.

5. Framework - Document Survey

I conducted a document survey of formal rules, including primary and secondary laws and procedures. Since the range of selected regimes is broad, I limited the study to sources that are presently in force and to earlier versions only as far as they affect these current rules. The formal governing rules can be found in a variety of documents such as legislative acts, treaties, statutes, protocols, and understandings. Primary sources typically do not contain all rules, but in practice there is a degree of leeway for adjudicative bodies to administer their internal affairs. I also analyze secondary legal instruments stemming from these legislative acts and treaties, including regulations, directives, decisions, rules of arbitration, recommendations, opinions, special procedural orders, codes of procedures, rules of the courts, practice directions, working procedures, etc.

The broad span of selected regimes also influences the temporal framework. On the one hand, there are rules that were recently amended: the ICC Rules of Arbitration in 2017; the UNCITRAL Arbitration Rules in 2014; the ECHR's 2018 Rules of Court; etc. On the other hand, other regimes employ procedural rules from sources that were adopted a few decades ago; for example, the WTO Dispute Settlement Understanding (DSU) 1994, or the rules of the ICJ that trace back under the Hague Conventions[364] to 1899 and 1907.

In common law, case law is regarded as the primary source of law whereas in civil law it is a secondary source that is subordinate to statutory law. With this in mind, I draw knowledge from

[364] *1899 Convention for the Pacific Settlement of International Disputes*, 29 July 1899, (entered into force 4 September 1900) [*Hague Convention 1899*] and replaced by *1907 Convention for the Pacific Settlement of International Disputes*, 18 October 1907 (entered into force 26 January 1910) [*Hague Convention 1907*].

the landmark cases of any given forum. In arbitration, there is no principle of precedence, yet, in international arbitration, tribunals frequently give regard to previous decisions. Also, all cases in general reflect the application and interpretation of formal rules. Thus, I assess a range of cases from the point of view of case law but also to illustrate some controversial points. To a lesser extent, I consult dissenting opinions and third-party submissions. Yet, since arbitration frequently adheres to the principle of confidentiality, the number of accessible cases has been limited (ICSID is an exception). This limited access makes the assessment somewhat incomplete.

The formal rules are the core of the research, but other sources, such as internal documents, guides, guidelines, manuals, resolutions, handbooks, guides, guidance notes, FAQs, etc., usually give additional details and reveal surrounding debates and controversies. Thus, they enlighten the governing texts. Although "internal" documents and communications from organizations that operate commercially and confidentially are difficult to acquire, all comparators typically make the above documents publicly accessible. On this basis, I include them in my analysis when necessary. However, ISDS forums usually do not provide a variety of other details. Thus, to gain a thorough understanding, I also check other alternative sources that evidence or reflect on practices in the interpretation of these formal rules. These may include newspapers, interviews,[365] researched data,[366] speeches, comments, etc. For instance, for remuneration based on official schedules and fees, I examine samples of cases that disclose arbitrators' fees as well as official websites, guides, newspapers, reports, analysis, etc. Since rules frequently change, I also examine

[365] Nik de Boer, "Interview with Judge Sacha Prechal of the European Court of Justice: Part I: Working at the CJEU" (18 December 2013), online (blog): *European Law Blog* <europeanlawblog.eu/2013/12/18/interview-with-judge-sacha-prechal-of-the-european-court-of-justice-part-i-working-at-the-cjeu/>.
[366] Marco Fabri & Philip M Langbroek, "Is There a Right Judge for Each Case - A Comparative Study of Case Assignment in Six European Countries" (2008) 1:2 Eur J Legal Stud 292 at 4.

reports and debates of former or existing working groups when these reports assist in understanding the rules in force. They also help to capture the up-to-date developments in ISDS and so point to where ISDS reform is going, such as in the case of the proposal by the European Commission to set up a multilateral and Investment Court System (ICS).[367]

6. Summary

Public and private laws share certain values. Likewise, international and domestic laws are frequently interdependent. ISDS can learn from systems with similar functions and goals. This learning process can be facilitated by comparing and analogizing ISDS to other regimes, a process that provides a basis for observation and insight beyond a single system. In the following chapters, I compare other public and private legal systems, and draw analogies to reveal different procedures and tools, structures and approaches of these systems for safeguarding values of participation and adjudicative independence and impartiality. This study can assist ongoing reform efforts.

[367] The new Investment Court System has also been included in the *EU-Vietnam FTA*, *supra* note 322.

Chapter 4: Significance of Methods of Adjudicative Appointment and Case Assignment

Introduction

In this chapter, I concentrate on procedural mechanisms that aim to secure adjudicative independence and impartiality - values of the rule of law and prerequisites to procedural fairness. Adjudicators should decide issues according to the law and facts, without favoritism or interference for whatever reason from appointing or assigning authorities.[368] Independence means freedom from such interference whereas impartiality - fair, unbiased, non-prejudicial and equal treatment including the absence of a personal interest in the case[369] - is the direct opposite of favoritism. Various tools have been used to safeguard adjudicative independence and impartiality, such as security of tenure, set remuneration, the separation of powers in the process of adjudicative appointment, and objective methods of case assignment (including separation of the methods of appointment from those of case assignment). These mechanisms that are often intertwined support adjudicative independence and impartiality as common and cumulative goals and are in place well before the dispute has reached the adjudicative body. In this chapter, I concentrate on the latter two: adjudicative appointment and methods of case assignment. I examine security of tenure and remuneration in the next chapter.

Adjudicative appointment is the process by which a qualified individual is nominated, selected from among the nominees, and appointed. The "method" of case assignment is the process by which cases are assigned to individual adjudicators from a list of qualified and (usually) already

[368] Philippe Sands, Campbell McLachlan & Ruth Mackenzie, "The Burgh House Principles on the Independence of the International Judiciary" (2005) 4:2 Law & Prac Intl Cts & Trib 247.
[369] P H Collin, *Dictionary of Law*, 5th ed (London, UK: Bloomsbury Publishing, 2007), sub verbos "impartial", "impartially".

appointed persons. These two steps - appointment and case assignment - are typically dealt with in separate phases. The core of my study is whether, in the process of appointment and case assignment, the principle of separation of powers as well as a system of checks and balances have been employed. I focus on decision-making powers to nominate, select, and appoint and on the powers and mechanisms that are used to assign cases to individual adjudicators. While qualifications and competencies play an important part in adjudicative appointment, I do not concentrate on these requirements.

There are various stages in the process of adjudicative appointment and case assignment. These stages can be allocated to and decided by different decision-makers. The relevant procedures define who has the power to decide, allowing decision-makers, at one end of the spectrum, to influence only an individual step (those that nominate cannot select nor appoint and *vice versa*) of the appointment process while, at the other end of the spectrum, other decision-makers can influence the appointment or case assignment process as the whole. The key purposes of the separation of powers is to make the process fair by containing the powers of individual decision-makers. Considering this principle, I examine who has the power to decide whether such powers are divided among various actors and whether the appointment process is separated from the assignment process.

The separation of powers as classically introduced by Montesquieu, calls for a system of checks and balances.[370] In his study of its historical development in the UK and the US, Erwin notes that:

> Judicial independence is the strongest safeguard against the exercise of tyrannical power by men who want to live above the law, rather than under it. The separation of powers

[370] Charles de Secondat Baron de Montesquieu, *The Spirit of Laws*, translated by Thomas Nugent (London, UK: George Bell and Sons, 1902).

> concept as understood by the founding fathers assumed the existence of a judicial system free from outside influence of whatever kind and from whatever source, and further assumed that each individual judge would be free from coercion even from his own brethren.[371]

This concept requires separation of adjudicative, executive and legislative powers[372] and serves as a check against the concentration of power in the hands of a few privileged individuals. Concentrated powers are problematic due to the risk of judicial decisions becoming politically motivated instead of being based on law and facts. This risk is reduced by dividing appointing powers among multiple decision-makers and confining them to the appointment stage. This implies a need for the separation of the power of adjudicative appointment, usually exercised by the executive branch, from the method of case assignment by allowing the latter step to be taken within the adjudicative branch. This separation limits the powers of any individual appointing decision-maker to assign adjudicators to specific cases, thus enhancing judicial independence and impartiality by making the assignment process and so adjudication free from an outside influence.

Once the appointment is made, the independence and impartiality of a new judge become backed by the immediate granting of security of tenure. Since tenured adjudicators are subject to the court's internal processes, the appointing authority has no power over the new judge. It has no tools to: alter the term or impose arbitrary conditions to it; remove adjudicators from office; obstruct their re-appointments (during the term there are none); or otherwise influence or pressure non-conforming individuals to succumb its decision-making to its demands. Also, tenure by cutting down (term) or eliminating (lifetime tenure) the need for reappointments reduces

[371] Sam J Jr Ervin, "Separation of Powers: Judicial Independence Judicial Ethics" (1970) 35:1 Law & Contemp Probs 108 at 121.
[372] "Separation of Powers-An Overview" (1 May 2019), online: *National Conference of State Legislatures* <www.ncsl.org/research/about-state-legislatures/separation-of-powers-an-overview.aspx>.

temptations to adjust one's behavior in accordance with the will of the appointing authority in order to secure future appointments. In specific cases, a lack of independence and impartiality is, however, a legitimate reason to disqualify an adjudicator.[373]

In the internal procedures of the court, an objective method of case assignment - rotation, algorithms, automated systems generating names, etc. - is usually used to secure independence and impartiality from within the adjudicative branch by limiting powers of individual decision-makers to make assignments political, personal or otherwise unfair. According to Fabri and Langbroek, "[c]ase assignment is the core-business of court organisations, because it touches upon some of the essential aspects of rendering justice: judicial independence and impartiality, organisational flexibility and efficiency."[374] According to the European Networks of Councils for the Judiciary (ENCJ),[375] the principles and criteria for allocating cases:

> should be objective and include: the right to a fair trial; the independence of the Judiciary; the legality of the procedure; the nature and complexity of the case; the competence, experience and specialism of the Judge; the availability and/or workload of the Judge; the impartiality of the Judge and lastly, the public perception of the independence and impartiality of the allocation.[376]

Accordingly, an objective and neutral mechanism bolsters the public perception of impartiality and neutrality in the adjudicative system and on the part of acting adjudicators.

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[373] See for instance, Diego M Papayannis, "Independence, Impartiality and Neutrality in Legal Adjudication Rule of Law" (2016) 28 Revus: J Const Theory & Phil Law 33 at 41; UNCTAD, "Recent Developments in Investor-State Dispute Settlement (ISDS)" (2014) IIA Issue Note, No 1 (UNCTAD/WEB/DIAE/PCB/2014/3) at 23, online: *UNCTAD* <unctad.org>; "2013-2014 ICSID Investment Treaty Cases - Key Issues" (25 August 2014), online: *McNair Chambers* <www.mcnairchambers.com/publications-full-list/> at 9–10.
[374] Fabri & Langbroek, *supra* note 366 at 1.
[375] *Minimum Judicial Standards IV: Allocation of Cases* (ENCJ Report 2013-2014), online: *European Networks of Councils for the Judiciary* <www.encj.eu/articles/76>.
[376] *Ibid* at 9 para 5.

However, the use of objective mechanisms alone does not suffice to safeguard independence and impartiality. Every protection serves its own purposes: the separation of powers is achieved by dividing appointing and case assigning powers to various stages and variety of decision-makers; adjudicative independence and impartiality from outside influence is safeguarded by dealing with case assignment within the adjudicative branch and so separately from appointment; and lastly independence and impartiality from coercion from within the adjudicative branch is achieved by objective methods of case assignment. Success in achieving adjudicative independence and impartiality depends on what safeguards, if any, are used and their cumulative outcome, as reflected in *Table 4*. In order to support public confidence in the fairness of the system as well as to minimize potential risks of misuse of power, it is important to have protections of adjudicative independence and impartiality at each stage of the adjudicative process.

Table 4: Separation of Powers and Components of Judicial Appointments and Case Assignments

SEPARATE ELEMENTS / SEPARATION OF POWERS	***Appointment***	***The Two Processes*** (appointment and case assignment)	***Case Assignment***	***Methods of Allocation***	***Overall Safeguards****
Yes	Dispersed to a variety of actors in individual steps of the process	Separated	Within the adjudicative branch	Objective (Rotation, randomness, algorithms, etc.)	Strong
No	Concentrated in the hands of a few individuals	Merged	Outside the adjudicative branch (e.g. executives)	Discretionary	Weak

*Of adjudicative independence and impartiality.

To evaluate ISDS, in this chapter I examine existing methods of adjudicative appointment and case assignment, as tools to safeguard adjudicative independence and impartiality, in a variety of adjudicative regimes. In this evaluation, I first examine what entity is empowered to make the

adjudicative appointment and whether the power to appoint is separated among various actors or concentrated in the hands of a few. Next, I assess the methods of case assignment and whether they are separate from the appointment process. In turn, I examine whether case assignment is done *ad hoc* in the adjudicative regime or whether, in contrast, a permanent body of adjudicators has been established. Lastly, I assess whether objective tools, such as rotas or algorithms, have been used in the process of case assignment.

1. Domestic Courts

a) UK Superior Courts (laws specific to England and Wales)

i. Appointment

The UK superior courts are the UK Supreme Court and the Senior Courts. The process of the appointment of judges to these courts is not identical. The appointment to the Supreme Court requires a specially convened selection commission every time there is a vacancy to be filled,[377] whereas to the Senior Courts the appointment is made by a permanent executive non-departmental public body - the Judicial Appointments Commission (JAC) - established in 2006 following the Constitutional Reform Act 2005 (CRA 2005).[378]

The Supreme Court

In the process of appointment, since candidates apply for the role themselves, there is no official body with powers to nominate but only to select.[379] The selection commission for the appointment

[377] *Constitutional Reform Act 2005* (UK), ss 25–31, sch 8 [*CRA 2005*]. See "Appointments of Justices" (last visited 1 May 2019), online: *The Supreme Court* <www.supremecourt.uk/about/appointments-of-justices.html>.
[378] *CRA 2005*, pt 4, sch 12.
[379] See for instance, *Information Pack: Vacancy for President of The Supreme Court of The United Kingdom* (last visited 16 May 2019), online: *The Supreme Court of The United Kingdom* <www.supremecourt.uk/docs/information_pack_president.pdf> at 6 [*Information Pack*]; *Appointment Process for*

of a Justice to the Supreme Court must be convened by the Lord Chancellor. Following the CRA 2005, the commission must have an odd number of members (the minimum is five) and include at least one non-legally-qualified person, one senior judge but not a Justice of the Supreme Court, and a member of each the Judicial Appointments Commissions/ Board in England and Wales, Scotland, and Northern Ireland nominated by chairs of these three latter bodies.[380]

In its deliberation, the commission must consult persons specified by the Supreme Court (Judicial Appointments) Regulations 2013 (UK).[381] Among these persons are senior judges,[382] Lord Chancellor, First Ministers in Scotland and Wales and the Judicial Appointments Commission in Northern Ireland.[383] From the nominated persons, the commission selects one candidate and notifies the Lord Chancellor about its decision. The Lord Chancellor can either accept, reject or ask for reconsideration of the commission's selection.[384] After the Lord Chancellor's approval, the Prime Minister must recommend the approved candidate to Her Majesty the Queen for the appointment.[385] The role of the Queen as well as the Prime Minister is strictly formal.[386]

Deputy President of the Supreme Court (2017), online: *The Supreme Court of the United Kingdom* <www.supremecourt.uk/docs/appointment-process-for-the-deputy-president-of-the-supreme-court.pdf> at 3.

[380] *CRA 2005*, s 27 sch 8 as amended by the *Crime and Courts Act 2013* (UK), [*CCA 2013*]. See *Procedure for Appointing a Justice of The Supreme Court of the United Kingdom* (April 2016) online: *The Supreme Court of the United Kingdom* <www.supremecourt.uk/about/appointments-of-justices.html> at 1 [*Procedure for Appointing a Justice*].

[381] Supreme Court (Judicial Appointments) Regulations 2013 (UK), SI 2013/2193, s 18 [*SC (JA) Regulations 2013*].

[382] According to the *CRA 2005*, s 60(1): the senior judges are the judges of the Supreme Court; the Lord Chief Justice of England and Wales; the Master of the Rolls; the Lord President of the Court of Session; the Lord Chief Justice of Northern Ireland; the Lord Justice Clerk; the President of the Queen's Bench Division; the President of the Family Division; the Chancellor of the High Court.

[383] *SC (JA) Regulations 2013*, 14 s 18.

[384] *CRA 2005*, ss 29–31; *SC (JA) Regulations 2013*, s 20–22.

[385] *Procedure for Appointing a Justice*, *supra* note 380 at 3.

[386] "Parliament's role in hiring and firing judges" (28 March 2012), online (blog): *The House Divided: Politics, Procedure and Parliament* <pp549.wordpress.com/2012/03/28/parliaments-role-in-hiring-and-firing-judges/>.

Senior Courts of England and Wales

Appointments to the Senior Courts are made by the JAC,[387] a permanent executive non-departmental public body, sponsored by the Ministry of Justice.[388] The JAC recommends candidates for judicial appointments up to and including the High Court and other senior posts like Lord Chief Justice, Heads of Division, Senior President of Tribunals, and Court of Appeal positions.[389] After consultation with the Lord Chief Justice, the Lord Chancellor may request the JAC to select a person for a recommendation or an appointment.[390] In order to complete the task, the JAC will announce a competition and invite applications for the position - aspiring candidates apply directly to the JAC.[391] The JAC convenes selection panels (usually 3 persons) that assess each shortlisted candidate's merits and a competency - using panel interviews, situational questioning about scenarios an applicant may face as a judge, a role-play, simulations of a court or tribunal's environment, and presentations. After their assessments, these panels recommend the most suitable candidates to the Commission. In its deliberation, the Commission considers not only these reports but all other relevant criteria. Unless waived, the JAC must carry statutory consultations - consulting individuals with experience with the post (for example, someone who has held the same office) - and other background checks.[392] The JAC Commissioners sitting as the Selection and Character Committee - examine potential character issues of each candidate and make the final decision who to recommend to the Appropriate Authority (Lord Chancellor, Lord Chief Justice or Senior President of Tribunals) for the appointment.[393] The Appropriate Authority

[387] *CRA 2005*, ss 61–62, sch 12; *The Judicial Appointments Commission Regulations 2013* (UK), SI 2013/2191 [*JAC Regulations 2013*].
[388] "The organisation" (last visited 15 May 2019), online: *Judicial Appointments Commission* <www.judicialappointments.gov.uk/organisation>.
[389] *CRA 2005*, pt 4; *JAC Regulations 2013*.
[390] *Ibid* ss 69, 75A, 78, and 87.
[391] See the JAC's official website at <www.judicialappointments.gov.uk/>.
[392] *JAC Regulations 2013*, s 15.
[393] *Ibid*.

can either accept, reject or ask for reconsideration of their selection.[394] On the advice of the Prime Minister and the Lord Chancellor following the recommendation of an independent selection panel, Her Majesty the Queen makes the appointment.[395]

Table 5: The UK Superior Courts - Appointment

APPOINTMENT TO	*Nomination*	*Selection*	*Appointment*
The Supreme Court*	Candidates apply	By a specially convened Selection Commission: • Conducts consultations • Recommends one candidate to the Lord Chancellor (The Lord Chancellor can accept, reject or ask for reconsideration).	After the Lord Chancellor's approval, the Prime Minister must recommend the candidate to Her Majesty the Queen for the appointment.
High Courts of England and Wales	By a permanent body - the JAC - that announces competitions and invites applicants.	By the JAC that • Conducts selection (a multilevel process). • Recommends a list of selected candidates to the Appropriate Authority.**	Made by Her Majesty the on the advice of the Lord Chancellor and the Prime Minister following the recommendation of an independent selection panel.

*12 permanent Justices. **Can accept, reject the candidate or ask for reconsideration.

ii. Case assignment

In any proceedings, the Supreme Court must consist of an uneven number of justices (at least three) - more than half of them selected from the permanent members.[396] Since these are the only legislative requirements and the Court has typically twelve permanent justices, it is for the Court to decide the size of panels. The size can range from three to eleven.[397] According to the Court, cases of high importance - constitutional, public issues, etc. - require panels of more than five

[394] *Ibid* ss 8, 14, 20, 26, 32, 41.
[395] *Senior Courts Act 1981* (UK), s 10 (1)–(2) [*SCA 1981*].
[396] *CRA 2005*, s 42; *The Supreme Court Rules 2009* (UK), SI 2009/1603, s 3(2), [*SC Rules 2009*].
[397] Joe Tomlinson, Jake Rylatt & Duncan Fairgrieve, "And Then There Were Eleven: Some Context on the Supreme Court Sitting En Banc in the Article 50 Case" (9 November 2016), online (blog): *UK Constitutional Law Blog* <ukconstitutionallaw.org/>.

justices.[398] Since panels of five justices have been criticized as potentially insufficient (two panels of five justices may deliver different decisions to the same case), panels of nine or seven justices have been increasingly more common.[399] Justices to individual cases are assigned by the Registrar after a consultation with the President and the Deputy President of the Court (they both typically chair these panels)[400] according to the case specificities and expertise of individual justices.[401] Since there are no hard rules to follow, the process as desired is flexible but its subjective approach makes it problematic. Thus, the system would be improved if the selection process is made more transparent.[402]

The Queen's Bench Division is one of the three divisions of the High Court dealing with judicial review.[403] It serves as an example of the High Court and its methods of case assignment. According to the court's guidelines, supplementing the Civil Procedure Rules (CPR) and the supporting Practice Directions (PD), cases are assigned on a rota basis.[404] The PD empowers the Senior Master, and the Chief Master to make arrangements for proceedings to be assigned to individual Masters.[405] The arrangements may vary in general or in particular cases, for example, after an assignment has been made the case may be transferred to another Master. This technique makes the system flexible to accommodate actual needs.

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[398] "Panel numbers criteria" (last visited 16 May 2019), online: *The Supreme Court* <www.supremecourt.uk/procedures/panel-numbers-criteria.html>.
[399] Penny Darbyshire, "The UK Supreme Court - is there anything left to think about?" (2015) 21:1 Eur J Curr Legal Issues at para 2.
[400] *Information Pack*, supra note 379 at 5.
[401] *Ibid*.
[402] Richard Buxton, "Sitting en banc in the new Supreme Court" (2009) 125 Law Q Rev 288; Hugh Tomlinson, "Selecting the Panel and the Size of the Court" (last modified 4 October 2009), online (blog): *UKSCBlog* <ukscblog.com/selecting-the-panel-and-the-size-of-the-court-updated/>.
[403] *SCA 1981*, s 31, sch 1(2); *The Queen's Bench Guide 2018: A guide to the working practices of the Queen's Bench Division within the Royal Courts of Justice* (Judiciary of England and Wales, 2018) at para 1.5.1 [*The Queen's Bench Guide 2018*].
[404] *The Queen's Bench Guide 2018*, *supra* note 403 at paras 1.1.2, 1.7.4, 9.1.1.
[405] *CPR PD* 2B ss 6.1–6.2.

A 2007 study claims that despite the formal role vested in "the head of court and the top of the judicial system" - the Lord Chancellor, the Master of the Rolls, etc. - the assignment is typically done by the court clerk.[406] The case is assigned following a "*ticketing system*" - the clerk assigns the case to the first professionally qualified and available judge.[407] The study notes that in "England the professional values are apparently considered to be self-evident and internalised by the judicial services - and do not seem to have the need to lay down these values in rules."[408] This process while bringing a higher flexibility lacks transparency. In order to explain how organizational (distribution of cases, etc.) and professional (judicial independence, impartiality, integrity, etc.) values are balanced it has been suggested that on the case assignment the court should create clear policies.[409]

Table 6: The UK Superior Courts - Case Assignment

CASE ASSIGNMENT	***Internal process - separate from appointment process***
The Supreme Court (12 Justices)	Cases are assigned according to the specificities of individual cases and expertise of Justices.
High Courts of England and Wales	On a rota basis - using a *ticketing* system.

b) US Supreme Court

i. Appointment

The Supreme Court consists of nine Justices - the Chief Justice of the United States and eight Associate Justices.[410] The appointment process of a Court Justice follows a multi-level procedure

[406] Fabri & Langbroek, *supra* note 366 at 4, 13–14.
[407] *Ibid* at 16, 22.
[408] *Ibid* at 24.
[409] *Ibid* at 25.
[410] 28 USC § 1 (2017). See "Justices" (last visited 18 May 2019), online: *Supreme Court of the United States* <www.supremecourt.gov/about/justices.aspx>.

devised to separate appointing powers - appointments are made by the President of the United States with the advice and consent of the US Senate.[411]

The power to nominate a Justice is vested in the President by the US Constitution.[412] Since the Constitution is silent about the nominee's qualifications, the President is free to choose any individual. It has been suggested that Presidents usually nominate persons that share their political and ideological interests.[413] The President's nomination is referred to the US Senate where the Senate Judiciary Committee (SJC) conducts hearings where nominees provide their testimonies.[414] The SJC reports out its nomination to the full Senate's consideration - favorably, negatively, or without recommendation.[415] The Senate's role is to provide advice to the President. Yet there are several views about the scope of its advisory role. One view suggests that the Senate's advisory role is strictly confined to the approval or disapproval, after the President selected a nominee, of the President's choice.[416] Another view suggests that the Senate's advisory role is broader - in addition to confirming the President's choice, the role equally applies before the nominee's selection.[417] Further, another view bridging the former two suggests that this advisory role is somewhere in between these two opposing views - the Senate is entitled to provide advice even before selection, but such advice is not binding.[418] A simple majority vote is required to confirm

[411] US Const art II, § 2, cl 2.
[412] *Ibid.*
[413] Ryan C Black & Ryan J Owens, "Courting the President: How Circuit Court Judges Alter Their Behavior for Promotion to the Supreme Court" (2016) 60:1 Am J Pol Sci 30. See also Barry J McMillion, "Supreme Court Appointment Process: President's Selection of a Nominee" (27 June 2018) R44235, Congressional Research Service at 8.
[414] See "United States Senate Committee on the Judiciary" (last visited 19 June 2019), online: *Committee on the Judiciary* <www.judiciary.senate.gov/>.
[415] Barry J McMillion, "Supreme Court Appointment Process: Consideration by the Senate Judiciary Committee" (14 August 2018) R44236, Congressional Research Service at 17–20.
[416] McMillion, *supra* note 413 at 5–6.
[417] *Ibid.*
[418] *Ibid.*

or reject a nominee.[419] In order to appoint the President's nominee the person must receive confirmation - empowers the President to appoint the candidate as a member of the Court - from the Senate.[420]

Table 7: The US Supreme Court - Appointment

APPOINTMENT TO	*Nomination*	*Selection*	*Appointment*
The US Supreme Court (9 permanent Justices)	By the US President	*Hearings* - by the Senate Judiciary Committee (SJC) that reports nominations to the Senate *Consideration* - by the full Senate that must confirm the nominee in order to get appointed	By the US President on the advice of the Senate

ii. Case assignment

The US Constitution, the Court Rules[421] or Guides say almost nothing about the institutional design of the Court and the method of case assignment.[422] Despite its current number (nine Justices), in history, the number varied from six in 1789 to ten in 1863 and for nearly four decades the Court authorized a one-Justice panel to decide all its cases during the summer.[423] The number of sitting Justices depends on availability. The current Court sits as a full court - a unified bench of nine Justices.[424] Yet the court can and has already decided a high percentage of its cases in a smaller number typically due to vacancies, illnesses and recusals.[425] In order to decide a case, a quorum of at least six Justices is required to ensure a sufficient presence.[426] However, even if their number

[419] Barry J McMillion, "Supreme Court Appointment Process: Senate Debate and Confirmation Vote" (7 September 2018) R44234, Congressional Research Service at 15.
[420] *Ibid.*
[421] *Rules of the Supreme Court of the United States*, 2017 [*Supreme Court Rules 2017*].
[422] Tracey E George & Chris Guthrie, "Remaking the United States Supreme Court in the Courts' of Appeals Image" (2009) 58:7 Duke LJ 1439 at 1443.
[423] Tracey E George & Chris Guthrie, "The Threes: Re-Imagining Supreme Court Decisionmaking" (2008) 61:6 Vand L Rev 1825 at 1853.
[424] Nick Robinson, "Structure Matters: The Impact of Court Structure on the Indian and U.S. Supreme Courts" (2013) 61 Am J Comp L 173 at 175, and 201–202; George & Guthrie, *supra* note 423.
[425] George & Guthrie, *supra* note 423 at 1853.
[426] 28 USC § 1; *Supreme Court Rules 2017*, r 4 (2).

drops below six, the Chief Justice, authorized by Congress, can delegate the Court's authority to a panel of three most senior judges.[427]

Table 8: The US Supreme Court - Case Assignment

CASE ASSIGNMENT	*Internal process - separate from appointment*
The US Supreme Court (9 permanent Justices)	A full Court (at least a quorum of six Justices) but can sit in a smaller number

c) Analysis

All examined domestic courts have resembling appointment processes of their permanent judges. These processes are divided to several phases - nomination/ application, selection, and appointment - each typically decided by a set of different decision-makers. This means that actors with powers to nominate are different from those who assess and select. The latter are typically also different from those who ultimately appoint the candidate. By dividing the powers among numerous actors, the process guarantees separation of powers and prevents ill-motivated appointments.

Considering methods of case assignment, all courts follow their internal procedures. Since this internal process is separate from the process of the adjudicative appointment the powers to appoint and assign are also separate. Yet each court assigns its cases to its permanent judges following a different scheme: the UK Senior Courts use a ticketing system on a rota basis; the UK Supreme Court assigns cases according to their specificities (including the size of the panel); the US Supreme Court requires sitting of the full Court. In addition, all courts have discretionary powers

[427] 28 USC § 2109; George & Guthrie, *supra* note 423 at 1853.

to adjust case assignment beyond the normal mechanisms to retain flexibility. In sum, considering qualities of methods of case assignment used by these courts, the UK Supreme Court uses the most subjective one.

2. European Courts

a) ECHR

i. Appointment

The ECHR has 47 judges (the same number of its state Parties) that operate on a permanent basis.[428] Requirements and procedures of their election are set in the European Convention on Human Rights (Convention).[429] This election process has two phases: (1) party states select their candidates; (2) the Parliamentary Assembly of the Council of Europe elects judges.[430] Since states can decide their own procedures of selection, it is upon them to ensure that their selecting procedures are fair and transparent.[431] To ensure that the selected candidates are fully qualified,[432] contracting states make their selections with the help from the Advisory Panel of Experts on Candidates for Election as Judge to the ECHR.[433] Once their selection is done, states provide lists

[428] *ECHR Convention*, *supra* note 164, as amended by *Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby*, 11 May 1994 (entered into force 1 November 1998) [*Protocol No 11*] and *Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, 13 May 2004 (entered into force 1 June 2010) [*Protocol No 14*]. See European Court of Human Rights, "Composition of the Court" (last visited 20 May 2019), online: *Council of Europe* <www.echr.coe.int/Pages/home.aspx?p=court/judges>.
[429] *ECHR Convention*, arts 21–23.
[430] See "Election of Judges to the European Court of Human Rights" (last visited 20 May 2019, online: *Parliamentary Assembly* <website-pace.net/web/as-cdh> ["Election of Judges"].
[431] *Ibid.*
[432] *Ibid.*
[433] Established following Council of Europe, Committee of Ministers, *Resolution on the establishment of an Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights CM/Res(2010)26* (adopted 10 November 2010); Steering Committee for Human Rights, *Selection and election of judges of the European Court of Human Rights: Report on the process of selection and election of judges of the European Court of Human Rights* (Strasbourg: Council of Europe, 2018) at 34–43.

of their three candidates to the Parliamentary Assembly of the Council of Europe. After all candidates are approved as qualified, the Parliamentary Assembly (the second phase), consisting of 324 parliamentarians, elects judges from these lists.[434] Candidates with the absolute majority of votes are declared elected and become permanent members of the Court.[435] In every proceeding, each contracting party has a right to have present a "national judge" - a judge elected in respect of the respondent state.[436] If there is no national judge among its permanent members,[437] the President of the Court may appoint the judge *ad hoc* - by selecting from a list of candidates submitted by the relevant state.[438] While serving on the court, "the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office."[439] This requirement applies to both permanent as well as judges *ad hoc*.

Table 9: ECHR - Appointment

APPOINTMENT TO	***Selection***	***Election***
ECHR (47 permanent judges)	Each state selects own candidates with help of the Council of Europe.	By the Parliamentary Assembly of the Council of Europe from lists submitted by states. Permanent judges - candidates with the absolute majority of votes. Judges *ad hoc* – appointed by the President of the Court from a list of candidates submitted by the relevant state.

[434] *ECHR Convention supra* note 164 art 22. "Election of Judges", *supra* note 430.
[435] "Election of Judges", *supra* note 430.
[436] *Rules of Court*, 2018 art 29(1) [ECHR *Rules of Court*]. See "Composition of the Court", *supra* note 428.
[437] ECHR *Rules of Court*.
[438] See "Composition of the Court", *supra* note 428.
[439] *ECHR Convention*, art 21 (3).

ii. Case assignment

Every ECHR judge is assigned to one of the Court's five Sections.[440] Composition of these sections should consider different legal systems of the Contracting States while being geographically and gender balanced.[441] These Sections are set up for a period of three years.[442] The Court has four main court formations consisting of one, three, seven (a Chamber) and seventeen judges (the Grand Chamber).[443] Since most of the judgments are delivered by Chambers[444] and the Grand Chamber decides issues of highest importance,[445] I concentrate on these two formations. Chambers are formed within each Section.[446] The Chamber consists of 7 judges, the President of the Section, the national judge of the State concerned, and five other judges designated by the Section President in rotation from among the remaining members of the Section.[447] The Grand Chamber consists of 17 judges,[448] the President and Vice-Presidents of the Court, the Presidents of the Section and the national judge, together with other judges selected by the drawing of lots.[449] No judge sitting in a Chamber which first examined the case can sit in the case referred to the Grand Chamber, except the President of the Section and the national judge.[450] The use of a rotational system and of drawing lots ensures randomness in composition of Chambers and the Grand Chambers.

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[440] ECHR *Rules of Court*, rs 1(d) and 25. See "Composition of the Court", *supra* note 428.
[441] ECHR *Rules of Court*, r 25(2).
[442] *Ibid*, r 25.
[443] *Ibid*, rs 24, 26 and 27–27A.
[444] "Details of Treaty No 155" (last visited 20 May 2019), online: *Council of Europe* <www.coe.int/en/web/conventions/full-list>; Dinah Shelton & Paolo G Carozza, *Regional Protection of Human Rights*, 2nd ed (Oxford, UK: Oxford University Press, 2013) at 176.
[445] *ECHR Convention*, art 30. The Grand Chamber also decides questions related to an interpretation of the Convention, Protocols, and whenever there is a risk of inconsistency with the Court's previous judgment.
[446] ECHR *Rules of Court*, r 26. See "Composition of the Court", *supra* note 428.
[447] ECHR *Rules of Court*, rs 1(e) and 26.
[448] ECHR *Rules of Court*, rs 1(c) and 24(1). See "Composition of the Court", *supra* note 428.
[449] ECHR *Rules of Court*, r 24(2).
[450] *Ibid*.

Table 10: ECHR - Case Assignment

CASE ASSIGNMENT	*Size*	*Judges sitting in every case*	*All remaining judges - randomness*
ECHR (47 permanent judges)	**The Chamber** (7 judges)	The President of the Section and the national judge	*Rotation*
	The Grand Chamber (17 judges)	The President and Vice-Presidents of the Court, the Presidents of the Sections and the national judge	*Drawing of lots*

b) CJEU

Treaties relevant to the appointment and case assignment processes of the two courts of the CJEU - the Court of Justice (CofJ) and the General Court (GC) - are the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). The CofJ consists of one judge from each Member State - 28 judges - and 11 advocates general.[451] According to the TEU, the GC should include at least one judge per Member State.[452] The number of GC judges is determined by the Statute of the Court of Justice of the European Union[453] - currently the GC consists of 47 judges,[454] however, in September 2019 the number will increase to two judges per Member State.[455]

[451] *TEU*, *supra* note 321, art 19(2). Conditions of the appointment are set out in *TFEU*, *supra* note 323, arts 253–254. See "Court of Justice of the European Union (CJEU)" (last visited 22 May 2019), online: *European Union* <europa.eu/european-union/about-eu/institutions-bodies/court-justice_en>.
[452] *TEU*, art 19(2).
[453] As prescribed by the *TFEU*, arts 253–254.
[454] *Ibid*; *TEU*, art 19(2).
[455] *Protocol (No 3) On the Statute of the Court of Justice of the European Union*, 25 March 1957, OJ, C 202/210, art 48 (entered into force 1 January 1958) [*Statute of the CofJ*] as amended by *Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union*, 16 December 2015, OJ, L 341/14 (entered into force 25 December 2015).

i. Appointment

Judges are nominated by each Member State[456] and appointed by common accord of the governments of all the Member States.[457] Before making their appointments, Member States must consult the suitability of selected candidates with for that purposes established panel.[458] This panel has been set up[459] and already twice renewed by the Council of the European Union.[460] The panel comprises seven members chosen from among former members of the CofJ and the GC, members of national supreme courts and lawyers of recognized competence.[461] Since all appointed judges (both courts) must perform their duties impartially and conscientiously, they are (unless exempted) precluded from holding any political or administrative office or any other occupation.[462]

Table 11: The CJEU - Appointment

APPOINTMENT TO	*Nomination*	*Consultation*	*Appointment*
CJEU (The CofJ - 28 judges, and the GC - 47 judges)	By each Member State.	Member States must consult for that purposes designated panel.*	By common accord of the governments of the Member States

*Consists of former members of the CofJ and the GC members of national supreme courts and lawyers of recognized competence.

[456] Simon Hix, *The Political System of the European Union*, 2nd ed, The European Union Series (Palgrave Macmillan, 2005) at 117.
[457] *TFEU*, arts 253–254; *TEU*, art 19(2).
[458] *TFEU*, art 255.
[459] *Council Decision of 25 February 2010 relating to the operating rules of the panel provided for in Article 255 of the Treaty on the Functioning of the European Union*, 27 February 2010, OJ, L 50/18 (entered into force 1 March 2010).
[460] *Council Decision (EU, Euratom) 2017/2262 of 4 December 2017 appointing the members of the panel provided for in Article 255 of the Treaty on the Functioning of the European Union*, 8 December 2017, OJ, L 324/50 (entered into force 1 March 2018).
[461] *TFEU*, art 255. See also "Fifth Activity Report of the panel provided for by Article 255 of the Treaty on the Functioning of the European Union" (28 February 2018), online: *Court of Justice of the European Union* <curia.europa.eu/jcms/jcms/P_64268/en/> at 4, and 37–41.
[462] *Protocol (No 3) on the Statute of the Court of Justice of the European Union*, 7 June 2016, OJ, C 115/210, art 2, and 4 in the consolidated version of the *TFEU*. These requirements apply to judges of the CofJ and the GC.

ii. Case assignment

Court of Justice (CofJ)

The Court's process of case assignment is governed, in addition to the Statute of the Court of Justice of the European Union, by the Rules of Procedure of the Court of Justice. The Court operates ten Chambers consisting of four to six judges.[463] The power to assign judges to these chambers is given to the President of the Court who does it in a secret process.[464] The Court sits in chambers of three and five judges, in a Grand Chamber (13 judges) or as a full Court.[465] Complexity of the case determines the number of judges assigned to each case.[466]

Chambers of three or five judges are composed of the President of the Chamber, the Judge-Rapporteur and the remaining number of judges.[467] Lists of the members of the Chambers of three and five judges, excluding their presidents, and a list of the Presidents of Chambers of five judges are drawn up and published in the *Official Journal of the European Union*.[468] Order of these lists is determined by seniority of judges, the date on which they took up their duties or, if found equal, by their age.[469] There is no specialisation among chambers.[470] Cases are assigned to chambers by the president's cabinet according to a list.[471] This process is described as "arbitrary".[472] Judges to

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[463] "Court of Justice: Composition of chambers" (last visited 22 May 2019), online: *Court of Justice of the European Union* <curia.europa.eu/jcms/jcms/Jo2_7029/en/>.
[464] *Rules of Procedure of the Court of Justice*, 29 September 2012, OJ, L 265/1, art 11 (entered into force 1 November 2012) [*Rules of Procedure of the CofJ*]. See also R Daniel Kelemen, "The political foundations of judicial independence in the European Union" in Susanne K Schmidt & R Daniel Kelemen, eds, *The Power of the European Court of Justice* (Milton Park: Routledge, 2013) 43 at 52, and 56 (n 11).
[465] *Statute of the CofJ*, arts 16–7; *Rules of Procedure of the CofJ*, arts 11, and 27–28.
[466] Roland Flamini, "Judicial Reach: The Ever-Expanding European Court of Justice" (2012) 175:4 World Affairs 55.
[467] *Rules of Procedure of the CofJ*, art 28(1).
[468] *Ibid*, arts 27–28.
[469] *Ibid*, arts 28(2)–(3), and 7.
[470] Susanne K Schmidt, "Who cares about nationality? The path-dependent case law of the ECJ from goods to citizens" in Susanne K Schmidt & R Daniel Kelemen, eds, *The Power of the European Court of Justice* (Milton Park: Routledge, 2013) 8 at 14.
[471] *Rules of Procedure of the CofJ*, art 60. See also de Boer, *supra* note 365.
[472] Schmidt, *supra* note 470 at 14.

every case assigned to a chamber are drawn from a relevant list following the order laid in the Rules of Procedure.[473] This means that they cannot choose their own cases.[474]According to these rules, in every case assigned to a Chamber, "the starting-point on those lists" is "the name of the Judge immediately following the last Judge designated from the list for the preceding case assigned to the Chamber concerned."[475] Allocation of other judges to particular cases not only follows the order but also alternate with the reverse order, thus the pattern goes as follows, the first judge on the list goes first, then goes the last one followed by the second one, penultimate one, third one and so on.

The Grand Chamber is composed of the President and the Vice-President of the Court, the Judge-Rapporteur, three Presidents of Chambers of five judges, and the number of judges necessary to reach fifteen.[476] Individual judges of the latter two are selected from designated lists - a list of Presidents of Chambers of five judges and a list of the other judges[477] - that are drawn according to their seniority.[478] Allocation that ensues follows the order of these lists alternating with the reverse order.[479]

The quorum for chambers of five and three judges requires three sitting judges whereas for the Grand Chamber there must be eleven judges.[480] Judges may be prevented from sitting in cases in

[473] *Rules of Procedure of the CofJ*, arts 7, 27–29, and 34–35.
[474] de Boer, *supra* note 365.
[475] *Rules of Procedure of the CofJ*, art 28(1).
[476] *Ibid*, art 27(1).
[477] *Ibid*, arts 7, and 27.
[478] *Ibid*, art 27(3)–(4).
[479] *Ibid*, art 27.
[480] *Statute of the CofJ*, art 17(2)–(3).

which they were previously involved in some other capacities.[481] On similar grounds, parties can request a change in the composition of the Court or one of its chambers.[482] However, they cannot do it on the grounds of the nationality of a judge.[483] If the required quorum for any assigned case is impossible to attain,[484] the President of the Court may designate one or more judges according to the order of the relevant list - the list of other judges for composition of the Grand Chamber,[485] and the lists for the composition of the Chambers of five and three judges.[486] If it is not possible to replace a judge within the designated chamber then the President of the Court may designate another judge to complete the Chamber.[487]

General Court (GC)

A composition of the chambers[488] and the process of case assignment is governed, in addition to the Statute of the Court of Justice of the European Union, by the Rules of Procedure of the General Court.[489] The Court sits in chambers of three or five judges,[490] in a Grand Chamber (15 judges),[491] as a full Court[492] or as a single judge.[493] Since the majority of cases is decided by the chambers of three and five judges[494] and those of legal difficulty or of a higher importance by the Grand

[481] *Ibid* art 18, and 47: CofJ and GC respectively. See also *Code of Conduct for Members and former Members of the Court of Justice of the European Union*, 23 December 2016, OJ, C 483/1, arts 3–4.
[482] *Statute of the CofJ*, art 18.
[483] *Ibid*.
[484] *Ibid*, art 17(2)–(3).
[485] *Ibid*, art 27(4).
[486] *Ibid*, art 28(2)–(3).
[487] *Ibid*, art 17(5); *Rules of Procedure of the CofJ*, arts 34–35.
[488] *Rules of procedure of the General Court*, 23 April 2015, OJ, L 105/1, arts 13–15 (entered into force 1 July 2015) [*Rules of procedure of the GC*]; *Statute of the CofJ*, art 50.
[489] *Statute of the CofJ*, art 50.
[490] *Rules of procedure of the GC*, art 13.
[491] *Ibid*, art 15.
[492] *Ibid*, art 10; *Statute of the CofJ*, arts 16, and 50.
[493] *Statute of the CofJ*, arts 16, and 50; *Rules of procedure of the GC*, art 29.
[494] Niamh Nic Shuibhne, "The Court of Justice of the European Union" in John Peterson & Michael Shackleton, eds, *The Institutions of the European Union*, 3rd ed (Oxford, UK: Oxford University Press, 2012) 148 at 159: Between 2005 to 2009, more than half of all cases were resolved by chambers with five members while chambers of three

Chamber,[495] I focus on these three formations. The Court has nine chambers of three as well as five judges. Since judges are assigned to more than one chamber, they can sit on both three and five chamber cases.[496] Cases are assigned to chambers by the President of the Court.[497] Cases other than appeals against the decisions of the Civil Service Tribunal (assigned to the Appeal Chamber) should be assigned to Chambers of three judges following prescribed rotas.[498] The President of the General Court can derogate from these rotas on certain conditions, such as connections between cases or to evenly spread the workload.

Each chamber has its own President. If in any Chamber of five or three judges the number of assigned judges to it is higher than five or three respectively, the President of the Chamber decides who takes the part in the judgment of the case.[499] The Grand Chamber is composed of fifteen judges, the President of the General Court, the Vice-President, the nine Presidents of Chambers, and other four judges filled on a rotational basis.[500] The quorum for chambers of five and three judges requires three sitting judges[501] whereas for the Grand Chamber there must be eleven judges.[502] If the required quorum is impossible to attain, a substitute judge may be designated from the same chamber or if that is not possible then from the court.[503]

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judges decided a third of cases. See also Court of Justice of the European Union, *Annual Report 2017: Judicial Activity* (Luxembourg: Court of Justice of the European Union, 2018) at 107.

[495] *Rules of procedure of the GC*, art 28.

[496] "General Court: Composition of chambers" (last visited 22 May 2019), online: *Court of Justice of the European Union* <curia.europa.eu/jcms/jcms/Jo2_7038/en/>.

[497] *Rules of procedure of the GC*, art 26(1).

[498] *Criteria for the assignment of cases to Chambers*, 16 August 2016, OJ, C 296/04: applicable from 20 September 2016 to 31 August 2019.

[499] *Rules of procedure of the GC*, art 26(3).

[500] Shuibhne, *supra* note 494 at 159.

[501] *Rules of procedure of the GC*, art 23(1).

[502] *Ibid*, art 23(1).

[503] *Ibid*, arts 17, 23(2), and 24(2).

Table 12: The CJEU - Case Assignment

CASE ASSIGNMENT	*Judges to individual chambers*	*Cases to chambers*	*The number of judges assigned to each case*	*Composition*
The CofJ (28 judges)	Assigned by the Court.	Assigned by the Court according to a list.	Depends on complexity of the case. (Chambers of three or five judges decide most cases).	• Judges sitting in all sittings. • Remaining judges selected following *rotas*.
The GC (47 judges)	Assigned by the Court.	Assigned by the President of the Court.	Depends on complexity of the case. (Chambers of three or five judges decide most cases).	• Judges sitting in all sittings. • Remaining judges selected following *rotas*.

c) Analysis

All examined European courts have similar features to previously examined domestic courts. They have permanent judges and similar processes of their appointment. The process is done in phases with appointing powers dispersed among various actors that are external to these courts. The Member States select their candidates with help from an external body, either the Council of Europe or a designated panel of persons of recognized competence set up by the Council of European Union. The adjudicative appointment is then made either by the Parliamentary Assembly or by common accord of the governments of the Member States as appropriate.

The process of appointment is clearly separated from the mechanics of case assignment. The case assignment is dealt with by these courts internally. The process is complex but once again similar in both courts. At the initial stage, judges are allocated to chambers and cases are then allocated to these chambers by the court. In each chamber there are judges who sit in every case, such as the President of the Chamber, while the remaining judges are allocated to individual cases following rotas. In these courts the case assignment methods differ in subtleties. They range from rotation and the drawing of lots, at the ECHR, to drawn lists and a use of forms of rotation (with selection following order of these lists alternated by a reverse order) at both courts of the CJEU. This

separation and multiplicity of steps safeguards independence and impartiality by preventing judges from being selected for cases in which they might have an interest or by preventing parties from interfering with the process.

3. International Judicial and Quasi-judicial Bodies

a) ICJ

i. Appointment

The Court consists of 15 permanent judges,[504] including President and Vice-President, a Registrar and judges *ad hoc*. Requirements and appointing procedures are governed by the Statute of the International Court of Justice, the Rules of Court and the Practice Directions. Candidates to the ICJ are nominated by national groups designated by Member States.[505] They consist of jurists who become members of the Permanent Court of Arbitration (PCA).[506] States that are not represented on the PCA must first designate their own national groups following the same procedures as those prescribed for the PCA members.[507] Each national group nominates up to four persons, but no more than two of its own nationality.[508] The ICJ judges are elected from the list of all nominees by the United Nations General Assembly and the Security Council in two independent votes.[509] The selected candidate must have an absolute majority of votes in both bodies.[510] All appointed judges must declare to exercise their powers impartially and conscientiously.[511]

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[504] *Statute of the International Court of Justice*, (1945) ICJ Acts & Doc 6, art 3 [*Statute of the ICJ*].
[505] *Ibid*, art 4.
[506] *Ibid*, art 4(1).
[507] *Ibid*, art 4(2).
[508] *Ibid*, art 7(1): Stipulates that only nominees are listed as eligible for election with exception to this rule in art 12(2).
[509] *Ibid*, arts 7–12.
[510] *Ibid*, art 10.
[511] *Ibid*, art 20.

Table 13: The ICJ - Appointment

APPOINTMENT TO	*Nomination*	*Appointment*
ICJ (15 permanent judges)	By national groups designated by Member States.	Candidate with an absolute majority votes received from two separate votes: • The UN General Assembly and. • The Security Council.

ii. Case assignment

The Court generally discharges its duties as the full Court.[512] The Rules of Court may provide for allowing one or more judges, according to circumstances and in a rotation, to be dispensed from sitting.[513] A quorum of nine judges, excluding judges *ad hoc*,[514] suffices to constitute the Court.[515] The Chamber of Summary Procedure, comprising five judges, includes the President, Vice-President, three judges and two substitute judges.[516] It is elected every year by the Court.[517] The Court may also form permanent or temporary chambers of a smaller number of judges, for example, three.[518] Elections to all Chambers, judges and presidents of Chambers, is done by secret ballot and by a majority of votes.[519]

If a judge of the nationality of one of the parties sits on the bench, then the other state party may choose a judge *ad hoc*.[520] Similarly, all parties may choose a judge *ad hoc* when no judge of their nationality is on the bench.[521] The nationality of the *ad hoc* judge does not have to correspond with

[512] *Ibid*, art 25(1).
[513] *Ibid*, art 25(2).
[514] *Rules of Court*, (1978) ICJ Acts & Doc 6, art 20 [*Rules of Court*] (as amended in 2005).
[515] *Statute of the ICJ*, art 25.
[516] *Ibid*, art 29; *Rules of Court*, art 15.
[517] "How the Court Works" (last visited 23 May 2019), online: *International Court of Justice* <www.icj-cij.org/en/how-the-court-works>.
[518] *Statute of the ICJ*, arts 25–26; *Rules of Court*, art 16.
[519] *Rules of Court*, art 18.
[520] *Statute of the ICJ*, art 31(2); *Ibid*, arts 1(2), and 35–37.
[521] *Statute of the ICJ*, art 31(3).

the nationality of the party.[522] It is preferable that the judge *ad hoc* is chosen from the list of the nominees to the court.[523] Parties in their selection should refrain from nominating persons who are acting or have acted in the last three years as an agent, counsel, or advocate in another case before the Court.[524] *Ad hoc* judges must declare, just like the elected judges, to exercise their powers impartially and conscientiously.[525]

In order to preserve adjudicative independence and impartiality, judges may not act as agent, counsel, or advocate in any case or sit in any case in that they previously acted as agents, counsels, or advocates for one of the parties, or in any other capacity.[526] Further, judges may not exercise any political or administrative function, engage in any other occupation of a professional nature.[527] Yet, until recently, ICJ judges frequently sat in ISDS cases.

Table 14: The ICJ - Case Assignment

CASE ASSIGNMENT	***Size***	***Allocation***
ICJ (15 permanent judges)	Typically, the full Court - 9 judges (one can be dispensed from sitting).	Election of all chambers done by secret ballot and a majority of votes.*

**Ad hoc* judges selected by parties preferably from the list of nominees.

[522] *Rules of Court*, art 35.
[523] *Statute of the ICJ*, arts 4–5.
[524] ICJ *Practice Directions*, (2013), ICJ Acts & Doc 6, *Practice Direction VII*.
[525] "Judges ad hoc" (last visited 23 May 2019), online: *International Court of Justice* <www.icj-cij.org/en/judges-ad-hoc>.
[526] *Statute of the ICJ*, art 17 (1)–(2).
[527] *Ibid*, art 16.

b) WTO

i. Appointment

As noted, the WTO has a two-level dispute settlement mechanism - a panel and the Appellate Body - governed by the Dispute Settlement Understanding (DSU).[528] Characteristics, composition, as well as procedures of these two levels have substantial differences. The Appellate Body is a permanent body with permanent adjudicators called Appellate Body members, whereas panels, consisting of panelists, must be established *ad hoc*.[529]

Panel

The *ad hoc* panels usually consists of three persons although it can also have five.[530] The WTO Secretariat maintains an indicative list of qualified individuals from which panelists may be drawn.[531] Yet names outside of the list can also be considered.[532] The list includes governmental and non-governmental individuals nominated by the WTO Members.[533] However, being on the list does not automatically lead to selection.[534] In practice, many panelists "are members of delegations to the WTO."[535] Since panelists must act independently and impartially,[536] they should disclose any information which "is likely to affect or give rise to justifiable doubts as to their

[528] *DSU*, *supra* note 97: Rules related to panels and the Appellate Body are set in articles 8 and 17 respectively.
[529] "Dispute Settlement System Training Module", online: <www.wto.org/english/Tratop_e/dispu_e/disp_settlement_cbt_e/signin_e.htm> s 6.3 at 2.
[530] *DSU*, art 8.5; Peter Van den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, 2nd ed (Cambridge, UK: Cambridge University Press, 2008) at para 3.3.2.3.
[531] *DSU*, art 8.4.
[532] "Dispute Settlement System Training Module", *supra* note 529.
[533] *DSU*, art 8.4: Members shall provide "relevant information on [nominees] knowledge of international trade and of the sectors or subject matter of the covered agreements." See also Louise Johannesson & Petros C Mavroidis, "The WTO Dispute Settlement System 1995-2016: A Data Set and its Descriptive Statistics" (2016) EUI Working Paper, RSCAS 2016/72 at para 3.2.1.
[534] *Ibid*.
[535] *Ibid*.
[536] WTO, *Rules of conduct for the understanding on rules and procedures governing the settlement of disputes* (11 December 1996) WTO doc WT/DSB/RC/1 at paras II, III, and IV(1), online: WTO <docs.wto.org> [*DSU Rules of conduct*].

independence or impartiality."[537] Further, in order to secure independence and impartiality of serving panelist, citizens of member states being parties to the dispute should not serve, unless parties to the dispute agree otherwise.[538]

In this process of appointment, the Secretariat and the Director-General are quite influential.[539] In order to establish a panel, the Secretariat proposes nominations to the parties to the dispute.[540] Disputing parties should not oppose these nominations unless they have a compelling reason.[541] If parties cannot agree on their panelists within the given time limits, either party may request the Director-General,[542] in consultation with the Chairman of the Dispute Settlement Board and the Chairman of the relevant Council or Committee to compose the panel.[543] In practice, the Director-General appoints panelists more frequently than parties.[544]

Appellate Body

The WTO's permanent Appellate Body is composed of seven persons. Although all WTO Member States can nominate candidates,[545] appointments are carried, following the recommendation made by the Preparatory Committee for the WTO, by the Dispute Settlement Board (DSB)[546] on jointly formulated proposals with a Selection Committee, composed by the Director-General and the

[537] *Ibid* at para VI (2).
[538] *DSU*, art 8.3.
[539] See *DSU Rules of Conduct*. See also Johannesson & Mavroidis, *supra* note 533 at para 3.2.1.
[540] *DSU*, art 8.6.
[541] *Ibid*.
[542] Since September 2013, it is Roberto Azevêdo: See "WTO Director-General: Roberto Azevêdo" (last visited 25 May 2019), online: *WTO* <www.wto.org/english/thewto_e/dg_e/dg_e.htm>.
[543] *DSU*, art 8.7. See also Craig VanGrasstek, *The History and Future of the World Trade Organization* (Geneva: World Trade Organization, 2013) at 258.
[544] Johannesson & Mavroidis, *supra* note 533 at 28 (table 16).
[545] Elvire Fabry & Erik Tate, "Saving the WTO Appellate Body or returning to the wild west of trade?" (2018) Policy Paper No 225, Jacques Delors Institute at 4.
[546] *DSU*, art 17(1).

Chairs of the General Council, Goods Council, Services Council, the TRIPS Council and chaired by the DSB Chair.[547] The Committee's task is to conduct interviews and make recommendation to the DSB.[548] Once the Committee's task is complete, the DSB takes its final decision to appoint.[549]

Table 15: WTO - Appointment

APPOINTMENT TO	*Nominations*	*Selection*	*Appointment*
Panel (untenured governmental or non-governmental panelists)	By Member States.	By the Secretariat that proposes candidates to parties.	*Ad hoc* - by the Director-General or parties.
Appellate Body (7 permanent members)	By Member States.	By the Selection Committee.	Final decision and appointment by the DSB.

ii. Case assignment

Since, the WTO panel merges appointment and case assignment procedures together (discussed above), I will examine methods of case assignment related to the WTO Appellate Body only. In order to decide an appeal, a body of three Appellate Body members out of seven, called a Division, must be established.[550] The process of selection of these three members is governed by the Working Procedures for Appellate Review, drawn by the Appellate Body in consultation with the Chairman of the DSB and the Director-General.[551] To ensure randomness, unpredictability, and opportunity for all members to serve regardless of their nationalities, they are selected to Divisions

[547] On 6 December 1994, the WTO approved its Preparatory Committee's recommendations for the procedures for the appointment of Appellate Body members See Preparatory Committee for the World Trade Organization, *Establishment of the Appellate Body*, (8 December 1994), WTO Doc PC/IPL/13 at para 13, online: *WTO* <docsonline.wto.org> approved by WTO in WTO, *Establishment of the Appellate Body*, (19 June 1995) WTO Doc WT/DSB/1 at para 13, online: *WTO* <docsonline.wto.org>. See also WTO, *Appointment/Reappointment of Appellate Body Members* (25 January 2016), WTO Doc WTO/DSB/70, online: *WTO* <docsonline.wto.org>.
[548] *Ibid*.
[549] *Ibid*.
[550] *DSU*, art 17.1; WTO, *Working Procedures for Appellate Review*, 16 August 2010, WTO doc WT/AB/WP/7 rs 1 and 6, online: *WTO* <docsonline.wto.org> [*Working Procedures for AB*]. See also "Dispute Settlement System Training Module", *supra* note 529 s 6.5 at 3. See also "Appellate Body Members" (last visited 19 June 2019), online: *WTO* <www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm>.
[551] *DSU*, art 17; *Working Procedures for AB* (2010), r 6(2).

on a rotational basis.[552] In practice the Appellate Body members are assigned to cases according to a mathematical scheme. Members are assigned a unique number - draw numbered chips out of a bag and the number is recorded (to identify them) - according to which they are assigned to cases.[553] VanGrasstek notes that "[t]his method ensures that no one knows in advance which cases they will be assigned or which of their six colleagues will be named to the same appellate panel."[554] Since members of the Appellate Body, just like panelist, must be independent and impartial, they cannot sit in cases that might create conflict of interest, direct or indirect[555] yet, unlike panelists, they can serve regardless of nationality.[556]

Table 16: WTO - Case Assignment

CASE ASSIGNMENT	*Size*	*Allocation*
Panel (untenured governmental or non-governmental panelists)	3-5 members.	Nominations and proposals made by Secretariat or DG from the list.
Appellate Body (7 permanent members)	3 out of 7 members.	Rotation, randomness (mathematical scheme).

c) Analysis

The ICJ and the WTO Appellate Body have permanent adjudicators. Their appointments are done in stages - nomination, selection, and appointment - with individual tasks vested in different decision-makers independent of the parties to a dispute. Nominations to both forums are made by member states or national groups. Selection and appointment are typically done by other decision-making bodies - the UN General Assembly and the Security Council (the ICJ), and the Selection

[552] *DSU*, art 17(1); WTO, *Working Procedures for AB* (2010) r 6. See also "WTO Analytical Index: Working Procedures for Appellate Review – Rule 6 (Practice)" (January 2018), online: *WTO* <www.wto.org/english/res_e/publications_e/ai17_e/ai17_e.htm>.
[553] VanGrasstek, *supra* note 543 at 241.
[554] *Ibid*.
[555] *DSU*, art 17(3); *DSU Rules of conduct*, at paras III–IV(1): These rules can be found as Annex II to the *Working Procedures for AB*.
[556] *DSU*, art 8(3); "Dispute Settlement System Training Module", *supra* note 529 s 6.5 at 3.

Committee and the DSB (the WTO). This power-separating method reduces the risk of politically motivated appointments. Case assignment by both forums is dealt with internally and, thus, separately from the process of the appointment - confining the powers of the appointing authority to the process of the appointment only. Further, to ensure independence and impartiality, both forums use mechanisms ensuring objectivity of their case assigning method - secret ballot and a majority of votes (the ICJ), and rotation (the WTO).

In contrast, the WTO panels are constituted *ad hoc*. The WTO maintains an indicative list - being on the list does not guarantee an appointment - of potential panelists. Nominations are done by Member States. Yet it is the Secretariat that proposes candidates - persons outside of the list may also be considered - to parties that have limited options to oppose it. Parties must agree on their panelists, if they cannot agree, they can ask the Director-General to make the appointment. This *ad hoc* nature makes the process less robust than that to the Appellate Body. This is due to the lack of the use of permanent panelists (a tool that confines appointing powers to the process of appointment), an objective method of case assignment and a clear separation of the process of appointment from the case assignment. Instead, the method seems to be merging these processes and in turn the powers behind them - making these powers concentrated in the hands of a few. Despite these potential setbacks, values of adjudicative independence and impartiality are safeguarded by the possibility to appeal decisions made by the *ad hoc* panel to the higher-ranking Appellate Body that employs robust safeguarding mechanisms.

4. Domestic and International Tribunals

a) FINRA

i. Appointment

FINRA maintains a roster of more than 7,200 public and non-public arbitrators.[557] Non-public arbitrators are those affiliated with the securities industry while public ones are not.[558] FINRA arbitrators are not regarded as employees but independent contractors.[559] Candidates for the post are referred by FINRA Recruitment Ambassadors or apply directly to FINRA.[560] Before becoming an arbitrator, the application must pass through a multi-phase process. Once the FINRA's preliminary review is successfully completed, the application is forwarded to a subcommittee of the National Arbitration and Mediation Committee (NAMC) for an approval. Once approved, the applicant must complete FINRA's Basic Arbitrator Training Program[561] on which successful completion, the applicant is added to its roster.[562]

Table 17: FINRA - Appointment

APPOINTMENT TO	*Nominations*	*Selection*	*Appointment*
FINRA (more than 7,200 untenured arbitrators)	Candidates are referred or apply directly.	A *three-step* process: • Preliminary review by FINRA. • An approval by a subcommittee of the National Arbitration and Mediation Committee (NAMC). • Approved applicants must successfully complete FINRA's Basic Arbitrator Training Program.	After the successful completion of the training program, the applicant is added to FINRA's arbitrator roster.

[557] *Customer Code*, *supra* note 335, r 12400; *Industry Code*, *supra* note 335, r 13400. See also "Become an Arbitrator Frequently Asked Questions (FAQ)" (last visited 28 May 2019), online: *FINRA* <www.finra.org/arbitration-and-mediation/become-arbitrator-frequently-asked-questions-faq> at para 1 [*"FAQ"*].
[558] *Customer Code*, r 12100 (r)(y); *Industry Code*, r 13100 (r)(x). See also "FAQ" *supra* note 557 at para 5; "Become a FINRA Arbitrator" (last visited 28 May 2019), online: *FINRA* <www.finra.org/arbitration-and-mediation/become-finra-arbitrator> [*"Become a FINRA Arbitrator"*].
[559] "Become a FINRA Arbitrator", *supra* note 558.
[560] *Ibid*; "Arbitrator Recruitment Ambassador Initiative" (last visited 28 May 2019), online: <www.finra.org/arbitration-and-mediation/arbitrator-recruitment-ambassador-initiative>.
[561] See online: *FINRA* <www.finra.org>.
[562] "FAQ", *supra* note 557.

ii. Case assignment

The FINRA's case assignment method is governed by two sets of arbitration rules - the Customer Code and the Industry Code.[563] The number of arbitrators sitting at any panel - one or three - depends on the amount claimed.[564] Arbitrators for each FINRA proceeding are selected by a Neutral List Selection System (NLSS).[565] This system generates lists of randomly selected candidates that are sent to disputing parties.[566] In doing so, the system excludes arbitrators identified as having current conflicts of interest.[567] Once the arbitrator's name is added to the roster, the name starts to appear on these lists – they may contain 10, 15 or 20 names. The number of generated names depends on various factors: the governing code, the form of dispute, the number of arbitrators and their role (public, non-public or a chairperson).[568] This process is also used to select chairpersons of individual panels.[569] Parties select their panel members by ranking and striking persons on these lists.[570] The Director of the Office of Dispute Resolution then combines these ranked lists and appoints the highest-ranked and available individuals.[571] If the number of arbitrators available from the combined lists is insufficient to form a panel, the Director

[563] *Customer Code*, *supra* note 335; *Industry Code*, *supra* note 335.
[564] *Customer Code*, r 12401 and *Industry Code*, *supra* note 335, r 13401: In claims up to $50,000 there is one arbitrator, in claims of more than $50,000 but less than $100,000 there are three arbitrators, and in other claims, there are three arbitrators, unless parties agree to one.
[565] *Customer Code*, rs 12400, 12402–12403, and 12800; *Industry Code*, rs 13400, 13403, 13406(c), and 13800.
[566] Barbara Black, "The past, present and future of securities arbitration between customers and brokerage firms" in Jerry W Markham & Rigers Gjyshi, eds, *Research Handbook on Securities Regulation in the United States* (Cheltenham, UK: Edward Elgar Publishing, 2014) 412 at 430 (note 110): The system was introduced in 2005 and replaced the previously used rotational method.
[567] *Customer Code*, rs 12402(b)(2), and 12403(a)(3); and *Industry Code*, rs 13403(a)(4), and (b)(4).
[568] *Customer Code*, rs 12402(b), and 12403(a): respectively, one arbitrator - a list of 10 public persons, and three arbitrators - lists of 10 non-public and 10 chairpersons and 15 public persons; and *Industry Code*, rs 13403(a)–(b): respectively Disputes Between Members: one arbitrator - a list of 10 non-public persons; and three arbitrators - lists of 20 non-public arbitrators and 10 non-public chairpersons; and Disputes Between Associated Persons or Between or Among Members and Associated Persons: one arbitrator - 10 public arbitrators; and three arbitrators - lists of 10 non-public persons, 10 public persons and 10 public chairpersons.
[569] *Customer Code*, r 12403 (a) (1) (C); and *Industry Code*, r 13403 (a)(b).
[570] *Customer Code*, rs 12400 (a); 12402(d); 12403(c); 12404 (a); and *Industry Code*, rs 13400 (a); 13404; 13407 (a); 13804(b).
[571] *Customer Code*, rs 12402 (e)(f), 12403 (d)(e); and *Industry Code*, rs 13405–13406.

has the discretion to appoint a person not on the list.[572] If parties agree, they may select their own arbitrators from or outside the FINRA roster.[573] If they are outside the roster, FINRA will attempt to secure their participation.[574] This option gives parties flexibility while merging the two processes - appointment and the case assignment - into a single process.

Table 18: FINRA - Case Assignment

CASE ASSIGNMENT	*Size*	*Allocation*	
		Default	*Parties' choice*
FINRA (more than 7,200 untenured arbitrators)	Panels of 1 or 3 members - (according to the amount claimed, unless parties agree otherwise).	• Randomly generated lists of candidates. • Parties select their panels by ranking and striking persons on lists. • The Director - after combining parties ranked lists - appoints the highest-ranked arbitrator (he has the discretion to appoint a person not on the list).	Parties can agree to own arbitrators on or outside the roster. FINRA will try to secure their participation.

b) WIPO

The WIPO's role in proceedings is administrative. The WIPO Arbitration and Mediation Center maintains a database of over 1500 individuals - consisting of highly specialized practitioners and experts in a field of various forms of intellectual property to seasoned commercial dispute resolution generalists - called "neutrals".[575] WIPO does not make its full list of neutrals available to the public,[576] instead, it makes only accessible more narrowly focused list of the WIPO Domain Name Panelists.[577]

[572] *Customer Code*, rs 12402 (f), and 12408; and *Industry Code*, rs 13406, and 13412.
[573] FINRA, "The Financial Industry Regulatory Authority's Dispute Resolution Activities" (last modified 16 April 2018), online: *FINRA* <www.finra.org/sites/default/files/2018_AC_Arbitration_Procedures.pdf> at 18: Applies for Large Cases; See also *Customer Code*, rs 12402 (a); and 12800 (b); and *Industry Code*, rs 13402; 13800 (b); 13802 (c); 13806 (c).
[574] "Large Case Pilot - FAQ" (last visited 28 May 2019), online: *FINRA* <www.finra.org/arbitration-and-mediation/faq-large-case-pilot> at para 12.
[575] "WIPO Neutrals" (last visited 29 May 2019), online: *WIPO* <www.wipo.int/amc/en/neutrals/index.html>.
[576] *Ibid.*
[577] "WIPO Domain Name Panelists" (last visited 29 May 2019), online: *WIPO* <www.wipo.int/amc/en/domains/panel.html>.

i. Appointment

The appointment of neutrals has several steps. The process of inclusion may commence on the Center's own initiative or on a candidate's direct application.[578] In their applications, candidates must provide their qualifications, expertise, and experience.[579] These as well as other factors (publication, professional membership, etc.) are considered by the WIPO Center Neutrals Committee.[580] Once the application gets accepted, the Center invites the candidate to join its database.

Table 19: WIPO - Appointment

APPOINTMENT TO	*Nominations*	*Selection*	*Appointment*
WIPO (more than 1,500 untenured "neutrals")	On the Center's own initiative or direct application by candidates.	Applications are considered by the WIPO Center Neutrals Committee.	Once the Committee accepts an application, the Center invites the candidate to join its database.

ii. Case assignment

The WIPO administers two types of disputes, default and *ad hoc* arbitration. The WIPO's role is to assist to select arbitrators from its list of neutrals.[581] The appointment of arbitrators to specific disputes is governed by either the WIPO Arbitration Rules, the WIPO Expedited Arbitration Rules, the UNCITRAL Rules (see below) or where applicable *ad hoc* rules.[582] The WIPO rules "are open to being modified by party agreement."[583] Yet parties are encouraged to consult the Center before making any modifications.[584]

[578] "WIPO Neutrals", *supra* note 575.
[579] *Ibid.*
[580] *Ibid.*
[581] "Role of the Center" (last visited 29 May 2019), online: <www.wipo.int/amc/en/center/role.html>.
[582] "Center Services in ad hoc Arbitrations", *supra* note 346.
[583] WIPO, *Guide to WIPO Arbitration* (Geneva: WIPO Publication No 919E) at 14 [*Guide to WIPO Arbitration*].
[584] "Drafting Efficient Dispute Resolution Clauses" (last visited 29 May 2019), online: <www.wipo.int/amc/en/clauses/clause_drafting.html>.

According to the WIPO Arbitration Rules, parties' agreement should be followed.[585] Parties may agree on the number of arbitrators, procedures of their appointment and even select their own arbitrators (even outside of the WIPO List of Arbitrators).[586] In contrast, under the Expedited Arbitration, there is always a sole arbitrator[587] whose nomination should be done by parties, subject to confirmation of the appointment by the Center.[588] If within the given time-frame - pursuant parties' selected procedures - the tribunal has not been established, the Center steps in with its default procedure.[589]

Under the WIPO Arbitration Rules, if parties fail to agree on the number of arbitrators, the tribunal should have a sole arbitrator, unless the Center determines a three-member tribunal as more appropriate.[590] Unless parties agreed otherwise, they should nominate the sole arbitrator jointly.[591] If not, selection of the sole or presiding arbitrator (in a three-member panel) will follow a list-procedure according to which the Center sends an identical list of at least three candidates with any qualification that parties agreed on.[592] After taking parties' preferences and objections to these candidates into account, the Center makes the appointment.[593] Yet the Center is authorized to use its discretion if parties do not agree, the selected candidate is not available, or the process is inappropriate.[594]

[585] *WIPO Arbitration Rules* (2014), art 15.
[586] *Ibid*, arts 14–15; *Guide to WIPO Arbitration*, *supra* note 583 at 22.
[587] *WIPO Expedited Arbitration Rules* (2014), art 14(a).
[588] *Ibid*, arts 14(a), and 17–18.
[589] *WIPO Arbitration Rules*, arts 15(b), 19. See also *Guide to WIPO Arbitration, supra* note 583 at 22.
[590] *WIPO Arbitration Rules*, arts 14(b), 16–17: The rules and the timeframe for a sole arbitrator is governed by art 16, while for three arbitrators by art 17. See also *Guide to WIPO Arbitration, supra* note 583 at 17.
[591] *WIPO Arbitration Rules*, art 15.
[592] *Ibid*, art 19 (b)(i); *WIPO Expedited Arbitration Rules*, art 14 (b)(i).
[593] *WIPO Arbitration Rules*, art 19(b).
[594] *Ibid*, art 19 (b)(v).

If in the three-member arbitration parties have not agreed on their appointment procedure then a default procedure applies - each party nominates one arbitrator, the two arbitrators then nominate the presiding one.[595] If either party fails to appoint its arbitrator[596] the Center will use its list-procedure.[597] Likewise, under the Expedited Arbitration, if parties fail to nominate their arbitrator, the Center will use its list-procedure, unless the Center deems a different procedure as more appropriate.[598] The Center makes an appointment while taking the parties' preferences and objections into account.[599] If no suitable person is found, the Center is authorized to make the appointment directly.[600] Despite using the WIPO List of Arbitrators as the primary source,[601] in its selection, the Center may also draw upon other sources.[602]

Table 20: WIPO - Case Assignment

CASE ASSIGNMENT	***Size***	***Allocation*** (from within or outside the WIPO roster)	
		Parties	*Default*
WIPO (more than 1,500 untenured "neutrals")	A sole or a three-member panel (parties' choice or by default).	Free to choose the method.	• A sole member* - by parties' joint decision (subject to confirmation by the Center). • A three-member tribunal - each party appoints one arbitrator - these two arbitrators appoint the presiding one). If not, a **list-procedure** applies: a sole or presiding arbitrator - parties provide preference or objections, the Director selects or appoints directly (e.g. there is no suitable candidate).

*The WIPO Arbitration & Expedited Arbitration Rules.

[595] *Ibid*, art 17(b)–(c).
[596] *Ibid*, art 17(b).
[597] *Ibid*, art 17(d), and 19.
[598] *WIPO Expedited Arbitration Rules*, art 14 (b)–(c).
[599] *Ibid*, art 14(b).
[600] *Ibid*.
[601] "Center Services in ad hoc Arbitrations", *supra* note 346.
[602] *Ibid*.

c) Analysis

Both arbitral bodies have databases of quasi-permanent but untenured arbitrators appointed through a multilevel process (application/ nomination, selection, and an appointment), and independently from the parties to the dispute. In each phase, there are different decision-makers. Actors with powers to nominate are different from those who assess, select and finally appoint the candidate. FINRA's nominations are done by entrusted adjudicators or on direct applications from candidates. The first review is done by FINRA whereas the final approval is conducted by the NAMC. After a successful completion of the FINRA's training program, the applicant is added to its roster. Similarly, the WIPO Center may act on its own initiative or on a candidate's direct application. Applicants are considered by for that purposes created Committee. Once accepted, they are invited to join the WIPO roster.

As a default, the case assignment is dealt with internally and, thus, separately from the process of the adjudicative appointment. Consequently, powers to appoint are separated from powers to assign. In the process, both forums employ neutral mechanisms - a randomly generated lists (FINRA) and a list-procedure (WIPO) on which parties provide their preferences and objections. Even though these forums appoint arbitrators while considering parties' choices, if necessary, they are authorized to arrange assignments directly. These techniques of power separation help to prevent unsuitable or ill-motivated appointments.

Since both forums respect the party autonomy principle (an ability to choose procedures, arbitrators, etc.), the default procedure only applies if parties fail to agree or appoint. In appointments outside of databases these forums step in by providing consultation or trying to

secure these individuals. Assignments that follow parties' choices are, thus, the only exception to the separation of powers as well as processes (appointment and case assignment) as parties by selecting their own arbitrators circumvent the multilevel-appointing process.

5. ISDS Administering Bodies

a) ICSID

i. Appointment

ICSID has its Panel of Arbitrators consisting of more than four hundred untenured persons[603] designated by ICSID contracting states (up to four persons of any nationality per state) and the Chairman[604] of the ICSID Administrative Council (ten persons of different nationalities).[605] Since the process of designation - identification and selection of panel members - is within the discretion of each member state, an interested individual must approach the state he or she wants as the designating authority. Once the selection is made, the state informs the Secretary-General about its designation.[606] In contrast, in his delegation (in addition to the required qualifications),[607] the Chairman should assure representation on the Panel of the main forms of economic activity and of principal legal systems of the world.[608] Despite its existence, the Panel of Arbitrators is not a permanent panel.

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[603] *Members of the Panels of Conciliators and of Arbitrators* (20 March 2019) ICSID/10 [*Members of the Panels*]. See also *Updated Background Paper*, *supra* note 353, at para 38.
[604] *ICSID Convention*, art 5. Since April 2019, the Chairman of the Administrative Council is the US candidate David R Malpass acting also as the President of the World Bank. See online: *World Bank Group* <president.worldbankgroup.org/home>. These offices were previously held by Jim Yong Kim (also the US candidate) who stepped down three years before expiry of his office.
[605] *ICSID Convention*, arts 3, and 13. See *Members of the Panels*, *supra* note 603. See also *Updated Background Paper*, *supra* note 353 at para 36.
[606] *Administrative and Financial Regulations* (2006), reg 21. See also "Panel Designation Procedure" (last visited 29 May 2019), online: *ICSID* <icsid.worldbank.org/en/Pages/about/Panel-Designation-Procedure.aspx>.
[607] *ICSID Convention*, art 14(1).
[608] *Ibid*, art 14(2).

Table 21: ICSID - Appointment

APPOINTMENT TO	*Selection*	*Appointment*
ICSID The Panel of Arbitrators (over 400 untenured arbitrators)	Within the discretion of each member state and the Chairman.	By: • Member States - up to four. • The Chairman - ten members.

ii. Case assignment

Assignments in ICSID, unlike courts, are administered *ad hoc* by disputing parties or an executive official, the Chairman. In individual cases, parties are free to agree on the number of arbitrators and the method of their appointment (e.g. parties may each elect an arbitrator who in turn choose their presiding arbitrator).[609] If parties are unable to agree on the number of panelists, the ICSID default mechanism applies and the tribunal shall consist of three arbitrators[610] most of whom should have nationalities different from those of disputing parties unless parties agree otherwise.[611] In addition, a person who previously acted as a conciliator or arbitrator in any proceedings for the settlement of the dispute cannot be appointed to the tribunal.[612] Since parties are not obliged to confine their selection to the Panel of Arbitrators,[613] their arbitrators are frequently outside of the list.[614] Consequently, the Panel of Arbitrators is most often used for appointments where parties are unable to agree on a nominee, where they request the Chairman to appoint the number of arbitrators not yet appointed or where the Chairman appoints the *ad hoc* Annulment Committee (three persons).[615] For appointments to tribunals a default procedure applies according to which

[609] *Ibid*, art 37(2); ICSID, *Rules of Procedure for Arbitration Proceedings* (2006), r 1 [*ICSID Arbitration Rules*].
[610] *ICSID Convention*, art 37(2)(b); *ICSID Arbitration Rules*, rs 2–3; *ICSID Additional Facility Rules* (2006), art 9 [*ICSID AFR*].
[611] *ICSID Convention*, art 39; *ICSID Arbitration Rule*, r 1(3); *ICSID AFR*, art 7.
[612] *ICSID Arbitration Rule*, r 1(4).
[613] *ICSID Convention*, art 40.
[614] "How to become an ICSID Arbitrator, Conciliator or Committee Member" (last visited 29 May 2019), online: *ICSID* <icsid.worldbank.org/en/Pages/arbitrators/How-to-Become-an-ICSID-Arbitrator-Conciliator-and-Committee-Member.aspx>.
[615] *ICSID Convention*, arts 38, and 52(3); *ICSID Arbitration Rules*, r 4(1); *ICSID AFR*, art 10. See also "Panels of Arbitrators and of Conciliators" (last visited 29 May 2019), online: *ICSID* <icsid.worldbank.org/en/Pages/about/Panels-of-Arbitrators-and-Conciliators.aspx>.

the Chairman provides a ballot form containing names of potential arbitrators.[616] Even though the Convention stipulates that the Chairman is restricted to choosing from the Panel of Arbitrators the ICSID Centre claims that selected arbitrators may or may not be its members.[617] In the ballot, parties indicate whether they accept or reject any candidate. The candidate on which parties agree is appointed as an arbitrator. If there are more candidates on which parties agree the final selection is made by the ICSID Centre.[618]

Since the Panel of Arbitrators is merely an indicative list, its membership does not provide any guarantee that an arbitrator will ever be assigned to a case. In other words, some of its members might be less frequently selected, if ever, than others. In practice, there are just a few arbitrators who adjudicate the majority of ISDS cases.[619] Also, the nationality of the Chairman who is at the same time the President of the World Bank[620] - the US candidate David R Malpass[621] - may play a key role in the selection of arbitrators. The fact that the appointee has always been the candidate of the US is seen as an unfair advantage for the US.[622]

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[616] "Selection and Appointment of Tribunal Members - ICSID Convention Arbitration" (last visited 29 May 2019), online: *ICSID* <icsid.worldbank.org/en/Pages/process/Selection-and-Appointment-of-Tribunal-Members-Convention-Arbitration.aspx>.
[617] *Ibid*.
[618] *ICSID Convention*, art 38. "Selection and Appointment of Tribunal Members - ICSID Convention Arbitration" (visited 18 December 2017), online: *ICSID* <icsid.worldbank.org/en/Pages/process/Selection-and-Appointment-of-Tribunal-Members-Convention-Arbitration.aspx>.
[619] Eberhardt & Olivet, *supra* note 5; Pia Eberhardt, "Profiting from injustice: How law firms and arbitrators fuel the investment arbitration boom", *The Monitor* (July/August 2015) 27 at 28–29, online: *Canadian Centre for Policy Alternatives* <www.policyalternatives.ca/publications/monitor/how-canada-gets-people-tortured/trackback?page=1>. See also Kanaga Raja, "Investment Arbitration a 'Self-Serving' Industry, says study" (6 December 2012), online: *Third World Network* <www.twn.my/title2/FTAs/info.service/2012/fta.info.241.htm>.
[620] *ICSID Convention*, art 5.
[621] "About David R. Malpass" (last visit 29 May 2019), online: *World Bank Group* <president.worldbankgroup.org/home>.
[622] *ICSID Convention*, art 5. See also Ante Wessels, "International investment court plan threatens our democracy" (23 March 2015), online (blog): *BlogFFII.org* <blog.ffii.org/international-investment-court-plan-threatens-our-democracy/>; Ante Wessels, "White House defends ISDS" (1 March 2015), online (blog): *BlogFFII.org* <blog.ffii.org/white-house-defends-isds/>.

Table 22: ICSID - Case Assignment

CASE ASSIGNMENT	*Size*	*Allocation* (from within or outside the ICSID roster)	
		Parties' choice	*Default*
ICSID The Panel of Arbitrators (over 400 untenured arbitrators)	A three-member panel unless parties agree otherwise.	Free to choose the method of appointment, number of arbitrators and individuals to serve (also, outside the Panel of Arbitrators).	• A sole member - jointly by the parties. • In a three-member tribunal - each party selects one arbitrator, the third arbitrator the parties choose jointly. If not: a **list-procedure** applies: the Chairman* provides a ballot form - a list of potential arbitrators (restricted to select from the Panel of Arbitrators) - to which the parties provide their preferences and objection. The candidate on which the parties agree is appointed as an arbitrator. If the parties agree on more candidates, the ICSID Centre makes the final selection.

*The Annulment Committee also formed by the Chairman.

b) PCA-UNCITRAL

i. Appointment

The PCA provides a stable institutional framework and a roster of experts for *ad hoc* arbitration. The PCA consists of a panel of more than 300 jurists called "Members of the Court"[623] appointed by member states who can potentially act as arbitrators.[624] Each member state can designate up to four individuals.[625] Members of the Court of each member state form a "national group".[626] In the PCA Rules, there are no further instructions regarding this selection process except that states are required to select individuals with appropriate competencies.[627]

Table 23: PCA-UNCITRAL - Appointment

APPOINTMENT TO	*Selection*	*Appointment*
PCA "Members of the Court" (over 300 untenured arbitrators)	Within the discretion of each member state.	By Member States of up to four members.

[623] "Members of the Court" (last visited 30 May 2019), online: *PCA-CPA* <pca-cpa.org/en/about/structure/members-of-the-court/>.
[624] *1899 Convention for the Pacific Settlement of International Disputes*, 29 July 1899, art 23 (entered into force 4 September 1900) [*Hague Convention 1899*] and replaced by *1907 Convention for the Pacific Settlement of International Disputes*, 18 October 1907, art 44 (entered into force 26 January 1910) [*Hague Convention 1907*].
[625] *Ibid.*
[626] See note 623.
[627] See note 624.

ii. Case assignment

PCA Arbitration Rules[628]

According to these rules, arbitrators are selected by parties, by the two party-selected arbitrators or the appointing authority on a case-by-case basis.[629] In their selection, parties and the appointing authority are free to choose outside of the list of the Members of the Court.[630] In any dispute, parties can agree on the number of arbitrators[631] and the method of their appointment.[632] In tribunals of three or five members, each party selects one arbitrator who in turn choose their presiding arbitrator or the remaining three as the case might be unless parties agreed otherwise.[633] If parties are unable to agree on the size of the tribunal, a default of three members applies.[634]

If parties fail to appoint their arbitrators, an appointing authority - selected by parties or the Secretary-General of the PCA[635] (parties made no selection, or the designated appointing authority fails to act)[636] - may be asked to step in. In addition, under the PCA Arbitration Rules the Secretary-

[628] *Optional Rules for Arbitrating Disputes between Two States* (1992); *Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State* (1993); *Optional Rules for Arbitration Between International Organizations and States* (1996); *Optional Rules for Arbitration Between International Organizations and Private Parties* (1996); *PCA Arbitration Rules* (2012): It is a consolidation of all the four prior sets of the PCA procedural rules that all rules remain valid. See "PCA Arbitration Rules" (last visited 30 May 2019), online: *PCA* <pca-cpa.org/en/services/arbitration-services/pca-arbitration-rules-2012/>. The *PCA Arbitration Rules* (2012) [*PCA Arbitration Rules*] and the *PCA Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One is A State* are the only PCA arbitration rules out of all PCA arbitration rules relevant for ISDS.
[629] *PCA Arbitration Rules*, arts 6, and 8.
[630] *PCA Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State*, art 8; *PCA Arbitration Rules*, art 10(4); *1907 Convention*, art 47.
[631] *PCA Arbitration Rules*, arts 8–9.
[632] *Ibid*, arts 7–10.
[633] *Ibid*, art 9; *PCA Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State*, art 7(1). Both articles refer to three arbitrators only.
[634] *PCA Arbitration Rules*, arts 7(1), 8(2), and 9(3); *PCA Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State*, art 5.
[635] Since 2012, the Secretary General is Hugo Hans Siblesz. See "Secretary General" (last visited 30 May 2019), online: *PCA* <pca-cpa.org/en/about/introduction/secretary-general/>.
[636] *PCA Arbitration Rules*, art 6; *PCA Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State*, arts 6–7.

General acts as an appointing authority.[637] In a sole-arbitrator tribunal,[638] the appointing authority makes its selection through a list-procedure unless parties agree otherwise, or the appointing authority decides that the list-procedure is not appropriate.[639] The appointing authority provides an identical list of at least three arbitrators to each party to indicate their preferences. In its selection, the appointing authority should consider persons who are most likely independent and impartial and of a nationality other than nationalities of the parties.[640] The appointing authority makes the appointment in accordance with the parties' order of preference.[641] If the appointment cannot be made, the appointing authority has the right to exercise its discretion.[642]

In the case of three arbitrators, if within the prescribed time one party fails to make an appointment then the other party can ask the appointing authority to do it.[643] Similarly, if within the prescribed time limits the two appointed arbitrators fail to appoint presiding or other remaining arbitrators then the appointing authority makes these appointments by using the above list-procedure.[644]

[637] *PCA Arbitration Rules*, art 6.
[638] *Ibid*, art 8.
[639] *Ibid*, arts 7(2), 8(2), and 9(3); *PCA Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State*, art 6(3).
[640] *PCA Arbitration Rules*, art 6(3); *PCA Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State*, art 6(4); *UNCITRAL Arbitration Rules* (2013), art 6(7).
[641] *PCA Arbitration Rules*, art 8(2).
[642] *Ibid*, art 8(2)(d); *PCA Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State*, art 6.
[643] *PCA Arbitration Rules*, art 9 (2).
[644] *Ibid*, art 8(2).

UNCITRAL Arbitration Rules

As noted, along with its own rules, the PCA administers the UNCITRAL Arbitration Rules.[645] Since the PCA rules have been updated in light of the UNCITRAL rules (version 2010),[646] considering the appointment process and number of arbitrators, these two sets of rules are nearly identical.[647] While they both give parties freedom to choose - methods of appointment,[648] the number of arbitrators,[649] etc. - the UNCITRAL rules, unlike the PCA rules, do not refer to the Members of the PCA Court[650] and do not contain provisions for tribunals of five members (although parties are free to agree on any number of arbitrators).[651]

According to the UNCITRAL rules a party may propose one or more persons as an appointing authority unless parties have already agreed on the appointing authority.[652] If after this proposal parties have not reached an agreement then any party may request the Secretary-General of the PCA to designate the appointing authority.[653] Any appointing authority may exercise its discretion in appointing the sole or the presiding arbitrator (a three-member tribunal).[654] In general, when acting as an appointing authority, the Secretary-General follows the UNCITRAL list-procedure which is identical to the above PCA list-procedure.[655] According to this list-procedure, the

[645] The latest revision of *UNCITRAL Arbitration Rules* was done in 2013, previous versions are: *UNCITRAL Arbitration Rules* (1976) and *UNCITRAL Arbitration Rules* (2010).
[646] See "PCA Arbitration Rules" (last visited 30 May 2019), online: *PCA* <pca-cpa.org/en/services/arbitration-services/pca-arbitration-rules-2012/>.
[647] The 2013 version of the *UNCITRAL Arbitration Rules* contains new article 1(4) otherwise the rules are the same as the 2010 version.
[648] *UNCITRAL Arbitration Rules* (2013), art 10.
[649] *Ibid*, art 7.
[650] *Ibid*, arts 9(1), and 10(4) as compared to the *PCA Arbitration Rules* (2012), arts 9–10.
[651] *UNCITRAL Arbitration Rules* (2013), arts 7(1), and 10.
[652] *Ibid*, arts 6, 8–10, and 14. Parties may propose as an appointing authority also the Secretary-General of the PCA.
[653] *Ibid*, art 6(2).
[654] *Ibid*, arts 8–9: sole arbitrator; and three arbitrators, respectively.
[655] *Ibid*, art 8(2); *PCA Arbitration Rules* (2012), art 8(2); *UNCITRAL Arbitration Rules* (2010), art 8(2); *UNCITRAL Arbitration Rules* (1976), art 6(3).

appointing authority provides a list of at least three candidates to which parties give their preferences or objections.[656] The Secretary-General is not limited to any list or panel and is, therefore, free to exercise his discretion and choose the person he thinks is the most appropriate for the matter at hand.[657]

*Table 24: PCA-UNCITRAL - Case Assignment**

CASE ASSIGNMENT	***Size***	***Allocation*** (from within or outside the PCA roster)	
		Parties' choice	*Default*
PCA "Members of the Court" **(**over 300 untenured arbitrators)	A three-member panel is by default unless parties agree otherwise (to one, five or more members).	Free to choose procedures, individual arbitrators, and the appointing authority.	• A sole arbitrator - by parties' agreement • A three-member tribunal - each party appoints one arbitrator - these two arbitrators appoint the presiding one). • A tribunal of five or more members - each party appoints one arbitrator - these two arbitrators appoint the remaining ones). If not: a **list-procedure** applies: the selection of a sole, presiding or any number of required but not appointed arbitrators is done by an Appointing Authority - parties provide preference or objections - the Appointing Authority selects or if unable appoints directly (e.g. there is no suitable candidate).

*The PCA and the UNCITRAL rules are nearly identical on this point.

c) ICC Court

i. Appointment

For the 2018-2021 term, the International Court of Arbitration of the International Chamber of Commerce (ICC) appointed 176 Court members representing more than 100 countries.[658] These members of the Court are appointed by the ICC World Council on the proposal of the local ICC national committees and groups - one member per each committee or group.[659] If there is no

[656] *UNCITRAL Arbitration Rules* (2013), art 8. See also *Rules of ICC as Appointing Authority* (2018), art 6(3).
[657] *UNCITRAL Arbitration Rules* (2013), art 8. See also "Appointing Authority" (last visited 30 May 2019), online: *PCA* <pca-cpa.org/en/services/appointing-authority/>.
[658] "2018: 10 key moments from ICC's Dispute Resolution year" (3 January 2019), online: *ICC - International Chamber of Commerce* <iccwbo.org/media-wall/news-speeches/2018-10-key-moments-iccs-dispute-resolution-year/> at para 7. See also "Court members" (last modified 1 July 2018), online: *ICC - International Chamber of Commerce* <iccwbo.org/dispute-resolution-services/icc-international-court-arbitration/court-members/>.
[659] *ICC Arbitration Rules* (2017), Appendix I, art 3.

national committee or group, the proposal is made by the President of the Court in jurisdictions[660] who also proposes its alternate members.[661] Once appointed, in the performance of their functions, Court members must remain independent from the national committees or groups.[662]

In order to become an ICC arbitrator an individual should contact the National Committee of the ICC under which the person wants to serve.[663] Yet being on the list does not guarantee that an individual will ever be appointed. In selecting an arbitrator, the Court conducts an individual search each time a request for an arbitrator is made.[664] In its search, the Court requests an appropriate National Committee or Group of the ICC to make a proposal.[665] In ISDS cases, states expressed concerns that ICC National Committees lack neutrality as "they are often composed of leading companies and business associations in their respective countries."[666] The ICC Rules have been revised in order to address this concern. Since this revision, if a proposal from an ICC National Committee is not acceptable, the Court may appoint the sole or presiding arbitrator directly.[667]

Table 25: ICC Court - Appointment

APPOINTMENT TO	*Nomination*	*Appointment*
ICC Court (about 200 untenured members of the Court)	By the local ICC National Committees and Groups or the President of the Court in jurisdictions - one member per each Committee or Group.	By the ICC World Council.

[660] *Ibid*, art 11.
[661] *Ibid*, Appendix I, art 3(4).
[662] *Ibid*, Appendix II, art 3.
[663] See for example: The US affiliate of the International Chamber of Commerce, the United States Council for International Business (USCIB): "International Chamber of Commerce ICC" (last visited 31 May 2019), online: *USCIB* <www.uscib.org/international-chamber-of-commerce-icc-ud-754/>; The UK ICC: "Dispute Resolution Services" (last visited 31 May 2019), online: *ICC United Kingdom* <iccwbo.uk/pages/dispute-resolution>.
[664] "Dispute Resolution" (last visited 31 May 2019), online: *USCIB* <www.uscib.org/icc-dispute-resolution/>.
[665] *ICC Arbitration Rules*, art 13(3).
[666] Commission on Arbitration and ADR, *ICC Commission Report: States, State Entities and ICC Arbitration* (2017) at para 38.
[667] *ICC Arbitration Rules*, art 13(3)–(4). See also *Ibid* at paras 37–39.

ii. Case assignment

Arbitrators are assigned on a case-by-case basis by parties, the Court or an appointing authority. Although the ICC Arbitration Rules contain a presumption in favour of a sole arbitrator, parties are free to agree on the number of arbitrators and the method of their appointment.[668] As reported, states and state entities usually prefer the three-member panels.[669] In sole member tribunals, if parties agree, they can nominate the sole arbitrator for confirmation.[670] In the three-member tribunals, unless parties agree otherwise, each party selects one arbitrator while the Court appoints the presiding one.[671] If parties fail to agree or appoint,[672] or one party is a state or a state entity,[673] the Court makes the appointment directly. When the Court or the Secretary-General confirm or appoint arbitrators, they must consider nationality and the candidate's relationship to the parties.[674] The decisions of the Court as to the appointment, confirmation, challenge or replacement of an arbitrator are final.[675] The Court may also act as an appointing authority upon the party agreement, designation by the Secretary-General of the PCA or otherwise following the UNCITRAL or other arbitration proceedings.[676]

[668] *ICC Arbitration Rules*, art 12. See also ICC Arbitration Clauses (2017), at 76.
[669] Commission on Arbitration and ADR , *supra* note 666 at 63–67.
[670] *ICC Arbitration Rules*, art 12(3).
[671] *Ibid*, art 12(5).
[672] *Ibid*, art 12 (2)–(5), and (8).
[673] *Ibid*, art 13(4).
[674] *Ibid*, art 13(1)–(2), and (5).
[675] *Ibid*, art 11(4).
[676] *Rules of ICC as Appointing Authority* (2018), arts 1–2.

Table 26: ICC Court - Case Assignment

CASE ASSIGNMENT	***Size***	***Allocation*** (from within or outside the ICC Court roaster)	
		Parties' choice	*Default*
ICC Court (about 200 untenured members of the Court)	A presumption of a sole arbitrator, unless parties agree otherwise - states or state entities generally prefer a three-member tribunal.	Free to choose procedures, individual arbitrators, and the appointing authority.	• A sole arbitrator - parties nominate their arbitrator for confirmation (by the Court or the Secretary-General). • A three-member tribunal - each party appoints one arbitrator and the Court appoints the presiding one. **If parties fail to agree or to appoint:** The Court makes the appointment directly

d) Analysis

All examined forums provide default procedures that determine who has the power to select and to appoint arbitrators to specific disputes unless parties agreed otherwise. Generally, the parties choose their arbitrators (except the presiding one). Where parties fail to agree or to appoint another default procedure steps in. For such purposes, ICSID and the PCA-UNCITRAL employ a list-procedure whereas the ICC Court makes the appointment directly. All these methods allow parties to influence the process - by selecting arbitrator or giving preferences and objections. Yet the final decision is at discretion of the appointing authority - usually the executives of these forums (the Chairman of the ICSID Administrative Council, the Secretary-General of the PCA, the ICC Court, etc.).

None of these organizations has a permanent list of arbitrators. All forums - ICSID, the PCA, and the ICC - maintain databases of arbitrators, a panel of arbitrators, members of the court or a database of arbitrators, but their procedural rules do not require that individual arbitrators should be selected from the respective list. Those with powers to appoint - parties, the party-appointed arbitrators, the forums executives (except the Chairman of the ICSID) or another appointing authority - are free to choose arbitrators as they wish. Since these lists are only indicative, there is

no equally spread workload or guaranteed appointment among its members. In fact, the system works in such a way that some individuals might never get appointed.

A case-by-case appointment merging processes of adjudicative appointment with case assignment is the norm for all of these bodies resulting in the lack of several levels of institutional safeguards. Since these processes are not separate, powers to appoint and to assign an arbitrator to a case are not dispersed but concentrated. This practice of case-by-case appointment - with powers vested in the disputing parties and executive officials - raises a concern of potentially inappropriate pressure on arbitrators. Generally, the separation of the process of adjudicative appointment from case assignment helps to shield adjudicators from this risk. The ISDS administering bodies, however, allow a direct link between the appointing authority and the adjudicator in each case. Thus, the appointing (or potentially appointing) officials can directly influence who is assigned to adjudicate. Also, by the nature of these systems, none of these appointing bodies and the associated rules use neutral mechanisms of case assignment such as rotation or random selection from a list of permanent adjudicators. Workload among members of the indicative lists is starkly uneven.

6. Comparative Remarks

In this chapter, I examined adjudicative appointment and methods of case assignment as values of adjudicative independence and impartiality. Collected dataset shows a spectrum of patterns ranging from bodies that employ multiple safeguarding methods at various stages of the process and supporting each other to bodies that use hardly any of these measures. Separation of powers at various levels of these processes prevent ill-motivated appointments. Consequently, out of all examined forums, domestic, European, and international courts use the strongest protections by

employing multiple safeguards of adjudicative independence and impartiality, they: (1) divide appointing powers to multiple independent stages – nomination/ application, selection, and appointment; (2) separate powers to assign (an internal process) from powers to appoint; (3) utilize objective methods of allocation - algorithms, principles of randomness, rotation or a secret ballot; (4) spread their workload evenly; and (5) disable parties to select their own adjudicators.

The WTO Appellate Body has characteristics similar to courts, but the WTO panels as constituted *ad hoc* lack various safeguards like separation of processes, separation of powers, objective selection, etc. Similarly, domestic and international arbitral tribunals - FINRA and WIPO - as constituted *ad hoc* lack a variety of safeguards, a fact exacerbated by their commercial nature and, thus, the need to respect values like party autonomy, confidentiality, etc. Yet, despite these characteristics, FINRA's default procedure has a range of safeguards that resemble those of the courts (unless parties agree otherwise): (1) an elaborate mechanism of adjudicative appointment; (2) separate processes of adjudicative appointment and case assignment; (3) a neutral allocative mechanism from a list of independently appointed arbitrators. WIPO, in contrast, seems to put a stronger emphasis on party autonomy since its default list-procedure only applies if parties do not agree or fail to appoint. Further, the powers to select the candidates under this list-procedure, while this process of the selection remains unclear, are vested in the WIPO executives.

Finally, all ISDS forums, just like WIPO, respect party autonomy - freedom to choose procedures, arbitrators, etc. - and use its default procedures only where parties fail to agree or appoint. In all cases, a party's choice of arbitrator, or agreement to choose an arbitrator, occurs against the backdrop of the party's view of who the appointing body would appoint if it were to exercise its

default powers used when parties cannot reach an agreement. The processes of ISDS forums do not come even close to the complexity and degree of safeguards that are employed by the courts due to: (1) the primacy of party autonomy and ability to influence the process (parties can select or provide their preferences to the list of candidates); (2) the use of merely indicative lists of adjudicators (the selection from them is not mandatory); (3) limited or no separation of powers to nominate, select, and appoint; (4) the merged processes and, thus, powers to appoint and to assign; (5) quasi-objective case assignment (a list-procedure); (6) the power of executives to appoint using its discretion; and (7) unevenly spread workload. Such practices reduce the division of powers to a bare minimum. Further, they make ISDS safeguards weaker than for instance, FINRA, a regulatory body that deals with purely commercial disputes but employs strong judicial safeguards while it retains flexibility for cases where parties agree on *ad hoc* rules. In contractual and hence horizontal disputes, the party autonomy principle has its place whereas in the ISDS treaty-based vertical relationships this arrangement is controversial. Yet even if ISDS is regarded as private arbitration, which is not, it provides weaker protections than other arbitral bodies. Further, FINRA as a mandatory forum for its members blocks any possibility of forum shopping. Consequently, while all the above courts lie on one end of a spectrum, the ISDS forums lie toward the opposite end.

In sum, in comparison to other bodies, the appointment and case assignment processes in ISDS lack several levels of institutional safeguards. The absence of these safeguards may influence public perception and raises questions about independence and impartiality. Along these lines, some commentators argue that selection on a case-by-case basis may put inappropriate pressures

on arbitrators linked to their prospects for future appointment.[677] Arbitrators who are selected case-by-case may feel a need to adjust their behavior and decisions in ways that are expected to increase their chances of re-appointment.[678] Further, unlike the state-state and arbitral bodies examined above, ISDS is a vertical arrangement in which only investors can initiate ISDS. The system thrives only if investors see it as favorable. As a result, arbitrators may feel a need to adjust their actions to the needs of investors as 'buyers' of their services.

Some arbitrators oppose these claims and point to their reputation for integrity as evidence of their independence and impartiality. Yet these statements reinforce the critique in that arbitrators, unlike judges, have a need to preserve their 'reputation' in order to be re-appointed. The word reputation raises the question of what kind of reputation arbitrators have in mind since the word can have a different connotation for different stakeholders. In addition, Eberhardt and Olivet claim that arbitrators may feel pressure from among their own tight-knit community of arbitrators, who exert immense influence over the investment arbitration system.[679] They argue that such a tight-knit community requires arbitrators to act in certain ways to preserve the hope of future appointments.[680] Breaking with this tight-knit community by independent judgment that is opposed to the mainstream ideology could mean that arbitrators do not get further appointments.[681]

In summary, the structure of ISDS for all of the examined ISDS contexts does not give adequate guarantees to secure independence and impartiality. A lack of separation of powers arises from the

[677] Jan Hendrik Dalhuisen, Additional Opinion in *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic* (2010), ARB/97/3 at para 25 (ICSID).
[678] *Ibid*: Dalhuisen criticized practices of ISDS arbitrators in seeking re-appointments as an issue related to adjudicative independence.
[679] Eberhardt & Olivet, *supra* note 5 at 35–43.
[680] *Ibid*.
[681] *Ibid* at 37.

merging of appointment and case assignment processes. This issue is exacerbated by the absence, in some cases, or insufficiency of objective methods of case assignment. These aspects create an environment of potential threat to independence and impartiality and an impression that these core values are inadequately protected. Despite claims that ISDS is neutral and apolitical, it is ultimately governed by the will of those with the power to decide who, in the case of ISDS, are not insulated from those with the power to appoint.

Chapter 5: Adjudicative Security – Tenure and Remuneration

Introduction

In this chapter, I explore two essential conditions of adjudicative independence and impartiality - security of tenure and remunerative techniques.[682] These typically interconnected forms of security support each other in providing a set of stable and repetitive incomes over the term of tenure. They create a vital background for fair adjudication by entering the picture of adjudicative proceedings immediately after the appointment process but well before any dispute is initiated. They safeguard personal independence of individual adjudicators by providing "freedom from external pressure, regardless of the source" - appointing authorities, friends, other adjudicators, governmental officials, the public, pressure groups, parties to the dispute, and other branches of government.[683] - and freedom from an inappropriate influence in the form of personal, professional or monetary incentives, repercussions or uncertainties.[684]

Security of Tenure

There are various conditions of adjudicative independence, yet the Supreme Court of Canada in *R v Valente* noted that security of tenure is the first and an essential one.[685] Tenure - a legal guarantee that an adjudicator will not be removed from office on arbitrary grounds - serves as a tool against external powers seeking to interfere with the judges' decision-making. Examples of its widespread use can be found in the UN *Basic Principles on the Independence of the Judiciary* and the Council of Europe *Recommendation on the Independence, Efficiency and Role of Judges* both using

[682] *R v Valente*, [1985] 2 SCR 673 at para 27 and 40; 24 DLR (4th) 161 [*Valente*].
[683] Aharon Barak, *The Judge in a Democracy* (Princeton: Princeton University Press, 2006) at 78.
[684] Nathaniel Yong-Ern Khng, "Judicial Independence and the Singapore Judiciary" (2012) 2012 Lawasia J 53 at 55; Barak, *supra* note 683 at 78–80.
[685] *Valente*, *supra* note 682.

identical words: "Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists."[686] Despite this range of character and quality of tenure - term of office with or without a possibility of a renewal or a life tenure - removals from office are possible only in exceptional circumstances - on grounds of proven misbehaviour or incapacity.

It took centuries of struggle, for example in England and its colonies, before security of tenure was recognized as a core principle of judicial independence.[687] These struggles turned on whether to use tenure during good behaviour, as opposed to the more problematic option of tenure during the pleasure of the executive - the king or a governor.[688] Tenure during the pleasure of the executive was seen as problematic because it carried a considerable risk that a judge could be removed from office at the king's pleasure if the judge decided against the king's will.

In contemporary adjudication, tenure serves as a mechanism to maximize adjudicative independence as well as public confidence in the judiciary.[689] While it is appropriate that adjudicators' powers are constrained by law and accountability to their peers, external sources of

[686] Council of Europe, Committee of Ministers, *Recommendation CM/Rec(2010)12* at paras 49–52 and "Explanatory Memorandum" at paras 54–55, reprinted in Council of Europe, *Judges: independence, efficiency and responsibilities* (Strasbourg: Council of Europe Pub, 2011); International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors: Practitioners Guide No 1* (Geneva: International Commission of Jurists, 2007) at 51–54; Office of the High Commissioner for Human Rights (OHCHR), UN *Basic Principles on the Independence of the Judiciary*, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, Principle 12 [UN *Basic Principles*].
[687] Ervin, *supra* note 371 at 121.
[688] *Ibid* at 110–111.
[689] Office of the High Commissioner for Human Rights in Cooperation with the International Bar Association, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, Professional Training Series 9 (New York: United Nations, 2003) at ch 4 para 4.5.2 [*Human Rights in the Administration of Justice*].

inappropriate influence are problematic.[690] Fair adjudication must be based on facts and the applicable law leaving political or economic preferences of powerful actors (such as states and private actors) aside. Tenure provides the space and security needed to decide fairly by shielding adjudicators from external powers: it separates adjudicators from powers, agendas and ideologies of those who appointed them (typically executives); disempowers external powers to enforce compliance by using repercussions – such as a change of work conditions, and removal from office;[691] fixed terms of office, or preferably, tenure until retirement age, reduce or eradicate the need to seek re-appointment with all of the associated risks – in particular a temptation to reach decisions favourable to the appointing powers in order to secure re-appointment.

Remuneration

Financial security provides another way to safeguard adjudicative independence and impartiality. In *Valente*, the Supreme Court of Canada described remuneration as "[t]he second essential condition of judicial independence."[692] Similarly, the Council of Europe maintains that remuneration - a part of the minimum working conditions that reflect responsibilities that adjudicators bear - is an essential factor for the independence of adjudicators.[693] Financial security brings financial stability and protection against remunerative uncertainties through a variety of

[690] Barak, *supra* note 683 at 78–80.
[691] *Ibid*.
[692] *Valente*, *supra* note 682 at para 40. See also the SCC's opinion about judges' remuneration in *Reference re Remuneration of Judges of the Provincial Court (PEI)*, [1997] 3 SCR 3; 150 DLR (4th) 577.
[693] Council of Europe, *Recommendation CM/Rec(2010)12*, *supra* note 686, at paras 53–55; and "Explanatory Memorandum", *supra* note 686, at paras 56–57.

facets - an adequate salary or other remuneration,[694] protections against reductions or erosion of salary,[695] and where appropriate even security of pension.[696]

Legally-mandated remuneration (typical to the judiciary)[697] gives adjudicators financial stability as well as independence. The amount is usually set and received in monthly instalments during the term of office or beyond as a secure pension. This arrangement gives adjudicators freedom to decide fairly - their decision-making does not affect their income - as well as freedom from having to compete each time with others for work and thus income. In contrast, remuneration for *ad hoc* (case-by-case) appointments has different qualities. Since *ad hoc* appointments are irregular and uncertain, also income for this work is unpredictable and insecure. This uncertainty underscored by scarcity of future appointments might force individual adjudicators, once appointed, to seek the best pay to cover the time without the income. In such a case, adjudicators have not only incentives to get appointed but also a personal stake in cases they adjudicate due to fees they receive. Remuneration based on personal incentives undermines public confidence in adjudicative independence and impartiality.

Methods of remuneration that promote financial security safeguard adjudicative independence and impartiality whereas inadequate methods can be used as tools to improperly influence decision-makers. There are various inadequate methods, for example, salaries paid externally instead of by the adjudicative branch. Along these lines, Ervin points out that salaries paid directly by the

[694] *Valente*, *supra* note 682 at para 40; Council of Europe, *supra* note 686; International Commission of Jurists, *supra* note 686; UN *Basic Principles*, *supra* note 686, Principle 11. See also *Human Rights in the Administration of Justice*, *supra* note 689 at paras 4.5.2–4.5.3.
[695] Barak, *supra* note 683 at 79.
[696] *Valente*, *supra* note 682 at para 40.
[697] UN *Basic Principles*, *supra* note 686, Principle 11; Council of Europe, *supra* note 686 at 53–55. See also *Human Rights in the Administration of Justice*, *supra* note 689 at paras 4.5.2–4.5.3.

executives can create dependence on the will of the executive.[698] Similarly, Barak argues that executive officials should not set the salary of a judge but rather should be administered internally by the judiciary.[699] In addition, low remunerative rates are problematic as they might create conditions for corruption.[700]

Other factors may also lead to problems. These include scarcity and competitive dynamics of *ad hoc* appointments and excessive remuneration. They all create monetary incentives - a form of an inappropriate external influence.[701] In this regard, Pauwelyn in his observation of the WTO and ICSID, two systems using *ad hoc* appointments but with disproportionate levels of remuneration, maintains that "low compensation comes with low pressures to seek reappointment and low temptations to be predisposed, biased or corrupted."[702] This constraining influence contrasts with high remunerative rates that create a competitive market for appointments and rulings. Also, for many, a competitive market leads to a few or zero appointments equal to income that is too low or none (unless secured from another source). This lack of income - an unacceptable pressure - makes adjudicators vulnerable to temptations to boost their chances for reappointments by adhering to the agendas of those with powers to appoint.[703]

[698] Ervin, *supra* note 371 at 112.
[699] Barak, *supra* note 683 at 79.
[700] *Human Rights in the Administration of Justice*, *supra* note 689 at paras 4.5.3.
[701] Khng, *supra* note 684 at 55; Clifford E Haines, "Judicial Independence and Judicial Accountability: How Judicial Evaluations Can Support and Enhance Both" (2010) 48:4 Duq L Rev 909 at 913.
[702] Pauwelyn , *supra* note 196 at 22: comparing between high (ICSID) and low (the WTO) levels of remuneration.
[703] Van Harten, *supra* note 195 at 627–628.

My research

As noted above, ISDS is empowered by IIAs. Yet IIAs are typically silent on the point of tenure and remuneration. The recently adopted *Colombia-Japan* BIT[704] that addresses the latter - ICSID fees and expenses apply unless parties agreed otherwise[705] - is an exception to this trend. Because of this widespread silence, the existence and qualities of individual adjudicative security is typically governed by rules and procedures set by one of the ISDS administering bodies. Accordingly, in this chapter, I assess the set of individual adjudicative security afforded by individual ISDS forums (ICSID, the PCA-UNCITRAL, and the ICC) in comparison to other adjudicative regimes. I map the use of security of tenure and variety of components of methods of financial security (see *Table 27*). Considering the latter, I assess whether these methods adequately safeguard independence and impartiality. Although the adequacy can be assessed by calculating the amount of compensation paid (including all emoluments), I do not evaluate this aspect. Rather, I focus on whether these methods provide stable remuneration that does not turn on the peculiarities of individual cases. That is, I examine remuneration from the perspective of qualities of stability and protection from scarcity, instability, or fluctuation. Accordingly, I am concerned with the general terms of remuneration, such as whether a basic salary is guaranteed, whether the salary is based on a scale or calculated *ad hoc*, whether the salary depends on performance, whether the salary is protected against reductions, whether there are other emoluments, and whether there is a financial security - as a part of the remunerative scheme - that goes beyond the terms of present service.

[704] *Agreement Between Japan and the Republic of Colombia for the Liberalization, Promotion and Protection of Investment*, 12 September 2011 (entered into force 11 September 2015) [*Colombia-Japan BIT*].
[705] *Ibid*, art 30(6).

Table 27: Components of Adjudicative Security: Tenure and Remuneration

	STRONG SAFEGUARDS	***WEAK SAFEGUARDS***
Tenure	Yes • Term of office (some renewable) or • Lifelong	No *Ad hoc* - discretionary appointments
Income	Guaranteed Set salaries during the term of office	Uncertain *Ad hoc* - based on appointments
Source of remuneration	Prescribed by the law Paid by the adjudicative branch	Based on peculiarities of the appointment e.g. the length of proceedings, etc., decided by adjudicators and paid by the parties
Methods of income	Regular Based on a scale	Irregular Schedules and fees, parties agree, caps applied
Protections & Stability of income	By legal instrument • Annual adjustments • Protection against reduction	None
Adequacy of remuneration	Neither low nor excessive	Either too low or excessive
Income beyond the term of present service	Guaranteed pension	None
Transparency	Salaries - publicly known	Salaries - confidential, disclosed at discretion

1. Domestic Courts

a) UK Superior Courts (laws specific to England and Wales)

The UK Supreme Court judges hold their offices during good behaviour up to the age of seventy.[706] Likewise, judges of the Senior Courts - the Court of Appeal and the High Court[707] - hold their offices during good behavior until they reach the age of seventy unless they vacate the office earlier.[708] Judges cannot be removed from their offices, except for serious misconduct and only by

[706] *Constitutional Reform Act 2005* (UK), s 33 [*CRA 2005*]; *Judicial Pensions and Retirement Act 1993* (UK), s 26, sch 5 [*JPRA 1993*] as amended by the *CRA 2005*; In England and Wales, no attempts to remove Senior or Supreme Court Justices have been ever exercised. See "Judges and parliament" (last visited 16 May 2019), online: *Courts and Tribunals Judiciary* <www.judiciary.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/jud-acc-ind/judges-and-parliament/>.

[707] *Senior Courts Act 1981* (UK), s 1 [*SCA 1981*] as amended by the *CRA 2005*. Senior Courts also include the Crown Court but since this latter Court is not entitled, according to the *Human Rights Act 1998*, to declare incompatibility of legislative acts and so judicial review I am not concerned with its judges; The *SCA 1981* lists the Court of Appeal judges and the High Court judges respectively (*ibid* ss 2, 4).

[708] *Ibid* s 11(1)–(3) as substituted by the *CRA 2005; JPRA 1993*, s 26(1), sch 5 as amended by the *CRA 2005*.

Her Majesty on the Address presented to Her by both Houses of Parliament.[709] Despite the existence of this practice in England and Wales since the *Act of Settlement* (1700), no attempts to remove Senior or Supreme court judges have been exercised yet.[710]

The UK Supreme Court and the Senior Courts judges are entitled to salaries and allowances set by legislative acts and generally remunerated according to the salary groups to which they belong.[711] These salaries can be increased but not reduced.[712] Current as well as historical sets of salaries are publicly available on the Ministry of Justice website.[713] The level of remuneration (salary and allowances) is determined by the Lord Chancellor[714] on the recommendation made by an independent Senior Salaries Review Body (SSRB).[715] Sets of salaries specify a salary for a given group and for whom such group applies. For example, in 2018-2019,[716] the President of the Supreme Court falls into the salary group 1.1 with annual salary of GBP 229,592, the Justices of the Supreme Court and the Chancellor of the High Court fall into salary group 2 with GBP 221,757, and the Puisne Judges of the High Court[717] fall in the salary group 4 with GBP 185,197.[718] In addition to base salaries, all judges are entitled to a pension.[719] For example, judges who retire after they have served 20 or more years or after they have reached the age of 70 receive one half

[709] *CRA 2005*, s 33; *SCA 1981*, s 11 (3).
[710] "Judges and parliament", *supra* note 706.
[711] *CRA 2005*, s 34; *SCA 1981*, s 12.
[712] *CRA 2005*, s 34(4); *SCA 1981*, s 12(3).
[713] See "Judicial salaries and fees" (12 March 2015), online: *GOVUK* <www.gov.uk/government/collections/judicial-salaries-and-fees>.
[714] Decided with the agreement of the Treasury/ the Minister for the Civil Service: *CRA 2005*, s 34(2), (6); *SCA 1981*, s 12(1), (6).
[715] See Review Body on Senior Salaries, "About us" (last visited 17 May 2019), online: *GOVUK* <www.gov.uk/government/organisations/review-body-on-senior-salaries/about>.
[716] Salaries with effect from 1 April 2018.
[717] The term puisne refers to any judge apart from the chief justice; See online: "Puisne" (last visited 19 June 2019), online: *Lexico* <www.lexico.com/en/definition/puisne>.
[718] "Judicial Salaries and fees: 2018 to 2019" (26 October 2018), online: *GOVUK* <www.gov.uk/government/publications/judicial-salaries-and-fees-2018-to-2019>.
[719] *SCA 1981*, s 12(7); *JPRA 1993*, ss 1–2, sch 1.

of their final annual salary.[720] If they retire earlier, they receive a reduced amount according to a pre-defined rate.[721] The use of set salaries implies that the length of proceedings does not determine judges' remuneration.

Table 28: The UK Superior Courts - Adjudicative Security

	Tenure	***Remuneration*** (publicly available)	***Peculiarities of proceedings***
The UK Superior Courts*	Yes Until the retirement age of 70. (A judge cannot be removed from office unless for serious misconduct.)	• Set salaries and allowances • Annual adjustments • Salaries during the term of office cannot be reduced • Pension (a half of the last salary or at appropriate rate)	Irrelevant

*The UK Supreme Court and High Courts of England and Wales.

b) US Supreme Court

According to the United States Constitution, Justices of the Supreme Court have lifetime tenure "during good behavior"[722] and may only be removed from office through a process of Congressional impeachment for the conduct of treason, bribery, or other high crimes and misdemeanors.[723] This lifetime tenure brings financial security. Judicial salaries including their increases are set by the legislature[724] and publicly available.[725] Judges are remunerated according

[720] *JPRA 1993*, s 3 raised the length of service for a full pension from 15 to 20 years.
[721] *JPRA 1993*, s 2, sch 1.
[722] US Const art III, § 1, cl 1; Khng, *supra* note 684 at 54–59; Barak, *supra* note 683 at 55; Barry J McMillion, "Supreme Court Appointment Process: President's Selection of a Nominee" (27 June 2018) R44235, Congressional Research Service.
[723] US Const art II, § 4; Vicki C Jackson, "Packages of Judicial Independence: The Selection and Tenure of Article III Judges Conference: Fair and Independent Courts: A Conference on the State of the Judiciary" (2007) 95:4 Geo LJ 965 at 989–990; Khng, *supra* note 684 at 54–59.
[724] 28 USC § 5. Salaries of the Chief Justice and each associate justice are determined according to the *Federal Salary Act of 1967* (US), s 225 (2 USC §§ 351–361) as adjusted by 28 USC § 461.
[725] See "Judicial Compensation" (last visited 20 May 2019), online: *United States Courts* <www.uscourts.gov/judges-judgeships/judicial-compensation>.

to annually adjusted pay schedules.[726] These adjustments, if made during justices' continuance in office, may only increase but not reduce their salaries.[727] For instance, as of January 2019, the base salary of the Chief Justice is US$ 270,700, whereas in the preceding year it was US$ 267,000.[728] The same rule applies for the associate justices whose base salary in 2019 is US$ 258,900, whereas in the preceding year it was US$ 255,300.[729]

Moreover, after reaching the qualifying age and terms of service justices are entitled to a pension.[730] There is the so-called "Rule of 80" - the retirement age and the years served must add up to 80 - that each Justice must satisfy.[731] Accordingly, the minimum years served for those of age 70 is 10, whereas Justices who decide to retire at the age of 65 must have served 15 years. During the remainder of their lifetime, Justices are entitled to receive an annuity equal to the salary they received at the time they retired.[732] Alternatively, a Justice may decide to retain the office and only retire from the regular active service.[733] In turn, after performing a range of required tasks, the person will receive the same annual salary as when in active service.[734] A pension is also guaranteed to Justices retiring because they are disabled from performing their duties.[735] Justices have also other benefits, for instance, an option to enrol in a federal health insurance plan.[736] For

[726] *Federal Pay Comparability Act of 1970*, 5 USC § 5303 (2017); 28 USC §§ 5, 461.
[727] US Const art III, § 1; 28 USC § 461 cl(b).
[728] "Judicial Compensation", *supra* note 725; See also: "Judicial Salaries: Supreme Court Justices" (last visited 20 May 2019), online: *Federal Judicial Center* <www.fjc.gov/history/judges/judicial-salaries-supreme-court-justices>.
[729] *Ibid*.
[730] 28 USC § 371(a).
[731] *Ibid* § 371(c); See also "FAQs: Federal Judges" (last visited 20 May 2019), online: *United States Courts* <www.uscourts.gov/faqs-federal-judges> at para 5. The "Rule of 80" means that a Justice of age 65 must have served 15 years, a Justice of age 66 must have served 14 years, etc.
[732] 28 USC § 371(a).
[733] 28 USC § 371(b).
[734] 28 USC § 371(b).
[735] 28 USC § 372(a). Justices serving at least 10 years receive the same annual salary, these serving less than 10 years receive one-half of the salary at the date of the retirement.
[736] Yoni Blumberg, "Here's how much money Brett Kavanaugh is expected to earn as a Supreme Court justice" (8 October 2018), online: *CNBC* <www.cnbc.com/2018/07/10/how-much-supreme-court-justices-get-paid.html>.

remuneration, since the use of the set salaries, the length of proceedings is irrelevant. Consequently, Justices have no financial incentive to tamper with their length.

Table 29: The US Supreme Court - Adjudicative Security

	Tenure	***Remuneration*** (publicly available)	***Peculiarities of proceedings***
The US Supreme Court	Yes Until retirement age and years of service according to the Rule of 80* (A judge cannot be removed from office unless for serious misconduct.)	• Set salaries and allowances • Annual adjustments • Salaries during the term of office cannot be reduced • Pension (if qualified the same amount as the last salary or lower)	Irrelevant

*E.g. earliest age 65 + 15 years of service or at latest at age of 70 + 10 years of service.

c) Analysis

The senior courts in the UK and the US employ similar safeguards (see *Table 30*). Senior judges have secure tenure and cannot be removed from offices except for particularly serious misconduct. In both countries the retirement age is 70, with some exceptions. In terms of remuneration, salaries are based on legislated scales that are annually adjusted. To protect against uncertainties, these annual adjustments cannot lead to a reduction of salaries. Judges in both countries are protected by pension schemes and as well they may receive some other benefits – such as allowances, and a federal health insurance scheme. Despite the extensive range of similarities, the pension amount for senior judges varies substantially between the two countries. In the UK, the maximum a senior judge can receive is one-half of the final annual salary, whereas in the US the amount is equal. Due to the use of scaled salaries, peculiarities of proceedings - especially their length - do not affect the amount of remuneration. This mechanism acts as a prevention against potential conflicts of interest. This use of robust measures suggests that domestic courts have strong remunerative safeguards.

Table 30: Domestic Courts - Adjudicative Security

	Tenure	***Remuneration*** (publicly available)	***Peculiarities of proceedings***
The UK Superior Courts*	Yes Until the retirement age of 70. (A judge cannot be removed from office unless for serious misconduct.)	• Set salaries and allowances • Annual adjustments • Salaries during the term of office cannot be reduced • Pension (a half of the last salary or lower)	Irrelevant
The US Supreme Court	Yes Until retirement age and years of service according to the Rule of 80* (A judge cannot be removed from office unless for serious misconduct.)	• Set salaries and allowances (insurance scheme) • Annual adjustments • Salaries during the term of office cannot be reduced • Pension (if qualified the same amount as the last salary or lower)	Irrelevant

*The UK Supreme Court and High Courts of England and Wales.

2. European Courts

a) ECHR

The ECHR has 47 permanent judges.[737] Judges are elected for a non-renewable term of nine years.[738] The term of office ends when judges reach nine years of service or age of 70.[739] No judge can be dismissed from office unless the judge ceased to fulfill conditions required by the office.[740] A decision to dismiss a judge can only be made by a majority of two-thirds of all judges.[741]

[737] David Gaukrodger & Kathryn Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community* (2012) OECD Working Papers on International Investment 2012/03 at 11. See "Composition of the Court", *supra* note 428.
[738] *ECHR Convention*, *supra* note 164; *Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, 13 May 2004 (entered into force 1 June 2010). See "Composition of the Court", *supra* note 428.
[739] *ECHR Convention*, art 23(2).
[740] *Ibid*, art 23(4).
[741] *Ibid*.

Financial security accompanies the term of office. Tenured judges are paid from the budget of the Council of Europe that is financed by states' contributions.[742] In addition to annually adjusted basic salaries, judges are paid allowances and expenses.[743] Above the basic salaries, the President, Vice-Presidents of the Court and the Presidents of Sections receive additional annually adjusted remuneration.[744] In contrast, judges *ad hoc* receive 1/365th of the annual salary payable to the ECHR permanent judges for each day of their service.[745] Basic salaries, additional remuneration and all annual adjustments follow the scale for and adjustments to salaries of Council of Europe staff members based in France.[746] Annual adjustments are recommended by the Co-ordinating Committee on Remuneration (CCR) and typically increase the amount previously received. Yet in 2016, the Ministers' Deputies adopted a remuneration adjustment procedure that allows the Committee of Ministers in specific budgetary or economic circumstances leading to a significant reduction in the Organization budget[747] to accept annual adjustments recommended by the CCR in part or not at all.[748] Considering these adjustments, in 2014 the basic monthly salary was EUR 14,464.04,[749] and in 2016, it amounted to EUR 14,767.80.[750] In 2017 and 2018 the CCR's proposed

[742] Gaukrodger & Gordon, *supra* note 737 at 71. See Council of Europe, Committee of Ministers, *Resolution on the status and conditions of service of judges of the European Court of Human Rights and of the Commissioner for Human Rights CM/Res(2009)5*, (2009), arts 3, 4, and 10 [*Resolution CM/Res(2009)5*] as amended by *Resolutions CM/Res(2013)4*, and *CM/Res(2015)5* and having regard to *Resolution Res(2004)50 on the status and conditions of service of judges of the European Court of Human Rights*, (2004).
[743] *Resolution CM/Res(2009)5*; Council of Europe, Committee of Ministers, *Decision* CM/Del/Dec(2018)1330/11.1, at para 5.
[744] *Resolution CM/Res(2009)5*, *supra* note 742, art 3(3). Additional annual remuneration in 2009 for the President of the Court was EUR 13,885 and for the Vice-Presidents of the Court and the Presidents of Sections it was EUR 6,942 adjusted according to adjustments made to salaries of the staff in France.
[745] *Ibid*, art 12; *Resolution Res(2004)50 on the status and conditions of service of judges of the European Court of Human Rights*, (2004), Appendix II, art 1(1).
[746] *Resolution CM/Res(2009)5*, art 3(1).
[747] For instance, the withdrawal of or a default of payment by one or more member countries.
[748] Council of Europe, Committee of Ministers, *Decision* CM/Del/Dec(2016)1268/11.5.
[749] "Judge of the European Court of Human Rights with Respect to Ireland" (16 September 2016), online: *Department of Foreign Affairs and Trade* <www.dfa.ie/media/dfa/alldfawebsitemedia/ourrolesandpolicies/int-priorities/humanrights/judgeechr/Information-Note-16-September-2014.pdf>.
[750] The gross monthly salary was EUR 16,613.78 (a basic salary of EUR 14,767.80 and a displacement allowance of EUR 1,845.98): see "Judge of the European Court of Human Rights" (4 January 2016), online: *Judicial Appointments Commission* <www.judicialappointments.gov.uk/vacancies/018>; See also "Judge of the European

adjustments to EUR 15,442.25 and EUR 15,640.62 respectively. However, due to an economic crisis and following this new adjustment procedure, the Committee of Ministers, did not approve these proposed adjustments.[751]

Further, judges who have completed at least five years of service can elect to join the Council of Europe pension scheme.[752] There are two applicable scenarios: (1) judges with more than five but less than ten years of service can elect whether to take this retirement pension or a lump sum; (2) judges who have served more than ten years receive the retirement pension.[753] In contrast, judges with less than five years of service are only entitled to a leaving allowance.[754] The maximum rate of the pension cannot exceed 70 percent of the last base salary grade.[755]

Since judges cannot engage in outside business,[756] they are fully dedicated to ECHR cases.[757] In 2001, the average length of proceedings was over three years.[758] Another study in 2005 found that

Court of Human Rights - Information Pack" (2016), online: *Judicial Appointments Commission* <www.judicialappointments.gov.uk/sites/default/files/sync/basic_page/information_pack_final_0.pdf>. Staff Regulations publicly available do not reproduce the applicable salary scales.

[751] Council of Europe, Committee of Ministers, *Decision* CM/Del/Dec(2017)1300/11.4 at paras 1 and 4: A decision not to award the CCR's proposed annual adjustments. See also Council of Europe, Committee of Ministers, Documents CM(2017)123-add2: Salary adjustment proposals that set out the basic salary scales. Council of Europe, Committee of Ministers, *Decision* CM/Del/Dec(2018)1330/11.1 at paras 1 and 5: A decision not to award the CCR's proposed annual adjustments.; See also Council of Europe, Committee of Ministers, Documents CM(2018)137 at Annex 4: The CCR's proposed annual salary adjustment.

[752] *Resolution CM/Res(2009)5*, art 10(1). The detailed rules for the Pension Scheme are set out in Appendices V, V bis, and V ter to the Staff Regulations, 2019 as amended by Resolution CM/Res(2019)1 and read in conjunction with *Resolution CM/Res(2009)5* as amended.

[753] *Ibid* the Staff Regulations, Appendix V bis and Appendix V ter.

[754] *Resolution CM/Res(2009)5*, art 10(1).

[755] Calculation of the amount of pension of the ECHR judges follows the Council of Europe Staff Regulations based in France. See Council of Europe Staff Regulations, (2019) Appendix V, art 10, Appendix V bis, art 10, and Appendix V ter, art 10, online: Council of Europe <publicsearch.coe.int/Pages/result_details.aspx?ObjectId=0900001680782c27#_Toc1483406>.

[756] *ECHR Convention*, art 21(3).

[757] Gaukrodger & Gordon, *supra* note 737 at 11.

[758] Frédéric Edel, *The length of civil and criminal proceedings in the case-law of the European Court of Human Rights*, 2nd ed, Human rights files No 16 (Strasbourg: Council of Europe, 2007) at 102.

while about three-quarters of the applications were pending for no more than two years, some other proceedings lasted longer than three or even five years.[759] Also, there are no time limits for full rehearing before Grand Chamber.[760] Since remuneration is based on salary scales and not on peculiarities of particular proceedings, their average length is irrelevant (except for the *ad hoc* judges). Yet, despite financial benefits the *ad hoc* judges might have from prolonged proceedings, they have limited power to influence their length.

Table 31: ECHR - Adjudicative Security

	Tenure (non-renewable)	***Remuneration*** (publicly available)	***Peculiarities of proceedings***
The ECHR	Yes Nine years or until age of 70.* (No dismissal unless judge unsuitable to fulfill conditions of the office.)	• Set salaries and emoluments paid by the Council of Europe • Annual adjustments (increase the amount) • Pension (if elected cannot exceed 70 percent of the last annual base salary)	Irrelevant

*Whichever comes first.

b) CJEU

All judges of the CJEU - 28 judges of the Court of Justice and 47 in the General Court - are appointed for a renewable six-year term.[761] The Court Presidents elected by judges in each Court serve a renewable three-year term.[762] During the term of office, a judge may be deprived of office

[759] *Ibid* at 102–103, n 522.
[760] Gaukrodger & Gordon, *supra* note 737 at 71.
[761] *TFEU*, *supra* note 323, arts 253–254; *TEU*, *supra* note 321, art 19(2).
[762] See "Court of Justice of the European Union (CJEU)" (16 June 2016), online: *European Union* <europa.eu/european-union/about-eu/institutions-bodies/court-justice_en>.

only, if he or she no longer fulfills the requisite conditions or no longer meets the obligations arising from the office, on a unanimous peer vote.[763]

The term of office, as is the case with ECHR judges described above, is accompanied by protection of financial security. Salaries, allowances and pensions of individual judges are determined by Regulations adopted by the Council of the European Union.[764] Judges are remunerated according to the posts they hold[765] - judges of different ranks and court affiliation have been assigned different percentages. The President and the Vice-President of the Court of Justice have the highest percentages, 138 and 125 percent respectively.[766] To get the basic salaries of individual posts, one must apply each post's percentage to the basic salary of an official of the Union with the highest step and grade (of the highest civil service grade).[767] Salaries are expressed in euros and annually reviewed.[768] The new scales are always applicable from 1st July, for instance, from July 1st, 2016,

[763] *Statute of the CofJ*, *supra* note 455, art 6. See also Udo Bux, "The Court of Justice of the European Union" (October 2018), online: *Fact Sheets on the European Union: European Parliament* <www.europarl.europa.eu/factsheets/en/sheet/26/the-court-of-justice-of-the-european-union> at para 2(b).
[764] *Council Regulation (EU) 2016/300 of 29 February 2016 determining the emoluments of EU high-level public office holders*, 29 February 2016, OJ, L 58/1 (entered into force 4 March 2016) [*Council Regulation (EU) 2016/300*].
[765] *Ibid*, art 2; *Regulation No 31 (EEC), 11 (EAEC), laying down the staff Regulations of officials and the conditions of employment of other servants of the European Economic Community and the European atomic energy Community*, 14 June 1962, OJ 45/1387, art 62 [*Regulation No 31*] as amended by *Regulation (EU, Euratom) No 1023/2013 of the European Parliament and of the Council of 22 October 2013 amending the Staff Regulations of Officials of the European Union and the Conditions of Employment of Other Servants of the European Union*, 22 October 2013, OJ, L 287/15 (entered into force partially 1 November 2013 and partially 1 January 2014).
[766] *Council Regulation (EU) 2016/300*, *supra* note 764 art 2: for example, President, Vice-President and other judges of the Court of Justice get 138%, 125% and 112.5% of the basic salary respectively while President, Vice-President and other judges of the General Court get 112.5%, 108% and 104% respectively.
[767] *Ibid* art 2: it is "the third step of grade 16". See also *Regulation No 31*, art 66 as amended by *2018 Annual update of the remuneration and pensions of the officials and other servants of the European Union and the correction coefficients applied thereto*, 14 December 2018, OJ, C 451/4, s 1.1 [*2018 Annual update*]: applicable from 1 July 2018.
[768] *Regulation No 31*, arts 63, and 65-66.

the basic salary was EUR 19,587.99,[769] in 2017 it was 19,881.81,[770] whereas in 2018 it was 20,219.80.[771] In addition to the basic annual salaries, judges get various allowances as well as reimbursement of their travel expenses.[772]

Further, the financial security of the CJEU judges is supported by a pension scheme[773] also annually updated.[774] Judges are entitled to their pension either after they have served at least ten years or after they reach the pensionable age of 66.[775] The amount is based on final salary and depends on the number of years and months served.[776] The maximum amount is 70 percent of the judge's final basic salary.[777] Judges may start to draw their pensions six years before pensionable age at a reduced rate.[778] As far as the length of proceedings is concerned, in 2018, the reported average of the Court of Justice was around 15 months, and of the General Court, it was less than 17 months.[779] Yet as judges are remunerated based on the salary scales, the length of proceedings is irrelevant.

[769] *2016 Annual update of the remuneration and pensions of the officials and other servants of the European Union and the correction coefficients applied thereto*, 14 December 2016, OJ, C 466/5, s 1.1.
[770] *2017 Annual update of the remuneration and pensions of the officials and other servants of the European Union and the correction coefficients applied thereto*, 14 December 2017, OJ, C 429/9, s 1.1.
[771] *2018 Annual update*, *supra* note 767 s 1.1.
[772] *Council Regulation (EU) 2016/300*, *supra* note 764 art 4–10.
[773] *Ibid*, art 11.
[774] *Regulation No 31*, arts 65–66 as amended by *2018 Annual update*, *supra* note 767.
[775] *Regulation No 31*, art 77.
[776] *Ibid*, art 77; *Council Regulation (EU) 2016/300*, *supra* note 764, arts 11–12.
[777] *Regulation No 31*, art 77.
[778] *Council Regulation (EU) 2016/300*, *supra* note 764, art 11.
[779] Court of Justice of the European Union, Press Release, No 36/18 "Judicial statistics 2017: the number of cases brought has once again exceeded 1 600" (23 March 2018), online: *Court of Justice of the European Union Press Release* <curia.europa.eu/jcms/jcms/Jo2_7052/en/?annee=2018>; Court of Justice of the European Union, Press Release, No 34/2016 "Statistics concerning judicial activity in 2015: new records in terms of productivity and cases brought for the Court of Justice of the European Union" (18 March 2016), online: *Court of Justice of the European Union* <curia.europa.eu/jcms/jcms/Jo2_7052/en/?annee=2016>: Since 2015, the length of proceedings has decreased.

Table 32: CJEU - Adjudicative Security*

	Tenure (non-renewable)	***Remuneration*** (publicly available)	***Peculiarities of proceedings***
The CJEU	Yes A renewable six-year term (Dismissal only if the judge is no longer fulfilling the requirements of the office.)	• Set salaries and emoluments (allowances, reimbursed expenses, etc.) by the Council of the European Union based on scales • Annual adjustments (increase the amount) • Pension (the maximum amount is 70 percent of the final basic salary)	Irrelevant

*The Court of Justice & the General Court.

c) Analysis

Both courts - the ECHR and CJEU - employ similar personal safeguards, see *Table 33*. They protect their judges by the security of tenure although their terms differ. The ECHR affords nine years of a non-renewable term or service until the age of 70, whereas the CJEU has a renewable six-year term. During the term, dismissal - applicable to both courts - is possible only if the judge no longer fulfills the requirements of the office. Yet the specific conditions for removal differ in that the ECHR requires a vote of two-thirds of all judges, whereas the CJEU requires a unanimous peer vote.

Judges of these courts receive guaranteed remunerative schemes that include salaries, other emoluments, and a pension. In each case, the amount is decided by the executive branch; respectively, the Council of Europe or the Council of the European Union. Remunerations are set by resolutions or regulations of the appropriate council. Salaries as well as pensions are based on prescribed scales and annual adjustments. Pension schemes are available for those who complete an appropriate length of service or reach the required pensionable age. The maximum pension cannot exceed 70 percent of the last annual base salary. The calculation of remuneration is complex yet its individual components are generally publicly available. Since the use of these elaborate protections, remuneration is independent of peculiarities of individual proceedings.

Table 33: European Courts - Adjudicative Security

	Tenure (non-renewable)	***Remuneration*** (publicly available)	***Peculiarities of proceedings***
The ECHR	Yes Nine years or until age of 70.* (No dismissal unless judge unsuitable to fulfill conditions of the office.)	• Set salaries and emoluments paid by the Council of Europe • Annual adjustments (increase the amount) • Pension (if elected cannot exceed 70 percent of the last annual base salary)	Irrelevant
The CJEU**	Yes A renewable six-year term (Dismissal only if the judge is no longer fulfilling the requirements of the office.)	• Set salaries and emoluments (allowances, reimbursed expenses, etc.) by the Council of the European Union based on scales by legislative acts • Annual adjustments (increase the amount) • Pension (the maximum amount is 70 percent of the final basic salary)	Irrelevant

*Whichever comes first. **The Court of Justice & the General Court.

3. International Judicial and Quasi-judicial Bodies

a) ICJ

ICJ permanent judges are elected for a renewable nine-year term.[780] A tenured judge cannot be dismissed unless in the unanimous opinion of other members of the Court he or she no longer fulfills conditions required for the office.[781] Financial security is part of the term of office - an annual salary,[782] allowances, and refunds of travel expenses, all tax-free[783] - fixed by the UN General Assembly.[784] During the term, remuneration cannot be reduced.[785] The annual salary consists of a base salary set in 2017 at US$ 174,742 plus an allowance of up to US$ 25,000 for the President.[786] At the end of their service, ICJ judges receive an annual pension equal to half of the

[780] *Statute of the International Court of Justice*, (1945) ICJ Acts & Doc 6, art 13 [*Statute of the ICJ*].
[781] *Ibid*, art 18(1); *Rules of Court*, (1978) ICJ Acts & Doc 6, art 6 [*Rules of Court*] (as amended in 2005).
[782] *Statute of the ICJ*, art 32(1).
[783] *Ibid*, art 32 (7).
[784] *Ibid*, art 32.
[785] *Ibid*, art 32(1)–(5).
[786] International Court of Justice, *CIJ Annuaire-ICJ Yearbook 2016-2017*, No 71, (The Hague: International Court of Justice, 2017) at 46–47; *Conditions of service and compensation for officials other than Secretariat officials: members of the International Court of Justice and judges and ad litem judges of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda: resolution / adopted by the General Assembly*, GA Res 65/258, UNGAOR, 65th Sess, Suppl No 49, UN Doc A/RES/65/258 (2011) at para 6.

annual salary.[787] In contrast, *ad hoc* judges, such as those of nationalities of disputing parties, are compensated for each day on which they exercise their functions.[788] They are paid 1/365th of the annual base salary and an interim cost-of-living supplement.[789] Since the permanent judges have set salaries, the length of proceedings is not relevant to their remuneration.[790] Although the *ad hoc* judges might benefit from prolonged proceedings, they have limited power to influence their length.

On top of that, during the term of office, the permanent judges could at one time earn additional substantive income by deciding ISDS cases.[791] To July 2017, sitting ICJ judges reportedly sat as arbitrators in 78 ISDS cases, about 10 percent of all known ISDS cases.[792] In all concluded ISDS cases which listed arbitrator fees (7 out of 14 cases), individual ICJ judges received on average US$ 159,000 per case.[793] In other ISDS cases ICJ judges are likely to receive on average US$ 426,000.[794] This role brought substantial financial supplements for their fixed remuneration at the ICJ and in practice weakened the ICJ's safeguards of adjudicative independence and impartiality.[795] ICJ judges could also benefit from working less at the court, undermining their apparent dedication to the ICJ workload.[796] The ICJ is an influential international adjudicative body, thus there is also an implication of this practice for other international adjudicative bodies.

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[787] *Statute of the ICJ*, art 32(7).
[788] *Ibid*, art 32(4).
[789] International Court of Justice, *supra* 786 at 46–47.
[790] International Court of Justice, *Report of the International Court of Justice: 1 August 2017-31 July 2018*, A/73/4 (New York: UN, 2018) at para 13; International Court of Justice, *Report of the International Court of Justice: 1 August 2016-31 July 2017*, A/72/4 (New York: UN, 2017) at para 13: Proceedings have been relatively short, "the period between the closure of the oral proceedings and the reading of a Judgment by the Court … on average … does not exceed six months."
[791] Bernasconi-Osterwalder & Brauch, *supra* note 328.
[792] *Ibid*, at 1.
[793] *Ibid*, at 2–3.
[794] *Ibid*.
[795] *Ibid*, at 4.
[796] *Ibid*.

This side work could also influence judges' decision-making in cases before the ICJ if they have an interest in ISDS appointments.[797] Similarly, there is a problem with their independence and impartiality if they decide challenges of other co-arbitrators or if they select arbitrators to sit in ISDS who may in future select the ICJ judges as arbitrators.[798] In light of these issues, it was appropriate to end this practice,[799] as the ICJ recently did. Notably, the ICJ Statute maintains that judges may not 'engage in any other occupation of a professional nature'.[800]

Table 34: ICJ - Adjudicative Security

	Tenure (non-renewable)	***Remuneration*** (publicly available)	***Peculiarities of proceedings***
The ICJ	Yes Permanent judges elected for a renewable nine-year term. (Judges cannot be dismissed unless they no longer fulfill conditions required for the office.)	• Set salaries, allowances and compensation - fixed by the General Assembly based on scales • Annual adjustments (cannot lead to a reduction) • Pension (half of the base annual salary) (*Ad-hoc* judges paid for each day - 1/365 of base annual salary of permanent judges plus interim cost-of-living supplement).	Irrelevant except for *ad hoc* judges

b) WTO

As noted, the WTO Secretariat maintains an indicative list of qualified governmental and non-governmental individuals,[801] from which panelists may be drawn.[802] As it is an indicative list, these panelists, just like external ones, do not enjoy security of tenure; their primary employment may be as government officials, academics, in the private sector or even in ISDS. In practice, many

[797] *Ibid*, at 5.
[798] *Ibid*.
[799] "IISD Welcomes ICJ Judges' Decision to no Longer Participate in Investor–State Arbitration" (27 October 2018), online: *IISD* <www.iisd.org/media/iisd-welcomes-icj-judges-decision-no-longer-participate-investor-state-arbitration> ["IISD Welcomes ICJ Judges' Decision"].
[800] *Statute of the ICJ*, art 16.
[801] *DSU*, art 8.
[802] *Ibid*, art 8.4. See also Johannesson & Mavroidis, *supra* note 533 at 3.2.1.

panelists are members of delegations to the WTO.[803] In contrast, Appellate Body members are appointed for a four-year term with a possibility of one renewal.[804] Despite the four-year term, the Appellate Body members do not work as full-time WTO employees but commonly work as academics or in the private sector.[805] Since panelists and Appellate Body members are not regarded as full-time employees, they are not part of the WTO's pension plan.[806]

Panelists and the Appellate Body members do not receive any compensation from the parties[807] but, despite the panelists' untenured nature and the Appellate Body members' nonemployee status, are paid from the WTO budget.[808] This method of remuneration assures that there is no financial link between the parties and their adjudicators that might potentially adversely impact the independence and impartiality of the latter.

The panelists' remuneration, typically paid in Swiss francs (CHF),[809] depends on whether they are governmental, or non-governmental officials. Before 2016, non-governmental panelists were paid a daily fee of CHF 600, whereas the governmental officials, commonly appointed by the WTO to keep its budget low, received no fee apart from a subsistence or per diem and capped reimbursement of expenses.[810] This difference in fees comes from the understanding that

[803] Johannesson & Mavroidis, *supra* note 533 at 3.2.1. See also "Dispute Settlement System Training Module", *supra* note 529, s 6.3 at 2.
[804] *DSU*, art 17(2).
[805] Pauwelyn, *supra* note 196 at 20.
[806] *Ibid* at 21.
[807] Gaukrodger & Gordon, *supra* note 737 at 71.
[808] *DSU*, arts 8(11), and 17(8).
[809] Committee on Budget, Finance and Administration, *Financial Rules of the World Trade Organization* (22 February 2017) WTO Doc WT/L/157/Rev.2 at para 7.7(d), online: *WTO* <docsonline.wto.org>.
[810] *DSU*, art 8(11). See also Louise Johannesson & Petros C Mavroidis, "Black Cat, White Cat: The Identity of the WTO Judges" (2015) Research Institute of Industrial Economics (IFN), IFN Working Paper, No 1066 at para 2.1.3.

governmental panelists are paid for their services by the governments that employ them.[811] The WTO, however, has developed a practice allowing governmental officials who are doing their panelist work outside of normal office hours (for example, on weekends) to get the same compensation as their non-governmental colleagues.[812] In 2016-2017, the level of fees changed: fees for non-governmental panelists increased from CHF 600 to CHF 900; a daily fee of CHF 300 for governmental ones was introduced.[813]

As Appellate Body members are elected for four years, they receive a monthly retainer as well as daily fees plus travel expenses and an allowance for meals and accommodation.[814] Since the introduction of the Appellate Body, the monthly retainer for the member's availability and a daily fee (originally set at CHF 7,000 and CHF 600 respectively) have increased. For instance, in 2011, the retainer fee was CHF 9,031 plus CHF 330 for administrative expenses.[815] The daily fees in following years were reported to reach CHF 780.[816]

[811] Pauwelyn, *supra* note 196 at 21.
[812] *Ibid* at 20 (note 87): In 2015, it was CHF 600.
[813] See *2018-2019 Budget Proposals by the Director-General*, WTO Doc WT/BFA/W/427/Rev.1 para 3.23, online: *WTO* <docsonline.wto.org> [*2018-2019 Budget Proposals*].
[814] *DSU*, arts 8(11), and 17(8); "WTO Analytical Index: DSU – Article 8 (Practice)" (December 2018), online: *WTO* <www.wto.org/english/res_e/publications_e/ai17_e/ai17_e.htm> at para 1.1. *Establishment of the Appellate Body: Recommendations by the Preparatory Committee for the WTO approved by the Dispute Settlement Body on 10 February 1995* (19 June 1995), WTO Doc WT/DSB/1 at para 12, online: *WTO* <docsonline.wto.org>. See also "Letter from the Chairman of the Appellate Body" in Committee on Budget, Finance and Administration, *Appellate Body Members* (18 March 2004), WTO Doc WT/BFA/W/109, online: *WTO* <docsonline.wto.org>; *Appellate Body Members* (25 June 2004), WTO Doc WT/BFA/W/118 at 1, online: *WTO* <docsonline.wto.org>. In 1995 allowance for meals and accommodation was set at CHF 435 and for administrative expenses CHF 300.
[815] Committee on Budget, Finance and Administration, *Dispute Settlement Expenditure* (7 March 2011), WTO Doc WT/BFA/W/228 at para 11, online: *WTO* <docsonline.wto.org>.
[816] Filippo Fontanelli et al, "Lights and Shadows of the WTO-Inspired International Court System of Investor-State Dispute Settlement" (2016) 1:1 Eur Inv L Arb Rev 189 at 54; See also Johannesson & Mavroidis, *supra* note 810 at para 1.2.3.

In 2015, before the increase of fees, Pauwelyn claimed that "600 CHF per day for non-governmental panelists is not an attractive fee for high profile/ status individuals outside of the government, especially private lawyers" and that the same was true for the Appellate Body members.[817] Although there was an increase in the remuneration, it seems that the increase may still not be attractive enough for these high profile individuals. For this fees structure, the length of proceedings is a relevant element for one's remuneration. Proceedings of the Appellate Body generally should not exceed 60 days; if a delay is necessary, then they in no case may exceed 90 days.[818] According to a study in 2015, the Appellate Body generally meets the 90-day deadline.[819] In contrast, a panel should generally issue its final report within six months or in cases of urgency within three months from the date of its composition or the agreement of the terms of reference.[820] It is possible for the panel to exceed these time limits by writing to the DSB with the reasons for the extension and the estimated time it needs to issue the report. In no case, should the time exceed nine months.[821] Yet, in practice, these panel proceedings last 12 months on average.[822] Since fees are calculated daily, the lengthier the proceedings, the higher the fees. These limits, though, suggest that there is a cap on daily fees per case and on the number of cases one can hear per year. Also, their capped nature puts some restraints to temptations to increase the length artificially. Overall, the WTO remuneration schemes indicate that panelists are less personally protected and more vulnerable to different incentives and temptations than the Appellate Body members.

[817] Pauwelyn, *supra* note 196 at 21.
[818] *DSU*, art 17(5).
[819] Gaukrodger & Gordon, *supra* note 737 at 59, and 71.
[820] *DSU*, art 12(8).
[821] *Ibid*, art 12(9).
[822] "Dispute Settlement System Training Module", *supra* note 529, s 6.3 at 5. See also World Trade Organization, *A Handbook on the WTO Dispute Settlement System*, 2nd ed (Cambridge, UK: Cambridge University Press, 2017) at 76–77 [WTO *Handbook*]: In this book, the WTO reports 11 months on average.

Table 35: WTO - Adjudicative Security

	Tenure (non-renewable)	***Remuneration*** (publicly available)	***Peculiarities of proceedings***
Panelists	No Governmental or non-governmental officials	Daily fees fixed and paid by the WTO • Governmental officials - CHF 300 daily fee • Non-governmental officials - CHF 900 daily fee • No pension	The length affects daily fees.
Appellate Body members	Yes Appointed for 4 years - with one possible renewal. (Commonly engage in other work - academic, private, etc.)	Monthly retainer and daily fees fixed and paid by the WTO • Monthly retainer: CHF 7,000 • Daily fee: CHF 600 • No pension	The length affects daily fees. Capped daily fees (max 90-day trials)

c) Analysis

Between the ICJ and WTO, the protection of individual security for adjudicators vary. The strongest level of protection is provided by the ICJ, where judges have security of tenure with a possibility of re-election, a stable base annual salary that cannot be decreased during the term, and paid allowances and travel expenses. After leaving the court, the financial security of the tenured judges does not end but continues through a pension scheme. This form of personal protection that reaches beyond the term of service gives judges peace of mind about their future, which means less room for improper influences. With set salaries, the peculiarities of the proceedings do not influence the amount of judges' remuneration.

The WTO's protections are more mixed. While the Appellate Body members have secure tenure for four-year terms with a possibility of one renewal, WTO panelists are selected *ad hoc* from either an indicative list or an external source. Thus, not all WTO adjudicators are protected by tenure, although all of them do get some level of predefined compensation. Appellate Body members get a monthly retainer, daily fees and travel refunds but are not regarded as full-time employees and are not covered by the WTO pension scheme. They can and frequently do work in the academic or private sectors or as arbitrators for ICSID. Since WTO panelists do not have secure

tenure, they are paid daily fees only when appointed. Both governmental and non-governmental panelists are typically engaged in another type of income-generating activity. The former panelists work for the governments of WTO Member States; the latter work in the academic or private sector. As such, panelists' income from WTO adjudicative activities is only a supplement to other income. The lack of a pension for panelists likewise entails a lack of financial security beyond the terms of present service. In disputes, the WTO protects the independence and impartiality of Appellate Body members and panelists by prescribing a maximum length for proceedings. This method not only ensures speedy proceedings but also limits adjudicators' personal incentives by capping their fees. Yet the maximum length for panelists is longer and in practice exceeded by several months. Since the WTO provides some personal protections to Appellate Body members and very little, if any, to panelists, they are, thus, more vulnerable to external pressure. Despite the stronger protections of Appellate Body members, they do not reach the level of protection provided by the ICJ.

Table 36: International Judicial and Quasi-judicial Bodies - Adjudicative Security

	Tenure (non-renewable)	***Remuneration*** (publicly available)	***Peculiarities of proceedings***
The ICJ	Yes Permanent judges elected for a renewable nine-year term - except *ad hoc* judges. (Judges cannot be dismissed unless they no longer fulfill required conditions.)	• Set salaries, allowances and compensation - fixed by the General Assembly based on scales • Annual adjustments (cannot lead to a reduction) • Pension (half of the base annual salary) (*Ad-hoc* judges paid for each day - 1/365 of base annual salary of permanent judges plus interim cost-of-living supplement).	Irrelevant except for *ad hoc* judges
WTO Panelists	No Governmental or non-governmental officials	Daily fees fixed and paid by the WTO • Governmental officials - CHF 300 daily fee • Non-governmental officials - CHF 900 daily fee • No pension	The length affects daily fees.
Appellate Body members	Yes Appointed for 4 years - with one possible renewal. (No full-employee status - commonly engage in other work - academic, private, etc.)	Monthly retainer and daily fees fixed and paid by the WTO • Monthly retainer: CHF 7,000 • Daily fee: CHF 600 • No pension	The length affects daily fees. Capped daily fees (60 or max 90-day trials)

4. Domestic and International Tribunals

a) FINRA

As noted above, FINRA arbitrators are regarded as independent contractors instead of employees. Joining the FINRA's database does not give arbitrators any personal security: tenure or guaranteed monthly income. Arbitrators are paid only for cases that they decide.[823] FINRA describes this type of remuneration as a supplement to the arbitrator's other income.[824] In general, arbitrators receive a fixed rate remuneration called "an honorarium" per one hearing session.[825] In general, the honorarium for one hearing session that lasts four hours or less[826] is set at US$ 300 with an additional US$ 125 per day for a chairperson.[827] Arbitrators might receive different honoraria in some other proceedings (US$ 350 or less)[828] or get compensated for the performance of a special task,[829] for postponed hearings, etc.[830] Arbitrators cannot ask parties to pay more than what they are entitled to receive from FINRA.[831] Since the honorarium depends on a variety of factors and the total income of individual persons is not public, one can only estimate the base amount. In regular proceedings, arbitrators get US$ 600 (two sessions - US$ 300 each), whereas the chairperson receives US$ 725 a day.[832] In 2017, FINRA reported that proceedings last 14 months on average.[833] It is, though, not clear how many sessions per these proceedings arbitrators had

[823] *Customer Code*, *supra* note 335, r 12214; *Industry Code*, *supra* note 335, r 13214. See also "Honorarium" (last visited 28 May 2019), online: *FINRA* <www.finra.org/arbitration-and-mediation/honorarium> ["Honorarium"].
[824] "Become a FINRA Arbitrator", *supra* note 558.
[825] *Customer* Code, r 12214(a); and *Industry Code*, r 13214(a).
[826] *Customer Code*, r 12100(p); and *Industry Code*, r 13100(p).
[827] *Customer* Code, r 12214(a); and *Industry Code*, r 13214(a).
[828] *Customer Code*, rs 12214(c), 12800(f); and *Industry Code*, rs 13214(c), 13800(f), 13806(f).
[829] *Customer* Code, r 12214(d); and *Industry Code*, r 13214(d): For example, a chairperson who writes a detailed decision will receive US$ 400.
[830] *Customer* Code, r 12214(a); and *Industry Code*, r 13214(a).
[831] "Honorarium", *supra* note 823.
[832] *Supra* note 830.
[833] FINRA, *2017 FINRA Annual Financial Report* (Washington, 2018) at 41, and 43, online: *FINRA* <www.finra.org/about/annual-reports-financials#annual-reports>.

served. The number of appointments, the length of proceedings and the number of sessions served all play a role in arbitrators' remuneration. Although arbitrators may possibly influence the length of proceedings and, thus, the number of sessions, the FINRA's neutral selection system suggests that arbitrators are unlikely to be able to influence their appointments.

Table 37: FINRA - Adjudicative Security

	Tenure	***Remuneration*** (Not publicly available)*	***Peculiarities of proceedings***
FINRA	No Arbitrators as independent contractors.	• *Ad hoc* - A supplement to an individual's other income • Honorarium per hearings + per specific activities performed set and paid by FINRA after the SEC approval (no parties involved) • No pension	The number of appointments and the number of sessions served both affect the arbitrator's remuneration.

*Final salaries of individual arbitrators.

b) WIPO

As noted above, the WIPO Arbitration and Mediation Center maintains a list of more than 1500 neutrals[834] - arbitrators, mediators, and experts - from more than 100 countries.[835] This list serves as a database from which the Center and the parties might but do not have to select the arbitrators. Being on the list does not provide security of tenure or financial security in any way, nor does it guarantee appointments. Remuneration depends on peculiarities and the number of cases individual arbitrators adjudicate. WIPO has several sets of schedules of fees, for general and specialized arbitrations, all expressed in US dollars.[836] Calculation of hourly or daily fee rates in each case follows the applicable WIPO's Schedule of Fees and is fixed by the Center after

[834] "WIPO Arbitration and Mediation Center" (last visited 29 May 2019), online: <www.wipo.int/amc/en/center/background.html>.
[835] *WIPO Handbook*, *supra* note 331, at para 4.165.
[836] AGICOA (meaning the Association of International Collective Management of Audiovisual Works) and Expedited Arbitration for Film and Media are examples of specialised arbitrations. See, for instance, "AGICOA - Schedule of Arbitration Fees and Costs" (last visited 19 June 2019), online: <www.wipo.int/amc/en/center/specific-sectors/agicoa/expedited-arbitration/fees.html>.

consultation with the arbitrators, and the parties.[837] In its calculation, the Center takes into account various factors: the amount in dispute; the number of parties; the complexity of the case; the status of the arbitrator; and any special qualifications required of the arbitrator.[838] The minimum hourly rate is set at US$ 300 but can go up to US$ 600.[839] In Emergency Relief Proceedings there is a cap at US$ 20,000, and in Expedited Arbitration for the Association of International Collective Management of Audiovisual Works (AGICOA) it is at US$ 5,000. Fixed fees are under the Expedited Arbitration: cases of the amount up to US$ 2.5 million and over US$ 2.5 million apply US$ 20,000 and US$ 40,000 respectively.[840] Yet, based on the complexity of the case and time spent by the arbitrator, even these fixed fees may be reduced or increased.[841] Otherwise, if the value of the case exceeds 10 million, then the amount must be agreed with the parties.[842]

On average, the length of proceedings under the WIPO Arbitration Rules takes 23 months, whereas under the WIPO Expedited Arbitration Rules it is seven months .[843] It seems that in the calculation of arbitrator's fees, the length of proceedings plays only a partial role in fixed or capped fees, whereas if they are agreed with parties as there is no cap,[844] its role may be more significant.

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[837] *WIPO Arbitration Rules*, art 71; *WIPO Expedited Arbitration Rules*, art 64.
[838] See "Schedule of Fees and Costs: WIPO Arbitration / WIPO Expedited Arbitration" (last visited 29 May 2019), online: <www.wipo.int/amc/en/arbitration/fees/index.html>; "Fees and Costs for WIPO Mediation and Expedited Arbitration for Film and Media" (last visited 29 May 2019), online: <www.wipo.int/amc/en/film/fees/index.html>; "Schedule of Fees and Costs: Emergency Relief Proceedings" (last visited 29 May 2019), online: <www.wipo.int/amc/en/emergency-relief/fees/index.html>; and *supra* note 836.
[839] *Ibid*.
[840] See "Schedule of Fees and Costs: WIPO Expedited Arbitration"; and "Schedule of Fees for WIPO Mediation and Expedited Arbitration for Film and Media", *supra* note 838.
[841] See *supra* note 838.
[842] *WIPO Arbitration Rules*, art 69. See also Schedule of Fees and Costs: WIPO Arbitration / WIPO Expedited Arbitration, *supra* note 838.
[843] Ignacio de Castro & Judith Schallnau, "What does it cost to defend your IP rights?" (June 2013), online: *WIPO|Magazine* <www.wipo.int/wipo_magazine/en/2013/03/article_0006.html>.
[844] Such as in case of WIPO Arbitration and Expedited Arbitration (in cases where the claimed amount is over $10M).

Table 38: WIPO - Adjudicative Security

	Tenure	***Remuneration*** (Not publicly available)*	***Peculiarities of proceedings***
WIPO	No Only an indicative database	• *Ad hoc* - linked to cases the arbitrator adjudicates - indicative hourly fees • According to a schedule with some fees fixed or capped** • Fees of cases exceeding the amount of US$ 10M are based on agreement of the Center, parties and arbitrators. • No pension (Final fees are fixed by the Center after consultation with the arbitrators and the parties.)	Its length affects the arbitrator's fees.

*Final salaries of individual arbitrators. **Expedited Arbitration: US$ 20,000 or 40,000 according to the amount of the case; Emergency Relief Proceedings: US$ 20,000; Expedited Arbitration for AGICOA: US$ 5,000.

c) Analysis

Both FINRA and WIPO do not provide security of tenure. Arbitrators at both bodies have no financial security and are paid *ad hoc* for disputes they are appointed to decide. At FINRA, the *ad hoc* character of its remuneration scheme suggests unguaranteed, irregular, and unstable remuneration from the arbitrator's viewpoint. While it is possible that some arbitrators might get frequent appointments, the system of non-tenure is unable to deliver stable and evenly spread workloads among all enlisted. Despite this lack of tenure and financial security, FINRA safeguards the values of adjudicative independence and impartiality by using fixed fees for set sessions that are paid exclusively by FINRA. This arrangement excludes parties from the remunerative process and limits the dependence of remuneration on the peculiarities of individual proceedings. In other words, there is no direct remunerative link between the adjudicator and the parties. FINRA also safeguards these values indirectly by using a neutral selection system.[845]

WIPO has also elaborated a system of remunerative schedules and fees. Yet the fact that the scheme allows the length of proceedings to influence an arbitrator's fees, which are moreover fixed by the Center after consultation with parties and the arbitrator, implies a potential conflict of

[845] Discussed in Chapter 4.

interest. That implication arises because the arbitrator's income depends on factors that the arbitrator can influence and because of the proximity between the parties and the adjudicators' remuneration. Therefore, while WIPO employs an elaborate system of fees, it does not shield arbitrators from such conflicts. The only protection at WIPO, in terms of personal security, is the use of fee schedules and, in some situations, fixed or capped fees, which all help to fix the final fees.

FINRA and WIPO deal with cases of private horizontal relations, where parties might seek flexible *ad hoc* arrangements with, in general, no public interest at stake. For such purposes, the limited personal safeguards may seem acceptable and reasonable. Yet the fact that these bodies are arbitral bodies does not mean that further personal protections should not be used to strengthen adjudicative independence and impartiality. Between the two bodies, FINRA uses stronger protections and works as an example of how strong safeguards can be employed by arbitral administering bodies. If the protections work for one arbitral body, with appropriate modifications they can work for others too.

Table 39: Domestic and International Tribunals - Adjudicative Security

	Tenure	***Remuneration*** (Not publicly available)*	***Peculiarities of proceedings***
FINRA	No Arbitrators as independent contractors.	• *Ad hoc* - A supplement to an individual's other income • Honorarium per hearings + per specific activities performed set and paid by FINRA after the SEC approval (no parties involved) • No pension	The number of hearings affects the arbitrator's remuneration.
WIPO	No Only an indicative database	• *Ad hoc* - linked to cases the arbitrator adjudicates - indicative hourly fees • According to a schedule with some fees fixed or capped** • Fees of cases exceeding the amount of US$ 10M are based on agreement of the Center, parties and arbitrators. • No pension (Final fees are fixed by the Center after consultation with the arbitrators and the parties.)	Its length affects the arbitrator's fees.

*Final salaries of individual arbitrators. **Expedited Arbitration: US$ 20K or 40K according to the amount of the case; Emergency Relief Proceedings: US$ 20K; Expedited Arbitration for AGICOA: US$ 5K.

5. ISDS Administering Bodies

a) ICSID

As noted, ICSID has a Panel of Arbitrators from which parties may but do not have to select their arbitrators. The existence of the Panel suggests two different schemes: one applicable to the Panel members and another to external arbitrators. Yet from the point of their personal security these schemes are not dissimilar. Members of the Panel of Arbitrators are appointed for a renewable six-year term. Yet for their adjudicative roles, remuneration of the Panel members, just like the external arbitrators, is linked to cases they adjudicate and, thus, administered *ad hoc*.[846] Since this membership does not guarantee evenly spread workload nor appointments (in fact, some arbitrators may never get appointed), one can hardly speak about any arbitrator's personal security.

Also, the arbitrator's appointment and its interconnected remuneration are not secured even when the arbitrator gets initially appointed. Before the tribunal's constitution, any appointed arbitrator may be replaced if a party requests so;[847] after its constitution arbitrators can be disqualified on a party's proposal on the grounds of a manifest lack of qualities required for the post,[848] or on the ground that the arbitrator was ineligible to be appointed.[849] In matters of disqualification, other members of the tribunal vote.[850] If votes are equally divided, unless parties agree otherwise, the final decision is made by the Chairman of the ICSID Administrative Council.[851] As an example of parties choice serves *Perenco v Ecuador and Petroecuador*[852] where parties agreed that any

[846] *ICSID Convention*, art 15(1).
[847] *ICSID Arbitration Rules*, r 7; *ICSID AFR*, art 12.
[848] *ICSID AFR*, arts 14–15.
[849] *ICSID Convention*, art 57.
[850] *Ibid*, 58; *ICSID Arbitration Rules*, r 7.
[851] *Ibid*.
[852] *Perenco Ecuador Ltd v The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador* (*Petroecuador*) (2009), Decision on challenge to Arbitration, Case No ARB/08/6 (ICSID).

challenges should be decided by the Secretary-General of the PCA rather than by the remaining members of the ICSID arbitration tribunal and under the IBA Guidelines instead of the ICSID standard.[853]

Arbitrators' income depends on the length of each case, its complexity and the amount under dispute according to the ICSID Schedule of Fees.[854] ICSID does not provide any financial security beyond the term of service like a pension. ICSID arbitrators get compensation per day working on the case as well as expenses - reimbursement of reasonably incurred travel and other expenses plus a per diem allowance for days of travel (meals, tips, and valet). Since 2008, each arbitrator is entitled to receive a fee of US$ 3,000 per meeting day or 8-hour day of other work (corresponding to US$ 375 per hour).[855] Each tribunal determines the fees and expenses of its members.[856] The tribunal members requests for higher fees is determined by the Secretary-General, with the approval of the Chairman.[857] Since arbitrators' fees depend on the number of appointments and peculiarities of proceedings, the more claims they are appointed to, and the longer these disputes take, the better off financially they are.[858] According to a study in 2014, the average compensation of ICSID arbitrators is US$ 200,000 per case.[859] In 2012, another study claimed that since 2009

[853] Gaukrodger & Gordon, *supra* note 737 at 94 (note 270). See also Federico Campolieti & Nicholas Lawn, "Perenco v. Ecuador: Was there a valid arbitrator challenge under the ICSID Convention?" (28 January 2010), online (blog): *Kluwer Arbitration Blog* <arbitrationblog.kluwerarbitration.com/2010/01/28/perenco-v-ecuador-was-there-a-valid-arbitrator-challenge/>.
[854] Michael Waibel & Yanhui Wu, "Are Arbitrators Political? Evidence from International Investment Arbitration" (2017) USC FBE, online: *University of Southern California* <www-bcf.usc.edu/~yanhuiwu/>.
[855] ICSID, *Administrative and Financial Regulations* (2006), reg 14. See also "Memorandum on the Fees and Expenses" (6 July 2005), online: *ICSID* <icsid.worldbank.org/en/Pages/icsiddocs/Memorandum-on-the-Fees-and-Expenses-FullText.aspx>. See also, for example, *The Renco Group, Inc V Republic of Peru* (2013), Procedural Order No 1, Case No UNCT/13/1 at para 3.2.1 (ICSID) (UNCITRAL Rules 2010).
[856] *ICSID Convention*, art 60.
[857] ICSID, *Administrative and Financial Regulations* (2006), reg 14(1).
[858] Bernasconi-Osterwalder & Brauch, *supra* note 328. See also Waibel & Wu, *supra* note 854 at para 2.2.
[859] Sergio Puig, "Social Capital in the Arbitration Market" (2014) 25:2 Eur J Intl L 387 at 389: Between 1972, year of the first ICSID dispute, and February 2014.

the average duration of proceedings dropped from over three to over two and a half years, and the annulment proceedings took about two years.[860] While the total income of each arbitrator is lacking, some individual fees can be found in case documents and arbitral awards. The Centre makes all the payments, excluding the parties from the process.[861] Since the income of all arbitrators depends on hours or days of work, there is no difference if an individual is a member of the Panel of Arbitrators or not. The average remuneration is quite considerable yet unpredictable since it relies on the number of appointments, if any, the length of proceedings as well as tastes and choices of parties to the dispute.

Table 40: ICSID - Adjudicative Security

	Tenure	***Remuneration*** (Not publicly available)*	***Peculiarities of proceedings***
ICSID	No Only an indicative database	• *Ad hoc* - linked to cases the arbitrator adjudicates - indicative hourly fees plus expenses fixed by the Secretary-General with the approval of the Chairman • Prescribed daily or hourly rate** • No pension (The Centre pays the fees after the parties' contributions.)	Its length affects the arbitrator's fees.

*Total income of individual arbitrators typically unavailable, except some fees in final awards etc. **Daily rate US$ 3,000 or hourly rate US$

b) PCA-UNCITRAL

Members of the Permanent Court of Arbitration are appointed for a renewable six-year term.[862] From the point of adjudication, this term does not serve as tenure, nor does it guarantee appointments to ISDS cases. Members of the Court can potentially act as arbitrators, yet those with appointing powers do not have to select from among them. Instead, they can choose from other

[860] Gaukrodger & Gordon, *supra* note 737 at 71.
[861] ICSID, *Administrative and Financial Regulation*, reg 14(2).
[862] *1899 Convention for the Pacific Settlement of International Disputes*, 29 July 1899, art 23 (entered into force 4 September 1900) [*Hague Convention 1899*] and replaced by *1907 Convention for the Pacific Settlement of International Disputes*, 18 October 1907, art 44 (entered into force 26 January 1910) [*Hague Convention 1907*].

sources: the PCA rosters of experts in various fields[863] or outside of the PCA altogether. Once selected, arbitrators can be challenged and removed from the panel for justifiable doubts as to their impartiality and independence or due to their inactions.[864] Removal of an arbitrator challenged by one party ensues if other parties agree or if the arbitrator decides to withdraw.[865] If neither happens, the designated appointing authority must step in and resolve the challenge.[866]

Here again, remuneration depends on whether an individual is appointed to decide a case or not. Since arbitrators are appointed *ad hoc*, there is no pension scheme. Considering arbitrator's fees, the PCA Rules provide similar criteria as the UNCITRAL Arbitration Rules. According to these rules, it is the arbitral tribunal that determines the costs of arbitration including the fees and expenses of all arbitrators.[867] In doing so, the tribunal should fix and state fees of each arbitrator separately.[868] Remuneration of arbitrators includes daily or hourly rates and travel and other expenses. These fees and expenses should be reasonable and take into account: the amount in dispute; the complexity of the subject matter; the time spent by the arbitrators, and any other relevant circumstances of the case.[869] Considering the latter, a set of the PCA Optional Rules[870] and the UNCITRAL rules, in appointments made by appointing authorities, require the tribunal to

[863] For instance, Panels of Arbitrators and Experts for Environmental Disputes; Panels of Arbitrators and Experts for Space-related Disputes. See "Members of the Court" (last visited 30 May 2019), online: *PCA* <pca-cpa.org/en/about/structure/members-of-the-court/>.
[864] *PCA Arbitration Rules* (2012), art 12 [*PCA Arbitration Rules*]; *PCA Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One is A State*, art 10; *UNCITRAL Arbitration Rules* (2013), art 12.
[865] *PCA Arbitration Rules*, art 12; *PCA Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One is A State*, art 10; *UNCITRAL Arbitration Rules* (2013), art 13(3).
[866] *PCA Arbitration Rules*, art 13(3)–(5), *PCA Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One is A State*, art 12; *UNCITRAL Arbitration Rules* (2013), art 13(4).
[867] *PCA Arbitration Rules*, art 40–41; *UNCITRAL Arbitration Rules* (2013), art 40–41; *PCA Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One is A State*, art 38–39.
[868] *PCA Arbitration Rules*, art 40(2)(a); *UNCITRAL Arbitration Rules* (2013), art 40(2)(a); *PCA Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One is A State*, art 38(a).
[869] *PCA Arbitration Rules*, art 41(1); *UNCITRAL Arbitration Rules* (2013), art 41(1); *PCA Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One is A State*, arts 39(1).
[870] *PCA Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One is A State*.

consider also relevant schedules of fees issued by the designated appointing authority.[871] The designated appointing authority or the Secretary-General of the PCA has the power to review these costs and make adjustments if they are inconsistent with these rules.[872] Ultimately, it is the PCA that administers arbitrator fees from deposits made by parties.[873]

Under these rules there are no institutional limits or fee caps akin to ICSID.[874] Arbitrator fees in the PCA administered ISDS cases are in general decided by agreement with parties.[875] Applied amounts of daily or hourly rates can often be found in Procedural Orders of the case.[876] In *Howard v Canada*, for example, the arbitrator's fee was US$ 3,000 per day or 8 hours of work.[877] The tribunal found the fee reasonable since this amount is the standard fee applied by ICSID and because there are other arbitral tribunals applying fees that are higher than this.[878] Likewise, *Windstream Energy v Canada*[879] and *Detroit v Canada*[880] both using the UNCITRAL rules applied the same fee of US$ 3,000. In contrast, some tribunals order fees that are higher: in *Mesa* v *Canada*,[881] and in *Clayton and Bilcon v Canada*[882] the hourly rate was US$ 550 totaling in US$

[871] *UNCITRAL Arbitration Rules* (2013), art 41 (2); *PCA Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One is A State*, art 39(2)–(4): these rules also require tribunals to consult their fees with any appropriate appointing authority.
[872] *PCA Arbitration Rules*, art 41(2), and (3)(b); *UNCITRAL Arbitration Rules* (2013), art 41(3)–(4)(c)–(d).
[873] *PCA Arbitration Rules*, art 43(5); *UNCITRAL Arbitration Rules* (2013), art 43(5).
[874] ICSID fee is US$ 3,000 per day or 8 hours of work.
[875] Gaukrodger & Gordon, *supra* note 737 at 20 (note 28).
[876] *Windstream Energy LLC (USA) v The Government of Canada* (2016), Award, 2013-22 at para 510 (PCA); See also Procedural Order No 1, 2013-22 at para 19 (PCA) [*Windstream Energy*]. See also *Detroit International Bridge Company v Government of Canada* (2015), Procedural Order No 1, 2012-25 at Section B paras 3–4 (PCA) [*Detroit International*].
[877] *Melvin J Howard, Centurion Health Corp & Howard Family Trust v The Government of Canada* (2010), Order for the Termination of the Proceedings and Award on Costs and Correction, 2009-21 at paras 67, and 70 (PCA) [*Howard*].
[878] *Ibid*, at para 67.
[879] *Windstream Energy*, *supra* note 876.
[880] *Detroit International*, *supra* note 876.
[881] *Mesa Power Group, LLC V Government of Canada* (2016), Procedural Order No 1, 2012-17 at para 23.1 (PCA).
[882] *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware v Government of Canada* (___), Procedural Order No 1, 2009-04 at para 12 (PCA): following ICSID, *Administrative and Financial Regulations*, reg 14, and Memorandum on the Fees and Expenses, *supra* note 855.

4,400;[883] in *Bermuda v Bolivia*[884] the hourly rate was US$ 600 totaling in US$ 4,800 per 8 hours of work; similarly in *Philip Morris v Australia*,[885] the hourly rate was EUR 500, an equivalent of about US$ 600 per hour.[886] Yet fees, including totals, are not always available because the case documents are not published or have been redacted like the totals in *Philip Morris v Australia*.[887] In 2014, a study that analyzed the available data found that average tribunal costs in past cases are 10 percent lower at ICSID than under the UNCITRAL Rules and suggested that the reason for such a difference was due to the ICSID's fee cap of US$ 3,000 per day.[888]

The length of proceedings is also a key element in arbitrators' fees. For illustration, in *Howard v Canada*, the fee was calculated in hours. Since proceedings were terminated, Professor Florestal was paid only for two days of work (US$ 6,000 in total).[889] In contrast, in *National Grid v Argentina*, each of the three arbitrators received in fees and expenses over 300,000 US dollars.[890] Since proceedings are usually lengthy, unless terminated, the fees arbitrators get are typically high. Despite these high or, as some regard, excessive fees, the *ad hoc* method depends on a variety of factors and, thus, is unstable, unpredictable and might cause considerable pressure on those who

[883] The total for 8 hours of work of this hourly rate is US$ 4,400.
[884] *South American Silver Limited (Bermuda) v The Plurinational State of Bolivia* (2018), Terms of Appointment, 2013-15 at para 13 (PCA).
[885] *Philip Morris Asia Limited (Hong Kong) v The Commonwealth of Australia* (___), Procedural Order No 1, 2012-12 at para 5 (PCA) [*Philip Morris*].
[886] The amount was converted at the time of the Procedural Order.
[887] *Philip Morris*, *supra* note 885 at 95.
[888] M Hodgson, "Counting the costs of investment treaty arbitration" (2014) 9 J Global Arb Rev 2 at 3, online: GAR <globalarbitrationreview.com/>. See also "Investor-state dispute settlement: A sequel" (2014) UNCTAD Series on Issues in International Investment Agreements II, UNCTAD/DIAE/IA/2013/2, online: *UNCTAD* <unctad.org> at 146.
[889] *Howard*, *supra* note 877 at para 70: Fees of President Judge Tomka amounted to US$ 13,687.50 for 36.5 hours of work; Arbitrator Professor Florestal was US$ 6,000 for 16 hours of work; and Arbitrator Mr Alvarez, QC received US$ 9,562.50 for 25.5 hours of work.
[890] *National Grid plc v The Argentine Republic* (2008), Award, Case 1:09-cv-00248-RBW at para 296(3) (ICSID).

rely on this type of income. Further, instead of providing security, the *ad hoc* appointing system creates inequality by dividing arbitrators to those with frequent, rare or no appointments.

Table 41: PCA-UNCITRAL - Adjudicative Security

	Tenure	***Remuneration*** (Variably publicly available)*	***Peculiarities of proceedings***
PCA	No Only an indicative database	• *Ad hoc* fees and expenses - linked to cases the arbitrator adjudicates - fixed by arbitrators after considering a range of prescribed factors** • No prescribed fees, no cap on fees • Daily or hourly rate must be reasonable*** • No pension • The appointing authority or the Secretary-General of the PCA has power to review such costs (The Court administers payments after the parties' contributions.)	The length affects the arbitrator's fees.

*Total income of individual arbitrators unavailable, except some fees in final awards etc. **The amount in dispute, the complexity of the subject matter, the time spent by the arbitrators, and any other relevant circumstances of the case. ***US$ 375 per hour (or US$ 3,000 per day) found reasonable but also higher hourly rates US$ 550 and US$ 600.

c) ICC Court

Members of the ICC International Court of Arbitration are appointed for a three-year term.[891] Yet, the Court itself does not decide disputes.[892] Arbitrators to disputes are appointed *ad hoc* and, thus, they are not protected by security of tenure. Since arbitrators are not the Court's employees, they do not enjoy benefits typically linked to employment, such as a pension. Also, within a prescribed time limit, a party can challenge appointed arbitrators for an alleged lack of impartiality, independence, or otherwise.[893] If necessary, the Court decides on the merits of these challenges.[894]

[891] *ICC Arbitration Rules* (2017), Appendix I, art 3(5). The last election took place on 30 June 2018. See note 658 at para 7. See also Commission on Arbitration and ADR , *supra* note 666 at para 57: Members of the Court are usually "private practitioners of international arbitration."
[892] *ICC Arbitration Rules*, art 1(2).
[893] *Ibid*, art 14(1).
[894] *Ibid*, art 14(3).

Since there is no security of tenure, there is also a lack of financial security. Arbitrators are paid, fees and expenses, only if appointed.[895] As reported, the ICC arbitrators in comparison to ICSID are paid more as their fees are calculated as a proportion of the amount in dispute.[896] The Court has an indicative scale for ordinary as well as expedited procedures.[897] In each case, the Court sets the fees following the appropriate scale that is calibrated according to the claimed amount plus time spent, rapidity and complexity of the dispute.[898] Yet, if necessary due to exceptional circumstances of the case, the Court may fix the fees higher or lower than the scale prescribes.[899] If the amount in dispute is not known, then the Court fixes the fee at its discretion.[900]

The ICC scales prescribe ranges and for them the minimum and the maximum fee for the initial amount plus an assigned percentage for the amount that gets over it.[901] For illustration, in ordinary arbitration, in cases with the amount up to US$ 50,000, the lowest fee of US$ 3,000 can go up to US$ 9,010.[902] In contrast, the minimum fee in a US$ 10 million dispute starts on US$ 39,167, whereas the maximum amount begins on US$ 187,400; in a US$ 100 million case, the minimum pay starts on US$ 77,867, whereas the maximum begins on US$ 351,300.[903] Accordingly, the higher the amount in dispute, the more an arbitrator gets paid. Similarly, since the time spent on

[895] *Ibid*, art 38(1).
[896] Puig, *supra* note 859 at 398 (note 61); Diana Rosert, *The Stakes Are High: A review of the financial costs of investment treaty arbitration* (Geneva: IISD, 2014) at para 5.3.
[897] *ICC Arbitration Rules*, art 30, and Appendix III, art 3(3). See "Costs and payments" (last visited 27 February 2019), online: *ICC - International Chamber of Commerce* <iccwbo.org/dispute-resolution-services/arbitration/costs-and-payments/>; "Cost calculator" (last visited 27 February 2019), online: *ICC - International Chamber of Commerce* <iccwbo.org/dispute-resolution-services/arbitration/costs-and-payments/cost-calculator/>.
[898] *ICC Arbitration Rules*, art 38(1), and Appendix III, arts 2–3: Fees for the expedited procedure are always lower than fees for the same amount in dispute in the ordinary arbitration.
[899] *Ibid*, art 38(2).
[900] *Ibid*, 38(1), and Appendix III, art 2 (1), and (4).
[901] For example: up to 50K; from 50,001 to 100,000K; from 100,000 to 200,000K, etc. For the full scale of fees see the *ICC Rules of Arbitration* (2017).
[902] In the expedited procedure, the lowest fee is US$ 2,400.
[903] *ICC Arbitration Rules*, Appendix III art 3. See also Puig, *supra* note 859 at 398 (note 61); Rosert, *supra* note 896 at 11.

the case also affects the fees, the lengthier proceedings are, the higher fees arbitrators receive. Fees are administered by the Court from deposits made up front by parties to the dispute.[904] For calculation of these deposits, the ICC uses arbitrator's average fees. For illustration, in a case of US$ 100,000, the average fee per arbitrator is US$ 10,060.[905] Since the ICC cases are frequently confidential, total lengths of proceedings, as well as final arbitrators' fees, are unknown. Despite the commonly high-income that one may earn, the *ad hoc* remuneration, just like in cases of ICSID and the PCA, is unstable, unpredictable and might cause considerable pressure on those who rely on it.

Table 42: ICC - Adjudicative Security

	Tenure	***Remuneration*** (Frequently confidential)	***Peculiarities of proceedings***
ICC	No Only an indicative database	• *Ad hoc* - linked to cases the arbitrator adjudicates - indicative hourly fees plus expenses fixed by the Court • Calculated following a scale calibrated according to the claimed amount plus time spent, rapidity and complexity of the dispute** • No pension (Fees paid by the Court after parties paid their contributions to the Court.)	The length affects the arbitrator's fees.

*Lowest scale fee is US$ 3,000 in cases of amount up to US$ 50,000; Highest scale fee is US$ 583,300 plus 0.0400% in cases of amount over

d) Analysis

None of the ISDS arbitral bodies - ICSID, the PCA and the ICC - provide sufficient personal security to arbitrators. Due to the *ad hoc* nature of their appointments, there is no security of tenure for any of the arbitrators. This is so even though some have been put on formal lists of arbitrators or fulfill other institutional roles for which they receive the security of tenure. Yet in their capacity as arbitrators they have no link to such tenure.

[904] "Cost calculator", *supra* note 897.
[905] *Ibid.*

From this lack of security of tenure comes inadequate financial security in terms of guaranteed, regular, and stable remuneration over the term of office. Arbitrators are remunerated only when appointed in a specific case, for the time spent and expenditure. Thus, remuneration is calculated and paid on *ad hoc* basis with no pension or other employment benefits. It depends, first, on whether the individual gets appointed and on frequency of the appointments. Frequent re-appointments of a small number of arbitrators implies less frequent appointments for others. Second, the amount of remuneration depends on the rules of individual institutions. The amount varies substantially among the examined bodies and depends on such factors as whether there is a fees cap or not, whether the amount is based on a fixed hourly rate or is calculated based on a scale, the length of proceedings, the amount in dispute, etc.

According to a 2016 study, ISDS brought substantial benefits to the legal industry in arbitrators' fees and other litigation costs.[906] Another study reported average fees for three-arbitrator tribunals of US$ 1.28 million per case making for an average fee per arbitrator of about US$ 426,500.[907] Not all fees are public, however, such that this figure accounts for only about two-thirds of surveyed cases.[908] Notably, this average fee exceeds the annual base salary of, for instance, judges at the ICJ and the UK Supreme Court.[909] Without further information on the length of proceedings for which the amount is paid and on the number of cases in which each arbitrator sat, it is not possible to determine the effective salary of individual arbitrators.

[906] Gus Van Harten & Pavel Malysheuski, "Who Has Benefited Financially from Investment Treaty Arbitration? An Evaluation of the Size and Wealth of Claimants" (2016) 12:3 Osgoode Legal Studies Research Paper Series, Research Paper No 14 at 2, and 12–13.
[907] Gaukrodger & Gordon, *supra* note 737 at 19; Bernasconi-Osterwalder & Brauch, *supra* note 328 at 3.
[908] Gaukrodger & Gordon, *supra* note 737 at 19 (note 23): 62 out of 143 surveyed cases provided no information about the arbitrators' fee.
[909] In 2017, the base salary of the ICJ judges was set at US$ 174,742 while for UK Supreme Justices it was set for period 2017-2018 at GBP 217,409 (after the exchange rate it is approximately US$ 308,000 (calculated 11 April 2018)).

The significance of arbitrator remuneration is relative since it depends on whether the arbitrator has other sources of income. In some cases, the arbitrator's fee is a question of one's livelihood. In others, it will be additional income beyond one's regular salary from work in the private sector, as a judge, as a government official, or as an academic. Salaries in these other occupations obviously differ substantially. For example, arbitrators who work in private practice and receive high levels of remuneration there may see work for some arbitral bodies as effectively pro-bono, while others may see it as generous additional income.[910] These facts suggest that the existence of additional sources of income may play a key role in whether the remuneration is a significant incentive or not.

Despite the potential considerable amounts that an arbitrator may receive, it remains the case that such remuneration is insecure due to its *ad hoc* nature. First, the lack of tenure creates pressure for arbitrators to secure and compete for appointments. Second, the workload among arbitrators cannot be allocated evenly. Instead, the system creates groups of arbitrators according to the frequency of their appointments: those appointed often, seldom, and never at all. Third, the lack of tenure means that arbitrators have no financial security. The scheme offers no financial protection to cover subsistence during a term of service or beyond. Fourth, insecurity may lead to fear and make arbitrators vulnerable to pressure to secure sufficient income in creative ways. Fifth, arbitrators have a personal stake in the cases that they adjudicate based on the incentive to secure more *ad hoc* income. This financial stake in disputes can create conflicts of interest. Sixth, all of the examined contexts for ISDS, albeit to different degrees, allow arbitrators to participate in the calculation of their fees. Seventh, without stability and predictability of income, arbitrators may

[910] Puig, *supra* note 859 at 398 (note 61): referring to ICSID.

have financial incentives to prolong proceedings to increase their immediate income. Eighth, the fact that fees are paid by, and some time negotiated with the parties, creates a close proximity between arbitrators and the parties whose interests are adjudicated, with a potential for inappropriate influence. For these reasons, it is questionable whether these arrangements for remuneration satisfy basic principles of protection at the heart of adjudicative independence and impartiality.

Table 43: ISDS - Adjudicative Security

	Tenure	***Remuneration*** (Except ICSID frequently confidential)	***Peculiarities of proceedings***
ICSID	No Only an indicative database	• *Ad hoc* - linked to cases the arbitrator adjudicates - indicative hourly fees plus expenses fixed by the Secretary-General with the approval of the Chairman • Prescribed daily rate US$ 3,000 or hourly rate US$ 375 • No pension (Fees paid by the Centre after parties paid their contributions to the Centre.)	The length affects the arbitrator's fees.
PCA	No Only an indicative database	• *Ad hoc* fees and expenses - linked to cases the arbitrator adjudicates - fixed by arbitrators after considering a range of prescribed factors** • No prescribed fees, no cap on fees • Daily or hourly rate must be reasonable - rates applied: US$ 375 per hour (or US$ 3,000 per day) US$ 550 and US$ 600 • No pension • The appointing authority or the Secretary-General of the PCA has the power to review such costs (The Court administers payments after the parties' contributions.)	The length affects the arbitrator's fees.
ICC	No Only an indicative database	• *Ad hoc* - linked to cases the arbitrator adjudicates - indicative hourly fees plus expenses fixed by the Court • Calculated following a scale calibrated according to the claimed amount plus time spent, rapidity and complexity of the dispute • Lowest scale fee is US$ 3,000 in cases of amount up to US$ 50,000; Highest scale fee is US$ 583,300 plus 0.0400% in cases of amount over US$ 500 million • No pension (Fees paid by the Court after parties paid their contributions to the Court.)	The length affects the arbitrator's fees.

*Considering the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators, and any other relevant circumstances of the case.

6. Comparative Remarks

In this chapter, I mapped the use of the personal security of adjudicators - security of tenure and remuneration (both elements of financial security) - as values of adjudicative independence and impartiality. Considering remuneration, I focused on the extent to which different methods provide financial stability without the need to rely on the peculiarities of cases. In surveying the characteristics of the used salary schemes and the way individual organizations calculate remuneration, I focused on: whether an adjudicator's base salary is fixed or depends on performance; whether the salary is protected from reduction; and whether financial security beyond the terms of present service exists.

My findings show that secure tenure is granted in all domestic, European, and international courts. The only differences lie in the term of office and whether it is renewable. The examined courts apply periods of tenure ranging from 6 years (CJEU; renewable) to 9 years (ICJ; renewable, and ECHR; non-renewable) to a prescribed retirement age (UK and US courts). Security of tenure goes hand in hand with financial security. In the examined courts, remuneration is prescribed by law or resolution with the amount in general made public. Typically, the amount is a combination of base salary and other emoluments. Judges receive a set of monthly salary that is reviewed annually. It is common that annual adjustments cannot lead to a reduction of salary. As a default, base salary does not depend on performance and does not rely on the particularities in proceedings or their length or the amounts in dispute. In turn, there is no risk that judges will have an incentive to prolong proceedings artificially. Further, this arrangement insulates adjudicators from an improper influence by a party - disputing parties cannot influence the amount of remuneration to which judges are entitled, thus avoiding any inappropriate proximity between them and their adjudicator.

The amount received, age of retirement, and years of service differ for individual courts, but all provide remunerative schemes that include a pension. The pension provides financial security beyond the term of present service. Judges are in general precluded from engaging in external work. Yet until recently, at the ICJ some judges frequently sat in ISDS cases. Since this side work weakens safeguards of adjudicative independence and impartiality, it was appropriate to terminate it.[911]

International and domestic tribunals - the WTO, WIPO and FINRA - use remuneration schemes that differ from courts. This distinction, however, can be explained by the difference in the work settings of these adjudicative bodies. Only the WTO Appellate Body incorporates security of tenure (four-year; renewable), although different from courts, and financial security in a monthly retainer. It is typical that Appellate Body members, as non-permanent employees, do external work in the private sector, academia, etc. Also, the length of Appellate Body and panel proceedings have some impact on daily fees but, for Appellate Body members, this impact is limited by caps on the length of proceedings. For panelists, who lack tenure, the WTO sets moderate daily fees and caps remuneration for expenses. Panel proceedings can be lengthier than the Appellate proceedings with more impact on the panelists' remuneration. Further, as both panelists and Appellate Body members are non-employees, they are not covered by the WTO pension scheme.

Both WIPO and FINRA have lists of potential arbitrators without granting security of tenure. In both cases, being on the list merely creates a possibility of selection to arbitrate. The remunerative schemes at both bodies is based on the cases that an adjudicator decides. WIPO uses schedules of

[911] "IISD Welcomes ICJ Judges' Decision", s*upra* note 799.

fees with caps and indicative hourly fees. FINRA has fixed fees per session or based on special tasks. As there is no tenure, there is no permanent employment and corresponding benefits including a pension scheme. The length of proceedings for both bodies has some impact on the amount of remuneration. Both the WTO and FINRA provide remuneration from their budgets with no option for arbitrators to negotiate higher fees with the disputing parties. WIPO is an exception in that final fees are fixed by the relevant administrative body after consultation with the arbitrators and parties. Based on these findings, WIPO affords the weakest personal protections for adjudicative independence and impartiality, but for ISDS.

Like WIPO and FINRA, ISDS administering bodies do not provide security of tenure. Since there is no tenure, there is no financial security. All ISDS bodies have indicative lists. Some arbitrators act as permanent members of these bodies but their status on the list does not bring any personal security. This *ad hoc* arrangement creates inequality in the allocation of cases. Even in the event of an appointment, remuneration may depend on the hourly rate, the amount in dispute, the length and complexity of the case, or a mix of these factors. The ICSID daily fee is capped and the lowest among the examined bodies. The PCA requires the fee to be reasonable; as such, the fee can be the same as at ICSID or higher. The ICC uses an elaborate indicative fees schedule that reflects the amount in the dispute. Other than at ICSID, the remuneration of individual arbitrators is frequently confidential. From available data, average fees per case can be substantial. Fees are typically fixed in consultation with the disputing parties and appointing authorities. In addition to ISDS fees, it is common for ISDS arbitrators to engage in outside work. The lack of tenure and financial stability puts more pressure on arbitrators to secure income to cover their daily expenses and subsistence unless they enjoy such benefits from other work.

Although the high level of remuneration might be a way to compensate for these uncertainties, it remains that only those appointed can benefit in this way. This fact underscores the gap between the most frequently-appointed individuals and those who are not or hardly ever appointed. The resulting pressure to find ways to make more money altogether with their vested interest in proceedings, may seriously undermine public confidence in the arbitrators' independence and impartiality.[912] ISDS arbitrators are more vulnerable to the whims of the 'market' for appointments and more vulnerable to incentives to encourage the boom of the industry, compete with other arbitrators for appointments, and work on longer and more complex proceedings. All of these factors affect how much, if anything, the person can expect to be paid. Consequently, the mechanisms for personal security of tenure and remuneration vary greatly between ISDS and courts, with the courts at one end of the spectrum and the ISDS at its other.

[912] Eberhardt & Olivet, *supra* note 5 at 7–8, and 35; Raja, *supra* note 619.

Chapter 6: Participatory Rights

Introduction

One of the core concerns of this study is the role of values linked to procedural fairness in legal proceedings. According to Solum, procedural fairness has two main principles, "participation" and "accuracy", and is concerned with questions related to "ordering of the principles and provisos", and "balancing costs and benefits".[913] While both principles and the strive to answer these questions all have their place in studies of procedural fairness, in my research I focus on one facet of procedural fairness, the principle of participation.[914]

Why participation? Participation is not merely a part of procedural fairness[915] it is "the very core of adjudication."[916] Participation for those affected is crucial as "no one shall be personally bound until he has had his day in court."[917] This "principle is as old as the law, and is of universal justice."[918] According to the participation principle, each interested party must be provided with a right to adequate participation.[919] Participation has various forms and ranges from the full right of standing to a limited access at the discretion of the tribunal. Only procedures that include at least the minimum right of participation - notice and an opportunity to be heard - to those with legal interest in proceedings can be considered fair.[920] This participation is a direct one. Since under

[913] Solum, *supra* note 215 at 242–305.
[914] *Ibid* at 273–305.
[915] *Ibid*. See also Sternlight, *supra* note 55 at 81.
[916] Fuller, *supra* note 142 at 396.
[917] Solum, *supra* note 215 at 309 referring to *Mason v Eldred*, 73 US 231 at 239 (1868), 18 L Ed 783; See also *Galpin v Page*, 85 US 350 at 368–369 (1874), 21 L Ed 959 350.
[918] *Ibid*.
[919] Solum, *supra* note 215 at 321.
[920] *Ibid* at 191, 305, 308 and 310.

certain circumstances notice or an opportunity to be heard are impracticable,[921] then indirect participation - through an adequate legal representation - will suffice.[922]

In this paper, I focus on forms of direct participation (to be heard and to observe) - ranging from the full right of standing to limited discretionary participation in a form of a mere assistance - thus leaving forms of indirect participation through representation aside. Further, because my focus is on the general provisions governing the right of standing for those with legal interest, I am not concerned with procedures related to access to documents and its technicalities (whom, under what conditions has access to what).

Legal disputes can arise out of various forms of agreements between parties with horizontal or vertical relations. For every legal relationship, there must be some sort of understanding, such as legislative intent, an agreement or a premise. For example, the right to judicial review can be premised on a legislative intent or grounded in the common law, other legal relations can arise from consensual agreements, be granted by treaties, or out of a premise that people are liable for their actions (as in tort). Each form of understanding defines the range of parties allowed to participate either fully or in limited forms. For full participation, an individual must have standing also known as *locus standi* translated as "a place to stand"[923] - typically granted to those with a legal interest in the lawsuit. The right of standing is "[t]he legally protectible stake or interest that an individual has in a dispute that entitles him to bring the controversy before the court to obtain

[921] *Ibid* at 279 and 305–306.
[922] *Ibid*: refering to Martin H Redish, "Procedural Due Process and Aggregation Devices in Mass Tort Litigation" (1996) 63 Def Couns J 18 at 22–25.
[923] Timothy Endicott, *Administrative Law*, 3rd ed (Oxford: Oxford University Press, 2015) at 413.

judicial relief."[924] The term "is essentially synonymous with being a party to a proceeding"[925] with all of the rights and duties attached to it.

The parties to proceedings are known as a claimant and a respondent. In complex disputes, there are multiple claimants, multiple respondents or both. In addition to the original parties, there might be other parties whose legal rights and interests are affected. These other parties will typically want to intervene in pending proceedings in order to protect these rights. It is a common practice that legal systems facilitate various types of intervention. Other parties are frequently called a "non-party", a "third party", or an "intervenor". However, the use of these terms is not always consistent. Intervention can be granted as a matter of right with full rights attached to it or with limited rights for example as *amicus curiae*. Generally, a person intervening as a matter of right, also known as a joining party, has the same rights as the original parties and is equally bound by the judgment. In contrast, individuals intervening as *amici* are not bound by the judgment as they do not become parties to proceedings.

In judicial reviews, lawsuit is typically initiated by natural or legal persons whose interest has been affected. In contrast, intergovernmental organizations (the ICJ and the WTO) that deal with purely state-state relations do not allow private parties to initiate disputes. Arbitral tribunals - domestic and international - have different remits according to their sources of authority - legislation, contract, treaty, etc. These sources usually define and limit right of standing - who can initiate

[924] Jeffrey Lehman & Shirelle Phelps, "Standing" in *West's Encyclopedia of American Law*, 2nd ed (Detroit: Thomson/Gale, 2005): "Standing, or locus standi, is capacity of a party to bring suit in court."
[925] Angela Del Vecchio, "International Courts and Tribunals, Standing" in Max Planck Encyclopedia of Public International Law (last updated November 2010), online: *Oxford Public International Law* <opil-ouplaw-com.ezproxy.library.yorku.ca/view/10.1093/law:epil/9780199231690/law-9780199231690-e79?rskey=VymYDY&result=4&prd=EPIL> at para 1.

dispute and against whom. Tribunals may specialize in consensual (purely private or state-state disputes), treaty-based (party-state disputes e.g. ISDS) or administer more than one. Standing is governed by the arbitral agreement (consensual arbitration), legislation (domestic arbitration), treaties[926] (ISDS) and procedural rules of the relevant arbitral administering body. Considering ISDS, foreign investors and their host states have right of standing. Yet only investors can initiate disputes before one of the international arbitration bodies specified by the governing IIA.

In the following five sections, I examine the spectrum of participatory rights afforded by the selected comparators with a special focus on the rights of third parties personally affected by proceedings. In my analysis, I define the primary parties with the full right of standing and the type of interest they ought to have in the aim to bring the suit. I map varieties of forms other parties have in order to protect their rights and interests - ranging from the full right of standing to a mere assistance. I conclude this chapter by analyzing the findings of all sections.

1. Domestic Courts

a) UK Superior Courts (laws specific to England and Wales)

An application for judicial review to the Senior Courts can be brought by natural or legal persons whose interests have been affected. These applicants must fulfill the requirement of standing which, in an ordinary claim, requires having "reasonable grounds for bringing … the claim"

[926] International Investment Agreements (IIAs), also called Investment Guarantee Agreements (IGA), are for example: Bilateral Investments Treaties (BITs), Free Trade Agreements (FTAs), Regional Investment Agreements (RIAs) and Multilateral Investment Agreements (MITs). See OECD, *Evolution of International Investment Agreements (IIAs) in the MENA Region*, Paper prepared in the context of the MENA-OECD Working Group on Investment Policies and Promotion (December 2010), online: *OECD* <www.oecd.org/mena/competitiveness/46581917.pdf> at 2.

otherwise the application can be struck out.[927] Also, the claimant must assert a right to have a remedy.[928] In contrast, in judicial review governed by the Senior Courts Act 1981, an individual or organization must have a "sufficient interest in the matter to which the application relates"[929] but "the claimant does not need to assert a right to remedy."[930] Thus, if there is no standing the claimant cannot proceed to a trial.

The "sufficient interest", introduced by the Rules Committee in the aim to simplify complexities of the pre-existing test, came into operation in 1978.[931] Since the Senior Courts Act 1981 does not say what "sufficient interest" means, it is up to the court to decide the test.[932] Soon after its introduction, the sufficient interest requirement was considered by the Supreme Court in *R v Inland Revenue Commissioners*.[933] According to Lord Wilberforce, "the question of sufficient interest can not … be considered in the abstract, or as an isolated point: it must be taken together with the legal and factual context. The rule requires sufficient interest in the matter to which the application relates."[934] Similarly, Lord Reed in the Supreme Court decision in *AXA General Insurance* maintains that the sufficient interest "depends … upon the context, and in particular upon what will best serve the purposes of judicial review in that context."[935] Additionally, according to a

[927] *Senior Courts Act 1981* (UK), s 42(3) [*SCA 1981*] (formerly the *Supreme Courts Act 1981*); *The Administrative Court Guide*, *supra* note 313 at para 4.12.
[928] Endicott, *supra* note 923 at 411–412.
[929] *SCA 1981*, s 31(3).
[930] Endicott, *supra* note 923 at 412.
[931] *Rules of the Supreme Court (Amendment No 3) 1977* (UK), r 3 (5) [*RCS 1977*]; Endicott, *supra* note 923 at para 11.1.2; Lady Hale, *Who Guards the Guardians?* (speech delivered at the Public Law Project Conference, 14 October 2013), online: *Supreme Court UK* <www.supremecourt.uk/docs/speech-131014.pdf> at 3.
[932] Endicott, *supra* note 923 at para 11.1.2.
[933] *R v Inland Revenue Commissioners, ex p National Federation of Self-employed and Small Businesses Ltd*, [1981] UKHL 2, [1982] AC 617 [*Fleet Street Casuals*]; The test was also considered in three recent Scottish cases: *R (O) v Secretary of State for International Development*, [2014] EWHC 2371 (Admin); *AXA General Insurance Limited & Ors v HM Advocate & Ors*, [2011] UKSC 46 [*AXA General Insurance*]; *Walton v The Scottish Ministers*, [2012] UKSC 44.
[934] *Fleet Street Casuals*, [1981] UKHL 2 at 2.
[935] *AXA General Insurance*, *supra* note 933 at para 170.

broad formulation, sufficient interest requires a test of proportionality, that in this context is "a relation between the value of hearing a claim for judicial review and the process cost," resulting in court's control over own processes.[936] The interest may be direct to the individual or indirect as a matter of public interest in which case an application for judicial review may be brought by charities, NGOs, pressure groups, representational groups, public interest groups or campaigning organizations.[937] A concerned person with a direct interest must be distinguished from a busybody, a person who interferes in things which do not concern the person.[938] Thus, the former has standing while the latter does not.

In legal disputes, the rights and interests of third parties may also become affected. In the domestic court settings, the procedural law generally authorizes persons directly or indirectly affected by a lawsuit "to intervene in the pending lawsuit if their own claim has a sufficiently close connection in law or fact."[939] Likewise, the UK system allows the third party's participation in the High Courts' judicial reviews that is governed by the Civil Procedure Rules (CPR).[940] Notably, albeit there is no formal route for this type of interventions before the Court of Appeal, they are also common.[941] According to the CPR, any person may apply for permission to file evidence or make representations at the judicial review hearings.[942] Third parties may seek to intervene to support their private interests or public ones,[943] each having its own implications and specificities.

[936] Endicott, *supra* note 923 at para 11.1.2.
[937] Hale, *supra* note 931 at 3.
[938] *Fleet Street Casuals*, [1981] UKHL 2 at 13; Hale, *supra* note 931 at 5.
[939] Yeazell et al, *supra* note 217.
[940] *Civil Procedural Rules* (UK), 54 [*CPR*] supplemented by the *Civil Procedure Rules Practice Directions* (UK), 54A [*CPR PD*].
[941] Justice, *To Assist the Court: Third Party Interventions in the Public Interest* (London, UK: Freshfields Bruckhaus Deringer, 2016) at para 14.2.
[942] CPR 54.17(1).
[943] Justice, *supra* note 941 at para 1.12.

Interested persons directly affected by the claim (natural and legal persons, and public bodies)[944] can reasonably expect to get permission to intervene by joining proceedings.[945] To enable intervention, the CPR obliges claimants to identify and serve their claims to all interested parties.[946] Any person so served may file an acknowledgment of service,[947] contest or support the claim,[948] can be party to any consent order as well as may seek a leave to appeal. This type of participation, despite the word intervention, is "akin in all material respects to being an actual party to the proceedings, rather than an intervenor."[949] Put differently, by joining proceeding the intervenor has full right of standing.

In contrast, a third-party intervenor, organization or person, seeking to assist the court in cases of public interest,[950] does not become a party to proceedings. In the US and elsewhere a third-party intervenor is typically called *amicus curiae*, translated as a friend of the court. Yet in the UK, *amicus curiae* refers to "a largely non-partisan figure, appointed by the Attorney General at the request of the court,"[951] thus, the use of the term: third-party intervenor. In the UK adversarial system, judges do not have resources to make further investigation but rely on arguments brought by parties.[952] Intervention in issues of public importance may bring arguments of broader public concerns and, thus, it is a helpful source of vital information that helps to decide the case fairly.[953]

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[944] *The Administrative Court Guide*, *supra* note 313 at para 2.2.1.
[945] *CPR* 54.1(2)(f); Justice, *supra* note 941 at para 1.13; *The Administrative Court Guide*, *supra* note 313 at paras 2.2.3, 2.3.4–2.3.5.
[946] *CPR* 54.6–7, *CPR PD* 54A 5.1.
[947] *CPR* 54.8.
[948] CPR Part 54, rule 54.14.
[949] *The Public Law Project: Third Party Interventions - a practical guide* (Public Law Project, 2008) at 5.
[950] *The Supreme Court Rules 2009* (UK), SI 2009/1603, rs 15(1), 26 [*SC Rules 2009*]; *Practice Directions* of the Supreme Court at para 3.3.17–18; See also Hale, *supra* note 931 at 6–15; Justice, *supra* note 941 at para 14.9.
[951] Justice, *supra* note 941 at para 1.11.
[952] *Ibid* at paras 1.1–1.4.
[953] Joint Committee on Human Rights, *The implications for access to justice of the Government's proposals to reform judicial review*, Thirteenth Report of Session 2013–14 (HL Paper 174/ HC 868) (2014) at 91–92; Justice, *supra* note 941 at paras 1.1–1.4.

The fact that judges interpret the law and set the precedence that applies to all citizens makes it even more invaluable.[954] Since it is in the power of the High Courts to decide whether to grant this permission, no parties' consent is required.[955]

Third parties are also allowed to intervene in issues of public importance raised before the Supreme Court.[956] Intervention can be sought during the process of application for permission to appeal[957] as well as after it has been already granted.[958] This intervention can be granted to any individual with interest in proceedings, any official body or non-governmental organization that seeks to make submissions in the public interest[959] or anyone who intervened in the court below.[960] These persons may seek to intervene on their motion, or the Court may invite them. According to Justice Hale, the more important the issue is, the more the Court needs help to get the right answer.[961] Justice Hale admits that the invitation is very open but maintains that it is not being abused.[962] Since there are no specific requirements, it is at the Court's discretion to allow the sought intervention. For the Court, it is more likely to grant permission if the intervenor does not repeat points brought by the parties but instead brings something new to consider.[963]

[954] Justice, *supra* note 941 at paras 1.1–1.4.
[955] *CPR* 54.17; *Ibid* at para 14.9.
[956] *The Administrative Court Guide*, *supra* note 313 at para 2.2.4; Hale, *supra* note 931 at 6–15.
[957] *SC Rules 2009*, r 15.
[958] *Ibid* r 26.
[959] *Ibid* rs 15, 26.
[960] *Ibid* r 26.
[961] Hale, *supra* note 931 at 6.
[962] *Ibid* at 7.
[963] *Ibid* at 8–9; Justice, *supra* note 941 at para 22.4.

*Table 44: The UK Superior Courts**

UK domestic courts	*Test*	*Status*	*Implications*
Full right of Standing	A "sufficient" interest test	Parties to proceedings	Bound by proceedings
Intervention as of right	Anyone directly affected	*The same rights as parties* (right of standing)	Bound by proceedings
Limited participation known as *amicus*	Granted at the discretion of the court	A non-party that intervenes in cases of public interest	Not bound

*Applicable to the Senior Courts and the Supreme Court.

b) US Supreme Court

Standing in the US context is "a personal, legally protectable interest in the outcome of the dispute"[964] governed by Article III of the US Constitution. Thus, standing does not focus on the issue the party wants to adjudicate but on whether the party can bring the claim or not.[965] Since parties have the power to burden other litigants and non-parties in day-to-day procedural and litigation tasks, and by obtaining their final judgment, another purpose of standing is to limit the range of litigants only to those who have a personal stake in the lawsuit.[966]

Under Article III, a person must have a "substantial" interest in the lawsuit. To satisfy the "substantial interest" test, a person must demonstrate three requirements: injury-in-fact, causation, and redressability.[967] Thus, the injury must be concrete and particularized, fairly traceable to the challenged conduct and with the likelihood that it will be redressed by a favorable decision.[968] In turn, there is no standing if there is a generalized injury, which is an injury "shared by all members

[964] Terese A West, "A Primer on Standing in Federal Court" (2 March 2017), online: *American Bar Association* <www.americanbar.org/groups/litigation/committees/woman-advocate/articles/2017/primer-on-standing-in-federal-court/>.
[965] "Substantial Interest: Standing" (last visited 20 May 2019), online: *Justia US Law* <law.justia.com/constitution/us/article-3/20-substantial-interest-standing.html> see note 394.
[966] Howard M Wasserman, "Argument preview: Standing for intervention" (10 April 2017), online (blog): *SCOTUSblog* <www.scotusblog.com/2017/04/argument-preview-standing-intervention/>.
[967] *Spokeo, Inc v Robins*, 578 US ___ (2016), 136 S Ct 1540, 194 L Ed (2d) 635.
[968] L Keith Beauchamp, "Standing: Standing Without Principles" (1986) 55:4 & 5 Geo Wash L Rev 1092; West, *supra* note 964; Wasserman, *supra* note 966.

of the public."[969] Yet if a person can claim an injury in a "concrete and personal way," then the number of the other injured does not matter.[970] Due to this personal interest requirement, likewise, organizations have no standing to represent their particular concept unless they assert their members' rights.[971]

The US federal civil law system recognizes that a third party, also called a non-party, may have rights and interests affected by legal proceedings and, thus, should be able to intervene. This non-parties' intervention, governed by the Federal Rules of Civil Procedure (FRCP),[972] may be unconditional as a matter of right[973] or conditional and granted at the discretion of the court.[974] In both cases, there is no need for permission of the original parties.

The court must permit intervention of right to anyone who is given an unconditional right to intervene by a federal statute[975] or to anyone with an interest or property in a lawsuit, whose ability to protect this interest may be impeded, and there is no adequate protection of this interest by the existing parties.[976] Since the latter rule mirrors the elements of Article III standing,[977] persons who

[969] "Substantial Interest: Standing", *supra* note 965.
[970] *Ibid*.
[971] *Ibid*.
[972] The FRCP is promulgated by the US Supreme Court and governs federal courts and can be found in 28 USC – Appendix (2018).
[973] FRCP, r 24 (a).
[974] *Ibid*, r 24 (b).
[975] *Ibid*, r 24 (a)(1).
[976] *Ibid*, r 24 (a)(2); Solum, *supra* note 215 at 310–311; Of an interest might be the FRCP, r 19 (a)(1)(B)(i) which is a flip side of the rule 24 (a). The rule favors joinder of an absent party if the "person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may … as a practical matter impair or impede the person's ability to protect the interest." At the same time the rule 19 in considering joinder of parties permits the court to dismiss an action if a party cannot join and its absence "might prejudice that person or the existing parties"; See also Ann Schwing, "Whether To Intervene or Seek To Be Amicus" (18 September 2013), online (blog): *IMLA Appellate Practice Blog* <blog.imla.org/2013/09/whether-to-intervene-or-seek-to-be-amicus/>.
[977] Eric S Oelrich, "The Relationship Between Standing and Intervention: The Tenth Circuit Answers by 'Standing' Down" (2006) 14:1 Mo Envtl L & Pol'y Rev 209; Wasserman, *supra* note 966.

want to bring a new issue before the court must, as clarified by the Supreme Court in *Town of Chester v Laroe Estates, Inc,* also satisfy the same requirement of Article III standing.[978] They, in turn, become parties to proceedings known as party-intervenors, intervenors-of-right or intervenor-plaintiffs that enjoy full party status,[979] and are equally bound by these proceedings. If, however, an intervenor only seeks to support existing parties' claims without gaining the full party status then no standing is required.[980]

Permissive intervention, always granted at the discretion of the court and governed by Rule 24(b) of the FRCP, generally applies to a person who is given a conditional right to intervene by a federal statute[981] or has a claim or defense that shares with the main action a common question of law or fact.[982] This type of intervention, designed "primarily to allow litigants in the federal courts to clear up in a single suit, questions which would ordinarily arise in separate federal suits,"[983] may be used by parties that do not meet the above requirements of standing.[984] Yet persons seeking to intervene under this head should still have a direct personal or pecuniary interest in the subject of the litigation.[985] However, if this permissive intervention should cause undue delay or prejudice to the original parties' rights, the court may deny it.[986]

[978] *Town of Chester v Laroe Estates, Inc* 581 US ___ (2017) at 6–7, 137 S Ct 810.
[979] Solum, *supra* note 215 at 311.
[980] Wasserman, *supra* note 966.
[981] FRCP, r 24 (b)(1)(A).
[982] *Ibid*, r 24 (b)(1)(B).
[983] Nicholas J Jr Campbell, "Jurisdiction and Venue Aspects of Intervention under Federal Rule 24" (1940) 7:1 U Pitt L Rev 1 at 10.
[984] Amy M Gardner, "An Attempt to Intervene in the Confusion: Standing Requirements for Rule 24 Intervenors" (2002) 69:2 U Chicago L Rev 681.
[985] *Ibid* at 683 citing Charles Alan Wright, Arthur Raphael Miller & Mary Kay Kane, *Federal practice and procedure* (St Paul, Minn: West Publishing Co, 1986) at 356.
[986] FRCP, r 24(b)(3).

Non-parties that have not suffered concrete injury may express their interest or become involved in the lawsuit through a*micus curiae* briefs.[987] This type of intervention is limited - the intervenor cannot raise new issues but may only support one of the parties' existing claims.[988] Permission to file *amicus curiae* briefs may be granted at the discretion of the Court or if all parties consent.[989] *Amicus curiae* briefs are regarded as helpful if they bring a relevant matter not already brought before the court.[990] Thus, a mere repetition of already stated points is not seen favorably. Albeit *amici curiae* are not legally bound, they may still be affected by the court's decision.[991]

Table 45: The US Supreme Court

US Supreme Court		***Test***	***Status***	***Implications***
Full right of Standing		Anyone with a "substantial" interest in the lawsuit*	Parties to proceedings	Bound by proceedings
Intervention	***Unconditional*** (as of right)	Guaranteed by federal statute or having an interest in the subject matter of the action	For **full party status** standing must be satisfied Otherwise, the **participation** is **limited** - the non-party supports one of the existing parties' claims	Bound by proceedings
	With a condition (at the discretion of the court)	Granted by a federal statute or having a claim or defense that shares with the main action a common question of law or fact		
Limited participation known as *amicus*		• At the discretion of the court; or • If all parties consent	Non-parties	Not bound

*Must demonstrate three requirements: injury-in-fact, causation, and redressability (not applicable to generalized injuries).

[987] Kerry C White, "Rule 24(A) Intervention of Right: Why the Federal Courts Should Require Standing to Intervene Note" (2002) 36:1 Loy LA L Rev 527 at 561.
[988] *Rules of the Supreme Court of the United States*, 2017, r 37 [*Supreme Court Rules*]; *Town of Chester v Laroe Estates, Inc*, 581 US ___ (2017) at 15; White, *supra* note 987 at 561.
[989] *Supreme Court Rules*, r 37 (2).
[990] *Ibid*, r 37 (1).
[991] Schwing, *supra* note 976 noting *Stryker v Crane*, 123 US 527, 540, 8 S Ct 203, 209, 31 L Ed 194, 199 (1887); *Munoz v County of Imperial*, 667 F (2d) 811, 816 (9th Cir); Ruben J Garcia, "A Democratic Theory of Amicus Advocacy" (2008) 35:2 Fla St UL Rev 46; Michael K Lowman, "The Litigating Amicus Curiae: When Does the Party Begin after the Friends Leave Comment" (1992) 41:4 Am U L Rev 1243.

c) Analysis

Both the UK and US domestic courts employ similar procedures. They provide the right of standing to those with interest in the judicial review. In the UK superior courts, parties must have "sufficient" interest, whereas the US Supreme Court applies narrowly formulated "substantial" interest test. Both jurisdictions require a personal stake in the action. Yet in the UK, the interest may be direct as well as indirect (brought by NGOs, etc.) interest.

Domestic laws of both countries in anticipation that non-parties might be affected by proceedings and seek protection of their rights make their intervention in ongoing disputes possible. Intervention refers to the full right of standing (personally affected individuals) or a limited right of assistance to persons intervening in the public interest. In all UK superior courts, the full party status applies to those directly affected, in the US, intervenors who want to bring a personal claim or raise new issues must satisfy the Article III standing requirement to become parties to proceedings. Otherwise, only limited participatory rights apply. Intervention to support the original parties' claims, known as *amicus curiae*, is granted, in both jurisdictions, at the discretion of the court if this assistance helps the court to decide the case.

2. European Courts

a) ECHR

The ECHR specializing in human rights breaches has strict rules of standing according to which only a "victim" - a natural person, NGO, or group of individuals who are victims of violation

committed by a State Party - qualifies for standing.[992] Before applying to the Court, an applicant must exhaust all domestic remedies.[993] The Court interprets the notion of victim autonomously and irrespective of domestic rules.[994] Thus, even if lacking the victim status at domestic law the applicant can still qualify under the Human Rights Convention.[995] Any successful applicant, however, may lose the victim status if the State Party responsible for violation acknowledges the violation and provides sufficient redress.[996]

A victim may be direct, indirect or under some circumstances even potential.[997] A direct victim is a person against whom a violating measure is directed and who directly suffers from this violation. Further, an action or omission directed at one individual may have a substantial impact on another person so-called an indirect victim.[998] An indirect victim must be a person with a personal and specific link with the applicant usually a family member who personally suffers because of the violation targeted at the original applicant.[999] Yet not all kinds of suffering qualify since the indirect victim must suffer "beyond what is normal or unavoidable in a case in which a family member is subjected to human rights violations."[1000] Finally, a potential victim is a person that has not been affected yet, but for whom the impact is imminent or who albeit lacking clear proof is

[992] *ECHR Convention*, art 34 as amended by Protocols No 11 and No 14.
[993] *Ibid*, art 35.
[994] European Court of Human Rights, *Practical Guide on Admissibility Criteria* (Council of Europe, 2011) at para 23 [*Practical Guide on Admissibility*].
[995] "Claim to be a victim" (last visited 21 May 2019), online: *ECHR-online* <echr-online.info/article-34/victim/#Indirect%20victim>.
[996] *Practical Guide on Admissibility*, *supra* note 994 at para 37.
[997] "Claim to be a victim", *supra* note 995.
[998] *Ibid*.
[999] *Practical Guide on Admissibility*, *supra* note 994 at para 30.
[1000] "Claim to be a victim", *supra* note 995.

very likely affected.[1001] Thus, all these victims have standing due to the personal nature of the impact of a violation.

Under limited circumstances, not only the personally affected applicants but also third parties may have standing before the court. This situation may happen when the original claimant died, and a third party pursues the claim on behalf of the affected party.[1002] There are two different scenarios: the applicant died after a claim was initiated, or before. If after, heirs or close relatives with a sufficient interest in so doing may be allowed to pursue the application on behalf of the deceased applicant.[1003] If before, the capacity to pursue the claim depends upon the violated right the third party (usually, a next-of-kin)[1004] seeks to redress.[1005] Yet rights that are strictly personal are not transferable.[1006] Interestingly, in exceptional circumstances, even the "general exclusion of NGOs from having standing in individual claims" may not apply. In *Centre for Legal Resources on Behalf of Valentin Câmpeanu v Romania*, the Court allowed the NGO to bring a claim on behalf of the deceased.[1007]

[1001] *Ibid*.
[1002] *Ibid*.
[1003] *Ibid*. *Practical Guide on Admissibility*, *supra* note 994 at para 33.
[1004] *Bazorkina v Russia*, No 69481/01, [2006] ECHR 751: Case of the death and disappearance of a son – mother found having standing.
[1005] "Claim to be a victim", *supra* note 995.
[1006] *Sanles Sanles v Spain*, No 48335/99, [2000] ECHR 2000-XI: the application under art 8 (right to private life, autonomy) was rejected. The right to autonomy is strictly personal, thus, a sister-in-law could not bring a case on behalf of the deceased; *Nölkenbockhoff v Germany* (1987), ECHR (Ser A) 123: The wife of a deceased was found to have standing because her reputation that was linked to the deceased was affected.
[1007] *Centre for Legal Resources on Behalf of Valentin Câmpeanu v Romania*, No 47848/08, [2014] ECHR 972; See also Brandeis Institute of International Judges, Brandeis Institute of International Judges, "2015 Brandeis Institute of International Judges Report: International Courts, Local Actors" (2016) 47:2 U Pac L Rev 371 at 418.

Due to this personal impact requirement, no "actio popularis" - an action of a member brought in the interest of public order - is allowed,[1008] meaning that organizations cannot bring public interest claims where they are not directly affected.[1009] The only route through which an unaffected party can participate is *amicus curiae*.[1010] This third-party intervenor does not obtain victim status and, thus, is not considered as a party to proceedings.[1011] The intervenor can be a State Party whose national is an applicant, any other State Party, the Council of Europe Commissioner for Human Rights and any person concerned that is not an applicant.[1012] A State Party whose national is an applicant and the Council of Europe Commissioner for Human Rights have right to intervene upon notifying the Registrar that they wish to exercise this right.[1013] Otherwise, intervention is done by an invitation of the Court[1014] or by request for permission.[1015] Applications must be duly reasoned,[1016] but consent of parties is not needed. Permission is granted at the discretion of the Court when such intervention is "in the interest of the proper administration of justice."[1017] These interventions are limited to written or oral submissions.[1018]

[1008] *Burden v UK*, No 13378/05, [2006] ECHR 1064, (2007) 44 EHRR 51 at para 33. See Aaron X Fellmeth & Maurice Horwitz, *Guide to Latin in International Law* (Oxford: Oxford University Press, 2009), sub verbo actio popularis.
[1009] See *Norris and National Gay Federation v Ireland*, [1985] ECHR 13, (1985) 44 DR 132.
[1010] In *Centre for Legal Resources on Behalf of Valentin Câmpeanu v Romania*, numerous *amicus curiae* briefs were submitted. See Brandeis Institute of International Judges, *supra* note 1007 at n 108.
[1011] Paul Gragl, *The Accession of the European Union to the European Convention on Human Rights* (Oxford, Org: Hart Publishing, 2013) at 151.
[1012] *ECHR Convention*, *supra* note 164 art 36; ECHR *Rules of Court*, 2018, r 44.
[1013] *ECHR Convention*, art 36(1); ECHR *Rules of Court*, *supra* note 101 r 44(1)–(2).
[1014] *ECHR Convention*, art 36(2); ECHR *Rules of Court*, r 44.
[1015] ECHR *Rules of Court*, r 44 (1)(b), (2), and (3)(a). See also Justice, *supra* note 941 paras 18.1–18.2; Sergio Carrera, Marie De Somer & Bilyana Petkova, "The Court of Justice of the European Union as a Fundamental Rights Tribunal: Challenges for the Effective Delivery of Fundamental Rights in the Area of Freedom, Security and Justice" (29 August 2012), online: *Centre for European Policy Studies* <www.ceps.eu/book-series/liberty-and-security-europe-papers?page=4> at 8–11; Paul Harvey, "Third Party Interventions before the ECtHR: A Rough Guide" (24 February 2015), online: *Strasbourg Observers* <strasbourgobservers.com/2015/02/24/third-party-interventions-before-the-ecthr-a-rough-guide/>.
[1016] ECHR *Rules of Court*, r 44(3)(a).
[1017] *ECHR Convention*, art 36(2).
[1018] *Ibid*; ECHR *Rules of Court*, r 44.

Table 46: ECHR

ECHR		*Test*	*Status*	*Implications*
Full right of Standing*		Direct, indirect or potential "victim" of a violating measure	Parties to proceedings	Bound by proceedings
Other parties		Must have a "sufficient" interest to pursue the claim on behalf of a deceased	Parties to proceedings	Bound by proceedings
Limited intervention (known as *amicus*)	As of right	A State Party whose national is an applicant and the Council of Europe Commissioner for Human Rights	Non-parties	Not bound
	At the discretion of the court	Any other State Party Any person concerned that is not an applicant		

*No *actio popularis*.

b) CJEU

The Court deals with a variety of types of violations and inactions of EU institutions brought in by complaints from individuals, companies, EU organizations and the Member States.[1019] The scope of participation ranges between the full right of standing to limited interventions in the form of *amicus curiae* briefs. Applicants for judicial review are privileged, semi-privileged or non-privileged. The privileged ones - the Member States, the Council, the Commission, and the European Parliament - have always standing.[1020] Semi-privileged applicants - the Court of Auditors, the European Central Bank and by the Committee of the Regions - have the right to initiate proceedings if their prerogatives are at stake.[1021] Finally, non-privileged applicants - natural and legal persons harmed by action or inaction of EU institutions - must satisfy requirements set in the Treaty on European Union (TFEU).[1022] In my assessment, I focus on claims brought by natural and legal persons.

[1019] *TEU*, *supra* note 321, art 19(3)(a); *TFEU*, *supra* note 323, art 263.
[1020] The full right of standing of Member States is governed by the *TFEU*, *supra* note 323, art 263 (2) according to which Member States can initiate proceedings, for example, to review legality of acts of the EU bodies; art 265 (1) failure to act by the EU bodies; art 259 failure to comply with Treaty obligation by another Member State; and art 273 disputes between Member States.
[1021] *Ibid*, art 263(3).
[1022] *Ibid*, art 263(4).

According to the TFEU, there are two main actions non-privileged applicants may initiate: a review of the legality of an act of EU bodies,[1023] and failure to act when the body was called upon to act.[1024] Considering the former, the Court has jurisdiction to review actions for lack of competence, misuse of powers or infringement of essential procedures, Treaties or the rule of law.[1025] Natural and legal persons may bring direct actions against EU bodies under one of the following three heads: (1) the person must be "an addressee" of an act; (2) the act is of "direct and individual concern" to that person; or (3) the person is "directly concerned" by a "regulatory act" that "does not entail implementing measures."[1026] Thus, a person who wants to bring an action must be an addressee of the act in question or have a "direct and individual concern." The direct concern element requires a direct link between the act and harm,[1027] whereas the individual concern element requires that the applicant must be able to distinguish himself from all other persons.[1028] However, these two heads are quite difficult to satisfy.[1029] The third head added under the Lisbon Treaty extends standing for direct actions in regulatory actions. Yet, since this head is still very restrictive, not many applicants have been able to satisfy it.[1030] Similarly, because of these requirements, trade associations or associations representing collective interests have no standing unless they represent persons who are direct and individual addressees of the act.[1031] Standing in

[1023] *Ibid*.
[1024] *Ibid*, art 265(3).
[1025] *Ibid*, art 263.
[1026] Michael Rhimes, "The EU Courts Stand Their Ground: Why Are the Standing Rules for Direct Actions Still So Restrictive" (2016) 9:1 Eur J Legal Stud 103.
[1027] See *Dreyfus v Commission*, C-386/96, [1998] ECR I-2309.
[1028] See *Plaumann v Commission*, C-25/62, [1963] ECR 95.
[1029] Rhimes, *supra* note 1026 at 107–110.
[1030] *Ibid* at 104–105.
[1031] See *Associazione Nazionale Bieticoltori (ANB), Francesco Coccia and Vincenzo Di Giovine v Council of the European Union*, T-38/98, [1998] ECR II-04191; Del Vecchio, *supra* note 925 at para 34; "EU Law: Judicial review and the European Union" (last visited 22 May 2019), online: *Webstroke Law* <webstroke.co.uk/law/eu-law/judicial-review-and-the-european-union>.

judicial review for claims for failure to act is admissible only after the appropriate EU body[1032] was called upon to act but failed to address it in infringement of the Treaties.[1033] Any act, except recommendations or opinions, can be reviewed.[1034] Yet if there is no obligation to act, a claim will fail.[1035] Further, any party (a Member State, an institution of the Union or any other person) that has not been heard may contest any Court's judgment that is prejudicial to that party.[1036] In doing so, the contestant must indicate how the contested decision is prejudicial to his rights as well as why he was unable to participate in the original case.[1037]

Another form of participation is a limited intervention by a third party, also called *amicus curiae*, in direct actions (actions for annulment,[1038] actions for failure to act[1039]), in indirect actions (pleas for illegality,[1040] references for preliminary rulings[1041]) or appeals.[1042] Parties that may intervene in direct actions are the Member States and institutions of the Union;[1043] and parties that must establish an interest in the result of the case - the bodies, offices, and agencies of the Union and any other persons (called non-state intervenors).[1044] The non-state intervenors may seek to represent their private or public interests[1045] but are further limited in that they cannot intervene in

[1032] *TFEU*, *supra* note 323, art 26(1): The EU governmental body, the European Parliament, the European Council, the Council, the Commission, the European Central Bank or bodies, offices and agencies of the Union.
[1033] *Ibid*, art 265(3); *Societa "Eridania" Zuccherifici Nazionali and others v Commission*, C-18/68, [1969] ECR 459.
[1034] *TFEU*, *supra* note 323, art 265(3).
[1035] *European Parliament v Council of the EC*, C-13/83, [1985].
[1036] *Statute of the CofJ*, *supra* note 455, art 42.
[1037] *Rules of Procedure of the CofJ*, *supra* note 464, art 157.
[1038] *TFEU*, *supra* note 323, art 263.
[1039] *Ibid*, art 265.
[1040] *Ibid*, art 277.
[1041] *Ibid*, art 267.
[1042] *Statute of the CofJ*, arts 23, 40, and 56; *Rules of Procedure of the CofJ*, arts 129–132; CJEU *Practice directions to parties concerning cases brought before the Court*, 31 January 2014, OJ L 31/1, arts 28–33 [CJEU *Practice directions*]; *Rules of procedure of the GC*, *supra* note 488, arts 142–145.
[1043] *Rules of procedure of the GC*, art 144(4); *Rules of Procedure of the CofJ*, art 131(2). Intervention should be typically allowed by the decision of the President, except where parties identified confidential information that if revealed to the intervenor could be prejudicial to these parties.
[1044] *Statute of the CofJ*, art 40.
[1045] Justice, *supra* note 941 at 6.

cases between the Member States, between institutions of the Union or between the Member States and institutions of the Union.[1046] Since intervention is ancillary to the main proceedings, intervenors cannot bring new issues but must support the claim as submitted by one of the parties.[1047] Intervenors as non-parties (do not enjoy full parties' rights) are not bound by proceedings. In their submissions, intervenors should not repeat pleas already made by the party they seek to support.[1048] This type of standing granted at the discretion of the court, as claimed, is quite restrictive. Additionally, non-state intervenors along with any unsuccessful parties, the Member States, and the institutions of the Union may appeal the General Court's decision.[1049] Yet the non-state intervenors may bring this claim only if they are "directly affected" by that decision.[1050]

In indirect actions, interventions are even more restrictive, since, they are not permitted in preliminary rulings unless the intervenor is a specified institution, agency or a Member State.[1051] In line with these rules, the Courts' registry while maintaining its inability to accept *amicus curiae* briefs from third parties rejected the submission of an *amicus curiae* brief from the Foundation for a Free Information Infrastructure in the Opinion procedure related to the Anti-Counterfeiting Trade Agreement (ACTA).[1052] Interestingly, albeit indirectly, under limited circumstances, even non-

[1046] *Statute of the CofJ*, art 40.
[1047] *Ibid*, art 40(4); *Rules of Procedure of the CofJ*, art 129; *Rules of procedure of the GC*, art 142.
[1048] CJEU *Practice directions*, *supra* note 1042, art 29.
[1049] *Statute of the CofJ*, art 56.
[1050] *Ibid*, art 56.
[1051] *Ibid*, art 23; CJEU *Practice directions*, *supra* note 1042, art 33. See also Carrera, De Somer & Petkova, *supra* note 1015 at para 5.1.
[1052] Ante Wessels, "FFII asks EU Court to accept amicus curiae briefs on ACTA" (22 November 2012), online (blog): *BlogFFII.org* <blog.ffii.org/ffii-asks-eu-court-to-accept-amicus-curiae-briefs-on-acta/>; Ante Wessels, "EU Court refuses FFII amicus curiae brief on ACTA" (14 November 2012), online (blog): *BlogFFII.org* <blog.ffii.org/eu-court-refuses-ffii-amicus-curiae-brief-on-acta/>. The FFII is abbreviation for the Foundation for a Free Information Infrastructure that filed *amicus curiae* about the *Anti-Counterfeiting Trade Agreement* (ACTA).

state parties' intervention is possible, for instance, a submission from a non-state party that was granted rights to intervene in domestic proceedings passes to the CJEU.[1053]

The CJEU's approach to third-party intervention faces criticisms as being too restrictive in that only very few applicants can participate. Since that restriction, third parties, as well as the general public, have no means "to inform the court of their knowledge, perspectives, or interests, or ... to demonstrate how a decision would affect them or their communities and societies."[1054] Consequently, the court by lacking insight from those affected cannot assess all potential implications and balance all relevant interests.[1055] One view maintains that, since the CJEU's decisions have binding effects on all EU citizens its decisions are of concern of every EU citizen and not only the parties involved[1056] and, thus, interpretation of participatory rights by the CJEU should be more open. Another view maintains that third-party intervention could "prolong the proceedings, leading to a backlog of cases"[1057] or hinder the CJEU effectiveness[1058] and suggests balancing this hindering effect with the adequate protection of individuals.[1059]

[1053] Carrera, De Somer & Petkova, *supra* note 1015 at para 5.1.
[1054] Sabine Devins, "European Justice: Befriending the European Court of Justice" (19 April 2017), online: *Handelsblatt Today* <www.handelsblatt.com/today/opinion/european-justice-befriending-the-european-court-of-justice/23568966.html>.
[1055] *Ibid*.
[1056] *Ibid*; Jasper A Bovenberg & Erik J Spaans, "Befriending the European Court of Justice" (18 April 2017), online: *Gulf-Times* <gulf-times.com/story/544883>.
[1057] Carrera, De Somer & Petkova, *supra* note 1015 at para 6.1.
[1058] Del Vecchio, *supra* note 925 at para 37.
[1059] *Ibid*.

Table 47: CJEU

CJEU	*Test*	*Status*	*Implications*
Full right of Standing	*Privileged* - have always standing *Semi-privileged* - if their prerogatives are at stake *Non-privileged* - either: - An addressee of an act - The act is of direct and individual concern - Directly concerned by a regulatory act that does not entail implementing measures	Parties to proceedings	Bound by proceedings
Other parties	Can contest the Court's decision - if they were not heard, and the judgment is prejudicial to their rights.	Parties to proceedings	Bound by proceedings
Intervention (known as *amicus*)	• The Member States and institutions of the Union* • Non-state intervenors and the bodies, offices, and agencies of the Union - must establish an interest in the case to intervene in a private or public interest.	Non-parties	Not bound

*Intervention should be typically allowed by the decision of the President, except where parties identified confidential information of which revelation to the intervenor could be prejudicial to these parties.

c) Analysis

Jurisdiction of the ECHR and the CJEU varies. Yet, considering natural or legal persons, standing in these courts is similar and typically granted to persons with direct or personal interest or harm. Other parties' standing is also anticipated albeit to different degrees. The ECHR limits standing to harmed parties with a direct link to the original but deceased applicant, whereas the CJEU allows third parties that have not been heard and to whom the Court's judgment is prejudicial to contest the Court's decisions.

Both courts accept limited third parties' intervention known as *amici*. Intervention as of right is typically granted to a State Party whose national is an applicant (the ECHR) or to a Member State and some qualified institutions by a decision of the President of the Court (the CJEU). Others, including natural and legal persons, may intervene only at the discretion of the respective court. The ECHR does not require third parties to have an interest in the result of the case, whereas parties

intervening before the CJEU must establish having interest that is private or public. Yet intervention before the CJEU is still criticized as too restrictive.

3. International Judicial and Quasi-judicial Bodies

a) ICJ

Standing before the ICJ in contentious cases is reserved for states to the exclusion of NGOs, intergovernmental organizations, and natural or legal persons.[1060] Harmed natural and legal persons, thus, may have a redress before the Court only through diplomatic protections exercised by states.[1061] Albeit the Court may request information relevant to the case from intergovernmental organizations, these organizations do not become parties to proceedings.[1062] States entitled to standing are all Member States of the United Nations (UN);[1063] non-Member States of the UN which adhere to the ICJ Statute; [1064] and a range of other non-states.[1065] Conditions for the latter are "subject to the special provisions contained in treaties in force, … laid down by the Security Council."[1066] In general, for the ICJ to have jurisdiction, the state must consent or otherwise accept

[1060] See "How the Court Works" (last visited 23 May 2019), online: *International Court of Justice* <www.icj-cij.org/en/how-the-court-works>; Del Vecchio, *supra* note 925 at para 13.
[1061] Phebe Okowa, "Issues of admissibility and the Law on International Responsibility" in Malcolm D Evans, ed, *International Law*, 4th ed (Oxford, UK: Oxford University Press, 2014) 477 at 479–480. In general, at the international level, individuals have *locus standi* through diplomatic protections unless the right on persons is directly granted by a specific treaty such as BITs, etc.
[1062] *Statute of the International Court of Justice*, (1945) ICJ Acts & Doc 6, art 34 [*Statute of the ICJ*]. See also Del Vecchio, *supra* note 925 at para 13.
[1063] *UN Charter*, *supra* note 325, art 93; *Statute of the ICJ*, art 34.
[1064] *UN Charter*, art 93(2): Under this category used to fall Liechtenstein, Japan, San Marino, Switzerland, and Nauru, However, all these states are now members of the UN. See also Del Vecchio, *supra* note 925 at para 9.
[1065] *Statute of the ICJ*, art 35(2).
[1066] *Ibid*. See also Del Vecchio, *supra* note 925 at para 10.

it.[1067] States can consent to a compulsory jurisdiction in all disputes with other signatory states by signing a declaration or *ad hoc* jurisdiction through treaties or agreements.[1068]

A state may bring a claim where it has proved injury to its direct or indirect interest.[1069] Direct interest is that which affects the state and its sovereign rights, for instance, damage to the state's property, state's warship, diplomatic missions, etc.; whereas indirect interest is usually an injury to natural or legal persons of the state.[1070] There is a presumption that any state has the right to protect its direct interests,[1071] for protecting its indirect interest the state must typically first establish the right to do so.[1072] Thus, a state may usually bring a claim on behalf of a natural person who is its citizen,[1073] if the link between the person and the state is genuine.[1074] Yet these persons cannot compel the state to do it.

Protection of legal persons' rights may become more complicated. For instance, in cases that involve multiple countries (the company's place of incorporation differs from its place of primary operation and nationality of shareholders), the right of standing revolves around the question of which state among them has the right to represent the company. For instance, the Court in *Barcelona Traction*, a company that was incorporated in Canada having shareholders of Belgian

[1067] International Court of Justice, *supra* 786 at 58–68. See also Tiffany M Lin, "Chinese Attitudes toward Third-Party Dispute Resolution in International Law Notes" (2016) 48:2 NYUJ Intl L & Pol 581 at 606–608.
[1068] Lin, *supra* note 1067 at 606.
[1069] Okowa, *supra* note 1061 at 480, and 495.
[1070] *Ibid* at 480.
[1071] *Ibid*.
[1072] Evan J Criddle, "Standing for Human Rights Abroad" (2015) 100:2 Cornell L Rev 269 at 282.
[1073] Okowa, *supra* note 1061 at 484.
[1074] *Ibid* at 485–487.

nationality but operated in Spain,[1075] held that the state of incorporation (Canada) is the one that has standing.[1076] The Court noted that two requirements must be satisfied: (1) the defendant state has broken an obligation towards the national state in respect of its nationals; (2) only the party to whom an international obligation is due can bring a claim in respect of its breach.[1077] Since, the obligation was held by Spain to the company incorporated in Canada and Belgium did not have the legal right in the interest of its shareholders it consequently did not have standing.[1078] Thus, in this case, the shareholders' nationality did not suffice for Belgium to establish the right to bring the case.

In contrast to the special interests and diplomatic protections so far discussed are requirements for standing in obligations that are owed to all parties, known as *erga omnes partes*.[1079] States Parties owe these obligations to all their citizens or the "international community as a whole."[1080] *Erga omnes partes* the Court considered in the *Belgium v Senegal* case where Belgium claimed that Senegal violated its obligations under the *UN Convention against Torture* to prosecute or extradite Mr. Habré, the former President of the Republic of Chad.[1081] The Court held that there is a common interest in compliance with the relevant obligations of the Convention,[1082] and, thus, any State

[1075] *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (New Application: 1962), [1970] ICJ Rep 3 [*Barcelona Traction*]. See also, International Court of Justice, *Handbook* (The Hague: International Court of Justice, 2014) at para 1.32.
[1076] Criddle, *supra* note 1072 at 282.
[1077] *Ibid*; *Barcelona Traction*, *supra* note 1075 at para 35.
[1078] D W Greig, "Third Party Rights and Intervention before the International Court" (1992) 32:2 Va J Int'l L 285 at 297.
[1079] Joseph William Davids, "Argentina v USA?" (9 August 2014), online (blog): *The {New} International Law* <thenewinternationallaw.wordpress.com/tag/icj/>.
[1080] Okowa, *supra* note 1061 at 495.
[1081] *Questions Relating to The Obligation to Prosecute or Extradite (Belgium v Senegal)*, [2012] ICJ Rep 422 at para 12 [*Belgium v Senegal*].
[1082] Such as these under arts 6(2), and 7(1) of the UN *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984 (entered into force 26 June 1987).

Party to the Convention can bring a claim to cease the breach. Since no special interest is required,[1083] Belgium seeking compliance with these obligations was found to have standing.

Also, other parties may seek protection of their legal rights in cases before the Court. One option they have is to become a full party to proceedings[1084] bound by the judgment.[1085] Joinder may be one route to become a party.[1086] Yet as joinder is typically only initiated by the original parties plus all parties must consent, it has its limits.[1087] If joinder is impossible for the lack of consent, the additional party's alternative option is to initiate the Court's ordinary compulsory proceedings.[1088] But since the responding party must still accept the Court's jurisdiction this other option has, just like joinder, the same limits. In other words, and as Greig maintains, if all original parties are amenable then the other party could be already joined to the original proceedings.[1089]

Another option that is at the behest of third parties is an intervention governed by articles 62 and 63 of the Statute of the Court.[1090] Yet intervention under these two articles has an incidental character to the main proceedings in that it must relate to the subject matter of the pending case.[1091] Thus, the other party cannot raise new issues. Under article 62 it is possible to become either a

[1083] *Belgium v Senegal*, *supra* note 1081 at para 669.
[1084] Beatrice I Bonafé, "Interests of a Legal Nature Justifying Intervention before the ICJ" (2012) 25:3 Leiden J Intl L 739 at 740.
[1085] *Statute of the ICJ*, art 59: The decision of the Court has no binding force except between the parties and in respect of that particular case. Greig, *supra* note 1078, maintains that article 59 has been used to limit intervention.
[1086] Dapo Akande, "Provisional Measures and Joinder of Cases at the International Court of Justice – The Answers" (18 January 2016), online (blog): *EJIL: Talk!* <www.ejiltalk.org/provisional-measures-and-joinder-of-cases-at-the-international-court-of-justice-the-answers/>.
[1087] Greig, *supra* note 1078 at 291.
[1088] *Ibid* at 291–292.
[1089] *Ibid* at 292.
[1090] *Ibid* at 288–289, and 291.
[1091] *Ibid* at 309– 311.

party or a non-party to proceedings.[1092] Yet under both scenarios, the intervenor must prove to have an "interest of a legal nature which may be affected by the decision in the case."[1093] In practice, the scope of article 62 is unclear and largely depends upon the kind of legal interest claimed.[1094] Intervention as a party is not elaborated on in the Statute but was considered by the Court.[1095] The Court opined that it could not grant the party status to an intervening party on its motion but can only be granted with parties' consent.[1096] Albeit possible, the Court has never granted permission to intervene as a party. In contrast, for non-party intervention, there is no need for parties' consent as the Court grants the status at its discretion.[1097] Non-party intervenors have limited rights without being bound by the Court's decision. The Court has scarcely granted non-party interventions, which some claim is due to the restrictive interpretation of article 62.[1098]

In contrast, a party to a multilateral convention, according to article 63, can intervene as of right whenever construction of this convention is in question.[1099] This view is supported by *travaux preparatoires*, subsequent practice, as well as accepted in the literature.[1100] Any party to a convention has the right to be notified and to intervene.[1101] Yet the intervenor cannot add a new provision but may only intervene in the construction of provisions disputed by the original

[1092] *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras)*, (Application by Nicaragua for Permission to Intervene), [1990] ICJ Rep 92 para 99; See also Bonafé, *supra* note 1084 at 740–741.
[1093] *Statute of the ICJ* 151, art 62; *Rules of Court*, (1978) ICJ Acts & Doc 6, art 81 [*Rules of Court*] (as amended in 2005). See also Bonafé, *supra* note 1084 at 740–743; Hyun Seok Park, "To Apply or to Declare, or Both - Links between the Two Types of Intervention under the ICJ Statute" (2013) 6:2 J E Asia & Intl L 415 at 416; Greig, *supra* note 1078 at 295, and 306.
[1094] Greig, *supra* note 1078 at 293; Bonafé, *supra* note 1084 at 739–740.
[1095] *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras)*, *supra* note 1092 at para 99.
[1096] *Ibid.*
[1097] A Suzette V Suarez, "Some Observations regarding Third-State Intervention under Article 62 of the ICJ Statute: Focus on the Philippine Application to Intervene in the Case concerning the Sovereignty of Pulau Sipadan and Pulau Ligitan" (2001) 17:4–6 World Bull 1 at 4; Greig, *supra* note 1078 at 293, and 306.
[1098] Greig, *supra* note 1078 at 289; Bonafé, *supra* note 1084 at 739; Park, *supra* note 1093 at 419.
[1099] See also note 514, art 82; Greig, *supra* note 1078 at 306.
[1100] Greig, *supra* note 1078 at 307.
[1101] *Ibid* at 306.

parties.[1102] Despite having a non-party status, the judgment rendered under this article is equally binding on parties as well as the intervenor. This article is rarely used, albeit for the right to intervene the party does not need to prove an interest.[1103] The use and protection afforded to third parties by these two articles are criticized as being close to nothing.[1104]

Table 48: ICJ

ICJ		***Test***	***Status***	***Implications***
Full right of Standing		• States* must prove injury to their direct or indirect interests; but • In *erga omnes partes* cases - no special interest is needed	Parties to proceedings	Bound by proceedings
Other parties		May use joinder or initiate new ordinary compulsory proceedings - all parties must consent	Parties to proceedings	Bound by proceedings
Intervention (known as *amicus*)	As of right	To states that are parties in multilateral treaties of which construction is questioned	Parties**	Bound
	At the discretion of the Court	An intervenor must prove having an interest of a legal nature that may be affected by the decision in the case.	Non-parties	Not bound

*Member States of the United Nations (UN), non-Member States of the UN which adhere to the ICJ Statute and other non-states; Claims of natural and legal persons can be brought by states only. It is done through diplomatic protections - the state must first establish the right to do so.
**Have limited right as they cannot raise new issues.

b) WTO

The WTO dispute settlement is reserved for governments of the Member States.[1105] Since non-governmental bodies have no direct access,[1106] if interested in the WTO dispute settlement, they must persuade or pressure a government of the WTO Member State to trigger a dispute.[1107] A state that makes a complaint which was not resolved amicably can bring the case to the panel. To initiate panel proceedings against a state that in violation of agreements covered by the WTO Dispute

[1102] Park, *supra* note 1093 at 422.
[1103] C Chinkin, "Article 63" in Andreas Zimmermann et al, eds, *The Statute of the International Court of Justice: A Commentary*, 2nd ed (Oxford, UK: Oxford University Press, 2012) 1573 at 1578–1579; Park, *supra* note 1093 at 421.
[1104] Greig, *supra* note 1078 at 289–291.
[1105] "Dispute Settlement System Training Module", *supra* note 529, s 1.4.
[1106] Claus D Zimmermann, "The Neglected Link between the Legal Nature of WTO Rules, the Political Filtering of WTO Disputes, and the Absence of Retrospective WTO Remedies" (2012) 4:1 Trade L & Dev 251 at 261.
[1107] "Dispute Settlement System Training Module", *supra* note 529.

Settlement Understanding (DSU) nullifies or impairs benefits accruing to it, a State Party must request an establishment of a panel that is typically automatically approved at the Dispute Settlement Board (DSB) meeting.[1108] Thus, it is usually the panel that considers the legal basis for the complaint.[1109] A question of standing arose in *EC—Bananas III* in a complaint brought by the United States[1110] where the panel held that there is no requirement of a legal interest test.[1111] The Appellate Body subsequently upheld the panel's view that all Members have an interest in enforcing the WTO rules due to the possible direct or indirect economic effects of a WTO violation.[1112] The Appellate Body in upholding the complainant's standing was satisfied that the claimant was a producer and a potential exporter of a product in question. Arguably on a similar basis but without raising the issue of standing, several states were allowed to bring complaints against violations of the WTO Agreement on behalf of other member states.[1113]

Parties to a dispute are the complaining and the responding Member States.[1114] Other member states may become co-complainants (may initiate proceedings in parallel or jointly), co-respondents or participate as third parties. In practice, states with large exports that are directly

[1108] *DSU*, art 6. See also *European Communities—Regime for the Importation, Sale and Distribution of Bananas* (1997), *WTO* Doc WT/DS27/AB/R at para 142 (Appellate Body Report), online: *WTO* <docsonline.wto.org> [*EC—Bananas III*].
[1109] See "Dispute Settlement System Training Module", *supra* note 529 s 4.1. See also "Repertory of Reports and Awards 1995-2013: Request for the Establishment of a Panel" (last visited 27 May 2019), online: *WTO* <www.wto.org/english/tratop_e/dispu_e/repertory_e/r2_e.htm>.
[1110] *European Communities—Regime for the Importation, Sale and Distribution of Bananas (Complaint by the United States)* (1997), *WTO* Doc WT/DS27/AB/R/USA (Panel Report), online: *WTO* <docs.wto.org>.
[1111] *Ibid* at paras 7.50–7.51.
[1112] *EC—Bananas III*, *supra* note 1108 at paras 136–138. See also "Dispute Settlement System Training Module", *supra* note 529, s 10.1.
[1113] *United States—Section 211 Omnibus Appropriations Act of 1998* (2002), *WTO* Doc WT/DS176/AB/R at paras 275–281, and 309 (Appellate Body Report), online: *WTO* <docsonline.wto.org>; *United States—Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea* (2002), *WTO* Doc WT/DS202/AB/R at paras 120–122, and 130–133 (Appellate Body Report), online: *WTO* <docsonline.wto.org>. See also "Dispute Settlement System Training Module", *supra* note 529, s 10.1.
[1114] "Dispute Settlement System Training Module", *supra* note 529, s 6.3 at 1.

affected tend to more likely become co-complainants while those indirectly affected more likely seek to intervene as third parties.[1115] Third parties are not obliged to participate but if they decide to do so disputing parties have no right to prevent them from becoming a third party.[1116] Further, if a third party considers that a matter previously decided before a panel nullifies or impairs its benefits, this party may initiate proceedings against respondent regarding these matters before the original panel.[1117]

For participation as a third party, a state must have "a substantial interest in a matter before a panel."[1118] Third states may reserve the right to participate by notifying the DSB.[1119] Alternatively, Member States can cite a "systemic interest" in a dispute. The WTO maintains that in practice since there is no scrutiny whether the interest is "substantial" any Member State that invokes systemic interest can participate in panel proceedings.[1120] The systemic interest, as argued, is not a way to circumvent the substantial interest test but a way for the Member States to signal their deep interest in the case.[1121] Third parties' rights are limited to the opportunity to be heard (active submissions or a passive presence), to make written submissions, and receive the submissions from the disputing parties.[1122] After consulting disputing parties and if the case so requires, panels may at their discretion grant enhanced third-party rights.[1123] As reported, they have exercised this option

[1115] Marc L Busch & Eric Reinhardt, "Three's a Crowd: Third Parties and WTO Dispute Settlement" (2006) 58:3 World Pol 446 at 454.
[1116] WTO *Handbook*, *supra* note 822 at 67.
[1117] *DSU*, art 10(4); "WTO Analytical Index: DSU – Article 10 (Practice)" (December 2018), online: *WTO* <www.wto.org/english/res_e/publications_e/ai17_e/ai17_e.htm> at paras 1.1, and 1.5.
[1118] *DSU*, art 10(2). See also "Dispute Settlement System Training Module", *supra* note 529, s 6.3 at 1.
[1119] *DSU*, art 10. See also WTO *Handbook*, *supra* note 822 at 82–83. "Dispute Settlement System Training Module", *supra* note 529, s 6.3 at 1.
[1120] "Dispute Settlement System Training Module", *supra* note 529, s 6.3 at 1.
[1121] Busch & Reinhardt, *supra* note 1115 at 452.
[1122] WTO *Handbook*, *supra* note 822 at 68–69.
[1123] *Ibid*, at 69–71.

cautiously on a case by case basis.[1124] Since third parties are not directly affected by the decision,[1125] the panel reports do not include conclusions and recommendations with respect to them.[1126] States that participated as third parties in panel proceedings cannot appeal the panel report, the right is reserved for parties to the dispute,[1127] but may only participate in the Appellate Body review as "third participants".[1128]

The Appellate Body distinguishes between a "third party" - a Member State that notified the DSB about its substantial interest in the matter and the one that may make written submissions and participate orally in panel proceedings; and a "third participant" - any party that either filed a written submission or appeared at oral hearings (including a passive appearance).[1129] Member States that did not participate as third parties cannot participate in the Appellate review[1130] unless they get permission granted at the discretion of the Appellate Body to submit *amicus curiae* briefs.[1131] In contrast, states that participated as third parties at the panel stage may also do so in the appeal as the so-called "third participant".[1132] In the current practice, for being a third participant, third parties have several options with varying degrees of involvement limited to oral and written submissions.[1133] If exercised within prescribed time limits, states may request: to file third-party submissions and appear at the oral hearing and make an oral statement,[1134] or just seek

[1124] *Ibid*.
[1125] "Dispute Settlement System Training Module", *supra* note 529 s 6.5 at 2 (note 1).
[1126] WTO *Handbook*, *supra* note 822 at 62.
[1127] *DSU*, art 17(4). See also "Dispute Settlement System Training Module", *supra* note 529 s 6.5 at 2.
[1128] "Dispute Settlement System Training Module", *supra* note 529 s 6.5 at 2.
[1129] *DSU*, art 10(2), and (4). *Working Procedures for AB*, *supra* note 550, r 1: defining terms: "third party" and "participant".
[1130] "Dispute Settlement System Training Module", *supra* note 529 s 6.5 at 2.
[1131] See *European Communities—Trade Description of Sardines* (2002), *WTO* Doc WT/DS231/AB/R at paras 161–167 (Appellate Body Report), online: *WTO* <docsonline.wto.org>. "Dispute Settlement System Training Module", *supra* note 529 s 6.5 at 2.
[1132] "Dispute Settlement System Training Module", *supra* note 529 s 6.5 at 2.
[1133] *Ibid*; *Working Procedures for AB*, rs 24, and 27(3). See also WTO *Handbook*, *supra* note 822 at 109–110.
[1134] *Working Procedures for AB*, rs 24(1)–(2), and 27(3)(a).

the two latter options.[1135] After the prescribed time limit, there are options granted at the discretion of the Appellate Body: the Member States that did not file their submissions may request permission to appear at the oral hearing and make an oral statement or to be passive observers.[1136]

Non-governmental bodies, trade association and interested individuals, can only participate before the panel and the Appellate Body through *amicus curiae* briefs.[1137] This participation is possible despite the fact, that both the DSU and the Working Procedures for Appellate Review lack specific provisions about *amici* for both - panels and the Appellate Body.[1138] *Amici* is, thus, based on that panels are entitled to seek information,[1139] and the Appellate Body may elaborate its working procedures.[1140] Along these lines, the Appellate Body in *US—Shrimp* held that panels could seek submissions from NGOs as well as accept non-requested briefs,[1141] and in *US—Lead and Bismuth II* the Appellate Body argued that if it finds "pertinent and useful to do so" it has the legal authority to accept *amicus curiae* briefs.[1142] Since these non-governmental bodies and individuals have no legal right to be heard,[1143] panels and the Appellate Body have discretion but no obligation whether to accept them.[1144] The question of *amicus* briefs and especially unsolicited ones is a controversial

[1135] *Ibid*, rs 24(2), and 27(3)(a).
[1136] *Ibid*, rs 24(4), and 27(3)(b). See also "WTO Analytical Index: Working Procedures for Appellate Review – Rule 24 (Practice)" (January 2018), online: *WTO* <www.wto.org/english/res_e/publications_e/ai17_e/wpar_rul24_oth.pdf> at para 1.2; "Dispute Settlement System Training Module", *supra* note 529 s 6.5 at 2.
[1137] Del Vecchio, *supra* note 925 at para 22.
[1138] Laurence Boisson de Chazournes, "Transparency and Amicus Curiae Briefs" (2004) 5:2 J World Inv & Trade 333 at 333–334.
[1139] *DSU*, art 13.
[1140] de Chazournes, *supra* note 1138 at 333–334.
[1141] *United States—Import Prohibition of Certain Shrimp and Shrimp Products* (1998), *WTO* Doc WT/DS58/AB/R, at paras 105–108, (Appellate Body Report), online: *WTO* <docsonline.wto.org>.
[1142] *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* (2000), *WTO* Doc WT/DS138/AB/R at para 42, (Appellate Body Report), online: *WTO* <docsonline.wto.org> [*US—Lead and Bismuth II*]. See also UNCTAD, *Dispute Settlement: World Trade Organization: Appellate Review* (New York: United Nations, 2003) at para 3.4.2, online: *UNCTAD* <unctad.org/en/Pages/DITC/TNCD/Dispute-Settlement-in-International-Trade.aspx>.
[1143] "Dispute Settlement System Training Module", *supra* note 529 s 9.3.
[1144] *Ibid*, ss 1.4, and 6.5 at 2.

one,[1145] albeit the fact that out of the Appellate Body numerous accepted submissions,[1146] none was unsolicited.[1147] Some states oppose this practice by arguing that there is no place for non-parties and especially NGO briefs as disputes are between the Member States only,[1148] whereas other commentators claim that the presence of NGOs before the WTO may impede democracy.[1149] Those who support *amici* briefs maintain that they bring views of those who are not represented in the dispute - public interests as well as those of industry.[1150]

Table 49: WTO

WTO		***Test***	***Status***	***Implications***
Full right of Standing*		Member States that complain about violations of the WTO Agreement, do not need a "legal interest"	Parties to proceedings	Bound by proceedings
Other parties directly affected		• Can become co-complainants in panel proceedings. • Can initiate proceedings against respondent regarding matters already decided at previous panel proceedings before the original panel.	Parties to proceedings	Bound by proceedings
Intervention				
Panel	As of right	Indirectly affected states must prove: • A substantial interest in the matter before a panel; or • A systemic interest	Non-parties	Not bound**
	At the discretion of the panel	Panels may seek briefs as well as accept non-requested briefs from NGOs, trade associations and interested individuals.		
Appellate Body	As of right	States that participated as a third party at the panel stage.	Non-parties	Not bound
	At the discretion of the Appellate Body	• States that did not participate in panel proceedings • Briefs from NGOs, trade associations and interested individuals		

*Panels & the Appellate Body. **Cannot appeal a panel report.

[1145] *Ibid*, s 9.3. See also Steve Charnovitz, "WTO Cosmopolitics" (2002) 34:2 NYU J Intl L & Pol 299 at 344–352.
[1146] de Chazournes, *supra* note 1138 at 334. See, for example, *US—Lead and Bismuth II*, *supra* note 1142. See also Del Vecchio, *supra* note 925 at para 22.
[1147] "Dispute Settlement System Training Module", *supra* note 529 s 9.3.
[1148] *Ibid*.
[1149] Jeffery Atik, "Democratizing the WTO" (2001) 33:3 & 4 Geo Wash Intl L Rev 451 at 459.
[1150] de Chazournes, *supra* note 1138 at 334–335.

c) Analysis

Standing under the ICJ and the WTO is reserved for states to the exclusion of other non-state parties. The complaining state: in the ICJ - must prove direct or indirect injury to its interest with the exception in *erga omnes partes* cases; in the WTO, for initiating a dispute for violation of the WTO agreements that nullifies or impairs the party's benefits, does not need to prove a legal interest. The only route for non-state parties (NGOs, natural or legal persons, etc.) is to persuade the Member States: to use diplomatic protection avenue (the ICJ) or persuade or pressure them to initiate a lawsuit (the WTO).

The Member States of the ICJ with direct or indirect interest that want to participate as additional parties may do so by using joinder. They become parties to proceedings bound by the judgment. Yet joinder is typically initiated by the original parties. Alternatively, the additional party may initiate new proceedings before the Court. Under both scenarios, however, all parties must give their consent. Similarly, at the WTO panel stage, states that are directly affected may become co-complainants - proceedings initiated in parallel or jointly. Also, if needed, a third-party state may initiate proceedings against a respondent regarding matters already decided at previous panel proceedings before the original panel. At the Appellate Body stage, only states that intervened as third parties at the panel stage, although they cannot appeal the panel report, may participate as third participants.

Another option the additional parties have is an intervention - a limited form of participation known as *amicus curiae* briefs where intervenors are typically not bound by the judgment. Under the rules of both bodies, this intervention is granted at the discretion of the hearing court, panel or

the Appellate Body, except where states intervene as of right as parties to multilateral treaties of which construction is questioned (the ICJ). The intervening parties must prove that they have an interest of a legal nature which may be affected by the decision in the case (the ICJ) or having a substantial or a systemic interest (the WTO). Despite the inability to appeal the panel decision, the WTO intervening parties may act as third participants in the appellate stage, whereas third-party states that did not participate in panel proceedings may only seek permission to submit *amicus curiae* briefs. The WTO panels and the Appellate Body may also seek and accept briefs from NGOs, trade associations and other interested individuals.

4. Domestic and International Tribunals

a) FINRA

FINRA administers compulsory and voluntary arbitration between private parties - customers, providers of financial services, etc. For FINRA members[1151] and associated persons,[1152] the FINRA arbitration is compulsory, whereas for the US customers (also called investors)[1153] and non-member organizations, arbitration before FINRA is optional.[1154] FINRA distinguishes between industry and customer related disputes and, thus, has two sets of arbitral rules that govern standing - the Customer Code and the Industry Code. The Customer Code governs the relationship between broker-dealers and their customers,[1155] whereas the Industry Code applies to intra-industry disputes that arise out of the business activities of FINRA members - brokerage firms,

[1151] *Customer Code*, *supra* note 335, r 12100(q); *Industry Code*, *supra* note 335, r 13100(q).
[1152] *Customer* Code, r 12100(b)(u); and *Industry Code*, r 13100(b)(u).
[1153] FINRA, *Regulatory Notice 16-25* (2016) at para 1, online: *FINRA* <www.finra.org/industry/notices> [*Regulatory Notice 16-25*].
[1154] "Guidance on Disputes between Investors and Investment Advisers that are Not FINRA Members" (last visited 28 May 2019), online: *FINRA* <www.finra.org/arbitration-and-mediation/investment_advisers>.
[1155] *Customer Code*, r 12200.

brokers and their associated persons.[1156] Employment issues are exempted from arbitration unless parties agree to arbitrate.[1157] Yet, if they do, employees of FINRA members have the right to request FINRA arbitration even if they "agreed to a forum selection clause specifying a venue other than a FINRA arbitration forum."[1158] Similarly, under the Customer Code,[1159] parties must arbitrate before the FINRA arbitral forum if their written arbitration agreements so require or if customers of FINRA members so request.[1160]

Since its compulsory nature, FINRA members cannot override the requirement to arbitrate before FINRA by any pre-dispute agreement.[1161] FINRA, opposing the court's decision in *Credit Suisse*[1162] that its members could add agreements requiring customers or employees to arbitrate in other forums and, thus, bypass the FINRA arbitration, issued a Regulatory Notice that puts members exercising this practice on notice as violating FINRA rules.[1163] In doing so, FINRA asserts that its "rules are not mere contracts that member firms and associated persons can modify" noting that their importance lies in protecting rights of customers and employees to choose arbitration if they wish so.[1164] Accordingly, bypassing FINRA arbitration for members is barred meaning that members that fail to submit its dispute to FINRA violate its rules and may face disciplinary action.[1165]

[1156] *Industry Code*, rs 13200, and 13100(b)(u), and (q). See also "Arbitration Overview" (last visited 28 May 2019), online: <www.finra.org/arbitration-and-mediation/arbitration-overview> ["Arbitration Overview"].
[1157] *Industry Code*, r 13201. See also "Arbitration Overview", *supra* note 1156.
[1158] Daniel LeGaye, "Forum Selection Involving Customers & Associated Persons" (8 November 2016), online: *LeGaye Law Firm* <www.legayelaw.com/forum-selection-provisions-involving-customers-associated-persons/>.
[1159] *Customer Code*, r 12200.
[1160] *Regulatory Notice 16-25*, *supra* note 1153 at 6–7.
[1161] *Ibid*.
[1162] *Credit Suisse Securities (USA) LLC v Tracy, et al*, 812 F (3d) 249 at 254–56 (2d Cir 2016).
[1163] *Regulatory Notice 16-25*, *supra* note 1153.
[1164] *Ibid*, at 3: considering FINRA rules 12200 and 13200.
[1165] *Ibid*, at 6–7.

The terms "employees" and "associated persons" seem to cause no difficulty. On the other hand, the interpretation of the term "customer" gets complicated. A customer (not a broker or dealer),[1166] is defined in *Citigroup*[1167] as one who, "either (1) purchases a good or service from a FINRA member, or (2) has an account with a FINRA member."[1168] Similarly in *Lee v AXA Advisors*, a widow - suing a company for her deceased husband's individual retirement account (IRA) on her own behalf - was found lacking standing since she was neither customer, nor had she purchased goods or services from the respondent.[1169] Yet the customer in *Citigroup* was broadly interpreted when compared to the court's narrow interpretation in *Berthel*.[1170] Berthel, a managing broker-dealer, provided services to other broker-dealers who sold securities to investors. Despite the requirement that FINRA members and associated persons (includes Berthel) must arbitrate disputes with customers in connection with their business activities, the court found that Berthel did not have to arbitrate as these investors were not his customers noting that there was no direct relationship between Berthel and the investors.[1171] For this lack of common understanding of the term customer, the US courts face criticism.[1172]

[1166] *Customer Code*, r 12100(k); and *Industry Code*, r 13100(k).
[1167] *Citigroup Global Markets, Inc v Abbar*, 761 F (3d) 268 (2d Cir 2014).
[1168] *Ibid*, at 275. See also "Who Qualifies as a 'Customer' to Bring a FINRA Arbitration Case?" (16 December 2014), online: *Maya Murphy, PC* <www.mayalaw.com/tag/finra-rule-12200/>; Brent A Burns, "Second Circuit defines 'Customer' under FINRA Rule 12200 Narrowly" (5 August 2014), online (blog): *New York State Bar Association* <nysbar.com/blogs/SecuritiesLitigation/2014/08/second_ciruit_defines_customer.html>. "Chris Lazarini Discusses Definition of 'Customer' under FINRA Rule 12200", (1 June 2017), online: *JD Supra* <www.jdsupra.com/legalnews/chris-lazarini-discusses-definition-of-31096/>.
[1169] *Mary C Lee vs AXA Advisors, LLC, Larry Dan George, and William Paul Evans* (2017), Award, at 3 Case NO 16-03173 (FINRA Arbitration). See also "Widow Lacks Standing In FINRA Arbitration Involving Husband's IRA", (8 December 2017), online: *Broke and Broker* <www.brokeandbroker.com/3711/widow-ira-finra/>.
[1170] *Berthel Fisher & Co Fin Servs, Inc v Larmon*, 695 F (3d) 749 (8th Cir 2012).
[1171] Liz Kramer, "Rule 12200" (5 November 2018), online (blog): *Arbitration Nation* <www.arbitrationnation.com/tag/rule-12200/>.
[1172] *Ibid.*

Both Customer and Industry Codes provide for the resolution of complex disputes in forms of multi-party proceedings and, thus, a possibility to initiate actions with multiple complainants, multiple respondents or both;[1173] consolidate separate but related claims;[1174] or join an additional party to proceedings.[1175] Since FINRA arbitration is consensual, the rights of third parties are limited. Albeit they may join proceedings, joinder is only initiated by existing parties, though the additional parties must provide their consent,[1176] and decided by the hearing panel.[1177] Otherwise, FINRA rules do not contain any other provision third parties may use to join proceedings on their motion and as of right. The only other option third parties have is limited intervention as non-parties in the form of *amicus curiae* generally accepted in appeals of FINRA disciplinary and membership proceedings before FINRA's National Adjudicatory Council (NAC).[1178] Before the NAC, these other parties with the consent of all parties or granted at the discretion of the Council may submit written *amicus curiae* briefs to the exclusion of oral arguments or replies.[1179]

[1173] *Customer Code*, rs 12312–12313; and *Industry Code*, rs 13312–13313.
[1174] *Customer Code*, rs 12100(m), and 12314; and *Industry Code*, rs 13100(m), and 13314: This power is within the authority of the Director of the Office of Dispute Resolution.
[1175] *Customer Code*, rs 12309(c), and 12404; and *Industry Code*, rs 13309(c), and 13407.
[1176] W Reece Bader, *Securities Arbitration: Practice and Forms*, Release 19 (Huntington: JurisNet, 2013) at 4–10.
[1177] *Customer Code*, r 12404; and *Industry Code*, r 13407.
[1178] "Amicus Brief Guidelines" (last visited 28 May 2019), online: *FINRA* <www.finra.org/industry/amicus-brief-guidelines>. See, for example, *Department of Enforcement v Charles Schwab & Company, Inc*, (2014), Disciplinary Decision, at 7 (note 9) (The Board of Governors Financial Industry Regulatory Authority): The FINRA NAC received: "Amicus Curiae brief of the North American Securities Administrators Association, Inc" (May 8, 2013), online: <www.nasaa.org/wp-content/uploads/2013/05/Amicus-Curiae_Schwab.pdf>; and "Brief of Amici Professors Barbara Black and Jill Gross in Support of FINRA's Opening Brief" (May 6, 2013), online: <lawprofessors.typepad.com/files/amicus-brief-final.pdf>; See also "NASAA Files Amicus Brief Supporting FINRA's Efforts to Reverse Ruling that Allows Schwab to Deny Customer Rights" (8 May 2013), online: *NASAA* <www.nasaa.org/23053/nasaa-files-amicus-brief-supporting-finras-efforts-to-reverse-ruling-that-allows-schwab-to-deny-customer-rights/>.
[1179] "Amicus Brief Guidelines" (last visited 28 May 2019), online: *FINRA* <www.finra.org/industry/amicus-brief-guidelines>.

Table 50: FINRA

FINRA	*Test*	*Status*	*Implications*
Full right of Standing - Consensual	Private parties* with the agreement to arbitrate: • ***Industry*** disputes - all members compulsory • ***Customer*** disputes - a person that purchased a good or service from a FINRA member, or (2) has an account with a FINRA member.	Parties to proceedings	Bound by proceedings
Other parties	Joinder on request made by one of the parties. All parties must consent.	Parties to proceedings	Bound by proceedings
Intervention (known as *amicus*)	Only written submissions • With the consent of parties; or • At the discretion of the Tribunal	Non-parties	Not bound

*Between two or more parties.

b) WIPO

A party to WIPO arbitration may be "any person or entity, regardless of nationality or domicile"[1180] - individuals, enterprises as well as public entities (governments, intergovernmental organizations, industry groups, civil society, etc.).[1181] The parties' relationship in WIPO is consensual: parties must agree to arbitrate either in contract clauses before a dispute arises, or use submission agreements for existing disputes.[1182] In practice, most disputes are based on contract clauses.[1183]

The main attributes of international commercial arbitration applicable to WIPO are confidentiality,[1184] privacy,[1185] and party autonomy.[1186] Under the party autonomy principle, parties may choose the place of arbitration, the governing law as well as procedures of the

[1180] "Frequently Asked Questions" (last visited 29 May 2019), online: <www.wipo.int/amc/en/center/faq/index.html>.
[1181] Consultation with the WIPO via email (13 May 2015, 20:38:21): Parties involved in WIPO cases have also included public entities, for instance, in the context of R&D disputes.
[1182] *WIPO Handbook*, *supra* note 331, at para 4.143.
[1183] "WIPO Caseload Summary" (last visited 29 May 2019), online: <www.wipo.int/amc/en/center/caseload.html>.
[1184] *WIPO Arbitration Rules* (2014), arts 75–78; *WIPO Expedited Arbitration Rules*, arts 68–71. See also *WIPO Handbook*, *supra* note 331 at 4.144; Katia Fach Gómez, "Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorably for the Public Interest" (2012) 35:2 Fordham Intl LJ 510 at 526.
[1185] *WIPO Arbitration Rules*, art 55(c); *WIPO Expedited Arbitration Rules*, art 49(c).
[1186] "Frequently Asked Questions", *supra* note 1180.

dispute.[1187] Due to the consensual nature, only parties to an arbitration agreement have been defined as parties that have standing.[1188] All hearings should be in private unless disputing parties agree otherwise.[1189] WIPO rules contain no provision that allows third parties to join proceedings on their motion and as of right. Joinder of an additional party, initiated only at a request of a disputing party, may be granted if all parties including the additional one agree.[1190] Likewise, consolidation of a new case with a subject matter substantially related to a pending one requires parties consent.[1191] *Amicus curiae* briefs are generally not allowed in private arbitration unless all disputing parties agree.[1192] The role of third parties allowed to participate as *amici* is ancillary to the main proceedings, with no adequate opportunity for these parties to present their own cases. Consequently, they are not bound by decisions rendered by WIPO.[1193]

Third parties' participation is further restricted by the strict confidentiality principle that narrows the range of situations when parties may disclose the existence of arbitration, its details, including documentary or other evidence, and the award to other parties.[1194] In general, all parties must typically agree before disclosure is made unless the WIPO arbitration rules authorize otherwise, for instance, where a party wants to challenge the arbitration before a court, enforce the award, or the disclosure is required by law or a regulatory body, the award falls into public domain, etc.[1195] The only time WIPO rules authorize disputing parties to make a unilateral disclosure that directly

[1187] *Ibid*.
[1188] *WIPO Arbitration Rules*, art 59; *WIPO Expedited Arbitration Rules*, art 53.
[1189] *WIPO Arbitration Rules*, art 55(c); *WIPO Expedited Arbitration Rules*, art 49.
[1190] *WIPO Arbitration Rules*, art 46; *WIPO Expedited Arbitration Rules*, art 40.
[1191] *WIPO Arbitration Rules*, art 47; *WIPO Expedited Arbitration Rules*, art 41.
[1192] Gómez, *supra* note 1184 at 527.
[1193] *Guide to WIPO Arbitration, supra* note 583 at 11.
[1194] *WIPO Arbitration Rules*, arts 75–77.
[1195] *Ibid*; *WIPO Expedited Arbitration Rules*, art 70.

relates to the rights of a third party is where they owe the obligation of good faith or candor to this third party.[1196]

Table 51: WIPO

WIPO	*Test*	*Status*	*Implications*
Full right of Standing - Consensual	Private parties* with the agreement to arbitrate	Parties to proceedings	Bound by proceedings
Other parties	Joinder on request made by one of the parties. All parties must consent.	Parties to proceedings	Bound by proceedings
Intervention (known as *amicus*)	• With the consent of parties; or • At the discretion of the Tribunal	Non-parties	Not bound

*Between two or more usually private parties.

c) Analysis

In terms of standing, FINRA and WIPO, both administering consensual dispute resolution, have similar rules. Disputes are typically between two or more private parties with an agreement to arbitrate. Both forums have provisions related to joinder and the consolidation of proceedings. Albeit under rules of both forums other parties may be added, the utility of these provisions is restricted, due to the anticipation that no third parties should become affected. None of them gives third parties the right to join proceedings at their behest - only an original party may initiate joinder plus the WIPO rules require consent from all original parties. Equally applicable for both forums is the general requirement that additional parties cannot be joined against their will but must consent to joinder. Third parties' intervention as of right, just like joinder, is not available. This restriction is in line with international arbitral disputes where third parties' interventions are typically only possible with parties' consent or at the tribunal's discretion.

[1196] *WIPO Arbitration Rules*, art 75(b); *WIPO Expedited Arbitration Rules*, art 68(b).

5. ISDS Administering Bodies

a) ICSID

Parties to the ICSID vertical disputes are a national of a Contracting State and any relevant Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State).[1197] Arbitration before ICSID is consensual - disputing parties must consent to the jurisdiction in writing.[1198] Consent may be given through an investment treaty, national law or stipulated in a clause of an investment contract.[1199] In ISDS, states typically consent to the ICSID jurisdiction through IIAs - they may or may not explicitly mention the Centre[1200] - that allow investors to choose from among several forums (applicable to all each examined ISDS forum). Some of these IIAs extend the range of states that may bring their dispute to the Centre to those that are non-parties to ICSID - for instance, Kyrgyzstan, Liechtenstein, Poland, and Tajikistan.[1201] If a state grants its consent through an investment treaty, an investor must consent separately by accepting the state's offer by writing to the Centre.[1202] Albeit there are two parties to a dispute, only the investor may initiate a claim meaning that states are always respondents. A state cannot unilaterally revoke once granted consent,[1203] yet it may require that all domestic

[1197] *ICSID Convention*, art 25.
[1198] *Ibid*, art 25(1). See also Board of Governors of the International Bank for Reconstruction and Development, "Report Of The Executive Directors On The Convention On The Settlement Of Investment Disputes Between States And Nationals Of Other States" (March 18, 1965) reprinted in Antonio R Parra, ed, *The History of ICSID* (Oxford, UK: Oxford University Press, 2012) 410 at para 23.
[1199] Board of Governors of the IBRD, *supra* note 1198 at para 24. See also Del Vecchio, *supra* note 925 at para 55.
[1200] See, for instance, *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, art 1122 (2)(a) (entered into force 1 January 1994) [*NAFTA*]; *Energy Charter Treaty*, 17 December 1994, art 26(4) (entered into force 16 April 1998) [ECT].
[1201] These states are all parties to the ECT. See "The Energy Charter Treaty" (last visited 30 May 2019), online: *Energy Charter* <energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/>.
[1202] Board of Governors of the IBRD, *supra* note 1198 at para 24.
[1203] *ICSID Convention*, art 25(1).

administrative or judicial remedies must be exhausted first[1204] in which case the investor has no standing until this condition has been fulfilled.

To qualify as a foreign investor the person must be a national - natural or juridical person also known as a legal person[1205] - of one of the ICSID Contracting States.[1206] If a natural person has dual nationality one of which is the nationality of the responding state this person cannot bring the suit before ICSID.[1207] Considering the legal person, the Convention is more flexible in that a legal person with dual nationality may initiate a dispute if the responding state agrees to treat that person as a national of another Contracting State.[1208] Since the right to access the Centre under the Convention covers only a limited number of investors, to overcome these limits, the Centre introduced the Additional Facility Rules (AFR). Accordingly, the AFR extends the scope of the Convention[1209] by applying to investment disputes between parties where one of them is not a Contracting State or a national of a Contracting State.[1210]

It is not uncommon that the rights and interests of other parties may become affected.[1211] Considering complex disputes that involve multiple parties, ICSID has already accepted a mass claim,[1212] yet both the Convention and the AFR are silent about joinder, third-party intervention

[1204] *Ibid*, art 26.
[1205] *Ibid*, art 25.
[1206] "Database of ICSID Member States" (last visited 29 May 2019), online: *ICSID* <icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx>: There are 154 Member States.
[1207] Board of Governors of the IBRD, *supra* note 1198 at para 29. See also Del Vecchio, *supra* note 925 at para 54.
[1208] Board of Governors of the IBRD, *supra* note 1198 at para 30.
[1209] *ICSID AFR*, art 5.
[1210] *Ibid*, art 2(1).
[1211] See *Bernhard von Pezold and Others v Republic of Zimbabwe*, Case No ARB/10/15 (ICSID); *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co (Private) Limited v Republic of Zimbabwe* (2012), Procedural order No 2, Case No ARB/10/25 at para 18 (ICSID).
[1212] *Abaclat and Others v Argentine Republic (formerly Giovanna a Beccara and Others v The Argentine Republic)* (2011), Decision on Jurisdiction and Admissibility, Case No ARB/07/5 (ICSID) [*Abaclat*]. See also Susan L Karamanian, "Introductory Note to Abaclat & Others v. Argentine Republic: Decision on Jurisdiction and

as of right[1213] and consolidation of cases. As argued, tribunals retain broad discretionary rights and, thus, they may use joinder and consolidation in cases where just one party objects or where contracts do not include these points.[1214] Since ICSID does not cover consolidation in a strict sense - meaning consolidation of pending proceedings (covered only by the NAFTA[1215] and some BITs[1216]), the only one that the Centre may perform is to appoint one tribunal to decide two formally separate claims.[1217] ICSID is equally silent about the rights of affected third parties to the full standing. These other persons since they are typically domestic citizens that do not qualify as foreign investors cannot initiate ISDS disputes. Also, since ISDS is a vertical dispute, and ICSID does not administer horizontal disputes, even foreign nationals may not initiate or join the host state in its claim against a foreign investor.

The only alternative these persons, called non-disputing parties, have is participation granted at the discretion of a tribunal. Non-disputing parties may submit written briefs (given after consultation with parties)[1218] or attend or observe all or part of the hearings (unless parties object).[1219] For written submissions, third persons must have a significant interest in the

Admissibility (ICSID)" (2013) 52:3 ILM 667 at 667. See also Jessica Beess und Chrostin, "Sovereign Debt Restructuring and Mass Claims Arbitration before the ICSID, the Abaclat Case Recent Developments" (2012) 53:2 Harv Intl LJ 505: A suit initially filed by 180,000 Italian bondholders resulted in a case with 60,000 claimants.

[1213] S I Strong, "Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or a Proper Equitable Measure?" (1998) 31:4 Vand J Transnat'l L 915. See also Rodrigo Polanco Lazo, "International Arbitration in Times of Change: Fairness and Transparency in Investor-State Disputes" (2010) 104 Am Soc'y Intl L Proc 591 at 594.

[1214] Lazo, *supra* note 1213 at 594.

[1215] *NAFTA*, art 1126.

[1216] Yulia Gabidulina, *Multi-Party Proceedings, Mass Claims and Consolidation in Investment Arbitration: Establishing Consent and Other Prerequisites for Joint Adjudication of Claims* (PhD Dissertation Exposé, University of Vienna, 2016) [unpublished], online: *Universität Wien* <ssc-rechtswissenschaften.univie.ac.at/suche/?q=investment+arbitration+expose&id=83984> at para 2.3 (note 14).

[1217] *Ibid*, at 4.

[1218] *ICSID Arbitration Rules*, r 37(2); *ICSID AFR*, art 41(2).

[1219] *ICSID Arbitration Rules*, r 32(2); *ICSID AFR*, art 39(2). See also Bennaim-Selvi, *supra* note 105.

proceedings.[1220] Since they are ancillary to the main proceedings, they must not disrupt them or unduly burden or unfairly prejudice either party.[1221] Also, the tribunal must consider whether and to what extent these submissions will assist in deliberation by bringing some new knowledge or insight and the extent it would address a matter within the scope of the dispute.[1222] ICSID in 2006, by removing the previous requirement of parties' consent, gave tribunals greater powers to grant *amici*.[1223] Before the 2006 change,[1224] *amicus* was granted in *Aguas Argentinas* since the subject matter of the dispute involved public interest - water distribution and sewage system.[1225] Since 2006, the *amicus curiae* was considered in *Biwater v Tanzania*[1226] also a case in the realm of the public domain.[1227] This decision that confirmed that *amici* submissions "do not give third parties any rights, status or privileges in the proceedings" is, according to Ishikawa, in line with decisions of previous tribunals.[1228]

Despite the principle that non-parties to a dispute should not be bound or legally affected by a decision, in ISDS various non-disputing parties have been affected, for example, *Chevron v*

[1220] *ICSID Arbitration Rules*, r 37 (2); *ICSID AFR*, art 41(2).
[1221] *Ibid*.
[1222] *Ibid*.
[1223] *ICSID Arbitration Rules*, r 32 (2); *ICSID AFR*, art 39(2). The change was proposed in 2005: See "Suggested Changes to the ICSID Rules and Regulations" (2005) Working Paper of the ICSID Secretariat at 11, online: ICSID <icsid.worldbank.org/en/Documents/resources/Suggested%20Changes%20to%20the%20ICSID%20Rules%20and%20Regulations.pdf>.
[1224] *ICSID Convention*, art 44: Tribunals are required to use rules in effect at the time the parties provided their consent to arbitration. See also Ishikawa, *supra* note 249 at 386.
[1225] *Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v Argentine Republic (formerly Aguas Argentinas, SA, Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v Argentine Re)* (2005), Order in response to a Petition for Transparency and Participation as Amicus Curiae, Case No ARB/03/19 at para 19 (ICSID).
[1226] *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* (2007), Procedural Order No 5 (Amicus Curiae), Case No ARB/05/22 (ICSID).
[1227] Ishikawa, *supra* note 249 at 387.
[1228] *Ibid*.

Ecuador[1229] and the case filed by Gabriel Resources against Romania,[1230] discussed in Chapter 2. By removing the previous requirement of parties' consent, ICSID gave tribunals greater powers to grant *amici*. Yet their rights to have their day at court continue unchanged. Intervention as a matter of right remains lacking meaning that *amicus curiae* briefs are the only existing option for non-disputing parties, thus instead of having standing, these parties' participation have serious limits - restricted as well as based on someone's discretion. Consequently, since these other persons may not bring their claims or join pending proceedings, and having no alternative to intervene as of right, are effectively precluded from protecting their rights and interests.

Table 52: ICSID

ICSID	*Test*	*Status*	*Implications*
Full right of Standing - Consensual	Parties* that agreed to arbitrate	Parties to proceedings	Bound by proceedings
Other parties	No joinder, but tribunals have broad discretionary powers.	Parties to proceedings	Bound by proceedings
Intervention (known as *amicus*)	Applicant must have a significant interest in the proceedings. At the tribunal's discretion, (no need for parties' consent): • Written submissions after consultation with parties • Access to hearings can be blocked if one party objects	Non-parties	Not bound

*Between a foreign national and a Contracting State - in ISDS granted in IIAs.

b) PCA-UNCITRAL

PCA Arbitration Rules

The 2012 version of the PCA Arbitration Rules, updated following the 2010 revision of the UNCITRAL Arbitration Rules, consolidates four prior sets of the PCA rules that still remain valid.[1231] Standing under the consolidated version is granted to parties that agreed to the PCA's

[1229] *Chevron Corporation and Texaco Petroleum Corporation v The Republic of Ecuador* (___), Case No 2009-23 (PCA).
[1230] Cecilia Jamasmie, "Romania says Gabriel Resources $4.4bn lawsuit over halted project can't be heard by arbitrators" (14 June 2018), online: *ID Platform* <isds.bilaterals.org/?romania-says-gabriel-resources-4>.
[1231] See "PCA Arbitration Rules" (last visited 30 May 2019), online: *PCA* <pca-cpa.org/en/services/arbitration-services/pca-arbitration-rules-2012/>.

jurisdiction through investment treaties, contracts or other agreements.[1232] Tribunals may deal with horizontal, vertical as well as multiparty disputes.[1233] Former disputes are between two states or state-controlled entities or between two private parties, vertical ones are, just like ISDS, between a private party and a state entity, whereas multiparty disputes may have a variety of combinations involving states, state-controlled entities, intergovernmental organizations, NGOs and private parties.

Typical tools for multi-party proceedings are joinder, consolidation, and intervention.[1234] The PCA rules and the Hague Conventions provide some provisions for joinder and intervention but none for consolidation. Albeit tribunals may permit joinder of a third person or persons at the request of an original party,[1235] these joining persons must be parties to the arbitration agreement and the joinder must not be prejudicial to any of the original parties. Given that the PCA rules stress the party autonomy principle, confidentiality, and privity,[1236] it is more likely that for consolidation of cases parties' consent would also be required. Regarding intervention, the Centre distinguishes between intervention by non-disputing parties and third persons. The rights of non-disputing parties - states that are parties to multilateral agreements - have been contemplated by the Hague Conventions.[1237] These non-disputing states that are parties to multilateral treaties have the right to intervene in disputes that are related to the interpretation of these multilateral treaties and are

[1232] *PCA Arbitration Rules*, art 1.
[1233] *Ibid*. See also PCA Arbitration Rules at 4. According to the *Hague Convention 1899*, art 26; and the *Hague Convention 1907*, art 47, the Court's jurisdiction may extend to non-Signatory Powers/ non-Contracting Powers, respectively.
[1234] Klas Laitinen, *Multi-party and multi-contract arbitration mechanisms in international commercial arbitration* (Master Thesis, University of Helsinki Faculty of Law, 2014) [unpublished] at para 1.2.
[1235] *PCA Arbitration Rules*, art 17(5).
[1236] UNCTAD, "Dispute Settlement: General Topics: 1.3 Permanent Court of Arbitration" (2003), online: *UNCTAD* <unctad.org> at paras 5.9, and 5.12.
[1237] *Hague Convention 1899*, art 56; *Hague Convention 1907*, art 84.

bound by the reached decision. Yet there are no procedures that govern this intervention in the Hague Conventions or the PCA rules.[1238] Similarly, there are no procedures that cover the rights of other parties, that includes right to standing, right to limited intervention including *amicus curiae* briefs, that are not parties to an agreement but their rights and interests have been affected.[1239] Since hearings are conducted in camera unless parties agree otherwise[1240] and, thus, in private, all non-disputing parties, who are not permitted to intervene as of right or at the discretion (including the public), are excluded. Along confidential proceedings also the publication of awards is restricted since parties' consent is needed.[1241] Accordingly, other parties have no right to intervene, whereas, regarding *amici*, it is more likely that this intervention may ensue with the parties' consent[1242] or at the tribunal's discretion under the general rules.

UNCITRAL Arbitration Rules

The PCA administers the UNCITRAL Arbitration Rules[1243] in horizontal (between private parties) and vertical (investor-state) disputes. As noted, standing in ISDS is governed by the relevant treaty and is granted by the host state to foreign investors of the other signatory state or states. Since 2010 the UNCITRAL rules permit joinder of third parties at the request of any disputing party.[1244]

[1238] UNCTAD, *supra* note 1236 at para 5.12.
[1239] Similarly, the PCA model law contains no provisions for either consolidation, joinder or intervention. See "Model Clauses and Submission Agreements" (last visited 30 May 2019), online: *PCA* <pca-cpa.org/model-clauses-and-submission-agreements/>.
[1240] *PCA Arbitration Rules*, art 28(3); *PCA Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One is a State*, art 25(4).
[1241] Nathalie Bernasconi-Osterwalder & Diana Rosert, *Investment Treaty Arbitration: Opportunities to reform arbitral rules and processes*, IISD Report (International Institute for Sustainable Development, 2014) at para 4.1.
[1242] UNCTAD, *supra* note 1236 at para 5.12. See also Richard Allen & Leng Sun Chan, "Comparative Chart of International Investment Arbitration Rules" (29 May 2018), online: *Global Arbitration News* <globalarbitrationnews.com/comparative-chart-of-international-investment-arbitration-rules/>.
[1243] UNCITRAL Rules are also administered by other arbitral institutions, for instance, ICSID and the International Chamber of Commerce (ICC).
[1244] *UNCITRAL Arbitration Rules*, art 17(5); The UNCITRAL rules 1976 were silent about joinder of additional parties. See also Lazo, *supra* note 1213 at 594.

Yet a joining third party must be a party to the arbitration agreement, and the joinder must not be prejudicial to any existing party. Despite the UNCITRAL rules being silent about consolidation, consolidation is possible if parties agree.[1245] For the purposes of ISDS, in 2013, the UNCITRAL rules were extended by the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.[1246]

Intervention is a form of participation typically granted either as a matter of right or at the discretion of the court. The UNCITRAL rules that applied prior to the Rules on Transparency are silent about intervention as of right or at the discretion and provide for hearings to be in camera,[1247] a procedure that effectively blocks participation by any other party except parties to the dispute.[1248] In contrast, the Rules on Transparency contain provisions related to interventions granted at the discretion of the tribunal.[1249] These Rules on Transparency while considering other parties' interests, distinguish between non-disputing parties to a treaty (other signatory states), and other persons called third persons.[1250] Under these Rules, hearings should be public except for confidentiality reasons or to preserve the integrity of the process.[1251] If there is a conflict between

[1245] UNCTAD, *supra* note 888 at 183.
[1246] *UNCITRAL Arbitration Rules* (2013), art 1(4): For ISDS these rules include *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*, art 1 [*Rules on Transparency*]. These adopted rules apply to treaties concluded before 1 April 2014 if Parties to a treaty, or disputing parties, agree to their application, or they apply to treaties concluded on or after 1 April 2014 unless parties agree otherwise. *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration*, 17 March 2015, known as *Mauritius Convention on Transparency* (entered into force 18 October 2017) provides a mechanism through which states can extends the application of these rules retrospectively. See also Maria Beatrice Deli, "Transparency in the Arbitral Procedure" in Andrea Gattini, Attila Tanzi & Filippo Fontanelli, eds, *General Principles of Law and International Investment Arbitration* (Leiden: Brill Nijhoff, 2018) 45 at 49. See also Bart Wasiak, "The Mauritius Convention on Transparency Enters into Force | Publications and Presentations" (19 October 2017), online: *Arnold & Porter* <www.arnoldporter.com/en/perspectives/publications/2017/10/the-mauritius-convention-on-transparency>.
[1247] See *UNCITRAL Arbitration Rules* (1976), art 25(4); *UNCITRAL Arbitration Rules* (2010), art 28(3); *UNCITRAL Arbitration Rules* (2013), art 28(3).
[1248] Bennaim-Selvi, *supra* note 105 at 790.
[1249] *Rules on Transparency*, arts 1(5), and 4–5.
[1250] *Ibid*, arts 4–5.
[1251] *Ibid*, art 6.

the applicable arbitral rules and the Rules on Transparency, the latter should prevail.[1252] Tribunals should allow or after consulting disputing parties may invite submissions from non-disputing parties to a treaty related to the interpretation of this treaty.[1253] After consulting disputing parties, tribunals may also accept submissions from non-disputing parties that relate to other issues within the scope of the dispute.[1254] Any of these submissions should not be prejudicial to any party or disrupt or unduly burden proceedings,[1255] and disputing parties should have sufficient opportunity to present their observation on these submissions.[1256] Similarly, after consultation with disputing parties, a tribunal may allow submissions regarding a matter within the scope of the dispute made by a third person.[1257] By allowing submissions, called *amici* briefs,[1258] tribunals do not grant any substantive rights.[1259]

[1252] *Ibid*, art 7.
[1253] *Ibid*, art 5.
[1254] *Ibid*.
[1255] *Ibid*, art 5(4).
[1256] *Ibid*, art 5(5).
[1257] *Ibid*, art 4. See also Mariel Dimsey, "Article 4. Submission by a Third Person" in Dimitrij Euler et al, eds, *Transparency in International Investment Arbitration: A Guide to the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration* (Cambridge, UK: Cambridge University Press, 2015) 128. See also Fernando Dias Simoes, "A Guardian and a Friend: The European Commission's Participation in Investment Arbitration" (2017) 25:2 Mich St Intl L Rev 233 at 243.
[1258] For example, in *Methanex, supra* note 107: The Tribunal made clear that it is in its authority to allow written submissions (*ibid* paras 24, 47, and 49) but declined authority to grant attendance to oral hearings (*ibid* paras 41, and 47); In *United Parcel Service of America Inc v Government of Canada* (2007), Decision on Petitions for Intervention and Participation as Amici Curiae of 17 October 2001, Case No UNCT/02/1 (ICSID): The tribunal decided that it is its discretion to grant *amici* (*ibid* para 61) yet declined its authority to grant access to hearings without parties' consent. In *Glamis Gold, Ltd v The United States of America* (2009), Award, at para 286, and Decision on Application and Submission by Quechan Indian Nation as of 16 September 2005, at para 9 (ICSID): The tribunal following NAFTA and the Free Trade Commission's Statement that allows for third parties participation, granted *amici* without questioning its appropriateness. Note that all three cases were governed by UNCITRAL Arbitration Rule 1976. See also Ishikawa, *supra* note 249 at 379–380 referring to *Methanex*. See also, Kyla Tienhaara, "Third Party Participation in Investment-Environment Disputes: Recent Developments" (2007) 16:2 Rev Eur Comp & Intl Envtl L 230 at 239–241.
[1259] *Methanex*, *supra* note 107 at paras 27, 29, and 33. See also Ishikawa, *supra* note 249 at 379–380.

Table 53: PCA-UNCITRAL

PCA		*Test*	*Status*	*Implications*
Full right of Standing - Consensual**		Parties that agreed to arbitrate*	Parties to proceedings	Bound by proceedings
Other parties**		Joinder at the request of a party. Joining persons must be parties to the arbitration agreement and the joinder must not be prejudicial to any of original parties	Parties to proceedings	Bound by proceedings
Intervention (known as *amicus*)		Contemplated under the Hague Convention to non-disputing parties in disputes related to the interpretation of multilateral treaties.	Non-parties	Not bound
PCA Rules	As of right			
	At the discretion	Most likely with parties' consent.	Non-parties	Not bound
UNCITRAL Rules	As of right	Tribunals shall allow or invite submissions from non-disputing parties to a treaty related to the interpretation of this treaty	Non-parties	Not bound
	At the discretion	• Submissions from **non-disputing** parties that relate to other issues within the scope of the dispute, or • Submissions made by **a third person**	Non-parties	Not bound

*In ISDS a foreign national and a Contracting State - granted in IIAs and accepted by the investor. **The PCA and the UNCITRAL rules since 2010.

c) ICC Court

The ICC Court deals with both types of relationships, horizontal (between private parties) and vertical (investor-state) - each governed by different types of binding agreements. ISDS, as noted, is typically governed by IIAs - about 18 percent of them all allow the ICC as a potential forum.[1260] By March 2018, the Court has administered 39 ISDS cases based on BITs.[1261] These cases were governed by several versions of the ICC Arbitration Rules.[1262] Rules prior to 2012 had a narrowly formulated scope - they referred to disputes as "business disputes"[1263] - yet under these rules, the

[1260] Rocío Digón & Marek Krasula, "The ICC's Role in Administering Investment Arbitration Disputes" in Arthur W Rovine, ed, *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2014*, Contemporary Issues in International Arbitration and Mediation: The Fordham Papers (Martinus Nijhoff Publishers, 2015) 58 at 59. See also Jean Kalicki, "The Prospects for Amicus Submissions, Outside the ICSID Rules" (14 September 2012), online (blog): *Kluwer Arbitration Blog* <arbitrationblog.kluwerarbitration.com/2012/09/14/the-prospects-for-amicus-submissions-outside-the-icsid-rules/>.
[1261] "ICC announces 2017 figures confirming global reach and leading position for complex, high-value disputes" (7 March 2018), online: *ICC - International Chamber of Commerce* <iccwbo.org/media-wall/news-speeches/icc-announces-2017-figures-confirming-global-reach-leading-position-complex-high-value-disputes/>.
[1262] The *ICC Arbitration Rules* (2017) are current rules. Previous versions are from 1988, 1998 and 2012. See Digón & Krasula, *supra* note 1260 at 60.
[1263] *ICC Arbitration Rules* (1998), art 1(1). See also Commission on Arbitration and ADR, *supra* note 666 at para 26.

Court had administered 9 ISDS cases.[1264] Since 2012, the ICC Arbitration Rules no longer contain the word "business" instead they refer to "disputes" only - an amendment that extended the scope to ISDS.[1265] This extension is reflected in more than a doubled the number of administered ISDS cases since then.[1266]

Disputing parties do not have to be members of the ICC to have their disputes administered by the Court, but all parties must agree to the ICC arbitration. The ICC Rules stress the need for a binding agreement between parties.[1267] Thus, there must be an arbitration agreement or a presumption of agreement to arbitrate to have standing, meaning that non-parties to the arbitration agreement cannot bring a dispute nor be forced to arbitrate.[1268] Since disputes may arise between more than two parties as well as become complex, the ICC Arbitration Rules provide for multi-parties' proceedings[1269] and affords tools like consolidation[1270] and joinder.[1271]

The Court will not consolidate pending proceedings on its motion[1272] but only at the request of an existing party.[1273] Consolidation is possible under one of the three following scenarios: (1) all parties agree; (2) all claims are made under the same arbitration agreement; or (3) claims may be made under multiple arbitration agreements if "the arbitrations are between the same parties, the

[1264] Digón & Krasula, *supra* note 1260 at 60–62.
[1265] See *ICC Arbitration Rules* (2012), art 1(2). See also Nathalie Voser, "Overview of the Most Important Changes in the Revised ICC Arbitration Rules" (2011) 29:4 ASA Bulletin 783 at para 2.
[1266] Digón & Krasula, *supra* note 1260 at 62.
[1267] *ICC Arbitration Rules* (2017), art 6(4). See also Commission on Arbitration and ADR, *supra* note 666 at para 31. See also Voser, *supra* note 1265 at para 4.2.2. See also Strong, *supra* note 1213 at 966.
[1268] Voser, *supra* note 1265 at para 4.2.2.
[1269] The Arbitration Rules (2017), art 8. About a third of all ICC arbitrations are multi-party arbitrations See *Ibid* at (note 12): referring to "2009 Statistical Report" (ICC, 2010) at 11, online: *ICC-International Chamber of Commerce* <library.iccwbo.org/dr-statisticalreports.htm>.
[1270] *ICC Arbitration Rules* (2017), art 10.
[1271] The Arbitration Rules are those of 2012, as amended in 2017. They are effective as of 1 March 2017 Article 7.
[1272] Voser, *supra* note 1265 at para 5.4.
[1273] *ICC Arbitration Rules* (2017), art 10.

disputes in the arbitrations arise in connection with the same legal relationship," and these multiple agreements are compatible.[1274] The final decision of whether to consolidate is for the Court.[1275]

Values of privity and party autonomy are also present in the requirements surrounding joinder, a tool that allows a limited range of additional interested parties to join and intervene in proceedings. Successfully joined parties become parties to proceedings with all rights and responsibilities attached to it. A joining party, just as with consolidation, must be a party to the same arbitration agreement as between the original parties[1276] or to another arbitration agreement between the joining party and the one that seeks to join the party.[1277] Thus, non-parties to the arbitration agreement cannot join proceedings, the only route for those wishing to participate, even if affected by the decision, is to get consent from all disputing parties, nor be forced to do it.[1278] Since claimants that need more respondents may, at the beginning of the proceedings, file a claim against multiple respondents (albeit they may use joinder too), joinder is in practice most often used by respondents.[1279] Joinder must be initiated by one of the existing parties before confirmation or appointment of an arbitrator since after then no joinder is possible unless all parties including the joining one agree.[1280] As Bennaim-Selvi claims "third-party standing would imply significant procedural changes and a different approach to disputes."[1281] Joinder, as argued, is "the first step" toward third parties' right to intervene in the ICC arbitration.[1282] Yet joinder does not give these third parties the right to join proceedings on their behest since only original parties wishing to

[1274] *Ibid*.
[1275] Voser, *supra* note 1265 at para 5.4.
[1276] *ICC Arbitration Rules* (2017), art 6(4)(i).
[1277] *ICC Arbitration Rules* (2017), art 6(4)(ii). See also Voser, *supra* note 1265 at para 5.1.
[1278] Strong, *supra* note 1213 at 966.
[1279] Voser, *supra* note 1265 at para 5.1.
[1280] *ICC Arbitration Rules* (2017), art 7.
[1281] Bennaim-Selvi, *supra* note 105 at 786.
[1282] Strong, *supra* note 1213 at 966.

submit arbitration against another party may initiate it[1283] giving the other parties to the arbitration agreement minimal opportunity to have their say.

The ICC rules are silent about the rights of third parties to intervene as *amici*.[1284] This lack stems from the general practice in the realm of international private law that does not permit intervention without the parties' consent. Accordingly, additional parties may only intervene if original parties agree to it. A similar restriction similarly applies in procedures governing hearings.[1285] While all parties to proceedings are entitled to attend, "persons not involved in the proceedings shall not be admitted," unless parties or tribunal agree.[1286]As argued, ISDS is not a private dispute because of the presence of a state and its role in resolving matters that are frequently of public interest. Yet the IIAs' typical silence about third parties submission does not assist these *amici* briefs.[1287] Since *amicus* in ISDS is regarded as an important tool, the ICC announced it would research this area.[1288] However, the ICC task force behind the 2012 Rules revision declined to incorporate provisions allowing *amici* briefs as believing that tribunals could allow them if parties consented.[1289] Recently, the ICC confirmed that in treaty-based arbitration tribunals may, after consulting the parties, allow *amici*.[1290] In essence, because of the above requirements, the legal rights of third parties have been treated as exceptions rather than the rule.[1291]

[1283] Voser, *supra* note 1265 at para 5.1.
[1284] Kalicki, *supra* note 1260: The ICC permitted *amicus* briefs in limited and unreported number of cases. See also Voser, *supra* note 1265 at para 5.1: Joinder cannot be used as a tool to simply assist during proceedings.
[1285] *ICC Arbitration Rules* (2017), art 26(3).
[1286] *Ibid*.
[1287] Kalicki, *supra* note 1260. Some exceptions exist, like the recent US Model BIT.
[1288] Gómez, *supra* note 1184 at 515.
[1289] *ICC Arbitration Rules* (2017), art 19(1). See also Kalicki, *supra* note 1260.
[1290] *ICC Arbitration Rules* (2017), art 25(3). See also *Note to Parties and Arbitral Tribunals on the Conduct of Arbitration under the ICC Rules of Arbitration* (2019), at para 143.
[1291] Bennaim-Selvi, *supra* note 309 at 786: referring to the *ICC Arbitration Rules* (2017), art 20.

Table 54: ICC Court

ICC Court	*Test*	*Status*	*Implications*
Full right of Standing - Consensual	Parties* that agreed to arbitrate	Parties to proceedings	Bound by proceedings
Other parties	Joinder of a non-disputing party only on a request of a party**	Parties to proceedings	Bound by proceedings
Intervention (known as *amicus*)	• If all parties consent, or • At the tribunal's discretion after consulting parties	Non-parties	Not bound

*In ISDS a foreign national and a Contracting State - granted in IIAs. **The joining party must be either a party to the same arbitration agreement as between the original parties or to another arbitration agreement between the joining party and the one that seeks to join the party.

d) Analysis

Among the ISDS administering bodies, ICSID is the only one that deals with purely vertical disputes, whereas the PCA-UNCITRAL and the ICC ordinarily deal with a variety of combinations involving horizontal and vertical disputes based on private agreements as well as treaties. The broader reach of the latter two forums stems from their commercial origin - they incorporate provisions related to private arbitration as well as rules modified or newly introduced to encompass ISDS cases. Standing in private disputes is guaranteed to parties with an arbitration agreement, whereas in ISDS participatory rights are governed by IIAs and limited to a foreign investor and a host state meaning that they do not authorize disputes to be initiated against a home state or another private party. In both these types of arbitration, procedural rules of the arbitration administering organization supplement the original governing legal document (a contract or a Treaty). The typically vague character of IIAs underscores the importance of these supplemental procedures. In principle, besides the right to initiate disputes, disputing parties have a range of other rights - the right to choose the governing law, procedures, etc.

In contrast, the rights of other interested parties are limited. Since IIAs are typically silent about other parties' rights - they do not authorize or prohibit their participation, it is up to the arbitration

administering bodies to accommodate third parties' rights by letting them participate. Yet these forums generally do not grant the right to standing or intervene as of right to anyone except the disputing parties, meaning that the rights of other interested parties (non-disputing parties, third parties or non-parties to the arbitral agreement) have been typically pretty limited. ICSID does not have any provision governing joinder, except that tribunals have broad discretionary powers that make it potentially possible. The other forums - the PCA and the ICC - allow joinder of an additional party only if that party is a party to the same arbitration agreement or have another arbitration agreement with the party that seeks to join them (the ICC Court) and only at the request of an original party. Further and along the fact that they cannot join proceedings on their motion, other interested parties that are without the agreement to arbitrate may only possibly join proceedings if all parties agree. Similar organizational limitations apply to consolidation: ICSID allows tribunals to consolidate related cases at their discretion, whereas the PCA and the ICC make it possible only at the request of disputing parties. Although in principle it is possible to consolidate cases between the same as well as different parties, its use is confined to claims that fall under the same arbitration agreement. This requirement leaves no alternative to non-parties to private arbitration as well as other parties that qualify as domestic parties or have their rights violated by another private party in ISDS.

The last remaining alternative other interested parties may have at their behest is *amicus curiae*. As argued, even if IIAs and procedural rules of these forums are silent about *amici*, arbitral tribunals may also act on their initiative.[1292] This participation is from its nature very restrictive. Among all forums, only non-disputing parties - states to treaties which interpretation is questioned

[1292] Simoes, *supra* note 1257 at 245 (note 64).

- have the right to intervene (the PCA-UNCITRAL Rules on Transparency). Otherwise, *amicus* is typically granted if the disputing parties consent (the PCA Rules) or at the discretion of the tribunal after consulting parties (the UNCITRAL Rules on Transparency and the ICC). ICSID is an exception to this trend as its rules require that *amici* must have a significant interest in the proceedings and assist the proceedings. Parties' consent is not needed but must be consulted and if one party objects application for *amicus* can be blocked. *Amici* participation is ancillary to the main proceedings; thus, the intervening abilities are limited. Parties participating as *amici* are typically not bound by the judgment, except when non-disputing states intervene in the interpretation of a treaty. In sum, IIAs restrict the range of persons able to invoke arbitration. States, the signatories of these IIAs, gave to these arbitral forums a power to draft their rules (states are not represented in these processes), but all treat third parties' participation as an exception. Since these arbitration houses compete among themselves, the more they are beneficial to those who may initiate dispute - foreign investors - the more appealing to investors they are. Thus, having unfair rules by placing a further hurdle on participatory rights of other affected parties, these arbitral forums increase benefits granted to investors.

6. Comparative Remarks

In this chapter, I presented a series of procedural rules related to participatory rights. The rules spanned domestic courts, supranational and international courts, a quasi-judicial body, and domestic and international tribunals. This range of adjudicative bodies provided a spectrum of approaches to the participation principle and, as such, to the right to protect one's rights and interests in adjudicative proceedings. Each of the examined bodies has different rules yet each of

them typically guarantees the full right of standing to all parties to the dispute that have a sufficiently strong legal interest.

The participatory rights of other affected non-parties stand in contrast to the full right of standing. While states traditionally recognize that third parties might have an interest in other parties' legal disputes, this recognition is not universal. Moreover, there is a difference between other parties that are directly and personally affected by a decision and those that seek to intervene in the public interest. While the former should be entitled to a full right of standing to the extent of their interest, the latter's participation is typically limited because the interest is not direct or personal.

For parties that are affected directly by a lawsuit, the fairest representation out of examined forums is afforded by domestic courts, which require all interested parties to be notified and have their day before the court. Standing is also anticipated for third parties at the CJEU as implied by the fact that third parties that have not been heard, where a judgment is prejudicial to their rights, can contest the Court's decisions. In addition, the ECHR can hear claims by directly-affected third parties, yet since the Court is resolving disputes that relate to a violation of human rights, the scope of this alternative is rather narrow - only possible on behalf of a deceased claimant whose human rights were violated if this third person is closely related to the deceased claimant.

The next in the spectrum of representation of other affected parties are the two bodies that specialize in state-state disputes: the ICJ and the WTO. Unlike the domestic courts, the ICJ requires that all the parties must have consented to its jurisdiction in all proceedings, including joinder proceedings. The ICJ guarantees the right to intervene to third parties that are parties to a

multilateral convention in cases where the convention has been invoked. Although such intervention is guaranteed and the third party is bound by the judgment, the party's right is also limited in that the party cannot raise new issues. In other types of cases, intervention is discretionary, and the intervening state must prove that it has a legal interest that may be affected by the ICJ's decision. Similarly, the WTO, allows directly affected states to be co-complainants. Further, the WTO allows third parties to participate as *amici* before WTO panels and to be third participants in Appellate Body proceedings.

The remaining arbitration tribunals are at the other end of the spectrum due to the limited representation they allow for third parties. Even so, there are two groups of arbitral tribunals that must be distinguished. The first group, consisting of FINRA and WIPO, deals with purely private disputes, whereby all parties must generally agree to arbitrate. In the case of FINRA, its arbitration is compulsory for members such that they violate the FINRA rules if they choose any other private arbitral forum. In contrast, consumers and employees of FINRA members are free to refer their disputes to another private arbitral body. Unlike FINRA, WIPO does not limit its authority to any particular membership. Also, while WIPO specializes in intellectual property rights, it can accept any type of commercial dispute.

In these private arbitral forums, the rules define the parties that have a full right of standing but are silent on the rights of third parties affected by the dispute. Although other parties may join the proceedings, this can be done only at the request of an original party. The only option for a third party at its own behest is an application to intervene as *amici*. However, this type of intervention is only granted where the original parties consent or at the discretion of the tribunal. This limitation

on the participatory rights of third parties stems from the fact that disputes decided by these bodies are characterized as part of a discretely private realm, where it is anticipated that third parties are not affected and where party autonomy is constituted as the substitute foundational principle.

By contrast, ISDS deals far less, if at all, with purely private disputes in the resolution of claims by private parties against sovereign states. Yet the full right of standing in ISDS cases is limited to the foreign investor and the host state. Although third parties may be able to join proceedings, under the PCA-UNCITRAL and the ICC rules this joinder can be initiated only by one of the original parties and not at the third party's behest or under the ICSID rules it can come at the discretion of the tribunal. Moreover, according to the PCA-UNCITRAL and the ICC rules, the joining party must be part of a mutual arbitration agreement with original parties, which indicates how joinder stems from a commercial spirit of the arbitration rules that is hardly applicable in treaty-based arbitration. Limited participation as of right is contemplated only under the PCA and the UNCITRAL rules; it applies to non-disputing States under the treaty only if the disputing parties question the treaty's interpretation. For other issues and other interested parties, the last opportunity to participate is discretionary intervention. Under the ICSID rules parties must show that they have a significant interest in proceedings. Although this discretionary intervention is available under the ICSID, the UNCITRAL and the ICC rules without parties' consent (except under the PCA Arbitration Rules where the consent might be required), the original parties must be consulted, and if one party under the ICSID rules objects, such intervention can be blocked.

In contrast to FINRA and WIPO, ISDS arbitral bodies frequently deal with issues of far-reaching implications for sovereign states, their regulatory space, and their citizens. Yet their rules do not

reflect this fact. The system as it stands is ill-suited for claims that involve the legal rights of other parties. Although proponents of ISDS claim that it is superior to domestic courts, including in terms of fairness, domestic courts are superior when it comes to representation and, more broadly, fairness (see *Table 55*). That is, domestic courts recognize that other parties may have legal rights that need protection and they provide them with the right to standing. In contrast, ISDS gives preferential treatment in general to foreign investors, in comparison to any other group, and, moreover, it disregards the rights of other affected parties in individual proceedings.

Table 55: Domestic Courts versus ISDS

FORUM / THE FORM OF PARTICIPATION	***Domestic courts*** *(the UK and the US)*	***ISDS Arbitral Forums*** *(ICSID, PCA-UNCITRAL and ICC)*
Full right of Standing	Disputing parties*	A foreign investor and host state
*Right to intervene***	Anyone directly affected or having an interest**	No
Discretionary intervention with the full party status	In the US, anyone who shares with the main action a common question of law or fact***	Joinder only at parties' request
Amicus as of right - limited to support existing parties	In the US, anyone who shares with the main action a common question of law or fact***	Only the PCA-UNCITRAL to non-disputing states
*Discretionary Amicus*****	Yes	Yes
No participation	Busybodies	All other parties

*Possibly multiple parties, other parties may join proceedings. **Parties gain the full party status. ***The right may be granted by a statute or to parties with an interest in the matter. ****Granted to support one of the parties, or in cases of public interest.

Because of ISDS's broad implications, the rules of ISDS administering bodies should embrace provisions that guarantee the right to participate, as in domestic private litigation such as tort proceedings, for those who are negatively affected by the lawsuit. On this note, the view that third-party standing needs a different approach to disputes and is impossible without significant procedural changes points to the fundamental gap between ISDS proceedings and fair representation. Although the achievement of fairness in ISDS might seem overwhelming, it is

clearly within the powers of ISDS arbitral bodies and inevitable, in a fair proceeding, that the right to participate will be guaranteed for all of those potentially wronged by an ISDS lawsuit.

Chapter 7: Conclusion

The purpose of this dissertation was to assess whether concerns that ISDS is an unfair or biased system due to a lack of institutional safeguards are substantiated. In this study, I focused on safeguards that are linked to the control of the use and prevention of abuse of powers and that are recognized as attributes of a fair trial: values of fairness and adjudicative independence and impartiality. I based my research on the assumption that these values are universal. This assumption stems from the fact that the values are protected by private and public law, and in a wide range of domestic and international legal systems, despite the existence of competing values. The protection of different competing values requires balancing. Since not all forums seek to protect the same set of values, it is natural that the safeguards of shared values afforded by different adjudicative bodies vary to some extent in their form and degree.

The protection of these values is typically provided by legislative and adjudicative bodies, respectively through legislative acts, treaties, etc. or through institutional design, internal procedures, and procedural rules. An essential part of the control of the use and the prevention of misuse of powers is in most cases done by primary law (legislative acts, treaties, etc.), although the same is not true for ISDS since IIAs are generally vague and do not deal with values and their safeguards. Consequently, protection of the values is left in the hands of ISDS administering bodies that are empowered to draft their own working procedures and procedural rules. Accordingly, although I examined all relevant legislative acts, the core focus of my research was on the institutional design of adjudicative bodies and their governing procedures.

ISDS is controversial and has proponents and critics. It is relatively young and faces difficulties in areas where other adjudicative systems, after centuries of development, have found solutions. For ISDS, since it is an adjudicative regime claimed to be based on the rule of law, fair rules and procedures are of the essence. The request for complex and carefully drafted rules is underscored by the fact that ISDS covers a broad array of parties and interests and because it encroaches on the powers of sovereign states affecting their citizens.

Some of the controversies about ISDS relate to its existence and some relate to its assigned qualities. A common argument for the existence of ISDS is that it is an adjudicative system that is, for its neutrality and freedom from bias, superior to domestic courts and that it provides safeguards at least equal to these courts. Yet this view is not universally shared. Some commentators see ISDS as a form of protection of foreign investment that is outright absurd others argue that ISDS is biased in favor of industry and others criticize its institutional design as inadequate or as having serious flaws relating to a lack of institutional safeguards and, thus, they question its neutrality and fairness. Among the debated safeguards are those that guarantee adjudicative independence and impartiality. Fairness, on the other hand, is questioned from the point of view of whether all of those affected by ISDS decisions can adequately participate in the process. Some critics seek systemic reforms, whereas others argue for its entire removal. Since these views about the core - independence, impartiality, and fairness - of adjudication in ISDS are so contradictory, I decided not only to assess the protections of these shared values afforded by ISDS but also to compare ISDS with a variety of adjudicative regimes in other contexts. This strategy was intended to give a more robust picture of whether ISDS is effective in controlling the use and preventing the abuse of powers as well as to show whether systemic reform is warranted.

Shared values can be safeguarded at different stages of the adjudicative process using a variety of techniques. To keep the project manageable, I decided to examine a few essential safeguards: adjudicative independence (and impartiality) and fairness. Considering the former, I examined methods of adjudicative appointment, methods of case assignments, separation of these two processes, and personal security in the form of tenure and guaranteed remuneration. All of these safeguards are typically used well before disputes have commenced and deal with mechanisms of separation of powers. They seek the same end: guaranteed adjudicative independence and impartiality as protection against unfair, politically motivated decisions. From the perspective of fairness, I examined another core feature of adjudication: the right to standing, with a particular focus on affected parties that have a legal interest (since any adjudicative system that limits the access of the aggrieved is unfair and selective in its intake of relevant information). An adjudication based on inadequate information cannot reach a fair outcome including for those already wronged, who are then hurt both by the original conduct or omission that is in dispute and by the adjudicative process itself.

The enlisted safeguards suggest that different mechanisms have been devised for various stages of the adjudicative process to cover a variety of risks from a variety of sources with the same goal in mind: adjudicative independence and impartiality. These risks may come from external sources, like executive or legislative bodies, parties to a dispute, friends, etc., or they may arise internally from the adjudicative branch. Since each has its own unique purpose, no mechanism should be treated as redundant or discarded as irrelevant.

I embarked on this comparative study by examining methods, checks, and balances of the separation of powers. I dealt with safeguards of values of adjudicative independence and impartiality in two separate phases. First, I examined two typically distinct processes employed before the commencement of proceedings: the process of adjudicative appointment and the process of case assignment. Separation of powers in these processes helps to prevent politically or other ill-motivated adjudicative appointments and case assignments. Second, I examined the use of the two most essential personal security mechanisms, also established before the commencement of proceedings: security of tenure and financial security. These tools safeguard against inappropriate influences, incentives or threats, and potential conflicts of interest. Each of these processes and securities can use robust methods and integrate multiple tools to cover all facets of the process, or weak ones that use a limited number of devices and leave parts of the process open to abuse. Lastly, I dealt with safeguards of procedural fairness focusing on whether all stakeholders have been treated fairly in terms of participatory rights. In doing so, I mapped the right to standing and assessed whether other parties have the right to participate to the extent of their legal interests.

I presented and analyzed the dataset that served as the basis for my analysis in chapters 4-6. The data show a spectrum of approaches among all selected adjudicative bodies ranging from forums that use robust multi-level protections to organizations that use, if any at all, weak or scarce safeguards. My findings show that the pattern in all the three segments covered in chapters 4, 5 and 6 remains consistent.

After analyzing all the findings, the outcome is as follows. First, domestic, European, and international courts use similar and the most robust institutional safeguards of all of the examined

values among all comparators. These safeguards differ in, for instance, the number of appointing authorities, the length and a possibility of a repetition of the tenure term, the amount of guaranteed remuneration, allowances and terms of pension, the exact type of allocative method of case assignment, etc. However, the relevance of these differences is marginal since the focus of the study is on whether the individual comparators employ the safeguards or some other alternatives. Until recently, the ICJ differentiated itself from the other courts in allowing its judges to do external professional work. Practices such as these undermine other protections afforded to safeguard adjudicative independence and impartiality since they create a room for a potential conflict of interest. Yet, the ICJ recognized that this practice was problematic and reconsidered it such that its judges are no longer allowed to participate in ISDS.

Concerning fairness, typically all of these courts anticipate that third parties may need to protect their interests and thus guarantee some form of right to standing as opposed to mere discretionary intervention. In this respect, the most accessible are domestic courts followed by the CJEU. The next is the ECHR which, due to the personal nature of the rights it protects, provides more limited access to other parties. For the ICJ, the Court always requires the consent of all parties involved, a practice that restricts another state party that seeks to protect its interest and its right to join or initiate new proceedings. Further, a discretionary type of intervention that typically seeks to support issues raised by one of the parties or some higher public interest is possible at all of the courts. These facts suggest that, among all of the courts, the ECHR and the ICJ provide the most restrictive participatory rights.

Second, there are domestic and international bodies - the WTO and FINRA - that use a mixture of safeguarding techniques but skip some others. Despite being placed in the same group, their use of safeguards is not identical. For appointments and case assignments, the WTO Appellate Body has characteristics similar to courts but WTO panels, like FINRA panels, are constituted *ad hoc* and influenced by parties. The WTO affords tenure and some financial security to its Appellate Body members (but not panelists), whereas FINRA provides none. Both bodies prescribe the fees such that adjudicators are paid for individual tasks performed and both remunerate them internally. Since the disputing parties are excluded from this remunerative process, they cannot use remuneration to influence their adjudicators' decision-making. Both bodies use mechanisms, including caps or limits to the length of proceedings that curb the level of income that their adjudicators may receive. These mechanisms, without questioning the integrity of individual adjudicators, help to speed up the decision-making process and boost public confidence that adjudicators cannot artificially drag on proceedings to increase their income. Both bodies use an objective case assignment mechanism: rotation by the WTO Appellate Body (excluding panels) and a neutral allocative system by FINRA. The WTO Appellate Body's allocative method based on rotation guarantees evenly spread appointments, workload, and reasonably similar income for all its permanent members. Panel members are excluded from these guarantees; their compensation for WTO work is a supplement to their income from primary employment elsewhere. In turn, FINRA's allocative method is not designed to guarantee appointments, evenly spread workload, or secured remuneration since it has more than 7000 enlisted adjudicators and allows disputing parties to indicate their preferences. The remuneration that FINRA adjudicators receive, like WTO panelists, is only a supplement to their income from their primary employment. Despite this lack of personal guarantees FINRA uses strong safeguards in that it divides powers to nominate, select,

and appoint among various actors; it separates the appointment process from the case assignment process; it precludes direct relations between parties and adjudicators by (1) using a neutral allocative system and (2) excluding parties from the negotiation of arbitrators' income; and it limits conflicts of interest by capping fees.

At the WTO, standing for other directly affected parties is possible to some degree. They can become co-complainants, or they can initiate a new proceeding against the respondent regarding matters already decided at previous panel proceedings. However, indirectly affected states may only participate in a limited form - as *amicus curiae* - and must have a substantial interest in the matter or invoke a systemic interest. Only these other parties that participated in panel proceedings may participate as of right at the appellate stage; the other non-participating parties may join only as passive observers. FINRA allows joinder, but only on request of one of the original parties, as well as discretionary intervention as *amicus*. Since *amicus* is designed to support one of the existing parties or some other public interest, it is an insufficient tool to protect one's own interests.

Finally, all international arbitral bodies - WIPO and all ISDS administering bodies - are at the other end of the spectrum in that none of them provides personal protections in the form of security of tenure or financial security. Instead, they maintain indicative lists only. Adjudicators joining these lists may go through several stages - nomination, selection, and appointment - but the methods to assign an arbitrator to a case allow the parties to skip these lists entirely by choosing their arbitrators from whatever sources they prefer. This direct selection of one's adjudicator impedes the objectivity and neutrality of the process. There is a prospect that parties will select arbitrators with favorable views; also, arbitrators have incentives to interpret the law in favor of investors in

order to get appointed. Further, it creates improper proximity between the disputing parties and their adjudicators with a potential risk that the former may inappropriately influence the latter. These potential risks arise because there are no adequate safeguards and, in turn, they undermine public confidence in the system. While most of these bodies may use a list-procedure to assign arbitrators to a case, the list's use is confined to situations when parties fail to agree or to appoint or when they request use of it. Moreover, even under the list-procedure parties may choose their arbitrators from among pre-selected ones. These allocative processes, like at FINRA, are not designed to guarantee appointments or evenly spread workload. Instead, they have a propensity to create two distinct groups of arbitrators: those frequently appointed (ISDS is criticized for its number of elite arbitrators and the difficulty to join their club) and the others.

At these international arbitral bodies, there is also no financial security since income depends on appointments. The level of remuneration is uncertain and based on a variety of factors (typically on peculiarities of proceedings) and calculated *ad hoc*. Each examined body has schedules of fees that are in some instances capped. Several of the institutions allow tribunals to set their fees and allow parties to get involved in negotiation of arbitrators' remuneration. These arrangements are at odds with values of independence and impartiality because they give rise to a potential conflict of interest. Arbitrators have a personal interest in the level of fees and the length of proceedings and in close relations between parties and their adjudicators. Capped fees and final fees typically are fixed and paid by these arbitral bodies from the parties' contributions and seem to be the only safeguarding features that these adjudicative bodies use. Further, the remuneration that arbitrators receive is, as argued, excessive and thus problematic for its corrupting potential. Even if high

incomes may be the way to compensate arbitrators for their otherwise uncertain remuneration, only those appointed can benefit in this way.

These methods of remuneration, instead of personal security, create a conflict of interest and an environment where arbitrators must compete to get appointed. Even if the integrity of individual adjudicators is not disputed and there is no actual conflict of interest or ill-thought motivation, the context of inadequate safeguards leaves too many opportunities for inappropriate pressure or behavior, thus undermining the perception of the neutrality and public confidence in the system.

Considering participation as the basis for fairness, all arbitral forums - ISDS, WIPO, and FINRA - typically anticipate the right to standing of the parties to the dispute. At the same time, they limit the rights of other parties having a legal interest. None of these forums guarantees the right to standing to other parties. The only potential option they provide is joinder (ICSID does not say so explicitly but gives tribunals broad discretionary powers under which joinder may potentially be possible). Except for ICSID, all other arbitral bodies, FINRA, WIPO, the PCA-UNCITRAL and the ICC, provide for joinder at the discretion of a tribunal or the original parties albeit typically only if all parties agree to it. The joining parties must be parties to the arbitration agreement and the joinder must not be prejudicial to any of the original parties. While this arrangement may be appropriate in purely private disputes of FINRA and WIPO, in treaty-based ISDS disputes, it is inadequate since there are no such arbitration agreements available. Its inadequacy is also due to the complexity of ISDS disputes and the nature of its stakeholders. ISDS typically deals with issues of a public nature where the number of these stakeholders is typically unknown. This arrangement hinders all other parties with legal rights (but no arbitration agreement) from joining proceedings

to protect their interests. Since all parties must typically agree to joinder, it is enough for one party that deems the additional party's legal interest as potentially threatening to block it from participating unless the adjudicative panel steps in, as happened in *Chevron*, *Bernhard von Pezold and others v Zimbabwe*, as discussed in chapter 2. All bodies allow discretionary participation in the form of *amicus*, but this option is inadequate for those with a legal interest.

One may point out that these distinguishing features (from courts) arise from the inherited characteristics of alternative dispute resolution (ADR). Yet this argument does not stand when one looks at FINRA, an arbitral body dealing with consensual dispute settlement, that consistently evinces stronger safeguards than treaty-based ISDS in order to encapsulate stakeholders that have no option to consent (such as property owners whose rights have been encroached). FINRA has powers to shape industry yet its powers, unlike ISDS, are limited by higher laws of the land and overseen by its authorities. The only potentially similar approach at FINRA and in ISDS relates to joinder.

ISDS proponents themselves compare its systemic safeguards to those of the courts and claim that, between the two, ISDS is superior. From the dataset, these claims are far from substantiated since ISDS - for its selective preferential treatment of some stakeholders and restrictive treatment of others (who have a legal interest) - does not exhibit itself as an unbiased system. Its neutrality and, thus, systemic superiority are not proven for the lack of adequate institutional safeguards. Instead, protection of its neutrality is sporadic, somewhat simplistic, and seriously flawed. Even though domestic courts, as some argue, may be biased, they easily surpass ISDS since they have the strongest safeguards and robust approach to other stakeholders, whereas ISDS, placed at the other

end of the spectrum, has the least institutional safeguards and the most restrictive access for adversely affected parties.

In comparison to ISDS administering bodies (ICSID, the PCA-UNCITRAL, and the ICC), WIPO follows similar rules and exhibits a similar lack of institutional safeguards, yet it also displays a few important distinctions. WIPO, like FINRA, is a different species of adjudication because it is based on consensual agreements as opposed to the treaty-based ISDS. Access to WIPO is open to anyone, domestically or across borders, who agrees to arbitrate a dispute of a private and commercial nature, whereas access to ISDS is open to treaty-qualified foreign investors but no-one else. This latter restriction applies despite the fact that ISDS, unlike WIPO, has the power to review acts and inaction of states and frequently deals with issues that have far-reaching effects on other parties, the general public, and the state's ability to act or regulate. Thus, ISDS is unquestionably unique in its lack of institutional safeguards. This lack is not marginal but substantial, as exposed in my analysis of adjudicative appointments, methods of case assignment, tenure and remuneration, and fairness via participation. Accordingly, the institutional design of ISDS proves the weakest and does not serve all its stakeholders. This conclusion stands even if one attempts to brand ISDS as purely private arbitration (although it is not) since it provides weaker protections than FINRA, a private arbitral body.

In this research, I examined a few essential safeguards. One must acknowledge the poor quality of ISDS institutional design across the whole ISDS group. While adjudicative independence and impartiality have already received plenty of attention, the protection of third parties' rights has been wrongly neglected. ISDS, as a system that sought to level the playing field for disadvantaged

foreign investors, de facto swung the equilibrium in the opposite direction by omitting appropriate safeguards. ISDS contributes to another unfairness by creating victims of its measures, providing preferential treatment to foreign investors while discriminating against other stakeholders. Equally, because of ISDS's unique and substantial lack of the essential safeguards, one might infer that ISDS is equally lacking safeguards in other vital areas: transparency in the form of accessibility to information, accountability of adjudicators, equality in terms of rights and responsibilities of parties to the dispute, etc. However, even if these three areas are the only lacunas in ISDS, they are substantial enough to warrant a significant systemic redesign.

Based on these findings, one can no longer talk about mere appearances of bias but systemic flaws and failures. Rejection of ISDS in its current form for the lack of safeguards of essential values seems inevitable. If the ISDS industry wishes to achieve neutrality, it should adhere to values of fair, independent, and impartial adjudication and thus create a dispute settlement regime that works for the betterment of all stakeholders.

This idea to reform ISDS is not new. My research comes in an era when ISDS is contested by scholars and practitioners and by the general public based on a call for fair and transparent adjudication that ISDS currently cannot provide. Due to its systemic flaws and under public pressure, various reform initiatives have been launched. Some states withdrew from ICSID others are re-negotiating treaties or seeking to apply newer versions with more contemporary terms to protect their regulatory space others seek to insert corporate social responsibility (CSR) clauses or provisions establishing a binding code of conduct on conflicts of interest of arbitrators.[1293] Further,

[1293] For instance, the *US-South Korea* FTA, see *supra* note 16, includes a clause regarding regulatory space. The recently drafted USMCA is phasing out ISDS between the United States and Canada, see *supra* note 15. The Model

the EU launched major initiatives to include a permanent Investment Court System (ICS) in its treaties and create a multilateral investment court. The UNCITRAL revised arbitration rules on transparency and had set up a working group to strengthen independence and impartiality of ISDS arbitrators. However, these reforms do not address the issues I have examined: the protection of essential values through institutional safeguards and the assurance of full standing for other parties with a legal interest in the proceeding.

Further, all of the examined arbitral bodies, ICSID, the PCA-UNCITRAL, and the ICC, have introduced various changes to respond to some concerns, such as transparency and, in some cases, rules governing non-party participation. Yet, considering fairness and safeguards of adjudicative independence and impartiality, these changes are too modest to make ISDS comparable to the courts. Since the gap between ISDS and courts is substantial, to level the playing field with them, ISDS likely requires a change so significant that a more feasible option than the reform may be to start anew.

The situation is uncertain as reforms may face difficulties. Only the future will show the successes or failures of various initiatives, such as the ICS or the multilateral court, and the strengths and weaknesses of their institutional design. The creation of a multilateral court, like every project, has been an ongoing process that has to resolve a variety of issues and overcome a series of hurdles.

Text for the Indian Bilateral Investment Treaty (2016), the Netherlands model BIT (2018), and the Belgium-Luxembourg Economic Union model BIT (2019) exemplify new versions of IIAs. Considering CSR, Canada included such a clause in recent investment treaties like the 2013 *Benin-Canada* BIT, art 4; the 2014 *Cameroon-Canada* BIT, art 15; the 2014 *Canada-Nigeria* BIT, art 16; the 2014 *Canada-Serbia* BIT, art 16; the 2014 *Canada-Republic of Korea* FTA, art 8.16; the 2014 *Canada-Mali* BIT and the 2015 *Burkina Faso-Canada* BIT. In 2011, the EU decided to include CSR language in all its FTAs: see EC, *European Parliament Resolution of 6 April 2011 on the Future European International Investment Policy*, [2012] OJ, C 296/34 at para 28. As an example of a treaty with language on an arbitrator's code of conduct, see the *EU-Canada CETA*, *supra* note 3, Annex 29 – B.

The purpose of my study was not to provide answers to the question of how to resolve pressing concerns about ISDS but to inform and contribute to the discussion of the basis for strengthening the methods for protecting fundamental values in ISDS by understanding how other adjudicative regimes achieve this goal. Further, the designers of the ICS and multilateral treaties, reformers, IIAs negotiators, and re-designers can all learn from other time-tested systems. Since I looked at shared values across many contexts, decision-makers in all these processes can benefit from the compiled dataset. My work may be helpful in various ways: to open minds, inspire, and encourage thinking, to show examples to recreate or avoid, to help adjust existing processes or contribute entirely new projects. In other words, my study can assist in ongoing reforms and in designing projects from scratch.

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