ISDS Reform Conference: Mapping the Way Forward
Discussion Paper for the Session on
Appointment of Arbitrators and Related Issues

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PURPOSE

1. This paper is to facilitate the discussion in the session on "appointment of arbitrators and related issues" at the ISDS Reform Conference, which will cover the topics of (a) examining the pros and cons of various methodologies in the appointment of arbitrators; (b) exploring how the ISDS reform should tackle the issues of "double hatting", issue conflicts and improving the arbitrator challenge procedures; and (c) examining the desirability (or undesirability) of replacing *ad hoc* arbitrators with full-time judges.

BACKGROUND

2. In July 2017, the United Nations Commission on International Trade Law ("**UNCITRAL**") entrusted the Working Group III (the "**Working Group**") with a broad mandate to work on the possible reform of investor-State dispute settlement ("**ISDS Reform**"). The mandate given to the Working Group include:

> "The Working Group would proceed to: (i) first, identify and consider concerns regarding ISDS; (ii) second, consider whether reform was desirable in light of any identified concerns; and (iii) third, if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission."[2]

3. At the 34th and 35th sessions of the Working Group, various topics of the current ISDS system were identified for further discussion at the following session. In the "Note by the Secretariat" on "Possible reform of investor-State dispute settlement (ISDS)", it was stated:

> "Concerns commonly expressed about the existing ISDS regime include (i) inconsistency in arbitral decisions, (ii) limited mechanisms to ensure the correctness of arbitral decisions, (iii) lack of predictability, (iv) appointment of arbitrators by parties ("party-appointment"), (v) the impact of party-appointment on the impartiality and independence of arbitrators, (vi) lack of transparency, and (vii) increasing duration and costs of the procedure. These concerns … have been said to undermine the legitimacy of the ISDS regime and its democratic accountability …. These concerns fall within two broad categories:

[2] Official Records of the General Assembly, Seventy-second Session, Supplement No. 17 (A/72/17) §§263-265

those concerning the arbitral process and outcomes … and those relating to arbitrators/decision-makers ….”[3]

4. The deliberations at the aforesaid two sessions were followed up at the 36th session of the Working Group. As to the concerns pertaining to arbitrators and decision-makers, the following specific concerns were identified at the 36th session: (a) the standards of independence and impartiality required of individual arbitrators, and the observation that those standards might be insufficiently clear in scope and homogeneous in practical application; (b) the existence of issue conflicts and double hatting; (c) the challenge mechanism and its limitations; (d) the limitations of the party-appointment mechanism as regards ensuring competence and qualifications of arbitrators; (e) impact of party remuneration, dissenting opinions and repeat appointments of certain arbitrators on the perception of bias; (f) limited number of individuals repeatedly appointed as arbitrators; and (g) lack of diversity in terms of gender, age, ethnicity and geographical distribution of appointed arbitrators.[4]

5. This discussion paper is not intended to cover all concerns identified above. Instead, it selects some of them and organise the disucssion under the following topics: (a) “The Arbitrator Appointment System”, (b) “Concerns about *ad hoc* Arbitrators”, and (c) “Replacing a*d hoc* arbitrators with full-time judges?”

CONCERN 1: The Arbitrator Appointment System

A. Party-appointment system

6. In ISDS cases, parties play a major role in appointing the arbitrators. Typically, for a 3-member arbitral tribunal, each party appoints one arbitrator initially. Then the presiding arbitrator will be agreed by the disputing parties directly, or selected by the party-appointed arbitrators.

7. From the parties’ own perspective, the party-appointment system allows parties to select their own preferred arbitrators according to their own criteria. Whilst the parties may have by agreement identified the qualities that an arbitrator should meet; parties, however, may attach different

[3] A/CN.9/WG.III/WP.142, §20. See also *Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session”*, A/CN.9/935, Chapter IV; and *Possible reform of investor-State dispute settlement (ISDS) (draft) – Note by the Secretariat* (A/CN.9/WG.III/WP.149), §8

[4] *Possible reform of investor-State dispute settlement (ISDS) (draft) – Note by the Secretariat* (A/CN.9/WG.III/WP.149), §§11-13

weight to different criteria, and come up with their own preferred choices. The parties' right to appoint their own preferred arbitrators is regarded as a fundamental right in the ISDS arbitral process enshrining the party's autonomy principle.

8. It is argued that parties generally have a high level of trust and confidence in the arbitrators they appoint and hence tend to be more willing to accept the arbitral awards delivered by the tribunals.[5]

9. The use of the party-appointment system in the context of ISDS, however, is not free from attack.

10. Firstly, it is said that ISDS cases require expertise in matters of both public and private international law and hence an arbitrator in ISDS cases should include the ability to take into account relevant issues of public interest or public policy, which are usually at stake in ISDS cases. However, it cannot be ensured that parties, in appointing the arbitrators of their own choices, will take that into account. This is exacerbated by the lack of transparency in the appointment process as parties are not obliged to disclose their appointment strategies to the other party. This reinforces the concern (or perception) that a party may appoint its preferred arbitrator without paying due regard to his/her ability to take into account public interest concerns.

11. Secondly, it is argued that there is an inherent flaw in the party-appointment system which cast doubts (whether as a matter of perception or otherwise) on the independence or impartiality of the appointed arbitrators. For example, *ex parte* interviews[6] are likely to be conducted prior to appointment and a party-appointed arbitrator may be perceived to be more readily to side with the party appointing him.

12. The perceived bias on the part of the party-appointed arbitrators is reinforced by the situations of (a) dissenting opinions in ISDS cases and (b) repeated appointments.

a. Dissenting Opinions

13. With respect to dissenting opinions, an empirical study has been done on 150 publicly reported ISDS decisions. Amongst the decisions studied,

[5] Alison Ross, *Paulsson and van den Berg presume wrong, says Brower*, GLOBAL ARB. REV., 6 Feb. 2012
[6] Pre-appointment interviews, under the current system, are limited to availability and conflict and cannot address the merits of the case. E.g. see *Practice Notes for Respondents in ICSID Arbitration 2015*. p.18

there were 34 cases (22%) in which party-appointed arbitrators issued dissenting opinions. It is also worth noting that nearly all of those 34 dissenting opinions were issued by the arbitrators appointed by the parties that lost the case in whole or in part.[7] The statistical information, some argue, gives rise to the concern about the independence and impartiality of party-appointed arbitrators.

14. Another front of attack against the party-appointment system is that arbitrators in ISDS cases are often characterised as favouring States or investors ("pro-State / pro-investor" arbitrators) based on their previous appointments. Statistical information suggests that some arbitrators are consistently appointed by claimant-investors (as frequent as 50 times) and some by respondent-States (as frequent as 82 times).[8]

15. On the one hand, the perception of bias on the part of the party-appointed arbitrators undermines the public confidence in the ISDS regime. It is also said that party-appointment system leads to polarisation in tribunals, where the ultimate responsibility for deciding the case rested with the presiding arbitrator.

16. On the other hand, it is argued that the alleged bias of party-appointed arbitrators is merely a perception rather than reality. Firstly, arbitrators are not randomly-selected and one must not assume that parties would select unsuitable candidates to take on appointments. Secondly, the fact that dissenting opinions are given is not itself indicative of bias. On this, there does not appear to be consensus on what the "correct" level of dissenting opinion should be, and whether the existence or level of dissenting opinions can indicate bias. In fact, some argues that dissenting opinions are a significant feature of international dispute settlment and play a critical role in fostering the letigimacy of international arbitration.[9] Thirdly, statistics indicate that issuing a dissenting opinion reduces the chances of reappointment as a presiding arbitrator.[10] Fourthly, the majority of ISDS cases are decided unanimously, indicating that in majority of cases, either the investor-appointed arbitrator is agreeing to

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[7] Albert Jan van den Berg, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, in Mahnoush Arsanjani et al. (eds.), *Looking to the Future: Essays on International Law in Honor of W Michael Reisman*, 821-843

[8] Source: Langford, Behn & Lie, *The Revolving Door in International Investment Arbitration*, Journal of International Economic Law (2017) Vol. 20 Issue 2, 301 (Table 1)

[9] 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* (2013) 29 Arb Int'l 7, 7-44. For those who are interested in reading Professor van den Berg's response, see *Charles Brower's Problem with 100% - Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration* in D Caron, S Schill, *et la*, *Practising Virtue: Inside International Arbitration* (OUP 2015), Chapter 30.

[10] Anton Strezhnev, *You Only Dissent Once: Re-Appointment and Legal Practices in Investment Arbitration*

reject the investor's claims or the State-appointed arbitrator is agreeing to find against the State.[11] On this, it is noted that the more recent studies suggested that the dissent rate is only in the range of 14.4% - 17% for ISDS cases.[12]

b. Repeated appointments

17. The issue of repeated appointments are in two aspects: (1) repeated appointments generally which gives rise to problems like lack of diversity in appointments; and (2) repeated appointments by the same law firm or party.

i. Repeated appointments generally

18. There has been a concern that in the ISDS context there is a lack of diversity in arbitrators appointments and as a result majority of arbitrator appointment goes to a small group of individuals.

19. Statistics speak for themselves: of the 372 individuals appointed to ICSID tribunals from 1972 until 2011, 37 were appointed to around 50% of the cases, and approximately one third had background education from only 5 universities,[13] and the top five arbitrators took up more than 11% of all arbitral appointments.[14]

20. Repeated appointments of a small group of arbitrators has contributed to the concern of the lack of diversity in the pool of arbitrators and indirectly creats an invisible barrier deterring young practitioners transitioning themselves from advocates to arbitrators. Repeated appointments also reinforce the perception that arbitrators in ISDS context are either "pro-investor" or "pro-State", which undermines the integrity and legitimacy of the ISDS system. See §14 above.

21. Despite foregoing, it has to be stressed that there is no empirical evidence on how repeated appointments, if at all, affect the arbitrators' independence and impartiality.

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[11] *Possible reform of investor-State dispute settlement (ISDS) - Ensuring independence and impartiality on the part of arbitrators and decision makers in ISDS (advance copy),* (A/CN.9/WG.III/WP.151) §42

[12] Charles Brower, *Trajectory of the Investor-State Dispute Settlement*, (2017) 49 Loy. U Chi. L.J. 271, 309-310

[13] *Possible reform of investor-State dispute settlement (ISDS) – Arbitrators and decisions makers: appointment mechanisms and related issues*, (A/CN.9/WG.III/WP.152) §26

[14] Information extracted from Langford, Behn & Lie, *The Revolving Door in International Investment Arbitration* (Table 1) (Footnote 8 *(supra)*)

22. Repeated appointments of a small group of arbitrators have also raised problems of availability and increased costs by lengthening proceedings, which is beyond the scope of this discussion paper.

ii. Repeated appointments by the same law firm or party

23. Repeated appointments by the same law firm or party as arbitrators are an "Orange List" matter that ought to be disclosed by the arbitrator(s) concerned under the IBA Guidelines on Conflict of Interest in International Arbitration (the "**IBA Guidelines**"):

> "3.1.3 The arbitrator has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties, or an affiliate of one of the parties.
>
> 3.1.5 The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties, or an affiliate of one of the parties.
>
> 3.3.8 The arbitrator has, within the past three years, been appointed on more than three occasions by the same counsel, or the same law firm."

24. Repeated appointments by the same law firm or party *per se*, however, do not without more lead to the conclusion of existence of justifiable doubts on the arbitrator's impartiality or independence. The IBA Guidelines provide:

> "Disclosure does not imply the existence of a conflict of interest; nor should it by itself result either in a disqualification of the arbitrator, or in a presumption regarding disqualification. The purpose of the disclosure is to inform the parties of a situation that they may wish to explore further in order to determine whether objectively – that is, from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances – there are justifiable doubts as to the arbitrator's impartiality or independence. If the conclusion is that there are no justifiable doubts, the arbitrator can act."[15]

25. The above proposition is illustrated in the following cases. In *Tidewater Inc. & Ors v. The Bolivarian Republic of Venezuela*, the two unchallenged

[15] IBA Guidelines on Conflict of Interest in International Arbitration, Part II, §4

arbitrators considered that "[t]*he starting-point is that multiple appointments as arbitrators by the same party in unrelated cases are neutral, since in each case the arbitrator exercises the same independent arbitral function*" and that "[r]*epeated appointments may be as much the* result *of the arbitrator's independence and impartiality as an indication of justifiable doubts about it*".[16]

26. Similar conclusion was reached in *Universal Compression International Holdings SLU v. The Bolivarian Republic of Venezuela*,[17] in which a party-nominated arbitrator was challenged on grounds of mutiple appointments by the same law firm / party. The chairman dismissed the challenge and held:

> "In this case, no objective fact has been presented that would suggest that [the challenged arbitrator's] independence or impartiality would be manifestly impacted by the multiple appointments by Respondent. [The challenged arbitrator] has been appointed in more than twenty ICSID cases, evidencing that she is not dependent—economically or otherwise—upon Respondent for her appointments in these cases.
>
> Claimant also claims that [the challenged arbitrator] 'will not be learning of Venezuela's actions and its defenses afresh in the present case—because she has already been exposed to them' in the other three cases. Claimant's assertions, however, are speculative and do not identify what evidence or arguments, if any, may be presented in those other arbitrations that would in Claimant's view 'unjustifiably influence [the challenged arbitrator], negating her ability to judge the present case independently and impartially'. In conclusion, the Chairman finds that the appointment of [the challenged arbitrator] on three prior occasions by Venezuela does not indicate a manifest lack of the required qualities."[18]

27. Supporters of the aforesaid proposition argue that given the relatively narrow pool of arbitrators available in the ISDS system, any restrictions against repeated appointments by the same law firm or party would render the existing ISDS system unworkable. On this, the following observation is made in the IBA Guidelines:

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[16] *Tidewater Inc. & Ors v. The Bolivarian Republic of Venezuela (Decision on Claimant's Proposal to Disqualify Professor Brigitte Stern, Arbitrator)*, ICSID Case No. ARB/10/5, 23 December 2010, §§60-61

[17] *Universal Compression International Holdings SLU v. The Bolivarian Republic of Venezuela (Decision on the Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Santiago Tawil, Arbitrators*), ICSID Case No. ARB/10/9, 20 May 2011

[18] *Ibid,* §§77-79. Also see §§86-88.

> "It may be the practice in certain types of arbitration, such as maritime, sports or commodities arbitration, to draw arbitrators from a smaller or specialised pool of individuals. If in such fields it is the custom and practice for parties to frequently appoint the same arbitrator in different cases, no disclosure of this fact is required, where all parties in the arbitration should be familiar with such custom and practice."[19]

28. However, the arbitral tribunal in *OPIC Karimum Corporation v. The Bolivarian Republic of Venezuela*[20] took a different view:

> "It is suggested by the arbitrators in [*Tidewater*] that multiple appointments as arbitrator by the same party in unrelated cases are a neutral factor in considerations relevant to a challenge. We do not agree. In our opinion, multiple appointments of an arbitrator by a party or its counsel constitute a consideration that must be carefully considered in the context of a challenge. In an environment where parties have the capacity to choose arbitrators, damage to the confidence that investors and States have in the institution of investor-State dispute resolution may be adversely affected by a perception that multiple appointments of the same arbitrator by a party or its counsel arise from a relationship of familiarity and confidence inimical to the requirement of independence established by the Convention. The suggestion by the arbitrators in *Tidewater* that multiple appointments are likely to be explicable on the basis of a party's perception of the independence and competence of the oft appointed arbitrator is in our view unpersuasive. In a dispute resolution environment, a party's choice of arbitrator involves a forensic decision that is clearly related to a judgment by the appointing party and its counsel of its prospects of success in the dispute. In our view, multiple appointments of an arbitrator are an objective indication of the view of parties and their counsel that the outcome of the dispute is more likely to be successful with the multiple appointee as a member of the tribunal than would otherwise be the case."[21]

29. Another concern that may arise from repeated appointments by the same law firm or party is that where the arbitrator concerned is appointed on

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[19] The IBA Guidelines, footnote 5

[20] *OPIC Karimum Corporation v. The Bolivarian Republic of Venezuela (Decision on the Proposal to Disqualify Professor Philippe Sands),* ICSID Case No ARB/10/14, 5 May 2011

[21] *Ibid*, §47

multiple arbitrations having related issues, whether such repeated appointments would give rise to justifiable doubt on his/her impartiality or independence.

30. The chairman in the *Universal Compression International Holdings SLU* case did not consider repeated appointments in such context would give rise to any concern. He held:

> "The international investment arbitration framework would cease to be viable if an arbitrator was disqualified simply for having faced similar factual or legal issues in other arbitrations. As was stated in *Suez Sociedad General de Aguas de Barcelona S.A. et al., and InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic, Suez, Sociedad General de Aguas de Barcelona S.A.*, and *Vivendi Universal S.A. v. The Argentine Republic* … the fact that an arbitrator made a finding of fact or a legal determination in one case does not preclude that arbitrator from deciding the law and the facts impartially in another case. It is evident that neither [the challenged arbitrator] nor her co-arbitrators will be bound in this case by any factual or legal decision reached in any of the three other cases."

31. Similar observation was made in *Electrabel SA v. Republic of Hungary*,[22] in which the unchallenged arbitrators observed:

> "…Investment and even commercial arbitration would become unworkable if an arbitrator were automatically disqualified on the ground only that he or she was exposed to similar legal or factual issues in concurrent or consecutive arbitrations. For example, every ICSID arbitration relates to the same ICSID Convention, just as many treaty arbitrations relate to the same Vienna Convention. As for governmental decrees and contractual wording, it is commonplace for arbitrators to review the same legislation or standard form of contract , such as FIDIC, the NYPE form of time charterparty or the Bermuda excess insurance form. We do not consider that Article 57 can now be interpreted, after more than forty years, effectively to outlaw widespread practices so long accepted by users and practitioners generally, particularly when such practices have helped to establish a growing body of specialist and experienced international arbitrators, so long desired by

[22] *Electrabel S.A. v. Republic of Hungary (Decision on The Claimant's Proposal to Disqualify a Member of the Tribunal)*, ICSID Case No ARB/07/19, 25 February 2008

users."[23]

32. On the other hand, in the case of *Caratube International Oil Company LLP & Mr. Devincci Salah Hourani v Republic of Kazakhstan*,[24] the challenge on grounds of repeated appointments was successfully made. The unchallenged arbitrators therein, whilst considered that repeated appointments alone did not indicate a manifest lack of independence or impartiality on the part of the challenged arbitrator, considered that the facts of the multiple arbitrations were basically identical and concluded that a reasonable and informed third party would find it highly likely that the challenged arbitrator could not be completely objective and open-minded, but would be prejudiced.

33. It is also argued that the concern about arbitrators' independence and impartiality is linked to the economic significance of such repeated appointments to the arbitrators concerned: it has been reported that on average an arbitrator's compensation per ISDS case can be conservatively estimated as in excess of US$400,000[25] (less expenses). It, to some extent, reinforces the concern about an arbitrator's impartiality and independence arising from repeated appointments.

34. On the whole, there is concern, whether as a matter of fact or perception, about the quality, independence and impartiality of party-appointed arbitrators. It is generally agreed that the concern, even only as a perception, ought to be addressed to maintain the public confidence in the arbitral process and the whole ISDS regime.

B. Authority-appointment system

35. Most institutional rules foresee the intervention of an appointing authority to assist the parties in the appointment process.[26] It has been suggested that the direct appointing authority role in selecting arbitrators has increased in recent years in the increasingly polarised ISDS field.[27]

36. The main concern relates to appointments by appointing authorities is the

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[23] *Ibid,* §41

[24] *Caratube International Oil Company LLP & Mr. Devincci Salah Hourani v. Republic of Kazakhstan (Decision on the Proposal for Disqualification of Mr. Bruno Boesch)*, ICSID Case No ARB/13/13, 20 March 2014

[25] *Appointing Authorities and the Selection of Arbitrators in Investor-State Dispute Settlement: An Overview,* Consultation Paper, March 2018, David Gaukrodger, Investment Division, Directorate for Financial and Enterprise Affairs, Organization for Economic Cooperation and Development, Paris, France, §31

[26] E.g. Article 38 of the ICSID Convention, Articles 8-9 of the UNCITRAL Arbitration Rules

[27] Footnote 25 *(supra),* §17

lack of transparency in the appointment process. Transparency is required in two stages: (1) the shortlisting and selection process; and (2) disclosure of appointments. Some authorities, like ICSID, has regularly disclosed information like the names of arbitrators, their nationality, the method of their appointments, who made the appointments and the date of appointment.[28]

C. Abolition of the party-appointment system?

37. Given the lack of transparency on the parties' appointment of arbitrators and the inherent risk (or perception) of bias of party-appointed arbitrators, it has been suggested that the party-appointment system should be abolished and replaced by (a) joint appointment of all arbitrators by the disputing parties; (b) appointment of arbitrators by a neutral body, e.g. the administering institution; or (c) permanent judges (which is discussed separately below).

38. Putting aside cases in which the parties are able to come to mutual agreement on the choices of arbitrators without intervention of the appointing authority, currently there are two commonly used methods through which arbitrators are selected in the case of parties' failure to reach agreement on the appointment of the sole or presiding arbitrator: namely the "ballot" procedure and the "list" procedure.

39. Under the "ballot" procedure, the appointing authority proposes potential appointees to the parties, each of them then indicates (without sharing its selection to the other party) which, if any, of the candidates they would accept. The appointing authority will then appoint one of the mutually agreed candidate(s) (subject to clearance of conflict and disclosure requirements) as the arbitrator(s).

40. Under the "list" procedure, the appointing authority similarly proposes potential appointees to the parties, each of them can strike a certain number of proposed appointees and rank the remaining appointees. The appointee who gets the best ranking will be appointed.

41. Under both procedures, if appointment cannot be made under the said procedures, the appointing authority will appoint the arbitrator(s) to fill the place(s).

[28] The Permanent Court of Arbitration do not publish information related to the arbitrator's identity or qualification except with parties' consent.

42. It can readily be seen under the "ballot" and "list" procedures, the appointing authorities play the leading and significant role in (1) shortlisting the candidates for consideration by the parties; and (2) appointing the arbitrators as the last resort in cases where the parties have failed to appoint the arbitrators under the said procedures.

43. The significant role that the appointing authorities are to play highlights the importance of transparency in the appointing process by the appointing authorities. Appointing authorities are expected to be transparent in the shortlisting process (which limits the choices of parties to the candidates put forward by the appointing authorities) and the last-resort appointing process (which imposes the arbitrator(s) on the parties in absence of agreement).

44. In addition to the "list" and "ballot" procedures, views have been expressed that a pre-established "roster" should be agreed by the contracting States to the investment treaties (not by the parties to the dispute) in advance, and that arbitrators, if they cannot be agreed by the parties *to the dispute*, are to be appointed by the appointing authority from the roster.

45. The China-Australia Free Trade Agreement 2015 is one of very few BITs which provides for the roster system in detail. It provides that the a list of arbitrartors of not less than 20 individuals shall be established by the Committee on Investment (established by the Contracting States), from which the Secretary-General (being the appointing authority) is to appoint to fill any vacancies if such vacancies cannot be filled by agreement of the parties to the dispute.[29]

46. Supporters of this option argues that the roster system enhances transparency, expedites appointments and promotes greater quality and consistency of decisions. It is also argued that it is a halfway house between a fully-fledged investment court and the *ad hoc* arbitration system.

47. The party-appointment system is a facet enshrining the principle of party autonomy, which is the fundamental tenet of arbitration. The abolition of the party-appointment system, some argue, is a draconian and disproportionate response to the concerns raised about party-appointed arbitrators, in particular when there is a lack of empirical evidence to substantiate the perception that the public may have held against party-

[29] Article 9.15 of the China-Australia Free Trade Agreement (2015)

appointed arbitrators. For instance, the roster system goes as far as excluding the investors from the participation in appointing the presiding (or sole) arbitrator for they have no role to play in setting up the "roster" in the first place.

48. It is argued that on balance the party-appointment system works well in that the alleged polarisation has been exaggerated (evidenced by the fact that majority of the ISDS cases are decided unanimously) and that the disputing parties (and their appointed arbitrators) tend to act sensibly in selecting the presiding arbitrator (evidenced by the relatively moderate level of intervention by the appointing authorities).

49. It is also doubtful whether parties are prepared to give up their right to appoint their own preferred arbitrators. In the 36th session of the Working Group, strong views have been expressed by States' representatives against the removal of the States' right to appoint their own preferred arbitrators on grounds that it is a fundamental feature of party's autonomy in arbitral process and that it is against the national interest to give up such a right. On this, developing States have in different degrees expressed their concerns about the lack of diversity in arbitrators and the lack of sufficient control over ISDS proceedings, caution must be exercised before further taking away the States' (limited) control over the arbitral process.

50. Further, it is not the case that there is complete lack of standards governing the conducts of arbitrators in the ISDS context. For example, the IBA Guidelines, though not legally binding, have been taken into account in various challenge proceedings.[30] It has been argued that the concern about arbitrators' independence or impartiality can be addressed by strengthening the existing controls over arbitrators, developing a new code of conducts at multilateral level with effective enforcement mechanism, giving clearer guidelines on the interpretation and application of the code; and imposing sanctions on non-complying arbitrators. It is noted that ICSID is currently working with the UNCITRAL Secretariat on a Code of Conduct for Arbitrators. Also, suggestions have been made to increase the transparency of the challenge

[30] E.g. *ICS Inspection and Control Services Ltd. v. The Republic of Argentina*, PCA Case No.2010-9, 17 December 2009 (in which it was held the IBA Guidelines, although not binding, "*reflect international best practices and offers examples of situations that may give rise to objectively justifiable doubts as to an arbitrator's impartiality or independence*"); *Perenco Ecuador Ltd v. The Republic of Ecuador*, PCA Case No.IR-2009/1, 8 December 2009 (challenge against a co-arbitrator; IBA Guidelines applied by parties' agreement); *Hrvatska Elektroprivreda, d.d. v. The Republic of Slovenia*, ICSID Case No. ARB/05/24 (challenge against Counsel's participation in the proceedings on grounds that the Counsel concerned and the presiding arbitrator were members of the same set of chambers; IBA Guidelines referred to)

decisions in order to shed light on how arbitral tribunals could apply the code of conducts.

CONCERN 2: Concern about *ad hoc* arbitrators

51. Under the current ISDS system, arbitrator appointments are necessarily *ad hoc* in nature and appointments are made only when disputes are submitted to arbitration.

52. The *ad hoc* nature of the appointments gives rise to certain issues that arguably affect the independence and impartiality of arbitrators: e.g. double hatting, issue conflicts, lack of diversity in arbitrators and the challenge procedures.

A. Double hatting

53. It has been suggested that international investment arbitration is marked by a "revolving door", in that single individual actors play multiple roles as arbitrators, counsel, expert witnesses, and tribunal secretaries within the *ad hoc* arbitration system. The movement between roles may be sequential or even simultaneous. Double hatting refers to the practice when a single individual plays different roles in different arbitration proceedings simultaneously.

54. According to the recent empircal study,[31] the practice of double hatting continues to exist. The practice, however, is not a common or widespread practice but within a small group of highly influential and well-known actors in the ISDS system.

55. It is generally noted that the practice has posed a number of issues including potential and actual conflict of interest. It is argued that even the appearance of impropriety (e.g. suspicion that an arbitrator would decide in a manner so as to benefit a party he represents in another dispute) has a negative impact on the perception of the legitimacy of the ISDS regime.

56. The problems arising from double hatting has been vividly put by Philippe Sands:

[31] Footnote 8 *(supra)*, 326-327

> "it is possible to recognize the difficulty that may arise if a lawyer spends a morning drafting an arbitral award that addresses a contentious legal issue, and then in the afternoon as counsel in a different case. Can that lawyer, while acting as arbitrator, cut herself off entirely from her simultaneous role as counsel? The issue is not whether she thinks it can be done, but whether a reasonable observer would so conclude. Speaking for myself, I find it difficult to imagine that I could do so without, in some way, potentially being seen to run the risk of allowing myself to be influenced, however subconsciously."[32]

57. Likewise, Judge Thomas Buergenthal has expressed similar view:

> "I have long believed that the practice of allowing arbitrators to serve as counsel, and counsel to serve as arbitrators, raises due process of law issues. In my view, arbitrators and counsel should be required to decide to be one or the other, and be held to the choice they have made, at least for a specific period of time. That is necessary, in my opinion, in order to ensure that an arbitrator will not be tempted, consciously or unconsciously, to seek to obtain a result in an arbitral decision that might advance the interests of a client in a case he or she is handling as counsel. ICSID is particularly vulnerable to this problem because the interpretation and application of the same or similar legal instruments (the bilateral investment treaties, for example) are regularly at issue in different cases before it."[33]

58. *Telekom Malaysia v. Ghana*[34] is apparently the first decision that a respondent host State challenged one of the tribunal's arbitrators for double hatting. There, Ghana applied to the Dutch courts (exercising supervisory jurisdiction) to challenge the arbitrator's appointment after it had learned that the arbitrator was concurrently acting as counsel on behalf of the investor in an application for an annulment of the reward in *Consortium RFCC v. Morocco* for Ghana intended to rely on the award in *RFCC v. Morocco* to advance its defence The Hague District Court held that the arbitrator's duty to advance his client's position in the *RFCC*

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[32] See Philippe Sands, *Conflict and Conflicts in Investment Treaty Arbitration: Ethical Standards for Counsel*", in Arthur Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (New York: Brill, 2012), 31-32

[33] Thomas Buergenthal, *The Proliferation of Disputes, Dispute Settlement and Dispute Settlement Procedures and Respect for the Rule of Law*, (2006) *Arbitration International*, Vol.22, No.4, 498

[34] *Republic of Ghana v Telekom Malaysia Berhard*, District Court of The Hague, 18 October 2004, Challenge No. 13/2004; Petition No. HA/RK 2004.667; and Challenge 17/2004, Petition No. HA/RK/2004/778, 5 November 2004

annulment proceedings was incompatible with his duty as arbitrator in the *Telekom Malaysia* case:

> "[A]ccount should be taken of the fact that the arbitrator in the capacity of attorney will regard it as his duty to put forward all possibly conceivable objections against the *RFCC/Morocco* award. This attitude is incompatible with the stance Prof. Gaillard has to take as an arbitrator in the present case, i.e. to be unbiased and open to all the merits of the *RFCC/Morocco* award and to be unbiased when examining these in the present case and consulting thereon in chambers with his fellow arbitrators. Even if this arbitrator were able to sufficiently distance himself in chambers from his role as attorney in the annulment proceedings against the *RFCC/Morocco* award, account should in any event be taken of the appearance of his not being able to observe said distance. Since he has to play these two parts, it is in any case impossible for him to avoid giving the appearance of not being able to keep these two parts strictly separated."[35]

59. The Dutch court ordered the arbitator concerned to resign as counsel in the *RFCC* case if he still wanted to remain as arbitrator in the *Telekom Malaysia* case, which he duly did. Ghada was not satisfied with the Dutch court giving the arbitrator a choice and filed a second challenge to the Dutch court seeking to remove the arbitrator from the panel of the *Telekom Malaysia* case. The challenge was, however, dismissed. The court held:

> "… After all, it is generally known that in (international) arbitrations, lawyers frequently act as arbitrators. Therefore it could easily happen in arbitrations that an arbitrator has to decide on a question pertaining to which he has previously, in another case, defended a point of view. Save in exceptional circumstances, there is no reason to assume however that such an arbitrator would decide such a question less open-minded than if he had not defended such a point of view before. Therefore, in such a situation, there is, in our opinion, no automatic appearance of partiality vis-à-vis the party that argues the opposite in the arbitration. …"[36]

[35] District Court of The Hague, civil law section, provisional measures judge, Challenge No. 13/2004, Petition No. HA/ RK 2004.667, Decision of 18 October 2004, reprinted at (2005) 23 ASA Bulletin 186, 192

[36] Footnote 34 *(supra)*

60. Whilst there are concerns about arbitrators wearing double, or even multiple, hats, the case against double hatting is not one sided. The following arguments have been raised against total ban of double hatting:[37]

(1) There is only a small pool of investment arbitrators and double hatting is an inevitable phenomenon. Limiting qualified legal counsel from sitting as arbitrators would undermine the quality of the arbitral process.

(2) The arbitrators' community in ISDS should be allowed to grow in diversity to move away from the existing pool being "*pale, male and stale*". Some tolerance has to be afforded to younger counsel transitioning into arbitrators.

61. The first argument might have been true years ago when the pool of qualified arbitrators available for ISDS cases remained very small. The argument is weakening when the pool has kept growing since 1990s. Yet, despite the growing pool of arbitrators, the practice of double hatting continues to exist. This explains that States and investors, who have been the major players in appointments, have to some extent contributed to the practice.

62. In respect of the second argument, the general consensus seems to be that tolerance is to be afforded to young practitioners to move from counsel to arbitrators. However, the transitioning period should be brief and a practitioner should cease taking up cases as counsel after taking up his first few appointments.

63. The issue of double hatting, however, should not be overstated. After all, in a three-member tribunal, an arbitrator needs to persuade at least one of the remaining two arbitrators to accept his argument in order to benefit his client in another case. Besides, the fact that majority of the ISDS cases are decided unanimously suggests that the concern of double hatting may be more apparent than real.

64. The statistics suggests that the situation of double hatting, though continues to exist, is improving. The findings suggest that (1) the practice of double hatting is prevalent among a small but highly-influential group of arbitrators (25 individuals and particularly so for a sub-group of 5 individuals within that group); (2) double hatting for the

[37] Footnote 11 *(supra)* §27

"top 25" individuals has been relatively stable in the recent years; (3) there has been a declining trend of double hatting due to many reasons such as retirement of those prominent arbitrators or those having sufficient caseload as arbitrators (and thereby precluding them from acting as counsel); and (4) last but not least some arbitrators have declared that they will not engage in practice as counsel.[38]

65. It is expected that the practice of double hatting should become less and less prevalent, though the removal of it is unrealistic (and may deter young counsel from transitioning to arbitrators).

B. Issue conflicts

66. Issue conflict arises where an arbitrator is said to have "pre-judged" issues based on their prior awards or decisions, publications and statements indicating their views on particular issues in dispute.

67. Judge Peter Tomka (the then-President of the International Court of Justice) in *CC/Devas (Mauritius) Ltd. v. The Republic of India*[39] made the following observation:

> "… the basis for the alleged conflict of interest in a challenge invoking an 'issue conflict' is a narrow one as it does not involve a typical situation of bias directly for or against one of the parties. The conflict is based on a concern that an arbitrator will not approach an issue impartially, but rather with a desire to conform to his or her own previously expressed view. In this respect … some challenge decisions and commentators have concluded that knowledge of the law or views expressed about the law are not *per se* sources of conflict that require removal of an arbitrator; likewise, a prior decision in a common area of law does not automatically support a view that an arbitrator may lack impartiality. Thus, to sustain any challenge brought on such a basis requires more than simply having expressed any prior view; rather, I must find, on the basis of the prior view and any other relevant circumstances, that there is an appearance of pre-judgment of an issue likely to be relevant to the dispute on which the parties have a reasonable expectation of an open mind."[40]

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[38] Footnote 8 *(supra)*, 326; Footnote 11 *(supra)* §34

[39] *CC/Devas (Mauritius) Ltd. v. The Republic of India (Decision on the Respondent's Challenge to the Hon Marc Lalonde as Presiding Arbitrator and Prof Francisco Orrego as Co-Arbitrator)*, PCA Case No.2013-09, 30 September 2013

[40] *Ibid*, §58

a. Challenges based on previous scholarly and professional writings

68. Past scholarly and professional writings and speeches expressing *general* views on substantive legal issues are not sufficient to sustain a challenge on grounds of issue conflict.

69. In *Urbaser SA v. The Argentine Republic*,[41] the arbitrator was challenged on the basis of his previous academic writings. The unchallenged arbitrators rejected the challenge and held:

> "What matters is whether the opinions expressed by [the challenged arbitrator] on the two issues qualified as crucial by Claimants are specific and clear enough that a reasonable and informed third party would find that the arbitrator will rely on such opinions without giving proper consideration to the facts, circumstances, and arguments presented by the Parties in this proceedings. Claimant's view is, as stated, broader. They do not include in their position the latter qualification and they contend that the opinions expressed by [the challenged arbitrator] are to be taken as such and that it appears 'unquestionable' that he shares the same opinion today, absent any evidence that he has changed his opinion in the meantime (such change not being noticed in [the challenged arbitrator's] statement …
>
> The Two Members seized with the challenge submitted by Claimants are of the view that the mere showing of an opinion, even if relevant in a particular arbitration, is not sufficient to sustain a challenge for lack of independence or impartiality of an arbitrator. For such a challenge to succeed there must be a showing that such opinion or position is supported by factors related to and supporting a party to the arbitration (or a party closely related to such party), by a direct or indirect interest of the arbitrator in the outcome of the dispute, or by a relationship with any other individual involved, such as a witness or fellow arbitrator."[42]

70. On the other hand, an arbitrator may be seen to have crossed the line if

[41] *Urbaser S.A. v. The Argentine Republic (Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan, Arbitrator)* ICSID Case No. ARB/07/26, 12 August 2010. See also *Repsol v. The Argentine Republic (Decision on the Request for Disqualification of the Majority of the Tribunal)*, ICSID Case No. ARB/12/38, 13 December 2013

[42] *Ibid*, §§44-45

his academic writing suggests that he is unlikely to keep an open mind. In the *CC/Devas (Mauritius) Ltd.* case,[43] the respondent challenged the co-arbitrator appointed by the investor on the ground that the challenged arbitrator had sat together with the presiding arbitrator in two other cases together decided the legal interpretation of a similar provision arose (the decisions of those two cases were subsequently annulled). In addition, the challenged arbitrator in an academic writing defended his position in those two other cases despite the annulment. The challenge was upheld:

> "The standard to be applied here evaluates the objective reasonableness of the challenging party's concern. In my view, being confronted with the same legal concept in this case arising from the same language on which he has already pronounced on the four aforementioned occasions could raise doubts for an objective observer as to [the co-arbitrator's] ability to approach the question with an open mind. The later article in particular suggests that, despite having reviewed the analyses of three different annulment committees, his view remained unchanged. Would a reasonable observer believe that the Respondent has a chance to convince him to change his mind on the same legal concept? [The co-arbitrator] is certainly entitled to his views, including to his academic freedom. But equally the Respondent is entitled to have its arguments heard and ruled upon by arbitrators with an open mind. Here, the right of the latter has to prevail. For this reason, I agree with the Respondent that [the co-arbitrator] should withdraw from this arbitration."[44]

71. It is considered that unless the opinions expressed are "*specific and clear enough that a reasonable and informed third party would find that the arbitrator will rely on such opinions without giving proper consideration to the facts, circumstances, and arguments presented by the [p]arties in [the] proceedings,*" there is no lack of independence and impartiality.[45]

72. The aforesaid conclusion is echoed by the ASIL-ICCA Task Force:

> "… Members of the Task Force from all perspectives urged that international arbitration benefits significantly from vigorous and open discussion of contemporary legal issues by knowledgeable persons. In the Task Force's view, scholarly or professional publications addressing issues at a general level (but not discussing

[43] Footnote 39 *(supra)*
[44] Footnote 39 *(supra)* §64
[45] Footnote 11 *(supra)* §§36-39

details of a particular dispute in which they have been named) should not be seen as impairing impartiality. It would be a significant loss for such informed commentary to be chilled by fear of a possible future challenge to the author on account of the views expressed. Opinion in the Task Force thus mirrored the approach of the 2014 IBA Guidelines on Conflicts of Interest, which consider that no disclosure is required where the arbitrator 'has previously published a legal opinion (such as a law review article or public lecture) concerning an issue that also arises in the arbitration. . . .' In this sense, the challenge in the *CC/Devas* case could be understood as illustrating – and not departing from – the general recognition that doctrinal views are not problematic based on the assumption that the arbitrator can be convinced to take a different view."[46]

b. Challenges based on past service as counsel / advocate or arbitrator

73. The general view is that prior professional advocacy *per se* is not an indication of bias. In *St Gobain Performance Plastics Europe v. The Bolivarian Republic of Venezuela*,[47] the Claimant challenged the Respondent-appointed arbitrator on the ground that "*there is a danger that* [the challenged arbitrator] *will decide a certain issue in favor of Venezuela because he has argued the same, or similar, issues in favor of Argentina in the past and potentially in the future*". The challenge was vigorously rejected:

> "The Arbitral Tribunal does not find that Claimant's arguments support a case of a 'manifest' danger in this regard. Claimant has presented no facts which cast 'reasonable doubt' on [the challenged arbitrator's] impartiality and independence, let alone facts which 'make it obvious and highly probable' that [the challenged arbitrator] lacks these qualities.
> …
> Even if one assumes *arguendo* that [the challenged arbitrator] did in fact vigorously advocate Argentina's positions in other investment treaty arbitrations, the Arbitral Tribunal cannot see why [he] would be locked in to the views he presented at the time. It is

[46] *Report of the ASIL-ICCA Joint Task Force on Issue Conflicts in Investor-State Arbitration*, The ICCA Reports No.3, 17 March 2016, §173
[47] *St Gobain Performance Plastics Europe v. The Bolivarian Republic of Venezuela (Decision on Claimant's Proposal to Disqualify Mr Gabriel Bottini from the Tribunal)*, ICSID Case No. ARB/12/13, 27 February 2013

> at the core of the job description of legal counsel - whether acting in private practice, in-house for a company, or in government - that they present the views which are favorable to their instructor and highlight the advantageous facts of their instructor's case. The fact that a lawyer has taken a certain stance in the past does not necessarily mean that he will take the same stance in a future case."[48]

See also the *Telekom Malaysia* case (the 2nd challenge) at §59 above.

74. Similarly, the arbitrator's previous decisions do not *per se* suggest that his independence or impartiality has been affected. In the *CC/Devas* case[49] the respondent also challenged the presiding arbitrator on the ground that he and the other co-arbitrator (also under challenge) had in two other cases together decided the legal interpretation of a similar provision arose (the decisions of those two cases were subsequently annulled). The fact that the presiding arbitrator had twice decided the issue *per se* was held to be not sufficient to sustain the challenge:

> "The circumstances presented by the Respondent as giving rise to justifiable doubts about the Presiding Arbitrator's impartiality are more limited. The Respondent argues that [the presiding arbitrator's] participation on the two panels with [the co-arbitrator], both of which discussed the 'essential security interests' provision in their decisions, is sufficient to disqualify him from participating on this Tribunal. I, however, find that [the presiding arbitrator's] more limited pronouncements on the relevant text are not sufficient to give rise to justifiable doubts regarding his impartiality. [The presiding arbitrator] has not taken a position on the legal concept in issue subsequent to the decisions of the three annulment committees and thus I can accept his statement that '[his] intention is to approach the matter with an open mind and to give it full consideration' and that '[he] would certainly not feel bound by the *CMS* or *the Sempra* awards'. In my view, there is no appearance of his prejudgment on the issue of 'essential security interests' which will have to be considered by the Tribunal in the ongoing arbitration."[50]

[48] *Ibid,* §§78, 80
[49] Footnote 39 *(supra)*
[50] Footnote 39 *(supra)* §66

c. Challenges based on the arbitrator's prior exposure to similar facts

75. The fact that an arbitrator's knowledge of significant facts from involvment in previous cases *may* give rise to a ground of challenge.

76. In the *Caratube* case[51] the claimant investor challenged the respondent-appointed arbitrator on the ground that he had also sat as an arbitrator in the *Ruby Roz* case. The claimant contended, amongst others, that there were "*obvious similarities between the* Ruby Roz *case and the present arbitration*" and such involvement manifestly affected the challenged arbitrator's ability to exercise independent and impartial judgment. The unchallenged arbitrators found that there was "*significant overlap in the underyling facts between the* Ruby Roz *case and the present arbitration, as well as the relevance of these facts for the determination of legal issues in the present arbitration*". Accordingly, they held:

> "… in the light of the significant overlap in the underlying facts between the *Ruby Roz* case and the present arbitration, as well as the relevance of these facts for the determination of legal issues in the present arbitration, the Unchallenged Arbitrators find that – independently of [the challenged arbitrator's] intentions and best efforts to act impartially and independently – a reasonable and informed third party would find it highly likely that, due to his serving as arbitrator in the *Ruby Roz* case and his exposure to the facts and legal arguments in that case, [the challegned arbitrator's] objectivity and open-mindedness with regard to the facts and issues to be decided in the present arbitration are tainted. In other words, a reasonable and informed third party would find it highly likely that [the challenged arbitrator] would pre-judge legal issues in the present arbitration based on the facts underlying the *Ruby Roz* case."[52]

77. In *EnCana Corporation v. Republic of Ecuador*,[53] the respondent appointed the same arbitrator in two parallel arbitrations involving similar claims under the same bilateral investment treaty. Accordingly, that arbitrator would receive all materials of the two arbitrations whilst his two fellow arbitrators would not. The tribunal expressed the following concern:

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[51] Footnote 24 *(supra)*
[52] Footnote 24 *(supra),* §90
[53] *EnCana Corporation v. Republic of Ecuador*, LCIA/UNCITRAL, Partial Award on Jurisdiction, 27 February 2004

> "… Pleadings or information provided by Ecuador to [the respondent-appointed arbitrator] in his capacity as a member of the other Tribunal are not thereby provided to this Tribunal. Moreover this Tribunal has no authority over the documents and information tendered to another Tribunal; it can only decide the present case in the light of the information tendered to it.
>
> On the other hand, as soon as [the respondent-appointed arbitrator] uses information gained from the other Tribunal in relation to the present arbitration, a problem arises with respect to the equality of the parties. Furthermore [the respondent-appointed arbitrator] cannot reasonably be asked to maintain a 'Chinese wall' in his own mind: his understanding of the situation may well be affected by information acquired in the other arbitration. The most he can be asked to do is to disclose facts so derived whenever they appear to be relevant to any issue before this Tribunal."[54]

78. The ASIL-ICCA Task Force in their Report drew the following conclusions from the practices of international courts and tribunals:

> "…the cases thus suggest that prior opinions about similar *legal* issues, without more, are generally not disqualifying. On the other hand, views about *factual* matters specific to the case at hand have been found to be of concern. Decision makers have upheld challenges where an arbitrator has had previous exposure to facts relevant to a particular dispute, but outside the case record, that may affect his or her ability to address the case on the basis of the parties' arguments alone. The degree of engagement with the specific facts at issue in the case may explain the difference between the disqualifications in *Caratube* and *EnCana* and the rejections in *Suez*, *PIP* and *Içkale* …."[55]

C. Lack of diversity of arbitrators

79. Lack of diversity of arbitrators in terms of gender, age, ethnicity and geographical distribution has been a concern in the ISDS regime for a long period of time. "Pale, male and stale" is a term (not politically correct but succinct) that describes the proclivity for choice of arbitrators.

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[54] *Ibid,* §§44-45
[55] Footnote 46 *(supra)* §174

80. There is not only over-concentration of appointments to a small pool of arbitrators, but also uneven distribution of appointments. Amongst the top 25 arbitrators who collectively have taken up one third of all arbitral appointments, with four exceptions, all are listed as nationals of Western States. For the four exceptions, one is from Eastern Europe but has been residing in the US for decades and the other three coming from Latin American States but maintaining their professional practices in the US or Western Europe. None of them are from Asian or African countries or jurisdictions.[56]

81. The uneven distribution of appointments (in terms of nationality) remains to be the case in recent years. According to the statistics, arbitrators from France, US and UK have consistently been the three largest groups of appointees and they have taken up almost 30% of the appointments. If one is to expand the analysis to "top 10 nationalities", the "top 10s" have taken up over 50% of the appointments, and none of them are of Asian or African nationalities.[57]

82. Parties to ISDS cases have certainly contributed to the aforesaid disparity. In terms of appointments made directly by parties in ICSID cases in 2016, 67% originated from Western Europe or North America. Comparing the national origins of disputing parties with that of the appointment arbitrators, the disparity grows even wider. While 22% of parties came from Eastern Europe and Central Asia, only around 2.5% of ICSID arbitrators originated from there. Similarly, 13% of ICSID parties came from the Middle East and North Africa, but only 4% of ICSID arbitrators came from those regions. 11% of ICSID parties came from Sub-Saharan Africa, but only 1.5% of ICSID arbitrators came from that region.[58]

83. The over-concentration and uneven distribution of arbitrator appointments also make the ISDS arbitrator community effectively a "closed shop", to which young practitioners find themselves difficult, if not impossible, to enter the market.

84. Another concern is the lack of gender diversity. According to the published surveys, in broad terms, women's participation in ISDS cases as arbitrators has been disturbingly minimal (around 5-6%).[59]

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[56] Footnote 8 *(supra)*

[57] The "Top 10s" are France, USA, UK, Canada, Switzerland, Spain, Australia, Germany, Italy and Mexico.

[58] Lucy Greenwood, *Tipping the balance – diversity and inclusion in international arbitration*, Arbitration International, Vol.33, Iss. 1, 1 March 2017, 99-108

[59] Footnote 13 *(supra)* §24. This figure takes into account of all ICSID appointments in the past.

85. Diversity in age is also a concern warranting consideration for it is essential for the sustainability of the ISDS system. This view, however, is not necessarily unanimous. The following observation was made in the recent survey:

> "Another example of the nuanced and disparate perspectives adopted by respondents was highlighted by a number of interviewees through the lens of age diversity. While most interviewees agreed that gender diversity, for example, is invariably desirable and therefore of less relevance to this enquiry, some advanced the idea that age diversity does not always improve the quality of a tribunal's decision-making. Some interviewees, both counsel and arbitrators, stressed the fact that the nature of some disputes, particularly in investment treaty arbitration, calls for arbitrators with a sufficient breadth of relevant experience that cannot easily be found among the younger generations of arbitrators. The issue, they argue, is therefore not age itself but rather the relevant previous experience that can only be acquired through continued practice over a long period of time.
>
> By contrast, others observed that, in general, they felt younger arbitrators display a particular drive to perform well in arbitrations, hoping that their proficient conduct will be noticed and that they will therefore attract more appointments in the future. Moreover, interviews revealed no general consensus as to who would qualify as a 'young' arbitrator in this context. While most interviewees think that an arbitrator under 40 years of age is commonly considered as 'young', a small number of interviewed respondents expressed that they would also consider 'young' an arbitrator under 50 years of age, particularly in light of their perception that the average arbitrator is likely to be well in his or her sixties."[60]

D. Adequacy of the challenge mechanism

86. An effective challenge mechanism is seen to be a critical safeguard to ensure arbitrators' independence and impartiality. It is said that an effective challenge mechanism must fulfil two functions: (1) to provide teeth of the requirements for independence and impartiality (i.e. partisan arbitrators must be disqualified) and (2) it must be sufficiently robust to

[60] Queen Marry and White & Case, *The 2018 International Arbitration Survey: The Evolution of International Arbitration*, pp.16-17

allow for cases to proceed.[61]

87. Almost all arbitration laws and rules contain provisions on procedures for challenging arbitrators for non-compliance with ethical requirements.

88. Generally speaking, the burden rests on the challenging party to make out the case that there are matters that give rise to sufficient doubts as to the challenged arbitrator's independence or impartiality. Whilst it is generally agreed that proof of actual bias is not required, the practice varies from one case to another as to what precise standard of proof the challenging party has to meet. For example, some arbitral tribunals have adopted the "reasonable doubts" test when applying article 57 of the ICSID Convention (which requires the challenging party to demonstrate a "manifest lack" of "reliability to exercise judgment"); whilst other indicated that "manifest" involved a higher standard, so that the conflict has to be evident or apparent.

89. In terms of the decision-makers of challenge applications are concerned, the current ICSID Arbitration Rules provides where there is a challenge to a single arbitrator on a three-member panel, the challenge is to be decided by the unchallenged arbitrators, unless they are equally divided, in which case the Chairman will decide. Challenges to sole arbitrators and to two or three members of a three-member panel are decided by the Chairman.[62] The UNCITRAL Arbitration Rules, on the other hand, vests the decision-making power in the appointing authority.[63]

90. One of the concerns raised about the current challenge mechanism is that there is lack of transparency in how challenge applications are decided, largely attributed to the facts (1) that challenge decisions are not routinely published in all fora, and (2) that the published decisions themselves indicate that the application of the standards of independence and impartiality is difficult to predict. The unpredictability of the challenge outcome, coupled with the fear of negative consequences that the challenging party may face if the challenge is unsuccessful, may have contributed to the system not being effectively utilised. On the other hand, it is observed that there is a general increase in the number of tactical, vexatious or frivolous challenges. In one ISDS case, there were five separate challenges to one arbitrator stretching from October 2011 to February 2016, all of which were dismissed.[64] Either of these undermines

[61] Footnote 11 *(supra)*, §49
[62] Rule 9 of the ICSID Arbitration Rules
[63] Article 13(4) of the UNCITRAL Arbitration Rules
[64] *ConocoPhillips Company & Ors v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30

the integrity and legitimacy of the ISDS system.

91. Another concern is whether it is suitable for the unchallenged arbitrators to decide a challenge application against their fellow arbitrator. It is said that having an external party decide on the delicate matter of removal of an arbitrator is preferable to a decision by the remaining members of the arbitral tribunal, because this ensures that an independent entity, not vested in the specific case, decides this fundamental matter. After all, the practice of double hatting and over-concentration of arbitrator appointments arguably gives rise to an impression that arbitrators tend to more generous to their fellow arbitrator subject to challenge.

E. Possible reforms?

92. It is noted that efforts have been made to diversity the pool of arbitrators. For instance, in the case of ICSID, the Secretariat has made effort in promoting a diverse and highly qualified pool of arbitrators. The effort has borne fruit: in 2018, 22 ICSID member States[65], most of them are non-Western States, designated 102 individuals to the ICSID Panels. Improvement has been made to actual appointments as well. In the case of ICSID, there has been constant improvement on gender diversity: from 12.3% of total female appointments in 2015 to 24% in 2018. Similar commitment has been expressed by PCA.[66]

93. While the numbers with respect to gender and geographic diversity have gradually improved, the extent of disparity in representation is still vast. In particular, when one considers diversity in nationality, even the recent figures remain to show that the appointments are still Western Europe- and North America-dominated and developing countries remain significantly under-represented.

94. Some suggest that the cause of lack of diversity in appointments is that disputing parties are not familiar with the potential arbitrator candidates, rather than any real basis or prejudice against appointing diverse candidates. The lack of familiarity gives rise to sense of insecurity and fear of making the wrong choice etc.[67]

95. It is said that tight controls can be imposed on candidates to reduce

[65] ICSID 2018 Annual Report, 22-23
[66] See "PCA Responds to Queries on Arbitral Legitimacy" (20 May 2014)
[67] Lucy Greenwood *Tipping the balance – diversity and inclusion in international arbitration*, (2017) Arbitration International, Vol.33, Iss. 1, 99, 105-106

double hatting or repeated appointments in order to promote diversity in appointments. For instance, an arbitrator may be required to confirm under the declarations the days or weeks that he has already committed to other undertakings over the next couple of years and/or require arbitral tribunal to provide the parties and the administering institutions with regular progress reports. These measures, to some extent, may (indirectly) force the disputing parties to expand their search for suitable candidates for appointment.

96. Although there is a growing representation in arbitrators from non-Western States, continued effort should be made to expand their representation. Many developing States have not nominated sufficient number of arbitrators that they are entitled to nominate under the ICSID or PCA systems. In doing so, there is a pressing need for States, in particular developing States, to build up capacity for counsel and potential arbitrators.

97. Insofar as the challenge procedure is concerned, as submitted above, the transparency in the challenge decisions should be increased. On this, administering institution should compile summaries of the challenge decisions or best practices to promote a uniform and consistent application of principles in dealing with challenge applications.

98. On the other hand, firm measures should be taken against tactical, vexatious and frivolous challenges, which serve no purposes other than delaying the arbitral process. It is noted that in the proposed reform of the ICSID Rules, measures such as a tighter challenge procedure timeframe and removal of "automatic suspension" upon filing a challenge etc. are proposed to address the issue. Also, the proposed reform also allows the unchallenged arbitrators to refer the challenge to the Chairman for decision if they see fit not to decide the challenge application themselves.

CONCERN 3: Replacing *ad hoc* arbitrators with full-time judges?

99. There is a resurgence of debate over the dichotomy between the advantages of courts system over *ad hoc* arbitral tribunals. The debate is in two-fold: (1) whether there should be an appellate body (this is to be covered by another discussion paper); and (2) whether there should be an investment court (consisting of the first instance level and the appellate level) replacing the *ad hoc* arbitral tribunal system.

100. Creating a standing international investment court system ("**ICS**") implies the replacement of the current system of *ad hoc* arbitral tribunals with a new institutional structure, namely a standing international court. The latter would consist of judges appointed or elected by States on a permanent basis, for example, for a fixed term. It could also have an appeals chamber.

101. The intensity of the debate is neatly summarised by Lucy Reed:

> "Speaking with more perspective, but still with drama, Philippe Pinsolle has taken the view that defending investment arbitration is a 'lost battle' because no 'rational discussion is possible' where the criticisms are 'largely ideological, if not emotional' and '[t]he perception is that private arbitration no longer passes the legitimacy threshold.' The only answer, says Maitre Pinsolle, is an investment court system.
>
> Others disagree, with equally dramatic language. Judge Stephen Schwebel has written that the investment court proposals 'smack of appeasement of uninformed criticism of ISDS rather than sound judgment.' His fundamental objection is that the EU investment court regime would replace 'a system [i.e. arbitration] that on any objective analysis works reasonably well' with 'a system that would face substantial problems of coherence, rationalization, negotiation, ratification, establishment, functioning and financing."[68]

102. Scholars and practitioners have advanced different arguments in favour of, or against, the ICS for various reasons, such as costs, enforceability of judgments, and jurisdictional limitation etc. Those arguments, no doubt, warrant consideration and debate in the ISDS reform discussion. However, for the purpose of this paper, the discussion is confined to "appointment of arbitrators and related issues".

103. An important argument in favour of ICS is that judges, as opposed to arbitraors, will be free from (perceived) inherent flaws in the party-appointed system and problems like double hatting or actual or apparent bias arising from repeated appointments by the same law firm or party. Judges, as the argumnt goes, will be truly independent and impartial in handling ISDS cases. The argument has been succinctly captured by

[68] Lucy Reed, *International Dispute Resolution Courts: Retreat or Advance*, (2017-2018) 4 McGill J. Disp. Resol. 129, 135

UNCTAD: [69]

> "This approach rests on the theory that investment treaty arbitration is analogous to domestic judicial review in public law because 'it involves an adjudicative body having the competence to determine, in response to a claim by an individual, the legality of the use of sovereign authority, and to award a remedy for unlawful State conduct.' Under this view, a private model of adjudication (arbitration) is inappropriate for matters that deal with public law. The latter requires objective guarantees of independence and impartiality of judges which can be provided only by a security of tenure – to insulate the judge from outside interests such as an interest in repeat appointments and in maintaining the arbitration industry. Only a court with tenured judges, the argument goes, would establish a fair system widely regarded to be free of perceived bias.
>
> A standing investment court would be an institutional public good serving the interests of investors, States and other stakeholders. The court … would go a long way to ensure the legitimacy and transparency of the system, facilitate consistency and curacy of decisions and ensure independence and impartiality of adjudicators."

104. Another argument in favour of ICS is that through ICS, by rules, can better achieve a fairer distribution of judicial appointments. For instance, Article 9 of the Statute of the International Court of Justice provides that States in electing judges shall bear in mind "*not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured.*" Taking Canada-EU Trade Agreement ("**CETA**") as an example, it is provided that the 15-member tribunal is to be comprised of (a) 5 nationals of EU member States; (b) 5 nationals of Canada; and (c) 5 nationals of third-countries.

105. There are, however, counter-arguments against the proposal of replacing arbitrators with judges.

106. Firstly, the argument against party-appointment system is that the arbitrators so appointed are likely to be biased in favour of the appointing

[69] Reform of Investor-State Dispute Settlement: In search of a Roadmap, UNCTAD, No.2, June 2013, 9 (www.unctad.org/diae)

party. It is unclear why this "inherent flaw" does not apply to ICS, under which judges are appointed by States.

107. Judge Schwebel made the following observation when he discussed CETA:

> "The inference to be drawn from the foregoing EU statements is that the system of arbitrators chosen by the parties to the dispute found in bilateral investment treaties and the ICSID Convention is not insulated from any real or perceived risk of bias. Yet the parties to cases before the Investment Tribunal will be investors and States. The question arises, if there is a risk, real or perceived, of bias of ad hoc arbitral tribunals, as the EU appears to insinuate, is there not a risk, real or perceived, of bias -- in favor of States and against investors -- in the EU Commission's proposals?
> If the fact of appointment by a party of an arbitrator is taken to import bias, is not the appointment of judges solely by States a formula for the establishment of courts biased against investors?
>
> I do not believe that it is the intention of the EU to entrench such bias in the courts proposed by the EU Commission. But if it is to be presumed that an arbitrator appointed by an investor is biased in favor of the investor -- a presumption that the record of investor/State arbitration does not sustain -- is there reason to presume that judges appointed only by States will not be biased in favor of States?"[70]

108. The existence of perceived bias on international judges is reinforced by statistics. In the empirical study conducted in 2004 over the cases decided by the International Court of Justice, it is suggested (1) that judges usually voted in favour of their home States; and (2) that judges are more likely to vote in favour of States that belong to a geopolitical bloc shared by their own State(s).[71]

109. Secondly, investors are excluded from the judges' election process. Under the current system, an investor appoints its own preferred arbitrator, and has some involvement in the appointment of the presiding arbitrator (by the "ballot" or "list" procedures or through the agreement

[70] Remarks by Judge Stephen M. Schwebel on *The Proposals of the European Commission for Investment Protection and an Investment Court System* (17 May 2016) (http://isdsblog.com/wp-content/uploads/sites/2/2016/05/THEPROPOSALSOFTHEEUROPEANCOMMISSION.pdf)

[71] Eric Posner & Miguel de Figueiredo, *Is the International Court of Justice Biased?* (John M Olin Programe in Law and Economics Working Paper No.234, 2004)

of the parties' respective trusted co-arbitrators). However, under ICS, investors are unlikely to have any, or any substantive role, to play in the election of judges who are to hear their cases.

110. The impact of depriving investors of participation in the selection process of judges cannot be under-estimated: the whole purpose of the ISDS system is to allow investors to seek reliefs directly against the host States for any non-compliance of substantive protection afforded by the relevant investment treaties. It is counter-intuitive to say that investors should have faith in the judges' election process dominated by States. It is important to maintain the system to be inclusive to allow investors' participation in the selection process.

111. Thirdly, host States do not necessarily find favour of ICS even investors are to be excluded from the judges' election process. Under ICS, host States, if sued, will also be deprived of the right to appoint its own preferred judge. As submitted above, resistance has been strong against any attempt to deprive the parties of their right to appoint their own preferred arbitrators in accordance with their own weighted criteria.

112. Fourthly, the election process of judges in permanent international tribunals is often highly politicalised, and there is no reason why ICS would be immune from this problem. Judge Buergenthal recalled what happened to him when he went through the re-election process to the ICJ:

> "… having just gone through a re-election process, I am particularly conscious of the variety of problems the current system poses for judges seeking election or re-election to certain courts and tribunals, particularly within the United Nations system. What struck me in my re-election campaign is how highly politicised the election process is for the various judicial positions that the UN membership has to vote for and how little judicial qualifications of the individual candidates or their judicial record seem to matter. In my case, for example, one state very formally proposed to vote for me, provided the USA agreed to support that state's candidacy for a seat on the Security Council. …
>
> Another problem that will have to be addressed at some point, I believe, has to do with the pressure that judicial candidates wishing to be renominated are likely to experience when they have to vote in a case in which their state of nationality is a party. That is another reason why, as I indicated a minute ago, I would prefer for national judges not to participate in cases involving their own

country. The problem might also be dealt with by limiting judges to one term only, possibly one longer single term."[72]

113. Fifthly, the ICS does not address the lack of diversity in arbitrators. Whilst the rules may provide for geographical / nationality distribution of judicial appointments (like CETA), it is unclear how the age, gender, or even language diversity is to be addressed. In fact, it is suggested that having depriving the investors of their right to appoint arbitrators, there is a risk that the individuals appointed to the ICS are likely come from similar background (e.g. government counsel or career judges instead of practitioners) and it may result in tribunals of monchoromatic experience and uniform views. Besides, the over-emphasis of the expertise in public international law (as a mandatory requirement for appointments as judges under the ICS) unncessarily excludes arbitrators with expertise in different legal areas and risks marginalising valuable ideas from other areas of law.[73]

[72] Footnote 33 *(supra)*, 498-499. Judge Kenneth Keith has expressed similar experience: *Challenges to the Independence of the International Judiciary* (26 November 2014) (Chatham House, International Law Programme Speech Transcript), 7-8

[73] James Crawford, *The Ideal Arbitrator: Does One Size Fit All?* (2018) 32(5) Am U Int'l L Rev 1003-1022, 1020-1021.