

Party-Appointed Arbitrators No More

The EU-Led Investment Tribunal System as an (Imperfect?) Response to Certain Legitimacy Concerns in Investor-State Arbitration

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Abstract

CETA, the EU-Vietnam FTA, and the EU-Singapore FTA are the first investment treaties to replace the practice of *ad hoc* tribunals and party-appointed arbitrators with a two-tiered investment tribunal system (ITS), consisting of a standing tribunal of first-instance and an appeal tribunal, comprised of a roster of members who are pre-selected by the treaty parties. Underlying this retreat to domestic court structures is the perception of partiality sometimes associated with party-appointed arbitrators. The article explores this risk of bias rationale and identifies potential drawbacks associated with the shift away from disputing party involvement in the selection of the tribunal, towards a more institutionalized form of adjudication. The array of foreseeable challenges with regard to the identity, tenure, and qualifications of arbitral members, particularly when combined with the duty to remain available and prohibition on “double-hatting”, cast doubt on the efficacy of these reforms in resolving the legitimacy concerns that spawned its creation. A better solution might be to expand the role of arbitral institutions in mediating the link between the parties and their chosen arbitrator.

Keywords

party-appointed arbitrators – selection of arbitrators – investment tribunal system – investment court system – EU court model – CETA – EU-Vietnam FTA – EU-Singapore FTA – role of arbitral institutions – blind appointment

* All views and errors are my own.

1 Introduction

This article examines the EU-led changes to *who* decides international investment disputes. In particular, the discussion evaluates the abolishment of the long-standing practice of *ad hoc* tribunals and party-appointed arbitrators in the Comprehensive Economic and Trade Agreement (CETA),¹ the EU-Vietnam Free Trade Agreement (EU-Vietnam FTA),² and the EU-Singapore FTA³ in favour of a standing roster of “members”,⁴ who are pre-selected by the state parties to each treaty. The investment chapters in these treaties each feature an investment tribunal system (ITS),⁵ which seeks to create a two-tier tribunal of first-instance and an appeals tribunal, for the first time in any treaty. However, before these treaties are ratified and the ITS becomes operational, it might be that the EU and its trading partners will succeed in superseding each ITS with a multilateral investment court (MIC).⁶ Regardless of which iteration this court model takes, it reflects a strong reaction to the perceived lack of accountability of party-appointed arbitrators,⁷ as well as broader alleged legitimacy issues with the current investor-state dispute settlement (ISDS) regime.

Akin to many common law and civil law national legal systems, the ITS reflects a shift towards a regime with *no* direct disputing party involvement in the selection of the adjudicators. Instead of the claimant investor and respondent state each having the opportunity to appoint an arbitrator, it is the state parties that appoint the members to the tribunal and appellate tribunal at the time

1 Comprehensive Economic and Trade Agreement between Canada and the EU and Its Member States (CETA), final text 29 February 2016, signed 30 October 2017, provisionally in force 21 September 2017. As a “mixed agreement” (EU Court of Justice (CJEU), Opinion 2/15, 16 May 2017), the investment chapter will only enter into force upon approval by each EU Member State’s Parliament. On 6 September 2017, Belgium asked the CJEU to decide whether the investment tribunal system (ITS) is compatible with EU law.

2 EU-Vietnam FTA, final draft text 1 February 2016.

3 EU-Singapore FTA Investment Protection Agreement, revised final draft April 2018.

4 European Commission (EC), “Proposal for Investment Protection and Resolution of Investment Disputes, Transatlantic Trade and Investment Partnership” (November 2015): perhaps as a concession between the terms “judges” and “arbitrators”, this deliberate change in the prevailing lexicon to the more neutral term “members” is a response to the alleged legitimacy concerns facing ISDS.

5 The EU first referred to the ITS as an “investment *court* system” (ICS) in its TTIP Proposal, *supra* note 1. The recently concluded EU-Singapore FTA also refers to the ITS as the ICS.

6 CETA, Art. 8.29; EU-Vietnam FTA, Art. 15. On 12 September 2017, the EU Council authorised the EC to open negotiations for the establishment of a multilateral investment court, and seek to enter into a convention with its Member States and other trading partners.

7 See, e.g., James Crawford AC, “The Ideal Arbitrator”, 32(5) *Am. U. Int’l L. Rev.* (2017), 1003.

of the roster's initial constitution through their respective Joint Committees.⁸ Therefore, when an arbitration is commenced, the disputing parties do not have control over which specific tribunal members will be assigned to their case. The selection process for adjudicators under this model thus harkens a retreat to perceptions of domestic litigation judges as being answerable to the public, independent, and accountable by virtue of their tenure as sitting judges; in contrast to existing ISDS regimes, where *ad hoc* arbitrators are answerable only to the disputing parties.⁹

In examining novel provisions that prohibit arbitral members from “double-hatting” as counsel and expert, impose an onerous duty to remain available, require proven expertise in international law, and grant court-like tenure, the discussion identifies potential challenges to the ITS’ ability to mitigate the alleged ills commonly associated with the constitution of *ad hoc* tribunals when the disputing parties are allowed to appoint their arbitrators. The ITS (and any eventual multilateral investment court) will have to resolve how it will attract adjudicators that are suitably qualified, available, diverse, and representative of the treaty parties. Just as some critics query whether the outcomes of arbitral awards are being influenced by arbitrators’ financial or strategic career interests, could the prospect of renewal of ITS members’ initial terms, and how this might influence their exercise of judgment, generate similar concerns (particularly if, over time, a pattern emerges of pro-state awards)? In terms of technical expertise, how will a standing roster of only 15, nine, or six members,¹⁰ who are randomly appointed in divisions of three to each case, effectively adjudicate disputes requiring industry-specific knowledge? Will the proposition that it is unethical to act as both arbitrator and counsel (which underlies the prohibition on double-hatting) prevent younger, but still experienced, lawyers from serving on the ITS, and thereby “make it more difficult to create the second generation of investment arbitrators”?¹¹ Finally, will the removal of disputing party involvement in the selection process make enforcement of the arbitral award more difficult, or have a dampening effect on foreign direct investment (FDI) over time?

Without attempting to address the whole host of alleged deficiencies with the ISDS system comprehensively, Part 2 of this article frames the party-appointed arbitrator debate within the broader context of the legitimacy

8 CETA, Arts. 8.27(2), (3), (12), (14), (15), 8.28(3), (7), 8.44(3)(e); EU-Vietnam FTA, Arts. 12, 13, 34; Ch. XX, Art. X.1.

9 Subject to ethical guidelines, standards, and procedures set out in the applicable arbitral rules, and detailed in these treaties.

10 Under CETA, EU-Vietnam FTA, and EU-Singapore FTA, respectively.

11 Crawford, *supra* note 7.

concerns that spawned its creation. Part 3 brings into focus the crux of the operative criticism driving the replacement of party-appointed arbitrators with a pre-selected standing body of members: the risk or *perception* of bias/partiality, by the fact of appointment by the parties. Part 4 then critically assesses the efficacy of CETA and the EU-Vietnam FTA's provisions governing the requisite qualifications, availability, and tenure of arbitral members, and identifies practical impediments which might usurp the intention underlying these reforms. Finally, in Part 5, the discussion moves beyond the EU model, and explores more modest reforms that hold the potential to assuage salient concerns about party-appointed arbitrators and *ad hoc* tribunals, without the need to remove disputing party involvement in the selection process entirely. One potential solution includes broadening the scope of participation by arbitral institutions and appointing authorities in mediating the link between disputing parties and their appointed arbitrators through a consultative "list" procedure or through "blind appointments" (where arbitrators do not know which party appointed them).¹² This could serve as a more palatable alternative to abolishing the practice of party-appointed arbitrators, and might better assuage concerns about arbitrators' potential affiliation biases than the ITS, while also respecting party autonomy in ISDS.

2 Framing the Party-Appointed Arbitrator Debate

This section frames the broader themes which animate the party-appointed arbitrator debate, in order to set the stage for the discussion that follows. Recall that, by design, international arbitration is meant to reflect the choices of the disputing parties. Most existing arbitral rules provide for

¹² Sergio Puig, "Blinding International Justice", 56(3) *Virginia J. Int'l Law* (2016), 647; See also David Gaukrodger, "Appointing Authorities and the Selection of Arbitrators in Investor-State Dispute Settlement: An Overview" Consultation Paper, *Organisation for Economic Co-operation and Development (OECD)*, (March 2018); See e.g. Netherlands' draft model BIT, released in May 2018, which prohibits double-hatting in investment disputes (for the last five years of the arbitrator's career) and states that all members of arbitral tribunals hearing disputes under the BIT "shall be appointed by an appointing authority": either ICSID (ICSID Rules) or PCA (UNCITRAL Rules). Thus, while the draft BIT abandons the system of party-appointment of arbitrators, rather than adopt the EU two-tier court model, it provides that appointing authorities should make their appointments after extensive consultations with the disputing parties (presumably through a "list" procedure). It further states that ICSID is not limited to that institution's panel of arbitrators, which is perceived in some quarters to include political appointees by states. However, it also states that its ISDS provisions will cease to apply of the EC's MIC comes into existence.

disputing party involvement in the selection of arbitrators.¹³ For a three-member tribunal, each party typically appoints one arbitrator and the presiding arbitrator is either agreed by the disputing parties directly, or selected by the party-appointed arbitrators¹⁴ (with or without consultation with the respective appointing party),¹⁵ by the arbitral institution, or by an appointing authority. In contrast, both tiers of the ITS reflect a court-like, pre-selected roster of tribunal members.

Nearly all dissenting opinions in investment arbitration awards are in favour of the party that appointed the dissenting arbitrator. While an arbitrator's reasons for dissenting might result from a variety of factors to do with the merits of the case and the arguments presented by the parties on certain issues, as well as the arbitrator's world view, some commentators nevertheless say that the correlation between party-appointed arbitrators and dissents raises concerns about neutrality.¹⁶ The ITS presents itself as an alternative to traditional ISDS, and a response to perceived issues of correctness, consistency, and coherence of investor-state arbitral awards on similar points of law, conflicts of interest between counsel and arbitrators, double-hatting, issue conflicts, repeat party-appointments, dissenting opinions by arbitrators in favour of the party that appointed them, and homogeneity of the arbitral bench. These, and other concerns, have coalesced into the impetus for this EU-led retreat to a structure reminiscent of domestic court structures. The threat of arbitrators' unconscious biases infiltrating their reasoning, and the outcome of cases on which they sit, is difficult to disentangle from the commonly cited problems with ISDS, each of which poses its own challenges to judicial independence.¹⁷

13 ICSID Convention, Arts. 36–40; ICSID Arbitration Rules, Rules 1–4; 2010 UNCITRAL Rules, Arts. 7–10; 2012 ICC Rules, Arts. 11–13; 2012 PCA Arbitration Rules, Arts. 8–13; AAA Commercial Arbitration Rules, Rules 11–16.

14 2010 UNCITRAL Rules, Art. 9(1).

15 Where the parties agree that the party-appointed arbitrators are to select the presiding arbitrator, they sometimes further agree that they are to be consulted by their appointed arbitrator in making his/her selection for presiding arbitrator. In many recent cases, the two co-arbitrators have sought to sever any consultations with their appointing party by seeking party agreement to their coming up with a list of candidates for presiding arbitrator, which is then put to the parties for their ranking of the candidates.

16 Albert Jan van den Berg, "Charles Brower's problem with 100 per cent – dissenting opinions by party-appointed arbitrators in investment arbitration" 31(3) *Arb. Intl.* (2015), 382. See also Albert Jan van den Berg, "Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration" in Mahnouch H. Arsanjani et al. (eds), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Martinus Nijhoff, The Netherlands, 2011) 821–843.

17 David Gantz, "An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges", 39 *Vanderbilt J. Transnat'l L.* (2009), 40, 68;

The EU's solution to perceived bias arises, first, from the notion that a standing body of state-selected decision-makers is better placed, as compared to party-appointed arbitrators, to resolve international investment disputes. A second underlying premise of the EU-led reforms might stem from an "exaggerated image of the arbitrator's decisional power"¹⁸ and from the perception, in some quarters, that investment treaty disputes require arbitrators to have *heightened* duties of impartiality and independence, beyond that which is required in international commercial arbitration.¹⁹ ISDS arbitrators are seen by some "as holding a public office, in the exercise of which they not only have to meet the expectations of the parties to the proceedings and incur obligations towards them, but must fulfil the expectations of a larger audience and its demands for consistency, predictability, accountability, and legitimate outcome."²⁰ While all arbitrators have a duty to be impartial and independent, the potential for an affiliation effect, or unconscious favour, towards the appointing party, and the difficulty in detecting and measuring it, has also led to heightened concerns about ISDS arbitrators.

The polemic on ISDS and the exploration of potential reforms has, in some circles, been reduced to a dichotomy between the advantages of standing courts over traditional *ad hoc* arbitral tribunals (leaving to one side the debate about the removal of ISDS in its entirety from FTAs). The resistance to ISDS embodied in CETA, for instance, "has essentially been pulling in two opposite directions: toward a partial renationalization of available recourses on the one hand, and toward what is viewed as a 'greater' internationalization of dispute resolution, namely the institutionalization of dispute resolution based on a court model, on the other."²¹ A resurgence of romanticism about the perceived judicial independence of tenured judges in comparison to arbitrators – who are accountable only to the disputing parties – is a key driving factor for this regression to familiar models in national court adjudication, rather than progression towards new structures.²² There are also those who see the ITS as

Theodor Meron, "Judicial Independence and Impartiality in International Criminal Tribunals", 99 *AJIL* (2005), 2, 360–361.

18 Crawford, *supra* note 7, 1003.

19 Loretta Malintoppi, "Remarks on Arbitrators' Independence, Impartiality and Duty to Disclose in Investment Arbitration", 7 *The Law and Practice of International Courts and Tribunals* (2008), 351; Stephan W. Schill, "Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and its Significance for the Roles of the Arbitrator", 23 *Leiden Journal of International Law* (2010), 401, 418–419.

20 Schill, *supra* note 19, 419.

21 Yves Fortier, "Preface: Canada", 13 *TDM* 1 (March 2016).

22 Lucy Reed, "International Dispute Resolution Courts: Retreat or Advance", John E.C. Brierley Memorial Lecture, McGill University, 11 September 2017.

emblematic of “appeasement of uninformed criticisms of ISDS, rather than sound judgment”.²³

By failing to move beyond this binary of *ad hoc* tribunals versus permanent courts staffed at the behest of the state parties, there are considerable doubts as to whether the EU’s removal of disputing party autonomy will be viewed positively by sophisticated investors contemplating FDI. The ITS might not, upon closer inspection, pass muster with regard to fairly balancing investors’ interests against that of the host states within which they invest sizable funds. It is not inconceivable that FDI will decline if investors are made aware that they will no longer have input over the selection of the decision-makers of their disputes under these treaties. This is not to say that the EU-led reforms are not innovative in several respects, and could in fact flourish as an alternative to ISDS for certain states – time will tell. For instance, affording the treaty parties the right to appoint members might serve to promote geographical diversity, representativeness and inclusiveness,²⁴ if and when developing countries promote their own experts in public international law,²⁵ subject to the stringent qualification requirements imposed by these treaties.

These treaties are also the first of their kind to provide for extensive appellate review, as of right, of the tribunal’s final awards for errors of law and fact, as well as review on the grounds for annulment stipulated in Article 52 of the ICSID Convention.²⁶ While the modalities of this novel feature are outside the scope of this study,²⁷ it warrants mentioning the potential countervailing effect of this reform on the legitimacy concerns related to party-appointed arbitrators. The notable shift in treaty drafting practice towards greater precision and detailed guidance for tribunals with respect to procedural and substantive obligations in these treaties, coupled with the potential embarrassment of being overturned on appeal, may lead to a reduction in inconsistency and

23 Stephen Schwebel, “The EU-Canada Free Trade Agreement (CETA) – Keynote Remarks”, 13 *TDM* 1 (March 2016); Philippe Pinsolle, speech at Dutch Arbitration Day (reported in *GAR*, “Defending investment arbitration ‘a lost battle’”, 11 October 2016).

24 Catherine A. Rogers, “Apparent Dichotomies, Covert Similarities: A Response to Joost Pauwelyn”, 109 *AJIL Unbound* (2016), 294. See, in this Special Issue, Katia Fach Gómez, “Diversity and the Principle of Independence and Impartiality in the Future Multilateral Investment Court”.

25 Gabrielle Marceau et al., “Judging from Venus: A Response to Joost Pauwelyn”, 109 *AJIL Unbound* (2016), 288.

26 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), 18 March 1965, 575 *U.N.T.S.* 159.

27 See Elsa Sardinha, “The New EU-Led Approach to Investor-State Arbitration: The Investment Tribunal System in the Comprehensive Economic Trade Agreement (CETA) and the EU-Vietnam Free Trade Agreement”, 32(3) *ICSID Rev.* (2017), 625, 641–646.

incoherence issues in arbitral awards, without the need for a standing tribunal of first instance. Therefore, maintaining *ad hoc* arbitral tribunals (with certain safeguards put into place with respect to party-appointed arbitrators) and bolting on a multilateral appellate body could conceivably achieve the same goals as the two-tier ITS.

The ITS is the structural blueprint for the EU's current negotiations regarding the creation of a MIC. The United Nations Commission on International Trade Law (UNCITRAL) Working Group III has also examined ISDS reforms.²⁸ In addition to the EU-model, UNCITRAL is considering whether a permanent standing or *ad hoc* appeals facility could be grafted on top of the prevailing ISDS regime, with minor adjustments to address specific issues, *without* the need to abolish party-appointed arbitrators or replicate the multi-tier hierarchy featured in many developed national legal systems. Notwithstanding that some states have removed ISDS provisions entirely from their investment treaties,²⁹ while others are contemplating doing so or are simply not interested in opting into the MIC,³⁰ whether states opt for the EU court model will significantly affect how investment treaty practice and legal studies develop in the coming years.

However, as the EU moves forward with its ambition of establishing a MIC to replace its bilateral ITS arrangements, what leeway will developing states have to negotiate significant shifts in this model in treaties where the EU is a counterparty? This is particularly concerning when one considers the relative bargaining power wielded by the EU, by virtue of the sheer size of its economy in comparison to that of its trading partners. Equally concerning is how unlikely it is that the EU will retreat from its insistence on a two-tier ITS. It would be very difficult for the EU to substantially modify its model, in light of the three-fold negotiating responsibilities on its multilateral, bilateral, and institutional stages – namely, its need to satisfy its MIC initiative (which arose as

28 "Possible reform of investor-State dispute settlement (ISDS) Note by the Secretariat", UN General Assembly, UNCITRAL Working Group III, 34th session (Vienna, 27 November–1 December 2017), A/CN.9/WG.III/WP.142.

29 E.g., Ecuador recently withdrew from its remaining investment treaties; The Mercosur block signed a new Protocol for the Cooperation and the Facilitation of Investment within the Mercosur which *excludes* ISDS. Damien Charlotin and Luke Eric Peterson, "Analysis: in new Mercosur Investment Protocol, Brazil, Uruguay, Paraguay and Argentina radically pare back protections, and exclude investor-State arbitration" (4 May 2017), *IAReporter*; Daniel Uribe, "Ecuador withdraws from its remaining investment treaties" (24 May 2017).

30 In December 2016, Argentina, Brazil, India, Japan and other nations reportedly met and rejected the MIC initiative: Investment Treaty News, "[EU] and Canada co-host discussions on a [MIC]" (13 March 2017).

a result of public consultation), its Member States, and the EU Parliament – in order to gain sufficient support to ratify any investment treaty.³¹

3 The Risk or Perception of Partiality

This section explores the nature and scope of the so-called “moral hazard” associated with party-appointed arbitrators.³² The potential for arbitrator bias is alleged by critics to most often occur in favour of the party that appointed them.³³ These critics view the perception of this type of partiality as sufficient to undermine the legitimacy of ISDS,³⁴ due in part to the important public interest element at play in most investor-state disputes.

The practical realities of arbitrator selection by disputing parties depicts a more balanced state of affairs. Arbitrators have to carve out a place and make their name in a competitive market, “which involves developing expertise and building a specific client base.”³⁵ The international law firms that dominate ISDS disputes tend to put forward candidates with good “track records”, which helps explain why several reputable arbitrators receive repeat appointments. Experienced counsel invest considerable time and resources into scrutinizing “the backgrounds of arbitrators, their relationship with the parties, published works and prior appointments before nominating them for arbitral

31 N. Jansen Calamita, “Bilateral and Multilateral Policy Challenges of the EU’s Investment Treaty Courts”, presented at CIL’s Lunchtime Series (Singapore), 4 June 2018.

32 Jan Paulsson, “Moral Hazard in International Dispute Resolution”, 25 *ICSID Rev* (2010), 339.

33 See, e.g., van den Berg, *supra* note 16; Joost Pauwelyn, “The Rule of Law Without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators from Venus”, 109 *AJIL* (2015), 761; Philippe Sands, “Developments in Geopolitics: The End(s) of Judicialization?”, 2015 *ESIL Conference Closing Speech*, 12 September 2015 (reprinted in *EJIL Talk!*); Chiara Giorgetti, “Who Decides Who in International Investment Arbitration”, 35(2) *U. Penn. J. Int’l Law* (2014), 431; Puig, *supra* note 12; Catherine Rogers, “Gamblers, Loan Sharks and Third-Party Funders”, in *ibid.* (ed.), *Ethics in International Arbitration* (Oxford: OUP, 2014); Pia Eberhardt and Cecilia Olivet, “Profiting from Injustice: How Law Firms, Arbitrators, and Financiers are Fueling an Investment Arbitration Boom” (November 2012), *Corporate Europe Observatory*; Malcolm Langford et al., “The Ethics and Empirics of Double Hatting” (24 July 2017), *ESIL Reflections*, 2.

34 See, e.g., Gus van Harten, “Perceived Bias in Investment Treaty Arbitration”, in Michael Waibel et al. (eds.), *The Backlash against Investment Arbitration*, 433–453.

35 Yves Dezalay and Bryant Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (UCP, 1996), 21–25; Crawford, *supra* note 7, 1012.

appointments”.³⁶ As a result of this background check, parties sometimes select arbitrators that evince “some inclination or predisposition to favour that party’s side of the case, such as by sharing the appointing party’s legal or cultural background or by holding doctrinal views that, fortuitously, coincide with a party’s case.”³⁷ Counsel naturally tend to recommend to their clients arbitrators that are knowledgeable in the field of law at issue, exhibit certain legal philosophies, and have rendered past decisions in line with the outcome their clients want to achieve. Some might say that this tactic of finding a reliable arbitrator is unseemly, and that the ITS removes the strategic advantage of a party appointing an arbitrator with a particular world view. However, while the ultimate goal is to find “someone with the maximum predisposition towards my client, but with the minimum appearance of bias”,³⁸ it is not easy to infer judicial attitudes from published arbitral decisions, let alone discern which arbitrator holds what view, because awards are often a melding of three individuals’ legal perspectives. While some commentators have connected this strategic vetting to arbitration outcomes,³⁹ other empirical studies have failed to reveal any verifiable correlation and causation between an arbitrator’s background and arbitral outcome.⁴⁰ Interestingly, will the state treaty parties to CETA, the EU-Vietnam FTA, and EU-Singapore FTA not employ these methods to name their allocated portion of Members to the ITS?

It seems that the real hazard is the *risk* or perception of bias on the part of party-appointed arbitrators. As noted by James Crawford in a recent article:

This outpouring of concern over the arbitrator has not been, for the most part, triggered by the performance of arbitrators in any given case. It is not a consequence of malfeasance. Rather it has been a reaction to a

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- 36 Michael Waibel, “Arbitrator Selection: Towards Greater State Control” in Andreas Kulick, *Reassertion of Control over the Investment Treaty Regime* (CUP, 2016), 344.
- 37 Doak Bishop and Lucy Reed, “Practical Guidelines for Interviewing, Selecting, and Challenging Party-Appointed Arbitrators in Commercial Arbitration”, 14 *Arb. Intl* (1998), 4; Elsa Sardinha, “The Impetus for the Creation of an Appellate Mechanism”, 32(3) *ICSID Rev.* (2017), 17.
- 38 Martin Hunter, “Ethics of the International Arbitrator”, 53 *Arb. Intl* (1987), 219, 223.
- 39 Gus van Harten, “Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Arbitration”, 50 *Osgoode Hall Law J.* (2012), 211: alleges arbitrators favour claimant investors from developed countries.
- 40 Susan Franck, “Development and Outcomes of Investment Treaty Arbitration”, 50 *Harvard Int’l Law J.* (2009), 435; Daphne Kapeliuk, “Collegial Games Analyzing the Effect of Panel Composition on Outcome in Investment Arbitration”, 31 *Rev. of Lit.* (2012), 267; Gus van Harten, “The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators”, 96 *Cornell Law Rev.* (2010), 47. See, in this Special Issue, Rodrigo Polanco Lazo and Valentino Desilvestro, “Does an Arbitrator’s Background Influence the Outcome of an Investor-State Arbitration?”.

perceived lack of accountability associated with an exaggerated image of the arbitrator's decisional power.⁴¹

It is therefore important to question whether the EU model is also attempting to remedy the more subtle, and not entirely inappropriate, risk that the parties will appoint arbitrators that see disputes through their eyes, with nothing further rising to the level of actual bias. Do arbitrators' world views really call into question the ethics of the current approach to ISDS? Is it unethical for an arbitrator to want to ensure that the arguments of the party that appointed them are properly understood by the tribunal? How often do clear-cut cases of bias manifest themselves – e.g. arbitrators acting as advocates for that party's cause, particularly in attempting to influence the presiding arbitrator, and/or sharing confidential information with the party that nominated them, about deliberations or the final award? Is it often enough to deprive the disputing parties – in the case of the ITS, the claimant investor – its right to appoint an arbitrator and feel invested in the process?

Proven or known instances of actual bias have been rare to date. They do happen, of course – the *Loewen*-type situation where an arbitrator admitted that inappropriate pressure was placed on him by his government's authorities,⁴² or the Slovenian arbitrator Jernej Sekolec caught on tape disclosing the tribunal's deliberations to a party representative, albeit after the proceedings had closed.⁴³ However, such instances appear to represent but a small proportion of the many arbitrators who do abide by the ethical standards incumbent upon them in the many investment treaty arbitrations (and hundreds of commercial arbitrations) ongoing at any given time. These two examples also share the feature in common that they stem from highly politically charged state-to-state arbitrations, rather than investor-state disputes.

It seems much harder to come by such indisputable evidence of actual bias, albeit possibly because of the inherent subtleties of the allegations that must be proved to support a finding of partiality. What is more, there are tools in existence to manage these issues, such as declarations of independence

41 Crawford, *supra* note 7.

42 Judge Abner Mikva, who served as the United States' appointee in *The Loewen Group Inc. and Ray Loewen v. United States* (NAFTA/ICSID Case No. ARB(AF)/9) arbitration, recounted that the U.S. Justice Department applied pressure on him to decide in its favour. David Schneiderman, "Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes", 30 *Nw.J. Int'l L. & Bus.* (2010), 383.

43 The story first broke in the Croatian newspaper *Večernji list*, which published the audio recordings of the conversations between Sekolec and the Slovenian state agent. Arman Sarvarian and Rudy Baker, "Arbitration between Croatia and Slovenia: Leaks, Wiretaps, Scandal" (28 July 2015), *EJIL Talk!*.

and continuing duties of impartiality, challenges to arbitrators, and so forth, without the need to disregard disputing party involvement in the selection process altogether. Under the current regime, perceived and actual biases can be revealed at the disclosure phase. Further guidance, and instructions to arbitrators in this regard, are also found in many national arbitration acts, institutional arbitral rules, soft law guidelines such as the International Bar Association (IBA) rules and, most recently, strongly worded and detailed provisions on ethics and conflict of interest rules in the CETA and EU-Vietnam FTA, and a three-page Annex in the EU-Singapore FTA. Increased transparency concerning some arbitrators' reputations and their competence, ideological proclivities on certain issues, and past cases can now be found on databases such as the Global Arbitration Review's *Arbitrator Research Tool* (ART) and Professor Catherine Rogers' *Arbitrator Intelligence*. As a self-regulating network, arbitrators also have a self-interest in carrying out their duties in accordance with the ethical guidelines incumbent on them, and those who do not are often marginalized by their colleagues. Furthermore, what is to say that state-appointed arbitrators are any less likely to exert bias, perhaps in favour of the state treaty party that appointed them.

4 Potential Challenges to the Abolishment of Party-Appointed Arbitrators

4.1 *State Party Autonomy*

In the last decade, several prominent arbitrators in ISDS have spoken out against the party-appointment practice, while several others have defended the integrity of what they view as an essential exercise of party-autonomy in the arbitration process. Proponents of preserving the prevailing ISDS system insist that the “timeless right of the parties to choose the arbitrators” is essential to the perceived legitimacy of ISDS.⁴⁴ In line with this view, one commentator notes that to “promote confidence in the international arbitral process, party input into the selection of arbitrators has long been common practice”.⁴⁵ Parties are keen to appoint at least one arbitrator, and often party-appointed arbitrators consult with the parties in a transparent fashion to appoint the presiding arbitrator. This approach provides the parties with a sense of ownership

44 Charles Brower and Charles Rosenberg, “The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded”, 29(1) *Arb. Intl* (2013), 9, 8.

45 William Park, “Arbitrator Integrity: The Transient and the Permanent”, 46 *San Diego L. Rev.* (2009), 629, 644.

in the process and arguably bolsters their willingness to enforce awards that are unfavourable to them, since they cannot complain about being excluded from the appointment process. In contrast, another commentator asserts that “there is no such right” for a party to name an arbitrator, and that even if such a right existed, “it would certainly not be fundamental”.⁴⁶

Permanent courts are not immune to spawning their own judicial independence issues. The election and appointment processes of the International Court of Justice (ICJ), the World Trade Organization (WTO), and the International Criminal Court have all been the subject of criticism by various interlocutors, as have national judiciaries. Legitimacy critiques of ISDs are sometimes premised on a faulty syllogism – some arbitrators leak the award, therefore all are bad; or, all dissenting opinions are the result of bias on the part of the dissenting party-appointed arbitrator, as opposed to the *bona fide* merits of the case and that arbitrator’s world view on certain legal issues and interpretation of the facts. The ITS in CETA, the EU-Vietnam FTA, and EU-Singapore FTA is not, and perhaps cannot be, structured in a way to resolutely avoid such trappings.

4.2 *Potential Term Renewal Incentives*

Under CETA, 15 Members shall be appointed to its tribunal, each sitting for a five-year term, renewable once.⁴⁷ The EU-Vietnam FTA calls for the appointment of only nine Members to the Tribunal, who shall be appointed for a four-year term, renewable once, while the EU-Singapore FTA states that the six Members of the Tribunal will be appointed for an eight-year term, with renewal subject to the discretion of the Joint Committee.⁴⁸ Presumably, in order to facilitate the retention of institutional knowledge and experience with the workings of the ITS, under all three treaties, the terms of half of its Members shall be extended for four to six years.⁴⁹ This potential for renewal could create a perceived incentive for Members to render pro-state awards, or awards in favour of the appointing state treaty party (be they a claimant investor of that nationality or the respondent state), at the first-instance level or to adjust awards under appellate review in accordance with their regulatory agenda.

For arbitrations under the EU-Vietnam FTA, it does not appear likely that the prospect of renewal will affect the frequency with which arbitral members

46 Paulsson, *supra* note 32.

47 CETA, Art. 8.27(5).

48 EU-Vietnam FTA, Art. 12(5); EU-Singapore FTA Investment Protection Agreement, Ch. 3 *Dispute Settlement*, Art. 3.9(5).

49 CETA, Art. 27(5) – 6 years; EU-Vietnam FTA, Art. 12(5) – 6 years; EU-Vietnam FTA Investment Protection Agreement, Ch. 3, Art. 3.9(5) – 4 years. See also Sardinha, *supra* note 27, 633–634.

issue dissenting opinions, since these will remain anonymous (although this provision could change before the treaty is finalized).⁵⁰ CETA and the EU-Singapore FTA, on the other hand, remain silent on this point. Dissents can provide a window through which to view the tribunal's deliberations and individual arbitrators' analytical and interpretative proclivities in a particular case. In general, and particularly in cases where there is no dissent or an anonymous dissent, there might not be any way of knowing for sure what compromises were brokered behind closed doors, which arbitrators hold which world view on international law, or what professional and social connections between the arbitrators might have prevailed on certain issues.⁵¹

4.3 *The Obligation to Remain Available*

The express duty of arbitrators to remain available, articulated in CETA, the EU-Vietnam FTA, and EU-Singapore FTA, is potentially the most problematic change. It might be that a MIC will be busier right from its inception, for otherwise, the ITS will be hard-pressed to entice arbitrators who meet the stringent qualification requirements, discussed below. Even if such arbitrators could be persuaded, they almost all have full schedules already set out for the next three to five years, so they would be hard-pressed to assume the obligation to reserve time to hear CETA cases on an on-call basis. Academics and retired national court judges can, and probably happily would, take on this role. However, is it problematic to only cultivate conditions amenable to academics and former judges? International investment law is a complex field, and practical, hands-on experience assisting arbitrators, arguing, and arbitrating such cases is valuable.

4.4 *Stringent Qualifications for Arbitral Members, But What About Industry Specific Expertise?*

ITS tribunal and appeal tribunal Members under CETA, the EU-Vietnam FTA, and EU-Singapore FTA must “possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognized competence”.⁵² In contrast to less specific competency requirements under ICSID,⁵³ for instance, tribunal and appeal tribunal members must have

50 EU-Vietnam FTA, Art. 12(12).

51 See, in this Special Issue, Catharine Titi, “Investment Arbitration and the Controverted Right of the Arbitrator to Issue a Separate or Dissenting Opinion”.

52 CETA, Art. 8.27(4); EU-Vietnam FTA, Art. 12(4); EU-Singapore FTA Investment Protection Agreement, Ch. 3, Arts. 3.9(4), 3.10(4).

53 ICSID Convention, Art. 14(1). They must possess high moral character, recognized competence in the fields of law, commerce, industry or finance, and reliability to exercise

“demonstrated expertise in public international law”.⁵⁴ The somewhat novel focus in these treaties on international law expertise appears to be a conscious policy decision on the part of the state parties. The litmus test of the credibility of the ITS will, to a certain extent, be the identities and quality of the Members of the Tribunal. These competence requirements might preclude the selection of some experienced commercial arbitrators and/or retired national judges who, while available to serve, are likely unlikely to have public international law experience. Such a result might not necessarily be such a bad thing. However, there remains a risk under these new schemes that, ironically, individuals who are unlikely to have the aforementioned expertise will be enlisted in the role of permanent adjudicators.

This debate raises a fundamental question, which is: “what are the characteristics of the perfect arbitrator?”⁵⁵ Is it a “false premise that there is an ideal arbitrator for all situations – a sort of ‘perfect arbitral being’”?⁵⁶ Of particular concern is the ability of a standing court comprised of a small roster of 15 (CETA), nine (EU-Vietnam), or six (EU-Singapore) Members,⁵⁷ who are randomly appointed to panels of three in each case, to effectively adjudicate disputes requiring industry-specific expertise. The case-allocation mechanism is similar to that found in some domestic judicial systems: the three Members of the Tribunal are to be appointed by the President of the Tribunal on a yet-to-be specified “random” rotational basis,⁵⁸ thereby ensuring that the specific composition of the tribunal in each case is unpredictable. This aspect of the ITS’ operation might result in members who are not specialized in the specific subject matter at stake in a particular dispute being assigned to that tribunal. In such circumstances, the standing roster of members, selected solely by the treaty parties, might generate new criticisms about the ISDS regime, and arguably tilts the balance too far in favour of states.

independent judgment. These qualities must also be met by candidates appointed from outside the Panel. Competence in public international law is not specifically required.

54 CETA, Arts. 8.27(4), 28(4); EU-Vietnam FTA, Arts. 12(4), 13(7). This wording is not included in the EU-Singapore FTA Investment Protection Agreement.

55 Donald McCrae, “Introduction to Symposium on Joost Pauwelyn, ‘The Rule of Law Without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators Are from Venus’”, 109 *AJIL Unbound* (2016), 277, 279.

56 Crawford, *supra* note 7, 1004.

57 CETA, Art. 8.27(5); EU-Vietnam FTA, Art. 12(5); EU-Singapore FTA Investment Protection Agreement, Ch. 3, Art. 3.9(2).

58 CETA, Art. 8.27(7); EU-Vietnam FTA, Art. 13(8); EU-Singapore FTA Investment Protection Agreement, Ch. 3, Art. 3.9(8).

4.5 *Prohibition on Double-Hatting as a Bar to Younger and Diverse Arbitral Appointees*

In response to the suggestion, in some circles, that it is unethical to serve as both arbitrator and counsel simultaneously, even in unrelated arbitrations, CETA, the EU-Vietnam FTA, and EU-Singapore FTA introduce a prohibition on double-hatting.⁵⁹ Members of the tribunal, and presumably the appeal tribunal, are barred from acting as counsel or party-appointed experts during their terms, but are allowed to serve as arbitrators in other cases, provided they remain available to hear cases under these treaties.

Is this prohibition necessary, given the strict ethical guidelines governing arbitrators? The double-hatting prohibition could further perpetuate the so-called “pale, stale and male” profile emblematic of investment arbitrators. Younger, but still experienced, men and women, as well as older practitioners from less developed countries and legal jurisdictions, might not be so inclined to give up their legal practises to hedge their bets on starting on the ITS part-time. Barred from acting as counsel, this sector of potential arbitrators might not be able to supplement their income with other arbitral appointments, as such privileged *ad hoc* contracts lie outside their control and are in the hands of disputing parties and arbitral institutions. Moreover, looking ahead to the EU’s ongoing negotiation towards the establishment of a MIC, query how many arbitral members will it have in order to be considered truly representative of its potentially wide membership? Will it attempt to maintain a rotating, albeit imperfect, geographical distribution in the nationality of its judges, as is the case for the ICJ?

For instance, under the MIC, if there are 50 arbitral members, and if members of the nationalities of the disputing parties are assigned to the three-member tribunal, what assurance is there that these adjudicators will not decide the case along “party-lines”, as pointed out by those who criticize dissenting party-appointed arbitrators and judges *ad hoc* at the ICJ?

5 **An Increased Role for Arbitral Institutions and Appointing Authorities in Mediating the Link between Disputing Parties and Nominee Arbitrator**

This section moves beyond the ITS and explores other possible avenues for assuaging the risk of bias with respect to party-appointed arbitrators. The

59 CETA, Arts. 8.30(1), 8.27(5); EU-Vietnam FTA, Arts. 14(1), 12(5); EU-Singapore FTA Investment Protection Agreement, Ch. 3, Art. 3.11(1).

discussion presumes the continuation of the current system of *ad hoc* arbitral tribunals and focuses on reform, rather than abandonment of the ISDS system. That is not to say that similar results could not, or are not, regularly achieved under the current practice, “as is” (e.g. where the parties’ counsel and/or the party-appointed arbitrators themselves maintain an acceptable distance from the appointing party throughout any initial interview phase, and after the tribunal has been constituted).

One direct and powerful way of severing the direct link between the disputing parties and the nominee arbitrator of administered arbitrations is to engage the arbitral institution or appointing authority as a mediator in the pre-appointment phase. Broadening the scope of participation by the institution/appointing authority, which has a more neutral position to the particular dispute (albeit such institutions are managed by individual court or board members, and legal counsel in the casework Secretariat), can perhaps serve as a correcting mechanism to bias or a sense of obligation on the part of arbitrators towards the party that appointed them. The centrality of a detached institution or authority in overseeing the appointment process might also help reduce the broader systemic perception or outward appearance of bias from the vantage point of the opposing party, of the co-arbitrators, and, particularly in highly contested investor-state disputes, of the public.⁶⁰ Although appointing authorities at the major arbitral institutions which administer ISDS cases differ in nature⁶¹ – some are public officials selected by governments, while others are generally lawyers with a private practice background – they are assisted by highly trained legal counsel who specialize in arbitration, and are all capable of engaging the disputing parties in an active consultative process, such as by way of a list procedure or through an exchange of names, in several back-and-forth rounds, if necessary. The participation of institutions/

60 However, arbitral institutions are competitive with one another, and it is important to acknowledge the minor, but extant, “perceived incentives” that are seen to exist in an arbitration market “characterised by reciprocal relationships among a small group of institutions and lawyers/arbitrators”, whereby “institutions select ... arbitrators who are often private sector lawyers”, who in turn “have an influential role in the selection of arbitral institutions for ISDS cases.” See OECD Consultation Paper, *supra* note 12, 15–16.

61 At ICSID and Permanent Court of Arbitration (PCA), the appointing authorities are the World Bank president and the PCA Secretary General, respectively, both of whom are effectively appointed by government officials. In contrast, the appointing authorities at Singapore International Arbitration Centre (SIAC), Hong Kong International Arbitration Centre (HKIAC), International Chamber of Commerce (ICC) International Court of Arbitration, and Stockholm Chamber of Commerce (SCC) tend to be board or “court” members of different nationalities, selected from private practice. See OECD Consultation Paper, *supra* note 12, 13–14.

appointing authorities in the appointment process, in consultation with the disputing parties, could help alleviate some of the legitimacy concerns which pervade this aspect of the ISDS. This method could prove to be particularly effective in curbing any unconscious bias on the part of arbitrators towards their appointing party, without resorting to the abolishment of the practice of party-appointed arbitrators altogether, or relegating all appointments to the exclusive remit of the state treaty parties or to arbitral institutions, without disputing party input. These methods have the potential to satisfy the disputing parties' desire to have someone of their choice adjudicate their dispute, which might, in turn, assist with enforcement efforts. Giving deference to party-autonomy in this way might help instil within the parties a sense of ownership in the ISDS process through which their final awards are rendered.

6 Conclusion

The ITS signals a fundamental shift away from the prevailing procedure provided for by many arbitral rules, whereby an *ad hoc* tribunal, consisting of party-appointed arbitrators and a third presiding arbitrator, is established to hear a particular case. Given the prohibition against Members of the ITS' tribunal and appellate tribunal acting as counsel and/or experts in other cases, and the obligation to ensure that they are available, it may be that at least some Members will be retired national court judges, academics, or slightly less experienced arbitrators, rather than those who are in high demand due to their experience and good reputation in the investment treaty area. This is because the terms of appointment to the CETA, EU-Vietnam FTA, and EU-Singapore FTA tribunals might not be sufficiently attractive to those with active arbitration practices. Considering the high qualifications and degree of expertise required of Members, it also remains to be seen whether the salaries subsequently paid will be sufficient to attract high calibre candidates who might find their portfolio of work reduced, and significantly so, due to the commitments they assume as Members, particularly the prohibition on counsel work. While there might be initial interest amongst potential candidates for the post, it is not inconceivable that the desirability of that role (at least from those most suited for the job) could diminish once the Tribunal has a full-time case load – although this might be an area on which the MIC could improve upon, by moving to a full-time case load much more quickly.