ENHANCING STANDING PANELS IN INVESTOR-STATE ARBITRATION: THE WAY FORWARD?

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ABSTRACT

This Article evaluates the perceived value of standing panels in investor-state arbitration (ISA) through a review of literature and a survey of recent investment treaties contained in the Appendix. It considers recent developments, such as the China-Australia Free Trade Agreement (ChAFTA), which establish provisions for an internal standing panel chosen by the state parties. While external standing panels—like those under the Rules of the International Center for the Settlement of Investment Disputes (ICSID) *—are often presented as a solution to deficiencies associated with ISA, their development is frequently limited. This Article proposes developing an empirically verified framework to support standing panels in ISA, including the selection of arbitrators for inclusion on panels, their appointment as ISA arbitrators, and the manner in which they reach decisions. It examines the development of in-house standing panels in the ChAFTA compared to external standing panels, such as those under the ICSID Rules, and the ad hoc appointments of arbitrators. It contends that institutional biases in selecting and appointing panelists from both internal and external lists, and decisional biases attributed to arbitrators, are not reasons to avoid relying on standing panels. It proposes that both internal and external panels are often preferable to ad hoc appointments made by disputing parties. It concludes by considering how to address institutional biases in devising an effective structure for standing panels, transparent procedures to regulate the selection and appointment to panels, and the management of those panels.*

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I. INTRODUCTION

This Article comprehensively reviews and extends the literature on the use of standing panels in investor-state arbitration (ISA). It explores the nature and scope of standing panels used in ISA, how such panels are structured under different investment treaties, and how they can be enhanced to promote expertise, transparency, impartiality, and equity in the selection and appointment of arbitrators. These treaties, limited to English-language versions commencing in 2014, are included in the Appendix.

The Article examines different models of ISA standing panels, including recent in-house models in which standing panels are established by the Treaty parties, such as under the China-Australia Free Trade Agreement (ChAFTA)[1] and the Free Trade Agreement (FTA) concluded between Singapore and the European Union;[2] external panels, such as the roster of the International Center for the Settle-

1. Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China, Austl.-China, June 17, 2015 [hereinafter ChAFTA].

2. Free Trade Agreement between the European Union and the Republic of Singapore, E.U.-Sing., June 29, 2015 [hereinafter EU-Singapore]; *EU and Singapore Affirm Commitment to Putting Free Trade Deal in Place*, EUR. COMM'N TRADE NEWS (Mar. 8, 2017), https://ec.europa.eu/

ment of Investment Disputes (ICSID) pursuant to the 1965 ICSID Convention;[3] and ad hoc appointments by investor-state disputants. It argues for devising standing panels that provide for the transparent selection of expert ISA panelists, for their expeditious appointment to ISA tribunals, and for effective and fair rules to govern ISA proceedings. The Article recognizes that developing a more coherent and uniform ISA jurisprudence in this field will be challenging, given the existence of different models of ISA standing panels and the potential for a proliferation of standing panels from treaty to treaty. However, it proposes that a careful balance be struck between uniform rules governing the structure and operation of ISA panels and the development of rules that satisfy the needs of different states, investors, and regulatory regimes. The Article will identify empirical responses to these challenges and examine the standards used to review ISA awards. Finally, it will assess alternatives to standing ISA panels, namely the European Union's development of a permanent multinational court.

II. The Treaties Surveyed

This section gives an overview of how disputing investor-state parties choose ISA arbitrators as provided for in different free trade and bilateral investment treaties. Relying on the UNCTAD Treaty Database,[4] the Appendix to this Article includes a survey of thirty-five investment-related treaties concluded between 2014 and 2016, organized by year and excluding treaties whose texts are not publicly available or published in English. That survey assesses how countries have responded to vocal challenges to ISA during this time period. The Appendix includes a summary of treaty provisions that provide for ISA and standing panels.

There is limited empirical evidence on the normative value of standing ISA panels, due in part to the few treaties that incorporate them, the confidential nature of ISA historically, and the difficulties in establishing a suitable research environment to examine standing

commission/commissioners/2014-2019/malmstrom/announcements/eu-and-singapore-affirm-commitment-putting-free-trade-deal-place_en (last visited Apr. 3, 2017).

3. Members of the Panels of Conciliators and of Arbitrators, Int'l Ctr. for Settlement of Inv. Disputes (Aug. 31, 2017), https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%2010%20-%20Latest.pdf.

4. *International Investment Agreements Navigator*, UNCTAD, Investment Policy Hub,
http://investmentpolicyhub.unctad.org/IIA/MostRecentTreaties#iiaInnerMenu (last visited May 1, 2016).

panels in operation.[5] While a majority of Bilateral Investments Treaties (BITs) in the study sample provide for ISA appointments from external standing panels, such as from the ICSID roster, most disputants avoid appointing from such panels.[6] As is discussed in Parts VI and VII below, this aversion of both investor and state parties to appointing external panelists arises from the perception of parties that standing panelists may lack impartiality, while the parties may each wish to appoint arbitrators who understand, and conceivably sympathize with, their perspectives. Conversely, the ChAFTA and EU-Singapore FTA provide for internal standing panels.[7] In particular, each treaty uniquely requires that both state parties shall select arbitrators to serve on an in-house panel of arbitrators.[8]

The study sample demonstrates that a limited number of treaties do no more than provide investor-state disputants with a list of acceptable arbitral institutions through which investors can file ISA claims, most notably by reference to ICSID or the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL Rules). Treaties relying on this drafting methodology include the following: the Japan-Oman BIT,[9] China-Korea FTA Investment Chapter,[10] Japan-Ukraine BIT,[11] Eurasia Economic Union-Vietnam FTA Investment

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5. *See* Anton Strezhnev, *Detecting Bias in International Investment Arbitration* 3-4 (drft. Mar. 12, 2016), http://scholar.harvard.edu/files/astrezhnev/files/are_investment_arbitrators_biased.pdf?m=1459524441 (presented at the 57th Annual Convention of the International Studies Association, Atlanta, Mar. 16-19, 2016); *see* Sergio Puig, *Social Capital in the Arbitration Market*, 25 EURO. J. INT' L 387 (2014); *see also* Thomas Schultz & Cédric Dupont, *Investment Arbitration: Promoting the Rule of Law or Over-Empowering Investors? A Quantitative Empirical Study*, 25 EURO. J. INT' L. 1147 (2015).

6. *See* Schultz & Dupont, *supra* note 5 (adding the proposition that a majority of FTAs also provide for appointments from standing panels); *See* James McCall Smith, *The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts*, 54 INT'L ORG. 137 (2000); Victoria Donaldson & Simon Lester, *Dispute Settlement*, *in* BILATERAL AND REGIONAL TRADE AGREEMENTS: COMMENTARY AND ANALYSIS 385, at 406-07 (Simon Lester et al. eds., 2d ed. 2015) (discussing the prevalence of standing panels in FTAs).

7. *See* ChAFTA, *supra* note 1, art. 9.15; EU-Singapore, *supra* note 2, ch. 15, art. 15.15.

8. *See, e.g.*, ChAFTA, *supra* note 1, art. 9.15(5)-(6), Annex 9-A.

9. Agreement between Japan and the Sultanate of Oman for the Reciprocal Promotion and Protection of Investment, June 19, 2015, UNCTAD, INVESTMENT POLICY HUB, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3481.

10. Free Trade Agreement between the Government of the People's Republic of China and the Government of the Republic of Korea, ch. 12, June 1, 2015, UNCTAD, INVESTMENT POLICY HUB, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3462.

11. Agreement between Japan and Ukraine for the Promotion and Protection of Investment, Feb. 5, 2015, UNCTAD, INVESTMENT POLICY HUB, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3324.

Chapter,[12] and Japan-Myanmar BIT.[13] Other treaties diverge in how they modify the default rules of arbitral institutions, including by resort to standing panels. Most treaties surveyed provide for the qualifications of arbitrators and rules governing their appointment, whether from standing panels such as the ICSID list or ad hoc by the parties.[14] For example, treaties like the Canada-Hong Kong BIT provide:

> [A]rbitrators shall have expertise or experience in public international law, international investment or international trade rules, or the resolution of disputes arising under international investment or international trade agreements. Arbitrators shall be independent of, and not be affiliated with or take instructions from, either Party and the disputing investor.[15]

Notably, most treaties surveyed do not bind ISA parties to the default rules of an institutional authority in appointing arbitrators, nor to making appointments from institutional rosters.

A limited number of treaties include supplementary rules governing the qualifications and conduct of arbitrators. For example, Canadian treaties, such as the Canada-Guinea BIT and the Canada-Burkina Faso BIT, provide that, in relation to issues of financial services, arbitrators appointed shall have 'expertise or experience in financial services law or practice, which may include the regulation of financial institu-

12. Free Trade Agreement between the Eurasian Economic Union and its Member States, of the One Part, and the Socialist Republic of Vietnam, of the Other Part, ch. 8, May 29, 2015, UNCTAD, INVESTMENT POLICY HUB, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3457.

13. Agreement between the Government of Japan and the Government of the Republic of the Union of Myanmar for the Liberalisation, Promotion and Protection of Investment, Dec. 15, 2013, UNCTAD, INVESTMENT POLICY HUB, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3113.

14. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, https://cil.nus.edu.sg/wp-content/uploads/formidable/18/1965-Convention-On-The-Settlement-Of-Investment-Disputes-Between-States-And-Nationals-Of-Other-States.pdf, [hereinafter ICSID Convention].

15. *E.g.,* Foreign Investment Promotion and Protection Agreement between Canada and Hong Kong, Oct. 2, 2016, UNCTAD, INVESTMENT POLICY HUB, http://investmentpolicyhub.unctad.org/IIA/country/35/treaty/3626; *see also* Agreement between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments, art. 18(4)–(5), Jan. 19, 2016, UNCTAD, INVESTMENT POLICY HUB, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3601; ChAFTA, *supra* note 1, ch. 9, art. 9.15(8); *see also* Free Trade Agreement between the Government of the Republic of Korea and the Government of the Socialist Republic of Vietnam, art. 9(21)(2)(a)–(b), May 5, 2015, UNCTAD, INVESTMENT POLICY HUB, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3582.

tions.'[16] Canada's recent FTAs also authorize a third party, the ICSID Secretary General, to appoint ISA arbitrators when the disputing parties fail to so appoint,[17] or in consolidation proceedings where the Secretary General is empowered to appoint all three arbitrators.[18]

However, only ChAFTA[19] and the EU-Singapore FTA directly preceding it,[20] provide for in-house standing panels established by the provisions in the respective treaty. As is discussed in Part III, these treaties also provide comprehensive rules regulating the qualification and appointment of panelists, as well as their removal from rosters, including for misconduct.[21]

III. Competing Models of Standing Panels

As identified in the Appendix, several recent treaties provide for standing panels, though they primarily call for external standing panels, such as

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16. Agreement for the Promotion and Reciprocal Protection of Investments between Canada and the Republic of Guinea, art. 23(2), May 27, 2015, UNCTAD, Investment Policy Hub, http://investmentpolicyhub.unctad.org/Download/TreatyFile/5095 [hereinafter Agreement between the Gov't of Canada and Repub. of Guinea]; Agreement between the Government of Canada and the Government of Burkina Faso for the Promotion and Protection of Investments, art. 24(2), Apr. 20, 2015, UNCTAD, Investment Policy Hub, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3460 [hereinafter Agreement between the Gov't of Canada and Burkina Faso]; Agreement between the Government of Canada and the Government of the Hong Kong Special Administrative Region of the People's Republic of China for the Promotion and Protection of Investments, art. 22(2), Feb. 10, 2016, UNCTAD, Investment Policy Hub, http://investmentpolicyhub.unctad.org/Download/TreatyFile/5094 [hereinafter Agreement between the Gov't of Canada and China].

17. *See, e.g.*, Agreement between the Gov't of Canada and Repub. of Guinea, *supra* note 16, at arts. 24, 26.

18. *See, e.g.*, Agreement between the Gov't of Canada and China, *supra* note 16, art. 26(3); *see also* Agreement between the Gov't of Canada and Repub. of Guinea, *supra* note 16, art. 28(3); *see also* Agreement between the Gov't of Canada and Burkina Faso, *supra* note 16, art. 29(1)–(4); *see also* Canada - Côte d'Ivoire Foreign Investment Promotion and Protection Agreement, art. 27(3), Nov. 30, 2014, UNCTAD, Investment Policy Hub, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3242; *see also* Canada - Mali Foreign Investment Promotion and Protection Agreement, art. 27(5), Nov. 28, 2014, UNCTAD, Investment Policy Hub, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3239; *see also* Canada-Senegal Foreign Investment Promotion and Protection Agreement, art. 28(3), Nov. 27, 2014, UNCTAD, Investment Policy Hub, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3240; *see also* Free Trade Agreement between Canada and the Republic of Korea, art. 8(28)(5), Sept. 22, 2014, UNCTAD, Investment Policy Hub, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3077 [hereinafter Canada-Korea FTA].

19. ChAFTA, *supra* note 1, art 9.15(5), at Annex 9-A.

20. EU-Singapore, *supra* note 2, at art. 9.18, 15.5.

21. *See* discussion *infra* Part III.

that provided for by the ICSID Rules. The most comprehensive recent treaty providing for in-house standing ISA is the 2015 ChAFTA, which includes a provision in its Chapter on Investment.[22] Section 2.3 of the ChAFTA requires that China and Australia each nominate five arbitrators, with ten additional arbitrators selected jointly, provided they are not nationals of China and Australia.[23] Annex 9-A includes rules that prescribe the qualifications and conduct of panelists selected to so serve.[24] In addition, a Joint Committee on Investment is empowered to "establish" and "maintain" the in-house panel, comparable to the EU-Singapore FTA in which a Joint Trade Committee is so empowered.[25]

The ChAFTA is unexceptional in permitting disputing parties to appoint ISA arbitrators ad hoc, a practice that is extensively utilized in investor-state arbitration.[26] It provides that each disputant can appoint one arbitrator, stipulating that the third arbitrator be appointed jointly.[27] However, the ChAFTA is unclear as to how arbitrator(s) "shall be drawn"[28] if disputants fail to make such appointments within a mandated time frame. The likely inference is that the Joint Committee established by the Treaty will oversee the standing panel, while China and Australia each will retain a high degree of control over the selection process.

The ChAFTA is supplemented by a Side Letter on Transparency Rules Applicable to the ICSID, providing that "the Parties shall enter into consultations within 12 months of the date of entry into force of the Agreement on the future application of the United Nations Commission on International Trade Law (UNCITRAL) Rules on Transparency in Treaty-based Investor-State Arbitration."[29] These consultations will presumably include establishing rules and procedures for managing the in-house panel, although the result of these consultations has not yet been made public.

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22. ChAFTA, *supra* note 1.

23. ChAFTA *supra* note 1, at art. 9.15(6); *see also* ChAFTA, *supra* note 1, at art.15.7(3) (establishment and composition of an arbitration tribunal).

24. ChAFTA, *supra* note 1, at Annex 9-A; *see also* EU-Singapore, *supra* note 2, at art. 9.18(6).

25. ChAFTA, *supra* note 1, at art. 9.7(3).

26. *See generally* ChAFTA, *supra* note 1, at art. 9(15).

27. *Id.* at art. 9(15)(1).

28. *Id.* at art. 9(15)(3)–(4).

29. *See* ChAFTA, *supra* note 1, at Annex IV (Side Letter on Transparency Rules Applicable to Investor-State Dispute Settlement, http://dfat.gov.au/trade/agreements/ChAFTA/official-documents/Documents/ChAFTA-side-letter-on-transparency-rules-applicable-to-investor-state-dispute-settlement.pdf). *See too* Esmé Shirlow, *Dawn of a New Era? The UNCITRAL Rules and UN Convention on Transparency in Treaty-Based Investor-State Arbitration, 31* ICSID REV. 622 (2016) (on the UNCITRAL Rules on Transparency and UN Convention on Transparency).

In contrast to the ChAFTA and EU-Singapore FTA,[30] some treaties provide for the selection of ISA arbitrators from external, rather than in-house, standing panels. For example, the Investment Chapter of the Canada-Korea FTA specifies that, "[in consolidation proceedings] the Secretary-General [of the ICSID] shall, within 60 days of receipt of the request, establish a Tribunal composed of three arbitrators appointed from the ICSID Panel of Arbitrators."[31]

Similarly, the Transpacific Partnership Agreement (TPPA) allows the disputants in consolidation proceedings to each appoint one arbitrator, with the Secretary General appointing the presiding member under the UNCITRAL Rules.[32] The Korea-New Zealand and Australia-Korea FTAs both adopt the same approach.[33] Under the UNCITRAL Rules, where disputants fail to agree upon a sole arbitrator, the appointing authority shall draw up a list of possible arbitrators.[34] Each disputant shall then eliminate names from the list that are unacceptable to it and rank its preferences among the remainder.[35] The appointing authority shall make the final determination based on the names remaining on the list.[36] However, the appointing authority can forego the list if it feels that the procedure is inappropriate, in which case all appointments are discretionary.[37]

Given that the Australia-China and EU-Singapore FTAs are exceptional in providing for inside standing panels, it is necessary to consider how other treaties provide for ISA, including through external panels. Encompassed within this analysis is a consideration of the nature and scope of competing systems of standing panels in ISA, and how to modify them in response to critical assessments of their features and operation.

30. ChAFTA, *supra* note 1, at art. 9.7(3); EU-Singapore, *supra* note 2, at art 9.18(4).

31. Canada-Korea FTA, *supra* note 18.

32. Trans-Pacific Partnership Agreement, art. 9(22)(6), 9(28)(a)–(c), Feb. 4, 2016, UNCTAD, INVESTMENT POLICY HUB, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3573. On the United State's official withdrawal from the TPP, see *The United States Officially Withdraws from the Trans-Pacific Partnership*, OFF. OF THE U.S. TRADE REP. (Jan. 2017), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/january/US-Withdraws-From-TPP.

33. New Zealand-Korea Free Trade Agreement, art. 10(29)(4)(a)–(c), Mar. 23, 2015, UNCTAD, INVESTMENT POLICY HUB, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3592; Korea-Australia Free Trade Agreement, art. 11(25)(4), Apr. 8, 2014, ATS 43, UNCTAD, INVESTMENT POLICY HUB, http://investmentpolicyhub.unctad.org/Download/TreatyFile/2971.

34. UNCITRAL, UNCITRAL ARBITRATION RULES, art. 8(2)(b) (2010), U.N. Doc. A/RES/31/98, 15 ILM 701 [hereinafter UNICITRAL ARBITRATION RULES].

35. *Id.* at art. 8(2)(b).

36. *Id.* at art. 8(2)(c).

37. *Id.* at art. 8(2)(d).

IV. The Scope of Standing Panels

A pervasive concern regarding the selection of ISA arbitrators from standing panels is that different panel models with inconsistent attributes will undermine the normative value of standing panels. Some treaties, such as treaties to which Canada is a party, establish detailed rules governing the selection, administration, and appointment from standing panels.[38] These rules include selection criteria, including the qualifications required for panel appointments or criteria for the random appointment of panelists to ISA tribunals.[39] Others defer to institutional authorities to satisfy the detailed selection and appointment criteria. For example, the ICSID Rules of Procedure include, *inter alia,* rules governing a request for arbitration, the appointment of arbitrators, and the conduct of hearings, awards, and post-award remedies.[40] Yet others, such as the Australia-Japan, EU-Georgia, EU-Moldova, and EU-Ukraine FTAs—all concluded in 2014—make no provision for ISA. Treaties also diverge over whether disputing parties or third parties should appoint ISA arbitrators.

As the Appendix demonstrates, most treaties give the disputing parties a choice as to whether to appoint ISA arbitrators ad hoc or from panels. Others, such as Canada's recent FTAs, provide that the Secretary General of the ICSID or the Permanent Court of Arbitration appoint the presiding arbitrator. Some treaties adhere to the UNCTAD's 2015 proposal, providing that arbitrators be appointed on a random basis, such as through a rotating roster system.[41] The result is a range of disparate rules and procedures governing standing panels, and little movement towards coalescence within a uniform model.

In recognizing such divergence across treaties, a 2015 UNCTAD World Investment Report argues for the random appointment of ISA arbitrators from standing panels. It reasons that a "roster of qualified arbitrators agreed upon by the contracting parties and determining by lot the arbitrators who sit on a specific case" will improve the overall arbitration process in ISA proceedings.[42] In so contending, the

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38. *See, e.g.*, ChAFTA, *supra* note 1, at art. 9.15(8).

39. ChAFTA, *supra* note 1, at art. 9.15(8).

40. *See Overview of an Arbitration under the ICSID Convention*, INT'L CTR. FOR SETTLEMENT OF INVEST. DISPUTES, https://icsid.worldbank.org/en/Pages/process/Arbitration.aspx (last visited Nov. 20, 2017).

41. ChAFTA, *supra* note 1, art. 9.15(5)-(6).

42. *See* UNCTAD, WORLD INVESTMENT REPORT 2015: REFORMING INTERNATIONAL INVESTMENT *Governance* (June 25, 2015), http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf [hereinafter UNCTAD WORLD INVESTMENT REPORT 2015].

UNCTAD proposal seeks to address pre-existing contentions that standing panels include unqualified candidates, that disputing parties seek to appoint standing panelists who are biased in their favor, and that extraordinary challenges directed at such bias are difficult to mount.[43] The corresponding issue with such a contention is that most commentators on external ISA standing panels do not provide empirical evidence of deficiencies in the operation of such panels to substantiate their criticisms that they are inefficient or biased in favor of one or the other party.[44] This raises two further controversial issues not readily evident in the literature. The first is whether these alleged deficiencies associated with ISA standing panels are redressed by requiring that the appointment of arbitrators be limited to those serving on standing panels, or conversely, that standing panels be abandoned in favor of ad hoc appointments by the disputing parties. The second issue is whether these limitations ascribed to standing panels are best remedied by requiring that third parties appoint standing panelists rather than permit disputing parties to appoint arbitrators who are both on and off rosters.

A study on standing panels currently in operation has the advantage of facilitating empirical scrutiny of how ISA panels function in practice, including in panel selection, as well as in the appointment, reappointment, and removal of panelists. Such empirical analysis is fittingly subject to procedures by which to assess the background, experience, and qualifications of panelists prior to their appointment or reappointment, and in determining whether to remove them from a standing panel. It can also assist in establishing grounds on which to remove panelists, as well as how to do so timeously, transparently and effectively.

V. Establishing Institutional Benchmarks

A limitation in modeling standing panels is the absence of institutional benchmarks that determine the comparative utility of different models of standing panels. A standing panel that consists of nothing more than a list of prospective appointees is likely to be only as valuable as the perceived quality of that list. However, the value of a standing panel system that includes rules governing its operation, including in

43. *See* Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*,107 AM. J. INT'L. L. 45 (2013) (identifying different paradigms identified with different actors accounting for conflicting outcomes, including in ISA decisions, based on the divergent interests of states, investors, NGOs, arbitrators and academics).

44. *See* discussion *infra* Part VII.

selecting and appointing ISA panelists, will depend on the workability of those rules in practice. If disputants are able to avoid those lists by making ad hoc appointments, the lists will have limited value, whether or not listed panelists are perceived to be of high caliber. This is arguably the case with the ICSID list, in which Article 13 of the ICSID Convention allows state signatories to nominate up to four arbitrators to the list of dispute resolvers[45] for a renewable term of six years.[46]

The limitation of the ICSID model is twofold. First, almost a third of states have not nominated parties to the ICSID Panel.[47] This arises due to the perception among states that ISA arbitration involving them is unlikely to eventuate, or that panelists on rosters are biased in favor of foreign investors.[48] Second, both states and investors may prefer to appoint arbitrators off-roster because doing so widens their choice of potential appointees, and because they are free to do so under the ICSID Rules and the vast majority of treaties that provide for ISA.[49] These perceptions among investor and state parties to ISA are not peculiar to signatories to the ICSID. As Brower and Rosenberg observe, the vast majority of BITs and FTAs providing for ISA for decades, preserve the right of disputing parties to appoint arbitrators ad hoc, affirming the disinclination of disputants to appoint from ISA rosters.[50] This is all the more credible in recognizing that Judge Brower was peculiarly equipped to observe such attitudes among ISA disputants, himself being a past judge on the Iran-US Claims Tribunal and an ad hoc judge on the International Court of Justice and the Inter-American Court of Human Rights.[51]

The reluctance of states in particular to nominate panelists to the ICSID list is also statistically verified in part. As Becky Jacobs notes in her survey of ICSID cases until 2013, only 108 out of 158 ICSID members nominated arbitrators.[52] Similarly, there is statistical evi-

45. ICSID Convention, *supra* note 14, at art. 13(1).

46. *Id.* at art. 15(1).

47. *See* Becky L. Jacobs, *A Perplexing Paradox: "De-Statification" of "Investor-State" Dispute Settlement?*, 30 EMORY INT'L L. REV. 17 (2015) (asserting that only 108 out of 158 ICSID members nominated arbitrators).

48. Strezhnev, *supra* note 5, at 2; Puig, *supra* note 5, at 422.

49. ICSID Convention, *supra* note 14, at art. 40(1).

50. Charles N. Brower & Charles B. Rosenberg, *The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption that Party-Appointed Arbitrators Are Untrustworthy is Wrongheaded*, 29 ARB. INT'L 7, 10-12 (2013).

51. *Charles N. Brower*, WHO'SWHOLEGAL.COM (2017), http://whoswholegal.com/profiles/19639/0/brower/charles-n-brower.

52. Jacobs, *supra* note 47, at 33.

dence that both state and investor disputants prefer not to appoint from standing panels. Professor Chiara Giorgetti whose expertise is in international dispute resolution, demonstrates that, in seventy-five percent of the cases she studied, ISA disputants selected their own arbitrators.[53] This view is affirmed by Sergio Puig, a law professor at the University of Arizona. He affirms more generally in a domestic U.S. context that, despite the existence of standing ISA panels, "most people assigned to the list are never appointed as arbitrators, suggesting that being on the list is not sufficient to achieve appointments, nor is being appointed by the institution a definitive factor in the centrality of arbitrators."[54]

However, what is less readily verifiable is, not Brower and Rosenberg's opinion that ISA disputants in general mistrust appointments made by others, including from rosters,[55] but their conclusion that ISA disputants have a "timeless right" to choose arbitrators.[56] Their argument, that standing panels are most often used in cases involving repetitive fact patterns, whereas ISA cases often involve divergent fact patterns, is verifiable.[57] They are also justified in contending that standing panels are most beneficial in disputes requiring industry-specific expertise, as distinct from ISA disputes involving diverse industries.[58] However, their proposal to resurrect a supposed right of ISA disputants to select ISA arbitrators as a rule of customary international law is unavoidably conjectural.

Most studies on standing panels in ISA are not comprehensive. Few focus on how to deal with the perceived selection, appointment, and constituency biases ascribed to standing panels.[59] There is scant accessible data by which to benchmark performance criteria in the selection, appointment, and administration of standing panels. Nor are there extensive empirical studies on how to regulate and manage panels effectively and fairly, beyond verifying the qualifications of prospective appointees.[60] One means of measuring the suitability of standing

53. Chiara Giorgetti, *Who Decides Who Decides in International Investment Arbitration?*, 35 U. PA. J. INT'L L. 431, 446 (2013).

54. Puig, *supra* note 5, at 416.

55. Brower & Rosenberg, *supra* note 50, at 14.

56. *Id.* at 8.

57. *Id.* at 21-22.

58. *Id.*

59. *See* Emilie M. Hafner-Burton & David G. Victor, *Secrecy in International Investment Arbitration: An Empirical Analysis*, 7 J. INT'L DISP. SETTLEMENT 161 (2016); Schultz & Dupont, *supra* note 5, at 1149.

60. Schultz & Dupont, *supra* note 5.

panels in ISA is to benchmark the opinions of disputing parties in regard to the time and cost efficiency of panel selection and appointment, such as through exit surveys on the conclusion of ISA disputes. Another mode of measurement is to benchmark the speed with which appointments are made and ISA decisions are reached and compare that benchmark to actual performance in discrete cases. A qualitative more than quantitative mode of measurement is to attempt to determine the extent to which ISA proceedings are expedited due to the experience and capabilities of ISA arbitrators appointed from panels, and their capacity to decide transparently, expeditiously and also comprehensively.[61] A formidable challenge is to measure bias in the selection and appointment of standing panelists, and in correlating that bias to allegations of a lack of independence and impartiality of panelists appointed by ISA disputants.[62]

VI. Bias in Panel Selection and ISA Appointments

A central problem exists in redressing the perception among developing nations that the ICSID list favors investors from developed nations, and the countervailing but less vocal view that ICSID panelists nominated by developing nations favor states over foreign investors.[63] This was a notable allegation leading to Latin American countries withdrawing from the ICSID Convention, starting with Bolivia in 2007,[64] followed by Cuba, Nicaragua, Ecuador, and Venezuela each pledging to terminate its ICSID membership.[65] The sequel to these actions was a 'chill' in which developing nations, fearful of ISA litigation, either capitulated to foreign investors by acceding to their demands, such as

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61. *Id.* at 1164.

62. *See* Sam Luttrell, *Foreign Investment Law Journal*, 31 ICSID Rev. 597 (2016) (on arbitrator challenges under the ICSID); Gabriele Ruscalla, *Transparency in International Arbitration: Any (Concrete) Need to Codify the Standard?*, 3 Groningen J. Int'l L. 1, 25 (2015) (On transparency in investor-state arbitration, including in appointments and conduct of arbitration). *See generally* Julie A. Maupin, *Transparency in International Investment Law: The Good, the Bad, and the Murky*, *in* Transparency in International Law 142 (Andrea Bianchi & Anne Peters eds., 2013).

63. *See* Leon L. Trakman & David Musayelyan, *The Repudiation of Investor–State Arbitration and Subsequent Treaty Practice: The Resurgence of Qualified Investor–State Arbitration*, 43 ICSID Rev. 194 (2016).

64. *See Bolivia Submits a Notice under Article 71 of the ICSID Convention*, Int'l Ctr. for Settlement of Invest. Disputes (May 16, 2007), http://icsidfiles.worldbank.org/icsid/icsid/staticfiles/Announcement3.html (on Bolivia's denunciation and withdrawal from the ICSID).

65. *See* Charles N. Brower & Sadie Blanchard, *From "Dealing in Virtue" to "Profiting from Injustice": the Case Against "Re-Statification" of Investment Dispute Settlement*, 55 Harv. Int'l L.J. 45 (2014); Emmanuel Gaillard, *The Denunciation of the ICSID Convention*, 237 N.Y. L.J. 122 (2007).

by removing restrictions on foreign direct investment, and/or declined to provide for ISA in their treaties.[66]

However, the backlash against ISA soon extended to developed nations, notably to Australia, even though it had not lost an ISA claim to a foreign investor. Not long after Ecuador's withdrawal from the ICSID Convention, the Australian Labour Government issued its 2011 Policy Statement, indicating that Australia would no longer agree to provide for ISA in its BITs and FTAs.[67] This Policy Statement was based on a study conducted by the Australian Productivity Commission which advised, *inter alia,* that ISA was inefficient and costly, and that Australia's domestic courts were more reliable and compliant with the rule of law than ISA arbitrators, presumably including those appointed from standing panels.[68] While the successor Liberal Government of Australia retreated from this categorical rejection of ISA,[69] opting for a case-by-case approach, the mainstream media continued to focus on Australia's initial denunciation of ISA.[70] The perceived result was that the

66. *See* Trakman & Musayelyan, *supra* note 63, at 194-99; *see* Fernando Cabrera Diaz, *South American Alternative to the ICSID in the Works as Governments Create an Energy Treaty* (Aug. 6, 2008), https://www.iisd.org/itn/2008/08/06/south-american-alternative-to-icsid-in-the-works-as-governments-create-an-energy-treaty.

67. Australian Government, Department of Foreign Affairs and Trade, *Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity* (Apr. 2011), http://blogs.usyd.edu.au/japaneselaw/2011_Gillard%20Govt%20Trade%20Policy%20Statement.pdf.

68. *See* Luke Nottage, *Investor-State Arbitration Policy and Practice in Australia*, *in* SECOND THOUGHTS: INVESTOR-STATE ARBITRATION BETWEEN DEVELOPED DEMOCRACIES 377-430 (Armand de Mestral ed., 2017) (with a manuscript version at http://ssrn.com/abstract=2802450); Jürgen Kurtz, *Australia's Rejection of Investor–State Arbitration: Causation, Omission and Implication*, 27 ICSID REV. 65 (2012); Leon E. Trakman, *Investor State Arbitration or Local Courts: Will Australia Set a New Trend?*, 46 J. WORLD TRADE 83 (2012); Australian Fair Trade & Investment Network Ltd., *Election 2016: Trade Policy Comparison* (June 20, 2016), http://aftinet.org.au/cms/1606-2016-election-policy-scorecard (stating that, more recently, the Australian Labor Party—in opposition since 2013—announced the complete abolition of ISA as part of its (unsuccessful) election campaign).

69. Australia announced in 2013 that it will revert to negotiating ISA on a case-by-case basis. *See Trade and Investment Topics–State Dispute Settlement*, AUSTRALIAN GOV'T, DEPT. OF FOREIGN AFF. AND TRADE, http://dfat.gov.au/trade/topics/pages/isds.aspx (Last visited June 6, 2015). Australia's subsequent agreements with Malaysia, ASEAN and Japan did not provide for ISA. However, its FTAs with Korea and China contain ISA dispute resolution clauses and allow investors to lodge claims under the ICSID rules. *See* Leon Trakman, Deciding Investor States Disputes: Australia's Evolving Position, 15 J. WORLD INVEST. & TRADE 152 (2014). For a discussion on Australia's FTA negotiations with Korea in the context of ISA, see Luke Nottage, Investment Treaty Arbitration Policy in Australia, New Zealand and Korea, 25(3) J. ARB. STUD. 185 (2015).

70. *See, e.g.*, *The Arbitration Game*, THE ECONOMIST (Oct. 11, 2014), https://www.economist.com/news/finance-and-economics/21623756-governments-are-souring-treaties-protect-foreign-investors-arbitration; Janet Eaton, *Multiple Countries Reject Investor-State (2013 Update)*, SIERRA CLUB

Australian Government had placed its outbound investors at the mercy of domestic courts in countries that lacked rule of law traditions, while relying on Australia's domestic courts for protection from claims brought by adventitious inbound foreign investors. The result is continued ambivalence towards ISA in Australia, as reflected in its selective inclusion of ISA in its treaties—a stance adopted to varying degrees by other countries that have vacillated over its value.[71]

Recent attacks on ISA in developing nations have followed successful claims brought by foreign investors, which have led to subsequent repudiations of ISA by South Africa[72] and perhaps Indonesia.[73] Reflected in the continuing controversy over the perceived partiality of ISA is the perception that the ISCID roster in particular reflects a constituency bias in favor of foreign investors. The perceived harm is the alleged subordination of domestic labor markets, public health schemes, and the environment, arising from the bias of ISA tribunals in favor of foreign investors.[74]

The concern over potential biases of ISA arbitrators extends beyond a clash between the interests of foreign investors and the boundaries of state sovereignty to transnational concerns, such as about public health and environmental safety.[75] This tension in transnational public policy

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CANADA FOUND. (Jan. 24, 2014), http://www.sierraclub.ca/en/main-page/multiple-countries-reject-investor-State-2013-update.

71. *See* Trakman & Musayelyan, *supra* note 63, at 194.

72. Luke Eric Peterson, *South Africa Pushes Phase-out of Early Bilateral Investment Treaties after at Least Two Separate Brushes with Investor-State Arbitration*, INVEST. ARB. REP. (Sep. 23, 2012), http://www.iareporter.com/articles/20120924_1; *South Africa: Bilateral Investment Treaties*, International Investment Agreements Navigator, UNCTAG, INVEST. POL'Y HUB, http://investmentpolicyhub.unctad.org/IIA/CountryBits/195 (last visited June 10, 2016); *see* UNCTAD WORLD INVESTMENT REPORT 2015, *supra* note 42 (noting that South Africa has continued to enforce its anti-ISA policies and terminated more of its investment treaties).

73. Kingdom of the Netherlands, Netherlands Embassy in Jakarta, *Termination Bilateral Investment Treaty*, http://indonesia.nlembassy.org/organization/departments/economic-affairs/termination-bilateral-investment-treaty.html (last visited June 6, 2015); Leon E. Trakman & Kunal Sharma, *Indonesia's Termination of the Netherlands–Indonesia BIT: Broader Implications in the Asia-Pacific?*, KLUWER ARB. BLOG (Aug. 21, 2014), http://kluwerarbitrationblog.com/blog/2014/08/21/indonesias-termination-of-the-netherlands-indonesia-bit-broader-implications-in-the-asia-pacific/; *see* UNCTAD WORLD INVESTMENT REPORT 2015, *supra* note 42, at 110 (noting that Indonesia continues terminating its BITs and has discontinued 18 of its 46 BITs); Antony Crockett, *Indonesia's Bilateral Investment Treaties: Between Generations?*, 30 ICSID REV. 437 (2015) (studies Indonesia's nuanced position on ISA).

74. *See, e.g.*, Leon E. Trakman, *The ICSID Under Siege*, 45 CORNELL INT'L L.J. 603, 638 (2012).

75. *See* J. ANTHONY VANDUZER ET AL., INTEGRATING SUSTAINABLE DEVELOPMENT INTO INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE FOR DEVELOPING COUNTRIES (Aug. 2012), https://www.iisd.org/pdf/2012/6th_annual_forum_commonwealth_guide.pdf (analyzing tension between domes-

is reflected in the claims brought by cigarette manufacturer Philip Morris, first against Uruguay and then against Australia under the Hong Kong Australia BIT, under the UNCITRAL Rules,[76] and followed by countries supporting Philip Morris against Australia under the WTO.[77] There, Philip Morris claimed that Australian legislation requiring the plain packaging of cigarettes expropriated Philip Morris' intellectual property.[78] Consistent with the UNCITRAL rules, each party appointed one ISA arbitrator with the third and presiding arbitrator being appointed by the Secretary General of the UNCITRAL. While the Tribunal denied Philip Morris' claim on jurisdictional grounds,[79] a central criticism was that unelected ISA arbitrators appointed by disputants should not have greater legal authority than the highest domestic courts to decide matters of public health that were of national and arguably, transnational importance.

An ongoing concern is whether ISA arbitrators should be subject to a restrictive system of review, limited to extraordinary grounds and falling well short of oversight by a court of appeal.[80] At issue is also doubt about the transparency of ISA proceedings taking place behind closed doors and not being subject to public scrutiny, a subject that was

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tic public policy directed at protecting the environment including but not limited to developing nations, industrial development favoring foreign investors).

76. Philip Morris Asia Ltd. v. Australia, Case No. 2012-12 (Perm. Ct. Arb. 2017), https://www.pcacases.com/web/view/5.

77. *See, e.g.*, THE GLOBAL TOBACCO EPIDEMIC AND THE LAW 4-23 (Andrew D. Mitchell & Tania Voon eds., 2014).

78. *Id*; *see* REGULATING TOBACCO, ALCOHOL AND UNHEALTHY FOODS: THE LEGAL ISSUES (Tania Voon et al. eds., 2014) [hereinafter REGULATING TOBACCO].

79. REGULATING TOBACCO, *supra* note 78 at 337; *see generally* Jarrod Hepburn & Luke R. Nottage, *Case Note: Philip Morris Asia v Australia*, 18 J. WORLD INV. TRADE 307 (2017).

80. *See generally* Hans Smit, *The Pernicious Institution of the Party-Appointed Arbitrator*, 33 COLUM. UNIV. ACAD. COMMONS 1, 2 (2010) (arguing that party appointed arbitrators should be banned unless their role as advocates is fully disclosed and accepted) (accessed June 10, 2016); Jan Paulsson, *Moral Hazard in International Dispute Resolution*, 25 ICSID REV. 339, 352 (2010) (arguing that ad hoc appointments should be abolished in all types of commercial arbitration); Gus Van Harten, *Reform of Investor-State Arbitration: A Perspective from Canada* 8 (Osgoode Hall Law Sch. of York Univ., Osgoode Dig. Commons, Paper No. 31, 2011), https://ssrn.com/abstract=1960729 [hereinafter Van Harten, *Reform of Investor-State Arbitration*]; Ingo Venzke, *Investor-State Dispute Settlement in TTIP from the Perspective of a Public Law Theory of International Adjudication*, 17.3 J. WORLD INV. & TRADE 374, 398 (2016); SAM LUTTRELL, BIAS CHALLENGES IN INVESTOR-STATE ARBITRATION: LESSONS FROM INTERNATIONAL COMMERCIAL ARBITRATION 445, 481 (Chester Brown & Kate Miles eds., 2011) (arguing that structural problems of ISA may be addressed by establishing a "standing corps of arbitrators"); Gus Van Harten, *The (Lack of) Women Arbitrators in Investment Treaty Arbitration* 1-2 (Colum. FDI Persp., 2012) (arguing that a mandatory panel of arbitrators will contribute to greater involvement of women arbitrators in investment treaty arbitration).

identified and redressed in part in the revised 2014 UNCITRAL Transparency Rules.[81] Further consternation is that ISA proceedings and awards ought not to undermine the political sovereignty and economic stability of defendant states on grounds of domestic public policy. These include, among others, preserving domestic markets from undue competition from foreign investors, maintaining public health standards by regulating the sale of imported tobacco products, and protecting the environment from industrial waste.[82]

The result of such seemingly state-centered, but also transnational considerations, is the growing tendency of countries to lodge extraordinary challenges to the awards of ISA arbitrators, albeit with limited success to date.[83]

A. *Identifying Bias*

A difficulty in mounting a successful, extraordinary challenge to an ISA proceeding or award is identifying the nature and significance of decisional bias of arbitrators appointed from standing panelists to decide ISA cases. Accepting that bias inheres in human judgment, how can standing panels be constructed to reduce allegedly pernicious biases in selecting and appointing panelists? Complicating this question is the observation that some commentators present bias, broadly construed, as the central defect of ISA, including in selecting and administering ISA panels, and in appointing panelists to arbitration tribunals.[84]

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81. *See* U.N. Comm'n on Int'l Trade Law, Rules on Transparency in Treaty-based Investor-State Arbitration (2014), http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf (revised, modifying the 2010 Rules, *supra* note 30) (seeking transparency and public access to information about treaties and their application).

82. *See, e.g.*, REGULATING TOBACCO, *supra* note 78.

83. *See e.g.*, See Baiju S Vasani and Shaun A. Palmer, *Challenge and Disqualification of Arbitrators at ICSID: A New Dawn?* 30 ICSID REV.194 (2015) (on the increasing number of successful challenges lodged against ICSID arbitrators); Lars Markert, *Challenging Arbitrators in Investment Arbitration: The Challenging Search for Relevant Standards and Ethical Guidelines*, 3.2 CONTEMP. ASIA ARB. J. 237, 237-243 (2010) (noting that studies suggest that there is a noticeable increase in challenges to arbitrators); Christopher Harris, *Arbitrator Challenges in International Investment Arbitration*, 5.4 TRANSNAT'L DISP. MGMT. 1, 1 (2008).

84. *See* Strezhnev, *supra* note 5 (finding conditional evidence of pro-claimant bias among arbitrators from advanced economies); *see infra* Part 6.1. *But see* Susan D Franck, *The ICSID Effect? Considering Potential Variations in Arbitration Awards,* 51 VA. J. INT'L L. 825, 830 (2011) (providing statistical evidence disputing pervasive bias of ISA arbitrators against developing countries).

Five primary kinds of bias are associated with the selection and appointment of members to ISA standing panels, as identified below.[85] The first type is the selection bias associated with the selection of panel members who are allegedly predisposed in favor of claimant investors, or respondent states.[86] This bias includes the perception that state parties will appoint standing panelists to reflect the biases that favor those countries, or in the case of developed nations, their outbound investors.[87] A second type is the constituency bias in selecting ISA panelists who demonstrate allegiance to a particular constituency, not limited to disputants. Such an allegiance varies from biases favoring state or investor parties as broad constituencies, or advantaging particular constituencies such as specific industries or public health lobby groups in the public sector.[88] The third type of bias is an appointments bias whereby disputants appoint ISA panelists with perceived biases benefitting foreign investors engaged in specific industrial, commercial, or public interest sectors.[89] The fourth type is the administrative bias attributed to the authority administering a standing panel by applying transparency procedures that protect allegedly in-confidence communications of foreign investors, or public interests directed in limiting the disclosure of allegedly confidential ISA proceedings. Finally, the fifth type of bias is a decisional bias, such as the decision of an ISA arbitrator appointed from a standing panel to advantage one disputant over the other. Decisional bias is treated as the most determinative challenge to ISA arbitration in general and to ISA standing panels in particular.[90]

Commentators identify the perception among states, foreign investors, and commentators that these different kinds of biases are interrelated.[91] For example, an alleged selection and appointments bias in choosing ISA panelists leads to a perception of decision biases by arbitrators whose decisions reflect the biases of those selecting and/or

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85. *See* discussion *infra* VI(A).

86. Strezhnev, *supra* note 5, at 4.

87. *See* Puig, *supra* note 5 (on selection and appointments biases in ISA arbitration).

88. *See* Ahmad A. Ghouri, *On Genealogy of Proposals to Reform Investor-State Arbitration*, 11.1 TRANSNAT'L DISP. MGMT. 1, 6 (2014) (providing an illustration of this bias).

89. *See, e.g.*, Daphna Kapeliuk, *Collegial Games: Analyzing the Effect of Panel Composition on Outcome in Investment Arbitration*, 31.2 REV. LITIG. 267 (2012); Nigel Blackaby, *Public Interest and Investment Treaty Arbitration, in* INTERNATIONAL COMMERCIAL ARBITRATION: IMPORTANT CONTEMPORARY QUESTIONS 355, 358 (Albert Jan van den Berg ed., 2003).

90. *See* Jill I. Gross & Barbara Black, *When Perception Changes Reality: An Empirical Study of Investors' Views of the Fairness of Securities Arbitration*, 2008 J. DISP. RESOL. 349, 354 (2008).

91. *See, e.g.*, Strezhnev, *supra* note 5, at 8-11; *see also* Puig, *supra* note 5.

appointing them.[92] The perception that that ISA selection criteria are tainted reinforces the allegation that ISA proceedings and ensuing awards are also tainted.[93] Whether or not such allegations of tainting are justified in fact is less significant than the perception among prospective disputants that biased determinations may eventuate, and that such bias should be avoided both reactively and proactively. Proactive responses to decision biases include attempting to foreclose bias in determining appointments to standing ISA panels.[94] Reactive responses to decision biases include attempts to remediate the effect of bias, such as through an ISA appeals process.[95]

However, the presumed correlation among different kinds of bias is not self-evident. An appointments bias in favor of appointing arbitrators with experience in commercial law may, but need not, correlate with a bias advantaging foreign investors over state respondents.[96] Selection criteria that include commercial expertise do not translate into procedural and decisional biases protecting commercial interests. Conversely, an appointments bias favoring arbitrators with experience in government need not correlate with a bias protecting governmental interests. Moreover, panelists may well have double-edged and offsetting biases. As Anton Strezhnev notes, "when the presiding member is a national of an advanced economy and has had experience working in government as opposed to purely private law/academia, claimants are about twenty-five percent more likely to receive an award of damages."[97] Constituency biases are also informed by social, economic, and religious backgrounds, along with gender and ethnic experience, any of which can give rise to disparate decisional biases. The alleged bias of panelists in favor of foreign investors may well be offset by a domestic interest in constraining foreign investment in order to preserve the natural habitat.[98]

92. Strezhnev, *supra* note 5, at 8-11.

93. *Id.*

94. *See* discussion *infra* Part XI.

95. *See* discussion *infra* Part VI(B).

96. *See* David Schneiderman, *Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes*, 30.2 NW. J. INT'L L. & BUS. 383, 397 (2010).

97. *But see* Strezhnev, *supra* note 5, at 23 (concluding that presiding ISA members employed by government and nationals of developed countries are more likely to decide in favor of investor claimants than government respondents).

98. *See infra* Part VII(D) (discussing redressing biases on equitable grounds).

B. *Responding to Bias*

From a policy perspective, bias is neither avoidable, nor must it necessarily be avoided. Even if bias is conceived as a risk in establishing and maintaining standing panels, it does not follow that standing panels are *per se* undesirable, nor that they are ineffective or unfair. Rather than be prejudicial, bias may assist in balancing opposing values, for example, by displaying sensitivity towards national interests and responsiveness to profit incentivized foreign investments.

However, it is important to identify and evaluate the appearance, nature, and perceived effect of bias in determining who to select for appointment to ISA standing panels. It is also important to determine how to redress biases that are deemed to be pejorative to future panel selection, appointment, and reappointment decisions. The purpose in addressing concerns about bias is to increase the perceived legitimacy of standing ISA panels, as well as to address criticisms of them, whether or not ensuing evidence of bias affirms those criticisms.

Institutional criteria are also needed to verify the qualifications and experiences of prospective panelists. The objective is to ensure that they have adequate in-house or external ISA training and to evaluate their suitability as panelists, such as by requiring disclosure of commercial consultancies and identifying conflicts of interest.[99]

Nevertheless, normative criteria used to gauge and redress bias in selecting standing panels, however constituted, are inevitably assailable. Institutional authorities can seek to offset allegedly pejorative bias through constituency proclivities in selecting seemingly neutral panelists, or an equal number of commercial and public interest panelists. However, they cannot reasonably eliminate every bias that is subsequently considered as being pejorative. Nor can they fully redress efforts to hide biases by state parties wishing to avoid disclosing their political and economic predilections such as in agreeing to the pre-judgment settlement of ISA disputes.[100]

Moreover, biases are unavoidably informed by beliefs that are difficult to identify, within even robust and transparent standing panel

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99. *See* Karin Oellers-Frahm, *International Courts and Tribunals, Judges and Arbitrators, in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rüdger Wolfrum ed., Oxford Univ. Press 2013) (discussing the qualifications for appointments to courts and tribunals).

100. *See* Hafner-Burton & Victor, *supra* note 59, at 5 (discussing efforts by the ICSID to reform its rules to achieve more transparency and the resistance of states to transparency, including in pre-judgement settlements, for political reasons).

systems.[101] Panelists may display belief biases that are not easy to detect *a priori*, reflecting their upbringing, enculturation, nationality, religion, personal convictions, or their distinctive legal backgrounds and experiences.[102] They may demonstrate gender or ethnic biases which neither their pre-selection professional profiles nor their screening interviews revealed.[103] Some decisional biases also are difficult to regulate, as when party-appointed ISA arbitrators prefer one ISA disputant over the other "due to their interest in re-appointment and in expanding the role of the arbitration industry."[104]

However, the presence of belief biases inhering in standing panel systems should not lead to the summary rejection of standing systems as *per se* bad, or their absence as *per se* good. Belief biases may produce outcomes that are perceived to be balanced and equitable, such as when arbitrators appointed from standing panels effectively weigh the attributes of environmental safety against commercial development, rather than rely on a pre-existing belief bias by which they treat one as inherently superior to the other.[105] Beliefs that are informed by arguments presented by disputing parties are, on balance, more supportable than beliefs that predispose a panelist to favor one disputant over the other. For example, religious beliefs may enrich human judgment, as much as they may marginalize and sublimate opposing religious or non-religious beliefs.

Nor are biases inferentially pejorative if they are undetected at the time of panel selection. Normative criteria can guide the selection of ISA panelists through selection interviews. However, they cannot be expected to eliminate biases, nor fittingly should they always seek to do so. For example, the operational biases of selected panelists that favor informal arbitral hearings about which panel administrators are un-

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101. *See* Anja Seibert-Fohr, *International Judicial Ethics, in* THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 758, 772-73 (Cesare P. R. Romano, Karen Alter, & Yuval Shany, eds., Oxford Univ. Press 2014) (discussing the duty to act impartially and respect confidences in international adjudication); *see, e.g.*, Strezhnev, *supra* note 5, at 6, 17 (acknowledging the difficulty in identifying arbitrator bias due to confidential ISA proceedings, unpublished ISA settlements, and few arbitrators deciding most cases).

102. *See, e.g.*, Justin D. Levinson & Danielle Young, *Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18.1 DUKE J. GENDER L. & POL'Y 1 (2010).

103. *See* Susan D. Franck & Lindsey E. Wylie, *Predicting Outcomes in Investment Treaty Arbitration*, 65 DUKE L. J. 459, 496-515 (2016).

104. Van Harten, *Reform of Investor-State Arbitration*, *supra* note 80, at 2.

105. *See, e.g.*, Steffen Hindeland, *Bilateral Investment Treaties, Custom and a Healthy Investment Climate*, 5.5 J. OF WORLD INV. & TRADE 789 (2004) (evaluating the tension between bilateral investment treaties that seek to attract FDI while also protecting the environment).

aware at the time of selection may subsequently aid in facilitating expeditious ISA proceedings and reducing hearing costs.[106] Attributing derogatory bias to the operation of ISA panels is at best inferential, not decisive. Constituency and decision biases can destabilize ISA appointments made from standing panels. However, such biases may sometimes benefit ISA proceedings rather than undermine them.

VII. Reaffirming Standing Panels

Four pillars presented in the following sections purport to reaffirm the value of ISA in general and ISA standing panels in particular, while redressing allegations of institutional and belief biases in selecting ISA panelists and appointing them as arbitrators. These pillars are directed at ensuring the equitable and efficient selection of panelists and their appointment as ISA arbitrators, streamlining otherwise cumbersome ISA proceedings, and limiting arbitrariness by holding panelists and arbitrators accountable for their conflicts of interest or other misconduct.[107]

A. *Rendering Arbitrators Accountable*

Accountability entails appointing individuals who satisfy specified criteria for appointment to, or reappointment on, standing panels. These criteria include disclosing—timeously, continuously and fully—any conduct that might raise a conflict of interest.[108] Violating such duties of disclosure can justify removal from a tribunal and exclusion from a standing panel.[109]

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106. *See* Jeffrey P. Commission, *How Much Does an ICSID Arbitration Cost? A Snapshot of the Last Five Years,* Kluwer Arb. Blog (Feb. 29, 2016), http://kluwerarbitrationblog.com/2016/02/29/how-much-does-an-icsid-arbitration-cost-a-snapshot-of-the-last-five-years/ (demonstrating costs of formal ICSID hearings); *see also* Hafner-Burton & Victor, *supra* note 59, at 163.

107. *See* North America Free Trade Agreement: Code of Conduct for Dispute Settlement Procedures, Ch. 19-20, http://www.worldtradelaw.net/document.php?id=nafta/19-20code.pdf# (discussing state-state arbitration).

108. *See* Int'l Bar Assoc., Guidelines on Conflicts of Interest in International Arbitration (2014), https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

109. International Dispute Resolution Committee, Working Group on Practical Aspects of Transparency and Accountability in International Treaty Arbitration, Comparison Chart on Arbitrators' Standards of Conduct, https://www.kluwerlawonline.com/document.php?id=WTAM2005028; *cf.* World Trade Org., Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, WTO Doc. WT/DSB/RC/1 (1996), https://www.wto.org/english/tratop_e/dispu_e/rc_e.htm.

Rendering panelists so accountable can assist in redressing perceived misconduct by ISA arbitrators without stifling ISA proceedings or rigidifying ISA decisions.[110] The accountability of ISA arbitrators can be further enhanced by extending the scope of review of arbitration awards beyond restrictive extraordinary challenges.[111] More rigorous accountability rules can also respond to controversial ISA practices, like permitting an ISA tribunal to decide challenges directed at the tribunal or a member of it.[112] A further reform measure is to establish accountability procedures, like those under the ICSID Rules,[113] that include disciplining a panelist for misconduct on petition of a disputant, or *in sua*. Compliance with rules of accountability that are applied transparently and even-handedly, in turn, may serve as a basis for continuing membership on the panel.

Importantly, the establishment of highly-qualified, well-trained, and esteemed panels can help to offset the criticism that ISA arbitration proceedings are unduly protracted. This criticism is most telling when it is directed at the length of time taken to appoint arbitrators, not limited to appointing arbitrators *ad hoc*.

B. Expediting Appointments of Arbitrators

Investors facing their first arbitral claim and developing nations with limited resources and ISA experience sometimes spend considerable time locating an appropriate arbitrator.[114] A panel of arbitrators can expedite the identification of appointees and assist in selecting ex-

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110. *See infra* Part X; Markert, *supra* note 83 at 237; *see generally* Harris, *supra* note 83 (discussing recent trends in arbitrator challenges).

111. Markert, *supra* note 83 at 237; ICSID Convention, *supra* note 14, art. 58.

112. ICSID Convention, *supra* note 14, art. 57; *see* Suez, Sociedad General de Aguas de Barcelona SA and Interagua Servicios Integrates de Agua SA v. Argentine Republic, ICSID Case No. ARB/03/17, Proposal for Disqualification of a Member of the Arbital Tribunal (Oct. 22, 2007); Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v. Argentine Republic, ICSID Case No. ARB/03/19, Proposal for Disqualification of a Member of the Arbital Tribunal 1, 19 (Oct. 22, 2007) (noting that "[t]he challenging party must prove not only facts indicating the lack of independence, but also that the lack is 'manifest' or 'highly probable,' not just 'possible' or 'quasi-certain'"); Markert, *supra* note 83 (providing an in-depth discussion of the arbitrator challenges in the context of the ICSID rules).

113. *See* Hamid Gharavi, *ICSID Annulment Committees: The Elephant in the Room*, GLOBAL ARB. REV. (Nov. 24, 2014), http://0-globalarbitrationreview.com.gull.georgetown.edu/article/1033891/icsid-annulment-committees-the-elephant-in-the-room. *See* discussion *infra* Part VIII.

114. *See* Peter R. Maida, *Rosters and Mediator Quality: What Questions Should We Ask?*, 8.1 DISP. RESOL. MAG. 17, 17-19 (2001); Ank Santens & Heather Clark, *The Move Away from Closed-List Arbitrator Appointments: Happy Ending or a Trend to Be Reversed?*, KLUWER ARB. BLOG (June 28,

perts.[115] Of comparative significance, the European Commission (EC) has argued that the use of standing panels in World Trade Organization (WTO) litigation reduces the lengthy time in appointing *ad hoc* panelists to WTO tribunals due to the shortage of qualified arbitrators and an ever-expanding list of cases. As a result, the EC has supported establishing permanent standing panels as a means of rendering appointments more efficient, improving the quality of panel reports, and reducing the number of reversals by the Appellate Body.[116]

However, the literature on the value of standing panels in WTO AB proceedings is more exhortatory than empirically verifiable. For example, Jacques Bourgeois, a trade lawyer specializing in European Union Law, maintains that the appointment of experienced panelists to WTO panels can lead to standardized panels that apply consistent and sustainable procedures.[117] He maintains further that this produces more efficient arbitral processes and greater coherence in ensuing reports.[118] However, there is limited empirical evidence to affirm these propositions, or to confirm whether standardizing panels is desirable. It is at least arguable that standardized panels can lead to duplication of rigid ISA rules, formalistic proceedings, or the perceived "judicialization" of ISA.[119]

Claims made for expedited ISA appointments from standing panels, as distinct from relying on ad hoc ISA appointments, in turn, are more anecdotal than empirical. Indeed, countervailing anecdotal evidence suggests that attempts to expedite ISA appointments may be counterproductive insofar as panel selection is based on the superficial and non-transparent assessment of candidates. In particular, appointment criteria that are based primarily on the formal qualifications and experience of candidates, such as in commerce or government, are less likely to address whether they may subsequently advantage foreign investor over government disputants, or the converse.[120]

2011), http://kluwerarbitrationblog.com/2011/06/28/the-move-away-from-closed-list-arbitrator-appointments-happy-ending-or-a-trend-to-be-reversed/.

115. *See* Maida, *supra* note 114 at 17-18; Santens & Clark, *supra* note 114 at 2.

116. Communication from the European Communities, *Contribution of the European Communities and Its Member States to the Improvement of the WTO Dispute Settlement Understanding*, WTO Doc. TN/DS/W/1, 1, 2-4 (Mar. 13, 2002).

117. Jacques H. F. Bourgeois, *Comment on a WTO Permanent Panel Body*, 6.1 J. INT'L ECON. L. 211, 211 (2003).

118. *Id.*

119. *See* Leon Trakman & Hugh Montgomery, *The "Judicialization" of International Commercial Arbitration: Pitfall or Virtue?*, 30.2 LEIDEN J. OF INT'L L. 405, 405-06 (2017).

120. *See* Puig, *supra* note 5, at 419.

Moreover, resorting to heuristic selection biases in panel selection may lead to the perception, if not reality, that membership of and participation on such panels may resemble membership of a social club. This perception is accentuated by the secrecy that traditionally surrounded ISA proceedings, the concern that tribunal members lobby investors and governments to be selected for panels and engage in pro-party maneuvers on panels in order to secure future appointments.[121] The perceived result is that participation in that club may subsequently influence, subtly or otherwise, how panelists decide ISA disputes for social reasons beyond the legal merits of the case.[122]

One challenge, therefore, is in being able to provide ISA disputants with ready access to qualified and impartial arbitrators appointment from standing panels, without adopting expedited selection procedures that sacrifice the caliber, diversity, and capacity of those panelists. A countervailing challenge is to avoid time-consuming selection and appointment procedures by micro-managing panels, amplifying costs, and delaying ISA proceedings. Ultimately, "the emergence of a set of tested professional norms governing arbitrator conduct may help to alleviate some sources of bias," such as to require panelists to disclose, on a continuing basis, professional or other associated affiliations that may give rise to a conflict of interest.[123] These norms could be devised de novo, such as by requiring that panelists be appointed by third parties rather than by disputants, to avoid the appearance of party bias. These norms can also be adapted from existing judicial selection and appointment requirements, like those of the Permanent Court of Arbitration, with variations directed at satisfying the needs of non-permanent standing panels.[124] These norms are discussed in Part VIII below.

C. Promoting Impartiality

Concerns about the impartiality of standing panels in ISA are among the most common reasons cited in favor of third parties, rather than disputing parties, appointing arbitrators from standing panels. The assertion is that arbitrators who are appointed by disputants will feel

121. *See* Puig, *supra* note 5, at 416 (discussing perceived selection and appointments biases in ISA arbitration).

122. *Id.*

123. Strezhnev, *supra* note 5, at 23.

124. *See* PCA Arbitration Rules, Art. 5-10 (2012), https://pca-cpa.org/wp-content/uploads/sites/175/2015/11/PCA-Arbitration-Rules-2012.pdf.

responsible to represent, or be more cognizant of, the interests of the appointing party.[125] Furthermore, even if party-appointed arbitrators decide against the parties appointing them, they still have multiple ways of indirectly supporting their appointing parties.[126] Giorgetti illustrated this phenomenon by contending that an investor complainant has an incentive to appoint an arbitrator who is predisposed to favor that investor's perspective to counterbalance the respondent state's appointment of a pro-state arbitrator.[127] The inferred result is that party-appointed ISA arbitrators in general lack impartiality. Accentuating this criticism is the assertion that such partiality is often difficult to detect *a priori* and even more difficult to prove *ex post facto,*[128] and that the perception of partiality favoring appointing parties often prevails even in the absence of evidence supporting it in specific cases.[129]

A critical response is to redress allegations of partiality either by eliminating or limiting party-appointed arbitrators. Jan Paulsson, himself a leading ISA arbitrator, interestingly argues for the abolition of unilateral ISA appointments.[130] He expresses doubts about party-appointed arbitrators who are chosen for their perceived loyalty to the appointing disputant, and not for their potential to be impartial. He concludes that ISA arbitrators should be selected either jointly or institutionally from a panel of standing arbitrators.[131] More critical still, Lieberman advocates renaming arbitrators as "party appointed advocates" in order to accurately capture their alleged true loyalties and to adjust the expectations of all participants in ISA proceedings.[132] The EC, too, has expressed doubt about the impartiality of party appointed arbitrators in both its reform proposals to the DSU and its TTIP

125. Leif Cocq-Rasmussen, *An Analysis of Geopolitical Considerations of Investor State Dispute Settlement and the Pursuit of Impartial Justice*, 7.1 AMSTERDAM L. F. 36, 47 (2015); *see* Paulsson, *supra* note 80, at 348.

126. *See* Smit, *supra* note 80, at 2 (arguing that arbitrators could reduce awards or rule only partially in favor of one side).

127. Giorgetti, *supra* note 53, at 445-46.

128. Brower & Rosenberg, *supra* note 50, at 8; Bruno M. Bastida, *The Independence and Impartiality of Arbitrators in International Commercial Arbitration from a Theoretical and Practical Perspective,* 6 REVIST@ E-MERCATORIA 1, 6 (2007).

129. Nathalie Bernasconi-Osterwalder & Diana Rosert, *Investment Treaty Arbitration: Opportunities to reform arbitral rules and processes*, 2014 INT'L INST. FOR SUSTAINABLE DEV. REPORT 1, 12.

130. Paulsson, *supra* note 80, at 349-51.

131. *Id.* at 352.

132. Seth H Lieberman, *Something's Rotten in the State of Party-appointed Arbitration: Healing ADR's Black Eye That Is "Nonneutral Neutrals"*, 5 CARDOZO J. OF CONFLICT RESOL. 215, 217 (2004).

negotiations. Drawing from WTO experience, it has asserted that a panel system which includes rules and procedures that highlight the independence and impartiality of ISA arbitrators "would enhance the legitimacy and credibility of the panel process in the eyes of the public, as the possibility of conflicts of interests would be eliminated and the independence of the panelists would be protected."[133]

More recently, the EU has criticized predominantly party-appointed ISA arbitrators, contending that "[t]he current system does not preclude the same individuals from acting as lawyers (e.g. preparing the investor's claims) in other ICSID cases . . . [and] . . . this situation can give rise to conflicts of interest—real or perceived."[134] As a result, the EU has advocated that standing panels be subject to prescribed terms of appointment and rules that establish boundaries between disputants and party-appointed arbitrators.[135] However, the EU has fallen short of proposing that non-parties, such as the Secretary General of the ICSID or Permanent Court of Arbitration, make such appointments.

It is also noteworthy that the recent Comprehensive Economic and Trade Agreement between the EU and Canada (CETA) provides that "upon appointment, [arbitrators] [. . .] refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment dispute under this or any other international agreement."[136]

In contrast to those who reject party-appointed arbitrators, Ahmed Ghouri, an academic who specializes in commercial dispute resolution, proposes to empower ISA arbitrators to interpret investment treaties broadly and to consider non-investment values and transnational public policy fill gaps in treaties.[137] He also proposes that arbitrators who are influenced by their appointing disputants are less likely to act in such an activist manner.[138] One inference arising from Ghouri's pro-

133. Communication from the European Communities, *supra* note 116, at 2-3. *See also* Rebecca Lee Katz, *Modeling an International Investment Court After the World Trade Organization Dispute Settlement Body* 22 HARV. NEG. L. REV. 164 (2016) (proposing a framework international treaty that establishes an international investment court, comprised of a standing appellate body (AB) and ad hoc panels to replace the current system of ISDS).

134. *Investment in TTIP and beyond—the path for reform: Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court*, EUROPEAN COUNCIL 6 (concept paper, May 5, 2005), http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF [hereinafter *Investment in TTIP and beyond—the path for reform*].

135. *Id.*

136. Comprehensive Economic and Trade Agreement, Can.-E.U., art. 8.30(1), Oct. 30, 2016, http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf.

137. Ghouri, *supra* note 88, at 8-10.

138. *Id.* at 4.

posal is that ISA arbitration will become more credible and authoritative, with arbitrators elaborating on the reasons for their decisions and applying policies, principles, standards and rules of investment law to investor-state disputes.[139] The further inference is that their decisions will become more influential on account of the extended reasons explaining why they have decided in favor a foreign investor claimant or a respondent government.[140]

In summary, a majority of critics of the current ISA system tend to favor standing panels in which third parties both choose the panel and appoint tribunal members from it, or a system where third parties and the parties appoint arbitrators jointly. They maintain that, even if party-appointed arbitrators act in a genuinely impartial manner, they are likely to continue to be considered as being partial. This assault on the legitimacy of arbitral proceedings is most pronounced when disputants are free to appoint arbitrators ad hoc and not from any panel.

However, critics of party-appointed arbitrators are less clear about how third parties responsible for selecting standing panels and appointing them as ISA arbitrators can avoid perceived selection and appointment biases, or how they can address decisional biases by arbitrators through the management of standing panels. As a result, third-party institutions like the ICSID are expected to continually refine their rules and procedures to contend with these issues and to demonstrate the prospective success of their reform measures. This expectation is complicated by the difficulty of institutions like the ISCID to secure multistate support for such innovations.[141]

Particularly challenging for treaty states is whether to adopt a blended approach in which both disputing and third parties appoint ISA arbitrators.[142] As an illustration, ChAFTA adopts a blended approach in which the disputants each choose one arbitrator, appointing the presiding arbitrator jointly, or failing their agreement, with a third party making that appointment.[143] However, this approach creates a potential arbitration-within-an-arbitration in which the presiding arbitrator exercises a casting vote primarily by supporting one party-appointed arbitrator over the other. A limited response to this problem is to impose comprehensive disclosure and independence require-

139. *See* discussion *infra* Part VIII.

140. *See* discussion *infra* Part VIII.

141. *See, e.g.*, Franck, *supra* note 84, at 828-29.

142. This blended approach is adopted, for example, Canada's treaties, *supra* note 16 and Appendix *infra*.

143. ChAFTA art. 9.15, *supra* note 1.

ments on all three arbitrators in order to distance them from the parties. However, this does not address the conflict-of-interest issue posed by the over-identification of party-appointed arbitrators with the position of the party appointing them.

Another response is to impose sanctions on panelists who fail to make adequate disclosures of any potential conflicts of interest, or who exploit those conflicts of interest that have already been disclosed. These sanctions may include the following: disqualifying them from serving on the arbitration tribunal in question, nullifying the ISA decision on due process grounds, and removing them from the applicable panel.[144] Imposing such sanctions is potentially significant in constraining pejorative bias by arbitrators. However, these sanctions may fail to remedy an arbitrator who privileges one disputant over the other, despite having disclosed a conflict of interest.

The only assured way of avoiding party appointed arbitrators being biased in favor of the appointing party is to require that third parties appoint all arbitrators from a diversely represented standing panel. However, this introduces the perception of the appointing authority making appointments selectively to advantage one party over the other. This is an issue arising from recent treaties, such as Article 25(4) of the Foreign Investment Promotion and Protection Agreement between Canada and Hong Kong Special Administrative Region Canada-Hong Kong FTA (2016), which grants the Secretary General of the PCA the "discretion" to appoint arbitrators.[145] In defense of such treaties is the fact that the third party responsible for appointing arbitrators, whether ad hoc or on-roster, may be permitted to appoint only when a disputing party fails to make a party appointment. This ensures that the parties have the opportunity to so appoint, while a qualified third party can appoint only in the absence a party appointment and only in consultation with the parties.[146] For example, the Canada-Hong Kong Treaty requires that the Secretary General of the PCA appoint ISA arbitrators "in consultation with the disputants if possible," and only when the parties are unable to make appointments within the allotted time.[147] However, this provision does not clarify the meaning of consultation with the parties "if possible," or the distinction between parties who are "unable" or unwilling to make appoint-

144. *See* Emmanuel Gaillard, *Abuse of Process in International Arbitration*, 32 ICSID REV. 1, 2–7 (2017) (on the abuse of process in international arbitration, including investor-state arbitration). *See* further discussion *infra* Part VIII.

145. *See infra* Appendix.

146. *See* Agreement between the Gov't of Canada and China, *supra* note 16, art. 25(4).

147. *Id.*

ments. The provision also does not redress bias in the appointment of arbitrators by parties who have the right of appointment in the first instance.[148] The provision also does not respond to the perception that external authorities making default appointments lack neutrality between disputing parties, whether or not that perception is justified in fact.[149] These issues are evaluated further in Part VIII.

D. Equitable Panel Selection and Arbitral Appointments

Studies on existing equity profiles of ISA arbitrators show that women are highly underrepresented as ISA arbitrators, including on standing panels.[150] For example, a study conducted in 2012 provides that, out of 631 investment treaty arbitration appointments, only 41 were women.[151] Within that number a small minority of women secured 75% of all appointments,[152] suggesting that most women appointed as ISA arbitrators have not arbitrated more than one case.

Racial and regional representation in ISA arbitration also remains highly uneven. Jacobs highlights that seventy percent of ICSID arbitrators are from Western Europe and North America, with common lawyers outnumbering civil lawyers.[153] A mere 2% of arbitrators are from Sub-Saharan Africa.[154] Similarly, there are few ISA arbitrators from Asia, despite the fact that China is a primary source of global inbound and outbound FDI.[155] A potential result is that standing panels that are underrepresented demographically, or along ethnic or gender lines, are prospectively partial insofar as arbitrators appointed from such panels may take insufficient account of diversity issues in their reasoning and determinations.

These concerns about deficient racial, regional and gender representation among ISA arbitrators are largely confirmed statistically in a comprehensive 2015 study conducted by Susan Franck and others on diversity in ISA arbitration. That study analyzed 413 cases of individuals who served as counsel in ISA proceedings and a further 262 individuals

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148. *Id.*

149. *Id.*

150. Van Harten, *The (Lack of) Women Arbitrators in Investment Treaty Arbitration*, *supra* note 80, at 1.

151. *Id.*

152. *Id.*

153. Jacobs, *supra* note 47, at 33.

154. *Id.* at 32.

155. *See* U.N. Conference on Trade and Dev. Global Investment Trends Monitor (Jan. 29, 2015), unctad.org/en/PublicationsLibrary/webdiaeia2015d1_en.pdf (stating that China became the world's top FDI destination in 2014).

who acted as arbitrators. Out of these 262 arbitrators, 67 served on ISA panels.[156] The study concluded that only 17.6% of arbitrators were female.[157] Furthermore, at most 20% of all appointments were from developing countries.[158] Other studies have verified these equity concerns. For example, Puig identified Brigitte Stern and Gabrielle Kaufmann-Kohler as two preeminent women who are frequently appointed as ISA arbitrators and classified them within a small group of elite "power brokers."[159] Interestingly, in noting that arbitral appointments from standing panels are skewed in favor of developed nations, he identified a small group of frequently appointed arbitrators from Latin America who were educated in Continental Europe, the United Kingdom, or the United States.[160]

Scholars have proposed different ways of addressing gender, racial, and regional inequalities in selecting standing panelists and appointing them to ISA tribunals. Franck has advised that arbitral institutions seek a stronger equitable balance both in appointing women to panels and in making arbitral appointments.[161] Others, such as Wellausen, have explored the influence that such factors as greater diversity along national lines can have upon ISA selection, appointment, and arbitral decisions.[162]

A difficult further issue to address is whether standing ISA panels should seek to include women and promote greater ethnic diversity in general, or along representational grounds, such as women with experience in representing disadvantaged women and/or ethnic groups in civil litigation. Whatever the view adopted on this issue, the outcome of equity appointments to ISA panels should not depend only on quantitative data that reflects statistical evidence of diversity in appointments, but also on qualitative considerations, such as how these appointments impact the reasoning used in reaching decisions that are equitable. Such qualitative concerns include examining how appointments along gender, ethnic, and national lines can enhance the quality of ISA proceedings, and how they can render tribunals more responsive, both

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156. Susan D. Franck et al., *The Diversity Challenge: Exploring the "Invisible College" of International Arbitration*, 53 COLUM. J. TRANSNAT'L L. 429, 430 (2015); *see also* Puig, *supra* note 5, at 387, 403-04 (providing similar observations and concluding that 93% of all appointments are men).

157. Franck, *supra* note 156, at 430, 452.

158. *Id.* at 491-92.

159. Puig, *supra* note 5, at 419.

160. *Id.*

161. Franck, *supra* note 156, at 430-31.

162. Rachel L. Wellausen, *Recent Trends in Investor-State Dispute Settlement*, 7.1 J. OF INT'L DISP. SETTLEMENT 117, 123-26 (2016).

proactively and reactively, to demographic, ethnographic, and gender issues in deciding ISA disputes. There are precedents for such normative assessments, such as jurimetrics assessments of the impact of diversity appointments upon both the reasoning and determinations reached by trial court judges in the United States and Canada.[163] Such studies can help to broaden the scope of diversity issues in the selection of ISA panelists, notwithstanding the risk of such studies themselves being challenged for demonstrating undue diversity bias.

VIII. Responding to the Treaty Challenges for Standing Panels

There are a number of pervasive challenges for treaty negotiators and administrators going forward. Included among these is how to respond to the criticism that governments primarily appoint standing panelists.[164] The concern is that the process of governments appointing the panelists will entail political maneuvering by the respective governments, who are seeking to ensure that future ISA appointments advance their national interests.[165] A related concern is that such appointees may reflect the economic and political predispositions of particular governments, such as the preference of some developed nations to maximize direct foreign investment opportunities for their investors.[166] These challenges are further reflected in the constituency biases allegedly displayed by governments in designing or adopting standing panels in their BITs and FTAs. This challenge is most noticeable in the recent generation of treaties providing for inside standing panels, such as the ChAFTA.[167]

There is nothing controversial in the notion that an investment treaty may be designed to promote greater investment liberalization, including by appointing panelists who identify foreign investment with liberalized trade. However, the nomination of standing panelists by governments, such as signatories to the ICSID, or their appointment by governments to an in-house treaty panel such as under the ChAFTA,

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163. *See, e.g.*, John J. Szmer et al., *Taking a Dip in the Supreme Court Clerk Pool: Gender-Based Discrepancies in Clerk Selection*, 98 Marq. L. Rev. 261, 265-66 (2014); *ArbitralWomen*, www.arbitral-women.org (describing an organization that assists in increasing the representation of women as arbitrators).

164. *See* Strezhnev, *supra* note 5, at 8-11.

165. *See* Santens & Clark, *supra* note 114, at 2 (discussing such horse trading in WTO proceedings).

166. *See, e.g.*, Puig, *supra* note 5, at 397.

167. Jason Webb Yackee, *Controlling the International Investment Law Agency*, 53(2) Harv. Int'l L. J. 391, 430 (2012).

may engender the view that appointments are vulnerable to political maneuvering. This includes arbitrators lobbying their governments for a place on a standing panel and states appointing party loyalists to such panels.[168] As Michael Cartland illustrates, albeit in relation to appointments to the WTO AB, many states were frustrated because major "horse trading" allegedly occurred behind the scenes over who would be appointed to hear a WTO appeal.[169] Similarly, Santens and Clark refer to a personal experience in which "arguably the most openly partisan party-appointed arbitrator was appointed from a closed list and was appointed repeatedly by the party whom he openly favored."[170]

One response to these criticisms of constituency bias ascribed to the selection of standing ISA panelists is that they are ordinarily constrained from being appointed as ISA arbitrators in cases involving states to which they are connected, such as through citizenship, residence, or place of business. For example, under the ICSID rules, a majority of arbitrators on a Tribunal must be nationals of States other than the State party to the dispute and the State whose national is a party to the dispute.[171] However, this does not address the perception that respondent states may engage in reciprocal bargaining to appoint sympathetic panelists nominated to standing panels by other countries. Even more problematic is the perception of bias associated with conflicts of interest arising from ISA panelists acting concurrently as ISA arbitrators, legal counsel, and/or advisors to investors or states.[172]

However, perceptions of institutional bias, such as the perception that ISA panelists nominated by developed nations are more likely to favor foreign investors of developed nations, tend to be anecdotal. They are not adequately substantiated empirically, such as by comprehensive interviews and questionnaires that are ethically compliant, nor by detailed statistical analysis.[173] What is needed is further empirical verification.

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168. Brower & Rosenberg, *supra* note 50, at 22.

169. Michael Cartland, *Comment on a WTO Permanent Panel Body*, 6(1) J. INT'L ECON. L. 214, 215 (2003).

170. Santens & Clark, *supra* note 114, at 2.

171. *See* ICSID Convention, *supra* note 15, at Article 39; The Rules of Procedure for Arbitration Proceedings, ICSID, Rule 1(3), http://icsidfiles.worldbank.org/icsid/icsid/staticfiles/basicdoc/partf-chap01.htm#r01.

172. Fiona Marshall, *Defining New Institutional Options for Investor-State Dispute* Settlement, 2009 INT'L INST. FOR SUSTAINABLE DEV. 1, 13 (describing the concern that ISA arbitrators not serve as arbitrators in one case and act as representative on another); *see also* Schneiderman, *supra* note 96, at 383.

173. *See infra* note 174. *But see* Schultz & Dupont, *supra* note 5, at 1149.

IX. Empirical Responses

This section examines the concerns of bias in panel selection that has prompted disputants, including state parties, to avoid choosing arbitrators from ISA standing panels. It also suggests ways of remedying those concerns.

A key purpose in reforming ISA standing panels is to assess empirically, not only the intensity of disputant reservations about the operation of standing ISA, but also the empirical validity of those reservations. Whether foreign investors resist appointments from standing panels by replicating investor practice, or because of reservations about institutional biases among standing panelists, requires empirical substantiation. That substantiation is important in determining whether standing panels are considered to be inherently flawed, or defective in the manner in which they are applied in practice. The reality is that disputants are likely to have varied and inconsistent reasons for not appointing from standing panels. They may seek to appoint ISA arbitrators whom they believe have the acumen, eloquence, and lucidity to understand and articulate the complex issues in dispute, and/or to persuade other members of a three-person tribunal of the legitimacy of their respective contentions. However, disputants may rely on standing panels to identify arbitrators whom they deem most qualified and expert, just as readily as they may rely on ad hoc appointments to accomplish those same ends. What is lacking from existing studies of standing ISA panels are comprehensive reasons why ISA disputants choose, or decline to choose, arbitrators from standing panels, beyond anecdotal assumptions about their predilections.[174] This deficiency is understandable. Both state and foreign investor parties may well be reluctant to publicize their motivations for not choosing particular ISA panelists. Indeed, both may wish to limit publicity about the process they used in selecting from panels on confidential grounds, and to avoid criticisms of their selection processes.

Even assuming that empirical evidence demonstrates that disputants avoid choosing from standing panels because they are concerned about adverse selection bias, it is still necessary to gauge the intensity of that opinion. The fact that some developing nations may be reluctant to cede their assertions of sovereignty to institutional authorities administering lists, such as the ICSID,[175] does not determine that those states

174. *See* discussion *supra* Part VII. *But see supra* Part VII(D) (discussing studies on limited equitable appointments to ISA tribunals).

175. Brower & Rosenberg, *supra* note 50, at 25.

are likely to resist lists if they believe that their concerns about constituency bias are being properly addressed. Similarly, states that resist standing panels to protect their domestic sovereignty, and foreign investors that resist standing panels to avoid perceived pro-state constituency biases among panelists, may change their perspectives if disputants perceive that their concerns are leading to responsive reforms. The anticipated benefit is that disputants can begin to escape from the prisoner's dilemma to which Giorgetti refers, in which foreign investors strive to appoint pro-investor arbitrators to counterbalance the prospect of respondent states appointing pro-state arbitrators.[176]

A means of limiting constituency bias in favor of claimant investors or respondent states is to strive to select, not only expert panelists for standing panels, but also those who have proven records of neutrality between disputants. However, no matter how assiduously a panel authority scrutinizes a candidate's employment background, past decisions, and scholarly writings before selection, belief biases are often disguised and/or difficult to detect *a priori*.[177] A further response is to seek a quantitative balance on standing panels between panelists who have representational interests that appear to favor both disputants, such as arising from their corporate or governmental backgrounds. However, requiring commercial law experience does not necessarily infer the appointee's propensity to favor claimant investors. Nor does public law experience inescapably infer an appointee's propensity to favor respondent states. What is inferred is the need for standing panels to include panelists with a balance of backgrounds in industry, commerce, government, and the public interest sector, directed at extending meaningful choices among ISA panelists.[178] What is also needed is a manageable number of panelists, arguably somewhat less than the proposal to have ninety panelists on the CETA Panel.[179]

Nevertheless, there are several options that can be assessed in determining how to better promote the neutrality of ISA panelists, without claiming to wholly eliminate constituency bias. The first is mechanical, namely, to circumvent the appointment biases of disputants by requiring that a third party, such as the Secretary General of

176. Giorgetti, *supra* note 53, at 445-46.

177. *See* Puig, *supra* note 5.

178. *See* Strezhnev, *supra* note 5, at 3-4, 10-12.

179. *See* GRUNDZÜGE EINES MODERNEN INVESTITIONSSCHUTZES—ZIELE UND HANDLUNGSEMPFEHLUNGEN, HARNACK-HAUS REFLECTIONS 15 (S. Hindelang and S. Wernicke eds., 2015) (describing the proposal that the list of individuals who are willing and able to serve as arbitrators includes at least 90 individuals).

the ICSID, make all ISA appointments from a standing panel, such as from the ICSID's list. As discussed in Part IV, Canada has adopted this approach in part in its recent treaties. However, even if states and foreign investors were willing to sacrifice their ISA appointment powers, they would need to be assured that the perceived constituency biases of third party appointing authorities and panel appointees would be properly addressed.[180]

A further option is to provide that disputants collaborate in making ISA appointments from standing panels and for a third party to appoint panelists should that collaboration fail.[181] This option is reflected in some of the treaties surveyed in Parts II and IV. This option would enable disputants to compromise over the appointment of the presiding arbitrator in the first instance and to revert to a third party appointing authority only if they are unable to reach a compromise. Here, the objective is to assess how willing disputants are to adopt this option based on empirical evidence of state and investor practice.

A fallback option is to provide for third party selection to and appointments from standing panels, such as on a random or rotating basis, not unlike the UNCTAD's 2015 proposal. However, given the difficulty of wholly eliminating constituency biases in making such selection and appointment decisions, the third party would need to adhere to transparent protocols in selecting panelists, including scrutinizing their backgrounds, credentials, and experiences. These could include, among others, engaging in reference checks, interviews, scrutiny of prior decisions, scholarship, commercial consultancies, and government employment. While experienced arbitrators are likely to have track records that could be interpreted as potentially biased in favor of one or the other disputant, such background scrutiny may provide countervailing evidence of substantive expertise, the capacity to reason at a high level, and demonstrated neutrality between disputants. Typifying such evidence are past decisions or other writings of appointees that are coherent, informed, authoritative, and that demonstrate their neutrality.

X. Reconsidering Standards of Review

A vexing concern is how to establish a balance between not subjecting ISA arbitrators to standards of review that are so stringent that they

180. *See* J. Paulsson, *Arbitration Without Privity*, 10 Foreign Inv. L.J. Rev. 232, 244 (1995) (describing the concern that third party appointments might become unduly entrenched).

181. *See* Paulsson, *supra* note 80, at 352.

discourage arbitrators from seeking panel selection, but not so easy to meet that they undermine confidence in ISA. The prevailing response to this issue is that the current balance unduly favors standards of review that are easy for ISA arbitrators to meet. An alleged consequence is that panelists who are appointed as ISA arbitrators are less likely to be effectively challenged due to exacting extraordinary challenge procedures.[182] A challenge procedure that amounts to a virtual guarantee of continued service on a standing panel is also likely to aggravate allegations of partiality, accentuate a perceived lack of arbitral independence, and undermine the reputation of the applicable standing panel.[183] In particular, a challenge procedure that empowers the tribunal to decide the challenge of one of its members is likely to accentuate concerns about the independence of the challenge process.

In support of ISA tribunals deciding challenges to their members is that they ordinarily have the most direct evidence of the alleged improper conduct of the arbitrator in issue. A competing response is that an appellate ISA tribunal is likely to be perceived as more impartial, and better able to identify improper conduct, not limited to examining the tribunal record and testimony of tribunal members. However, a formidable task is to arrive at a verifiable balance between exacting and adaptable standards of review. If the standards of review applied to ISA proceedings and awards are perceived as being overly flexible, they are likely to undermine confidence in ISA, including in the administration of standing panels by the ICSID or under the UNCITRAL Rules. If standards of review are considered unduly exacting, they are likely to sublimate the authority of ISA tribunals, lead to narrow and regimented decisions, and discourage experienced arbitrators from seeking panel selection or withdrawing from panels. Particularly problematic is how the appointing authority responsible for choosing panelists may construe the scope of extraordinary challenges to proceedings administered under those treaties. While ISA tribunals are generally reluctant to discipline their own members, it remains to be seen whether a joint committee established by treaty will construe extraordinary challenges restrictively or expansively.

The ideal solution to redress the perceived ineffectiveness of ISA challenge procedures is to develop standards of review that ensure that ISA arbitrators can operate efficiently and fairly, without being subject

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182. *See* Trakman, *supra* note 74, at 638.

183. *See* Hafner-Burton & Victor, *supra* note 59, at 161; Schultz & Dupont, *supra* note 5, at 1147.

to challenges designed to intimidate or otherwise coopt them. This includes the need to avoid ISA arbitrators being overly pressured by litigious parties who engage in overt or veiled conduct directed at inducing tribunals to decide in their favor. Conversely, it is equally important that challenge proceedings constrain the abuse of discretion by arbitrators. In issue is the need for challenge mechanisms in which there is reasonable proportionality between the abuse of arbitral discretion and the regulatory response to that abuse, including in deterring abuse in related cases.

Whatever the response, regulatory procedures are needed to avoid *a priori* undue resort to potentially destabilizing challenge procedures. These procedures need to focus on how to limit actual or prospective conflicts of interest by panelists appointed as arbitrators, such as by imposing rules of disclosure and sanctions for non-compliance by panelists. While such procedures are ordinarily provided for by treaty or customary international law, their application to challenge is inevitably subject to restrictive or expansive interpretation, which can be a further source of disputation.

The ChAFTA is an example of a treaty that grants treaty parties significant interpretative authority. Article 9.18.2 directs ISA tribunals to adhere to the joint interpretation adopted by the treaty parties through the Inter-State Committee on Investment. Key questions are likely to arise over the Committee's interpretation of the disclosure duties of ISA arbitrators appointed from the in-house panel. For example, how might it construe the disclosure duties of ISA arbitrators appointed from the in-house panel in response to allegations of failing to disclose having acted as a consultant to a foreign investor immediately prior to, or acting concurrently with, an ISA appointment? While Article 9.18 grants the Committee wide powers of interpretation, that interpretation is likely to depend *inter alia* on: the priority the Committee accords to the purpose of the dispute resolution provisions in the ChAFTA, the wording of the applicable clause(s), the state conduct in issue, and the wider investor-state context including prior ISA decisions in analogous cases.[184]

The ideal result is the adoption of procedures that regulate the conduct of ISA, commencing with the selection of standing panelists, and that limit the justification for arbitral challenges. Key proactive

184. *See* Schultz & Dupont, *supra* note 5, at 1147, 1165-67 (concluding that investor-state arbitrator since the 1990s "seems to favor the 'haves' over the 'have-nots', making the international investment regime harder on poorer than on richer countries").

procedures include the following: imposing transparent and continuous duties of disclosure on panelists and arbitrators, establishing viable grounds for bringing challenges, and adopting reasonable methods of conducting and enforcing challenge proceedings.[185] In arriving at these ideal results, it is important to appreciate that challenge procedures are sometimes complex and protracted, and that such complexity is often unavoidable given the intricate and interpersonal issues involved. Conversely, challenge procedures that are excessively truncated may succumb to the accusation of promoting cadre justice, or no justice at all for the party bringing the challenge. What is most desirable is that challenge proceedings are not perceived to exacerbate the perception of arbitrariness or incompetence directed at circumventing pre-existing ISA proceedings. Nor ought challenge proceedings to overturn awards and undermine—on political or spurious legal grounds—the reputation of arbitrators and the standing panels from which they are drawn.

XI. An Alternative: A Permanent Multilateral Investment Court

One alternative to ISA provisions is to create permanent panels of ISA arbitrators similar to an established national court system. In recent years, the EC has responded to criticisms of ISA provisions, such as in the Transatlantic Trade and Investment Partnership (TTIP) under negotiation, by proposing the creation of permanent panels of ISA arbitrators, resembling "traditional court systems."[186] The EC has urged that "steps . . . be taken to transform the [investor-state dispute] system towards one which functions more like traditional courts systems, by making appointments to serve as arbitrators permanent, [and] to move towards assimilating their qualifications to those of national judges."[187] The EC has added that "this option would not present technical difficulties" and "would break the link between the parties to the dispute and the arbitrators, . . . mean[ing] that all arbitrators have been vetted by the Parties."[188]

185. *See* UNCITRAL Arbitration Rules, *supra* note 34.

186. *See* Press Release, European Commission, Conclusion of the 13th TTIP Negotiation Round (Apr. 29, 2016) (http://trade.ec.europa.eu/doclib/html/154480.htm) (at the time of writing, the parties concluded the 13th round of negotiation talks). *See too* Sir Michael Wood, *Choosing between Arbitration and a Permanent Court: Lessons from Inter-State Cases,* 32 ICSID Rev. 1 (2017) (on a permanent investment court based on inter-state tribunals such as the ICJ, the WTO AD and the International Tribunal for the Law of the Sea in Hamburg).

187. *Investment in TTIP and beyond—the path for reform, supra* note 134, at 7.

188. *Id.*

More recently, the EC has announced its plan to spearhead the development of a world investment court.[189] Citing prior concerns with ISA, the EC has argued that a court-like institution for resolving investment disputes is essential to remedy deficiencies in the existing ISA system.[190] Included in this proposal is the development of a standing panel of investment judges functioning as an investment court.[191] The EU has most recently negotiated to incorporate the investment court concept bilaterally into the Canada-EU FTA (CETA) and the EU-Vietnam FTA. However, these treaties do not establish how the broader world investment court will be constituted, nor how it will function. Instead, the EU governments through their Council of Ministers have adopted a declaration on the multilateral investment court, making specific reference to CETA, stating, "Moreover, the Council supports the European Commission's efforts to work towards the establishment of a multilateral investment court, which will replace the bilateral system established by CETA, once established, and according to the procedure foreseen in CETA."[192]

The rationale in support of a permanent investment court coincides, in some respects, with the rationale supporting the further development of ISA panels. Both initiatives strive to select and appoint panelists with a reputation for impartiality in decision-making, along with legal training, investment law expertise and adjudicative experience.[193]

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189. *See* August Reinisch, *Will the EU's Proposal Concerning an Investment Court System for CETA and TTIOP Lead to Enforceable Awards—The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration*, 19 J. INT'L ECON. L., 761, 763 (2016) (describing the proposed international investment court system); N. J. Calamita, *The (In)Compatibility of Appellate Mechanisms with Existing Instruments of the Investment Treaty Regime*, J. WORLD INVE. & TRADE (forthcoming 2017) (manuscript at 5) (https://ssrn.com/abstract=2945881).

190. *See European Commission Inception Impact Assessment on the Establishment of a Multilateral Investment Court for investment dispute resolution*, (Jan. 8, 2016), http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_trade_024_court_on_investment_en.pdf; In Pursuit of an International Investment Court: Recently Negotiated Investment Chapters in EU Comprehensive Free Trade Agreements (July 2017), http://www.europarl.europa.eu/RegData/etudes/STUD/2017/603844/EXPO_STU(2017)603844_EN.pdf.

191. *See Proposal of the European Union for Investment Protection and Resolution of Investment Disputes* (12 November 2015), http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf.

192. Statement, Council of the European Union, Statement by the Commission and the Council on Investment Protection and the Investment Court System (Oct. 27, 2016), http://data.consilium.europa.eu/doc/document/ST-13463-2016-REV-1/en/pdf [hereinafter Statement on Investment Protection and the Investment Court System].

193. *See* Strezhnev, *supra* note 5, at 23; *see also* Maida, *supra* note 114 at 17-18. *See also* Stephen S. Kho, Alan Yanovich, Brendan R. Casey & Johann Strauss, *The EU TTIP Investment Court Proposal*

Both aim to limit constituency biases in selecting panelists for rosters and decisional biases by adjudicators appointed from those panels.[194]

The nature and scope of the international investment court is still subject to negotiation, with a number of factors remaining to be determined. These include, *inter alia*, the terms and conditions governing membership, the scope and authority of the court, the allocation of its costs, the method used to appoint judges, the court's geographical and equitable balance, the enforcement of its decisions, and its location.[195] These issues are further complicated by the fact that treaty parties may negotiate to modify its rules and procedures to suit their discrete circumstances.

An international investment court does have some virtues. If it is widely endorsed, it can help to limit the diffusion of standing ISA panels that vary from treaty to treaty. It can provide continuity by providing judges with continuing appointments and establishing a secretariat to administer the court. It can promote greater consistency in hearing procedures and decisions. It can regulate the conduct of judges appointed to it, such as by limiting their access to investment or governmental consultancies that constitute potential conflicts of interest.[196] It can promote uniformity in ISA jurisprudence. It can improve the overall reputation of investment dispute resolution.[197] It is also perceived as a means by which states can exert greater control over the appointment of arbitrators, to "eliminate the risk of vested interests."[198]

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and the WTO Dispute Settlement System: Comparing Apples and Oranges?, 32 ICSID REV. FOREIGN INVEST. L. J. 326 (2017) (on the EU's proposed International Investment Court for incorporation into the TTIP).

194. Statement on Investment Protection and the Investment Court System, *supra* note 192 at 26.

195. *Id.*

196. *But see* Nathalie Bernasconi-Osterwalder & Martin Dietrich Brauch, *Is "Moonlighting" a Problem? The role of ICJ judges in ISDS* (Nov. 2017), http://www.iisd.org/sites/default/files/publications/icj-judges-isds-commentary.pdf (demonstrating that judges on the International Court of Justice have sat or are sitting as arbitrators in almost 10% of the 817 known investment treaty cases). However, it is arguable that the expertise of judges on the ICJ and the conditions of their employment there justify their appointment to serve as ISA arbitrators.

197. *See* Steffen Hindelang & Teoman M. Hagemeyer, *In Pursuit of an International Investment Court: Recently Negotiated Investment Chapters in EU Comprehensive Free Trade Agreements in Comparative Perspective*, 105 (Study for the Eur. Parl., Pol'y Dep't, Directorate-Gen. for External Policies, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3007590 (describing methods of regulating the conduct of the Court).

198. *See European Commission Fact sheet: Investment Protection and Investor-to-State Dispute Settlement in EU agreements*, at 9 (Nov. 26, 2013), http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151916.pdf.

However, a permanent investment court also poses obstacles. It can lead to rigidified attitudes among permanent members of the court. It can imbed pro-investor or pro-respondent state interests on the court. It can complicate transitions onto and off the court. Importantly, it can lead to the further proliferation of ISDS claims, if states adopt it inconsistently, if at all, in their bilateral and multilateral treaties.[199]

A noteworthy alternative to a permanent international investment court is an appellate mechanism established by treaty, including the review of ISA awards by arbitrators appointed from treaty standing panels. This is a possible construction of Article 9.23 of ChAFTA which provides that, within three years after the entry into force of the Agreement, 'the Parties shall commence negotiations with a view to establishing an appellate mechanism to review awards' including to 'hear appeals on questions of law.'[200] The benefits of establishing an appellate standing panel, as distinct from a permanent investment court include maintaining structural consistency in progressing an appeal from an ISA to an appellate panel, establishing consistent grounds for allowing that appeal, and developing rules of procedure to govern the conduct of that appeal.[201] However, ensuring these benefits presupposes that treaty parties are able to establish appellate mechanisms that satisfy these consistency requirements in a manner that is considered fair and efficient, and that does not lead to a multiplicity of appellate mechanisms under different investment treaties.

199. August Reinisch, *supra* note 189, at 771; G. Van Harten, *The European Union's Emerging Approach to ISDS: a Review of the Canada-Europe CETA, Europe-Singapore FTA, and European-Vietnam FTA*, 1 U. BOLOGNA L. REV. 138, 141 (2016); *See* Kyle D. Dickson-Smith, *Does the European Union Have New Clothes?: Understanding the EU's New Investment Treaty Model*, 17 J. WORLD INV. & TRADE 773, 812 (2016).

200. Barton Legum, *Appellate Mechanisms for Investment Arbitration: Worth a Second Look for the Trans-Pacific Partnership and the Proposed EU-US FTA?*, in RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM 437-442 (Jean E Kalicki & Anna Joubin-Bret eds., 2015); *See* Mark Feldman, *Investment Arbitration Appellate Mechanism Options: Consistency, Accuracy, and Balance of Power* 32(3) ICSID REV. (2017) (on weighing up sometimes competing policies directed at achieving greater consistency, accuracy, coherence, predictability and finality through an ISA appellate mechanism); Eun Young Park, *Appellate Review in Investor-State Arbitration*, RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM 443-454 (Jean E Kalicki & Anna Joubin-Bret eds., 2015) (discussing appellate review of ISA awards).

201. Barton Legum, *Options to Establish an Appellate Mechanism for Investment Disputes*, *in* APPEALS MECHANISM IN INVESTMENT DISPUTES 231 (Karl Sauvant ed., 2008); Christian Tams, *An Appealing Option? The Debate about an ICSID Appellate Structure*, Essays in Transnational Economic Law (June 2006), http://telc.jura.uni-halle.de/sites/default/files/altbestand/Heft57.pdf; D. McRae, *The WTO Appellate Body: A Model for an ICSID Appeals Facility?*, 1(2) J. INT'L DISP. SETTLEMENT 371, 371 (2010); *See* N. J. Calamita, *supra* note 189, at 5 (discussing an ISDS appellate mechanism).

XII. Conclusion

The success of standing panels from which investor-state arbitrators are chosen will depend on the asserted attributes of standing panels, their governance structures, and the manner in which they are implemented and operated. It will also depend on their capacity to prevail over ad hoc investor-state arbitration, reliance on domestic courts, or resort to a permanent international investment court.

Standing panels in investor-state arbitration are currently being tested empirically, with recent treaties adopting different models of in-house and external panels. This Article has focused, *inter alia*, on the in-house standing panel model adopted in the 2015 ChAFTA. The challenge ahead is to demonstrate that the reform of standing panels is both principled and practical, and that it redresses the interests of disputants without subordinating the interests of one to the other. Well-intentioned but unrealistic reforms of ISA, including of standing panels, can cause a backlash that denigrates the value of that reform and any worthwhile adaptations that might follow from it.[202]

Ultimately, the case for extending standing panels in ISA will depend on earning the trust of those who rely on it. Gaining that support will require an ongoing assessment of how standing panels can improve the efficient selection of standing panelists, promote professional and accountable ISA appointments, and advance the stature, effectiveness, and fairness of ISA decisions. It will depend on reconciling different models of standing panels based on normative perceptions and empirical studies verifying, or gainsaying, their value.

What remains to be fully tested is the manner in and the extent to which reform of the rules governing standing panels can redress concerns about unpredictability and partiality in the selection, appointment, and/or decisions of arbitrators. A mandatory panel system that lacks transparency may not earn the trust of foreign investors and respondent states. A standing panel system that is unduly malleable, is likely to lead to opportunistic challenges, destabilization and induce qualified panelists to withdraw from them. The task ahead is to create and navigate along the pathway between these two extremes. What needs to be avoided is the quest for a multiplicity of unique standing panels that are irreconcilable, or alternatively, prematurely pursuing a uniform model that is likely to be illusive.

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202. *See* Malcolm Langford & Daniel Behn, *Managing Backlash: The Evolving Investment Treaty Arbitrator?*, Eur. J. Int'l L. (forthcoming) (manuscript at 2) (http://ssrn.com/abstract=2835488.)

APPENDIX
TABLE OF INVESTMENT AGREEMENTS

INVESTMENT TREATY/ INVESTMENT CHAPTER	ARBITRAL INSTITUTION	STANDING PANELS	APPOINTING AUTHORITY	ROSTER CONSTITUTED	ARBITRATOR QUALIFICATIONS AND CODE OF CONDUCT	ARBITRATOR CHALLENGES
Canada–Hong Kong (2016)	UNCITRAL [art. 23(1)]	**NO** Unless determined otherwise, the disputants select one arbitrator each and jointly appoint the third arbitrator by agreement [art. 25(1)] **Exception**: Consolidation orders	The Secretary-General of the PCA appoints at own discretion, in consultation with the disputants if possible, when the parties are unable to make ad hoc appointments within the allotted time [art. 25(4)] In consolidation cases, the Secretary-General of the PCA makes the appointments [art. 26(3)] In consolidation cases, the tribunal shall be established under the UNCITRAL Rules [art. 26(4)]	NOT APPLICABLE	art. 22(2); art. 25(2)	Not specified, default institution rules
Japan–Iran (2016)	UNCITRAL; ICSID [art. 18(2)(b-c)]	**NO** Unless determined otherwise, the disputants select one arbitrator each and the selected arbitrators select the chair [art. 18(4)(a)]	The Secretary-General of the PCA appoints if the disputants fail to make appointments within the allotted time [art. 18(4)(b)]	NOT APPLICABLE	Not specified, default institution rules	Not specified, default institution rules

INVESTMENT TREATY/ INVESTMENT CHAPTER	ARBITRAL INSTITUTION	STANDING PANELS	APPOINTING AUTHORITY	ROSTER CONSTITUTED	ARBITRATOR QUALIFICATIONS AND CODE OF CONDUCT	ARBITRATOR CHALLENGES
TPPA (2016)	ICSID; The ICSID Additional Facility Rules; UNCITRAL [art. 9.19(4)(a-c)] Any other arbitral tribunal if both sides agree [art. 9.19(4)(d)]	**NO** Unless determined otherwise, the disputants select one arbitrator each and jointly appoint the third arbitrator by agreement [art. 9.22(1)] **Exception:** Consolidation orders	If the disputants fail to appoint arbitrators within the allotted time, the Secretary-General of the ICSID will make appointments at his/her discretion [art. 9.22(3)] In consolidation proceedings, the chair is appointed by the Secretary-General, unless the disputants agree otherwise [art. 9.28(4)(a-c)] In consolidation proceedings, the tribunal shall be established under the UNCITRAL Rules [art 9.28(8)]	NOT APPLICABLE	Code of Conduct for Dispute Settlement Proceedings	Not specified, default institution rules
Iran–Slovakia (2016)	UNCITRAL [art. 17(3)(a)] Any other arbitral institution if both sides agree [art. 17(3)(b)]	**NO** Unless determined otherwise, the disputants select one arbitrator each and jointly appoint the third arbitrator by agreement [art. 18(1)]	The President of the ICJ makes appointments if parties fail to make appointments within the allotted time [art. 18(3)]	NOT APPLICABLE	art. 18.4-5; UNCITRAL Transparency Rules	Not specified, default institution rules
Brazil–Malawi (2015)	NO ISA	NO ISA	NO ISA	NO ISA	NO ISA	NO ISA

INVESTMENT TREATY/ INVESTMENT CHAPTER	ARBITRAL INSTITUTION	STANDING PANELS	APPOINTING AUTHORITY	ROSTER CONSTITUTED	ARBITRATOR QUALIFICATIONS AND CODE OF CONDUCT	ARBITRATOR CHALLENGES
Japan–Oman (2015)	ICSID; The ICSID Additional Facility Rules; UNCITRAL [art. 15(4)(a-c)] Any other arbitral tribunal if both sides agree [art. 15(4)(d)]	Not specified, default institution rules	Not specified, default institution rules	NOT APPLICABLE	Not specified, default institution rules	Not specified, default institution rules
Australia–China (2015)	ICSID; The ICSID Additional Facility Rules; UNCITRAL [art. 9.12(4)(a-c)] Any other arbitral tribunal if both sides agree [art. 9.12(4)(d)]	**YES** **NOTE:** unclear if the disputants are limited to selecting arbitrators from the roster Unless determined otherwise, the disputants select one arbitrator each and jointly appoint the third arbitrator by agreement (art. 9.15(1)]) **Exception:** Consolidation orders	The Joint Committee on Investment establishes and maintains a roster that has at least 20 arbitrators willing to serve on arbitral panels [art. 9.15(5)] Standing Panel Composition: ● Parties select 5 arbitrators each. 10 additional arbitrators who are not nationals of either state are chosen jointly [art. 9.15(6)] The Secretary-General of the ICSID makes appointments from the roster if parties are unable to select arbitrators within the allotted time [art. 9.15(3-4)]. However, the Secretary-General of the ICSID makes appointments from other sources if the list is not constituted [art. 9.15(7)]	NOT AVAILABLE AT THE TIME OF WRITING	art. 9.15(8); Side Letter on Transparency Rules Applicable to the ICSID; Annex 9-A (Arbitrator Code of Conduct)	Not specified, default institution rules

INVESTMENT TREATY/ INVESTMENT CHAPTER	ARBITRAL INSTITUTION	STANDING PANELS	APPOINTING AUTHORITY	ROSTER CONSTITUTED	ARBITRATOR QUALIFICATIONS AND CODE OF CONDUCT	ARBITRATOR CHALLENGES
			In consolidation proceedings, the third arbitrator is appointed by the Secretary-General of the ICSID from the panel of arbitrators, unless the disputants agree otherwise [art 9.21(4)(c)] In consolidation proceedings, the tribunal shall be established under the UNCITRAL Rules [art 9.21(9)]			
<u>China–Korea (2015)</u>	ICSID; The ICSID Additional Facility Rules; UNCITRAL [art. 12.12(3)(b-d)] Any other arbitral tribunal if both sides agree [art. 12.12(3)(e)]	**NO** Selection of arbitrators not specified, default institution rules apply	Not specified, default institution rules	NOT APPLICABLE	Not specified, default institution rules	Not specified, default institution rules
<u>Eurasia Economic Union–Vietnam (2015)</u>	ICSID; The ICSID Additional Facility Rules; UNCITRAL [art. 8.38(3)(b-d) Any other arbitral tribunal if both sides agree [art. 8.38(3)(e)]	**NO** Selection of arbitrators not specified, default institution rules apply	Not specified, default institution rules	NOT APPLICABLE	Not specified, default institution rules	Not specified, default institution rules

INVESTMENT TREATY/ INVESTMENT CHAPTER	ARBITRAL INSTITUTION	STANDING PANELS	APPOINTING AUTHORITY	ROSTER CONSTITUTED	ARBITRATOR QUALIFICATIONS AND CODE OF CONDUCT	ARBITRATOR CHALLENGES
Canada–Guinea (2015)	ICSID; The ICSID Additional Facility Rules; UNCITRAL [art. 24(4)(a-c)]	**NO** Unless determined otherwise, the disputants select one arbitrator each and jointly appoint the third arbitrator by agreement [art. 26(1)] **Exception:** Consolidation orders	If the disputants fail to appoint arbitrators within the allotted time, the Secretary-General of the ICSID will make appointments at his/her discretion, in consultation with parties where practical [art. 26(4)] In consolidation orders, the Secretary-General of the ICSID makes all arbitrator appointments [art. 28(3)] In consolidation orders, the tribunal shall be established under the UNCITRAL Arbitration Rules [art 28(3)]	NOT APPLICABLE	art. 23(2); art. 26(2)	Not specified, default institution rules
Korea–Vietnam (2015)	ICSID; The ICSID Additional Facility Rules; UNCITRAL [art. 9.19(1)(a-c)] Any other arbitral tribunal if both sides agree [art. 9.19(1)(d)]	**NO** Unless determined otherwise, the disputants select one arbitrator each and jointly appoint the third arbitrator by agreement [art. 9.21(1)] **Exception:** consolidation orders	If the disputants fail to appoint arbitrators within the allotted time, the appointing authority will make all appointments at his/her discretion [art. 9.21(4)] In consolidation cases, a tribunal is chosen at the discretion of the Secretary-General of the PCA [art. 9.22(5)] In consolidation cases, the tribunal shall be established under the UNCITRAL Arbitration Rules [art. 9.22(1)]	NOT APPLICABLE	art. 9.21(2)(a-b)	Not specified, default institution rules

INVESTMENT TREATY/ INVESTMENT CHAPTER	ARBITRAL INSTITUTION	STANDING PANELS	APPOINTING AUTHORITY	ROSTER CONSTITUTED	ARBITRATOR QUALIFICATIONS AND CODE OF CONDUCT	ARBITRATOR CHALLENGES
Burkina Faso–Canada (2015)	ICSID; The ICSID Additional Facility Rules; UNCITRAL [art. 25(1)(a-c)] Any other arbitral tribunal if both sides agree [art. 25(1)(d)]	**NO** Unless determined otherwise, the disputants select one arbitrator each and jointly appoint the third arbitrator by agreement [art. 27(1)] **Exception:** Consolidation orders	If the disputants fail to appoint arbitrators within the allotted time, the Secretary-General of the ICSID will make appointments at his/her discretion, in consultation with the parties where practical [art 27(4)] In consolidation proceedings, the Secretary-General of the ICSID makes the appointments [art. 29(3)] In consolidation orders, the tribunal shall be established under the UNCITRAL Arbitration Rules [art. 29(4)]	NOT APPLICABLE	art. 24(2); art. 27(2)	Not specified, default institution rules
Korea–New Zealand (2015)	ICSID; The ICSID Additional Facility Rules; UNCITRAL [art. 10.20(3)(a-c)] Any other arbitral tribunal if both sides agree [art. 10.20(3)(d)]	**NO** Unless otherwise decided, the disputants select one arbitrator each and jointly appoint the third arbitrator by agreement [art. 10.23(1)] **Exception:** Consolidation orders	If the disputants fail to appoint arbitrators within the allotted time, the appointing authority will make appointments at his/her discretion [art. 10.23(3)] In consolidation proceedings, the appointing authority appoints the third arbitrator who serves as the chair of the panel, unless parties otherwise agree [art. 10.29(4)(a-c)] In consolidation orders, the tribunal shall be established under the UNCITRAL Arbitration Rules [art. 10.29(8)]	NOT APPLICABLE	Not specified, default institution rules	Not specified, default institution rules

INVESTMENT TREATY/ INVESTMENT CHAPTER	ARBITRAL INSTITUTION	STANDING PANELS	APPOINTING AUTHORITY	ROSTER CONSTITUTED	ARBITRATOR QUALIFICATIONS AND CODE OF CONDUCT	ARBITRATOR CHALLENGES
Korea–Turkey (2015)	ICSID; The ICSID Additional Facility Rules; UNCITRAL [art. 1.17(5)(a-c)] Any other arbitral tribunal if all sides agree [art. 1.17(5)(d)]	**NO** Unless otherwise decided, the disputants select one arbitrator each and jointly appoint the third arbitrator by agreement [art. 1.17(5)(13)]	Not specified, default institution rules	NOT APPLICABLE	Not specified, default institution rules	Not specified, default institution rules
Japan–Mongolia (2015)	ICSID; The ICSID Additional Facility Rules; UNCITRAL [art. 10.13(4)(a-c)] Any other arbitral tribunal if both sides agree [art. 10.13(4)(d)]	**NO** Unless otherwise decided, the disputants select one arbitrator each and jointly appoint the third arbitrator by agreement [art. 10.13(10)]	If disputants fail to appoint arbitrators within the allotted time, the Secretary-General of the ICSID or the Secretary-General of the PCA will make the appointments [art. 10.13(10)]	NOT APPLICABLE	Not specified, default institution rules	Not specified, default institution rules
Japan–Ukraine (2015)	ICSID; The ICSID Additional Facility Rules; UNCITRAL [art. 18.4(a-c)] Any other arbitral tribunal if both sides agree [art. 18.4(d)]	Not specified, default institution rules	Not specified, default institution rules	NOT APPLICABLE	Not specified, default institution rules	Not specified, default institution rules
Japan–Uruguay (2015)	ICSID; the ICSID Additional Facility Rules; UNCITRAL [art. 21.3(a-c)] Any other arbitral tribunal if both sides agree [art. 21.3(d)]	**NO** Unless otherwise decided, the disputants select one arbitrator each and appoint the third arbitrator by agreement [art. 21.11]	If the disputants fail to appoint arbitrators within the allotted time, The Secretary-General of the ICSID will make the appointments from the ICSID Panel of Arbitrators [art. 21.11]	NOT APPLICABLE	art. [21.12(a-c)]; art. [21.13]	Not specified, default institution rules

INVESTMENT TREATY/ INVESTMENT CHAPTER	ARBITRAL INSTITUTION	STANDING PANELS	APPOINTING AUTHORITY	ROSTER CONSTITUTED	ARBITRATOR QUALIFICATIONS AND CODE OF CONDUCT	ARBITRATOR CHALLENGES
Canada–Côte d'Ivoire (2014)	ICSID; The ICSID Additional Facility Rules; UNCITRAL [art. 23.1(a-c)] Any other arbitral tribunal if both sides agree [art. 23.1(d)]	**NO** Unless otherwise decided, the disputants select one arbitrator each and appoint the third arbitrator by agreement [art. 25(1)] **Exception:** Consolidation orders	If the disputants fail to appoint arbitrators within the allotted time, the Secretary-General of the ICSID will make appointments at his/her discretion, in consultation with the parties where practical [art 25(4)] In consolidation orders, the Secretary-General of the ICSID makes all arbitrator appointments [art. 27(3)] In consolidation orders, the tribunal shall be established under the UNCITRAL Arbitration Rules [art. 27(4)]	NOT APPLICABLE	art. 22(2); art. 25(2)	Not specified, default institution rules
Canada–Mali (2014)	ICSID; The ICSID Additional Facility rules; UNCITRAL [art. 23.1(a-c)]	**NO** Unless otherwise decided, the disputants select one arbitrator each and appoint the third arbitrator by agreement [art. 25(1)] **Exception:** Consolidation orders	If the disputants fail to appoint arbitrators within the allotted time, the Secretary-General of the ICSID will make appointments at his/her discretion [art. 25(4)] In consolidation orders, the Secretary-General of the ICSID makes all arbitrator appointments under the UNCITRAL Arbitration Rules [art. 27(5)] In consolidation orders, the tribunal shall be established under the UNCITRAL Arbitration Rules [art. 27(1)]	NOT APPLICABLE	art. 22(2); art. 25(2)	Not specified, default institution rules

INVESTMENT TREATY/ INVESTMENT CHAPTER	ARBITRAL INSTITUTION	STANDING PANELS	APPOINTING AUTHORITY	ROSTER CONSTITUTED	ARBITRATOR QUALIFICATIONS AND CODE OF CONDUCT	ARBITRATOR CHALLENGES
Canada–Senegal (2014)	ICSID; the ICSID Additional Facility Rules; UNCITRAL [art. 24.1(a-c)]	**NO** Unless otherwise decided, the disputants select one arbitrator each and appoint the third arbitrator by agreement [art. 26(1)] **Exception:** Consolidation orders	If the disputants fail to appoint arbitrators within the allotted time, the Secretary-General of the ICSID will make appointments at his/her discretion, in consultation with the parties where practical [art. 26(4)] In consolidation orders, the Secretary-General of the ICSID makes all appointments [art. 28(3)] In consolidation orders, the tribunal shall be established under the UNCITRAL Arbitration Rules [art. 28(4)]	NOT APPLICABLE	art.23(2); art. 26(2)	Not specified, default institution rules
ASEAN–India (2014)	ICSID; The ICSID Additional Facility Rules; UNCITRAL [art. 20(7)(b-d) Any other arbitral tribunal if both sides agree [art. 20(7)(e)]	**NO** Unless otherwise decided, the disputants select one arbitrator each and appoint the third arbitrator by agreement [art. 20(10)]	If the disputants fail to appoint arbitrators within the allotted time, the appointing authority will make appointments at his/her discretion from the ICSID Panel of Arbitrators or the PCA Panel of Arbitrators [art. 20(10)]	NOT APPLICABLE	art. 20(11)(a-e)	Not specified, default institution rules
Japan–Kazakhstan (2014)	ICSID; The ICSID Additional Facility Rules; UNCITRAL [art. 17(4)(a-c) Any other arbitral tribunal if both sides agree [art. 17 (4)(d)]	**NO** Unless otherwise decided, the disputants select one arbitrator each and appoint the third arbitrator by agreement [art. 17(11)]	If the disputants fail to appoint arbitrators within the allotted time, the Secretary-General of the ICSID will make appointments, subject to parties selecting up to three nationalities each that are unacceptable to them [art 17(11-13)]	NOT APPLICABLE	Not specified, default institution rules	Not specified, default institution rules

INVESTMENT TREATY/ INVESTMENT CHAPTER	ARBITRAL INSTITUTION	STANDING PANELS	APPOINTING AUTHORITY	ROSTER CONSTITUTED	ARBITRATOR QUALIFICATIONS AND CODE OF CONDUCT	ARBITRATOR CHALLENGES
Israel–Myanmar (2014)	ICSID; the ICSID Additional Facility Rules; UNCITRAL [art. 8(2)(c-e)]	Not specified, default institution rules **NOTE**: Arbitrators shall be nationals of countries that have diplomatic relations with both contracting parties [art. 8(4)]	Not specified, default institution rules	NOT APPLICABLE	Not specified, default institution rules	Not specified, default institution rules
Canada–Korea (2014)	ICSID; The ICSID Additional Facility Rules; UNCITRAL [art. 8.23(1)(a-c)] Any other arbitral tribunal if both sides agree [art. 8.23(1)(d)]	**NO** Unless otherwise decided, the disputants select one arbitrator each and appoint the third arbitrator by agreement [art. 8.25(1)] **Exception:** Consolidation orders	If the disputants fail to appoint arbitrators within the allotted time, the Secretary-General of the ICSID will make appointments at his/her discretion [art. 8.26(2)] In consolidation orders, the Secretary-General of the ICSID makes all arbitrator appointments under the UNCITRAL Arbitration Rules from the ICSID Panel of Arbitrators and where it is not feasible to appoint from the Panel, the Director General shall appoint at own discretion [art 8.28(5)]	NOT APPLICABLE	art. 8.25(2)(a)(b)	Not specified, default institution rules
Canada–Serbia (2014)	ICSID; The ICSID Additional Facility Rules; UNCITRAL [art. 24(1)(a-c)]	**NO** Unless otherwise decided, the disputants select one arbitrator each and appoint the third arbitrator by agreement [art. 26. 1)]	If the disputants fail to appoint arbitrators within the allotted time, the Secretary-General of the ICSID will make appointments at his/her discretion, in consultation with parties where practical [art 26(4)]	NOT APPLICABLE	art. 23(2); art. 26(2)	Not specified, default institution rules

INVESTMENT TREATY/ INVESTMENT CHAPTER	ARBITRAL INSTITUTION	STANDING PANELS	APPOINTING AUTHORITY	ROSTER CONSTITUTED	ARBITRATOR QUALIFICATIONS AND CODE OF CONDUCT	ARBITRATOR CHALLENGES
		Exception: Consolidation orders	In consolidation orders, the Secretary-General of the ICSID makes all arbitrator appointments [art. 28(3)] In consolidation orders, the tribunal shall be established under the UNCITRAL Arbitration Rules [art. 28(4)]			
Colombia–Turkey (2014)	ICSID; UNCITRAL [art. 12(6)(b)(c)]	**NO** Unless determined otherwise, the disputants select one arbitrator each and appoint the third arbitrator by agreement [art. 12(16)] **Exception:** Consolidation orders	If a consolidation order is found to be valid by the Secretary-General of the ICSID or the Secretary-General of the PCA, an arbitral tribunal shall be established [art. 12(20)]	NOT APPLICABLE	art. 17(a)(b)	Not specified, default institution rules
Australia–Japan (2014)	NO ISA	NO ISA	NO ISA	NO ISA	NO ISA	NO ISA
EU–Georgia (2014)	NO ISA	NO ISA	NO ISA	NO ISA	NO ISA	NO ISA
EU–Moldova (2014)	NO ISA	NO ISA	NO ISA	NO ISA	NO ISA	NO ISA
EU–Ukraine (2014)	NO ISA	NO ISA	NO ISA	NO ISA	NO ISA	NO ISA

INVESTMENT TREATY/ INVESTMENT CHAPTER	ARBITRAL INSTITUTION	STANDING PANELS	APPOINTING AUTHORITY	ROSTER CONSTITUTED	ARBITRATOR QUALIFICATIONS AND CODE OF CONDUCT	ARBITRATOR CHALLENGES
Egypt–Mauritius (2014)	ICSID; UNCITRAL [art. 10(4)] Cairo Regional Centre for International Commercial Arbitration [art. 10(4)] The LCIA-MIAC Arbitration Centre in Mauritius [art. 10(4)] Any other arbitral tribunal if both sides agree [art. 8.23(1)(d)]	**NO** Unless otherwise decided, the disputants select one arbitrator each and appoint the third arbitrator by agreement [art. 10(7)]	If the disputants fail to appoint arbitrators within the allotted time, the appointing authority of the relevant arbitral tribunal will make appointments [art. 10(7)]	NOT APPLICABLE	Not specified, default institution rules	Not specified, default institution rules
Canada–Nigeria (2014)	ICSID; The ICSID Additional Facility Rules; UNCITRAL [art. 24(1)(a-c)]	**NO** Unless otherwise decided, the disputants select one arbitrator each and appoint the third arbitrator by agreement [art. 26.1)] **Exception:** Consolidation orders	If the disputants fail to appoint arbitrators within the allotted time, the Secretary-General of the ICSID will make appointments at his/her discretion in consultation with the disputants, where possible [art. 26(4)] In consolidation orders, the Secretary-General of the ICSID makes all arbitrator appointments [art. 28(3)] In consolidation orders, the tribunal shall be established according to the ICSID Additional Facility Rules or the UNCITRAL Rules if neither Party is a party to the ICSID Additional Facility Rules [art. 28(4)]	NOT APPLICABLE	art. 23(2); art. 26(2)	Not specified, default institution rules

INVESTMENT TREATY/ INVESTMENT CHAPTER	ARBITRAL INSTITUTION	STANDING PANELS	APPOINTING AUTHORITY	ROSTER CONSTITUTED	ARBITRATOR QUALIFICATIONS AND CODE OF CONDUCT	ARBITRATOR CHALLENGES
Australia–Korea (2014)	ICSID; The ICSID Additional Facility Rules; UNCITRAL [art. 11.16(3)(a-c)] Any other arbitral tribunal if both sides agree [art. 11.16(3)(d)]	**NO** Unless otherwise decided, the disputants select one arbitrator each and appoint the third arbitrator by agreement [art. 11.19(1)] **Exception:** Consolidation orders	If the disputants fail to appoint arbitrators within the allotted time, the Secretary-General of the ICSID will make appointments at his/her discretion [art. 11.19(3)] In consolidation orders, the Secretary-General of the ICSID appoints the 3rd arbitrator who will act as a chair, unless parties agree otherwise [art. 11.25(4)] In consolidation orders, the tribunal will be constituted according to UNCITRAL Rules [art. 12.25(8)]	NOT APPLICABLE	Not specified, default institution rules	Not specified, default institution rules
Canada–Cameroon (2014)	ICSID; The ICSID Additional Facility Rules; UNCITRAL [art. 23(1)(a-c)]	**NO** Unless otherwise decided, the disputants select one arbitrator each and appoint the third arbitrator by agreement [art. 25. 1)] **Exception:** Consolidation orders	If the disputants fail to appoint the arbitrators within the allotted time, the Secretary-General of the ICSID will make appointments at his/her discretion in consultation with the disputants to the extent possible [art. 25(4)] In consolidation orders, the Secretary-General of the ICSID makes all arbitrator appointments [art. 27(3)] In consolidation orders, the tribunal shall be established according to UNCITRAL Rules [art. 27(4)]	NOT APPLICABLE	art. 22(2); art. 25(2)	Not specified, default institution rules
Japan–Myanmar (2013)	ICSID; the ICSID Additional Facility Rules; UNCITRAL [art. 18(4)(a-c)]	Not specified, default institution rules	Not specified, default institution rules	NOT APPLICABLE	Not specified, default institution rules	Not specified, default institution rules