NOTES

SAVING PRIVATE ISDS: THE CASE FOR HARDENING ETHICAL GUIDELINES AND SYSTEMATIZING CONFLICTS CHECKS

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ABSTRACT

The European Union (EU) has declared its dissatisfaction with investor-state dispute settlement (ISDS) and its intention to replace it with an investment court system. Other states have expressed concerns over the transparency of ISDS and have withdrawn or failed to renew their bilateral investment treaties. Two of the major ISDS conventions, the International Centre for Settlement of Investment Disputes (ICSID) and the United Nations Commission on International Trade Law (UNCITRAL), are reviewing proposals for reform. Because arbitrator bias is one of the few ways that an award can be challenged, this Note proposes reforms in the selection and appointment of arbitral tribunals.

Arbitrators are required to disclose conflicts and are advised to reveal circumstances that may create the perception of partiality and/or a lack of independence. The structure of the arbitration community makes it more vulnerable to circumstances under which an arbitrator might be biased due to the various roles that they play within the community or how they adjudicate certain issues. This Note proposes two solutions to mitigate these concerns: (1) a "hardening" of ethical guidelines into regulations that govern arbitrator conduct and (2) a mandatory, systematic conflicts check like those used by many law firms to prevent conflicts.

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I. INTRODUCTION

"For the EU ISDS is dead."[1]

With these words, the European Union (EU) affirmed its intention to replace investor-state dispute settlement (ISDS) with an international investment court. ISDS provisions appear in bilateral and multilateral investment treaties (BITs/MITs) and are the only means of dispute settlement in nearly all investment treaties. They represent an almost unique form of international law that permits private individuals (foreign investors) to bring claims directly against a host state through international arbitration. Disputes begin with an allegation that a

1. EUR. COMM'N, *EU-Japan Economic Partnership Agreement*, 6 (July 1, 2017), http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155684.PDF.

state's actions breached its treaty obligations to foreign investors through actions that were, among other things, an indirect expropriation, discriminatory treatment, arbitrariness, or a denial of justice.[2] These disputes are settled by arbitral tribunals that may award individuals money damages if they find a state in breach of its treaty obligations. Recent decisions have also granted preliminary injunctions, suggesting that the scope of dispute settlement is expanding.[3]

Legal scholars, non-governmental organizations (NGOs), and states have expressed concern with ISDS in terms of its neutrality, transparency, consistency, predictability, and overall legitimacy. There is growing pressure to reform ISDS, and a few countries have withdrawn from and/or chosen to reassess their BITs with an eye toward limiting investor protections to preserve sovereignty over national laws and regulations.[4] The EU has gone as far as to propose replacing ISDS with an international investment court that will serve as a permanent, public tribunal like the Appellate Body of the World Trade Organization.[5]

Although public adjudication may have more transparency than the current ISDS system, there is a risk that an investment court could limit the defenses of investors by forcing them to face judges chosen entirely by the state and that decisions could turn on public opinion rather than the facts and the law.[6] From a practical perspective, the time and cost to establish an investment court system (ICS) is probably much higher than the time and cost to reform the established ISDS process. Investors and arbitration institutes have an opportunity to take the initiative and design reforms that will satisfy the concerns of states without stripping the protections that incentivize foreign investors to fund long-term investments that benefit national economies.

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2. *See, e.g.*, *Glamis Gold Ltd. v. U.S.*, Award, 48 ILM 1038, ¶ 22, 10-11 (June 8, 2009), https://www.italaw.com/cases/487.

3. David Gaukrodger & Kathryn Gordon, *Investor State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, 11 (OECD Working Papers on International Investment, Working Paper No. 2012/03, 2012), http://www.oecd.org/daf/inv/investment-policy/WP-2012_3.pdf. Many treaties expressly state that tribunals do not have the power to suspend or limit state actions.

4. Rian Matthews & Nandakumar Ponniya, *Withdrawal from Investment Treaties: An Omen for Waning Investor Protection in AP?*, LEXOLOGY (May 12, 2017), https://www.lexology.com/library/detail.aspx.

5. *The Multilateral Investment Court Project*, EUR. COMM'N (Oct. 20, 2017), http://trade.ec.europa.eu/doclib/press/index.cfm; *Appellate Body*, WTO, https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm (last visited Oct. 1, 2018).

6. INV. DIV. DIRECTORATE FOR FIN. AND ENTER. AFF. OECD, APPOINTING AUTHORITIES AND THE SELECTION OF ARBITRATORS IN INVESTOR-STATE DISPUTE SETTLEMENT: AN OVERVIEW, COMPILATION OF INITIAL COMMENTS RECEIVED 6 (Mar. 2018), http://www.oecd.org/investment/investment-policy/ISDs-Appointing-Authorities-Arbitration-Compilation-March-2018.pdf.

Legal scholars and practitioners have focused on the independence and impartiality of arbitrators as a concern. The current regime requires arbitrators to pledge their independence and impartiality when they are appointed to an arbitral tribunal.[7] During the appointment process, arbitrators must decline appointment if they have actual conflicts of interest and are advised to voluntarily disclose any circumstances that may create the impression that they lack independence or impartiality.[8] Voluntary disclosure assists disputing parties in determining whether to oppose the appointment. These relatively loose regulations create several serious concerns, including information gaps that allow obvious conflicts to go undetected, demographic stagnation in the arbitration community, an increased risk of litigation based on challenges to arbitrators for bias, and national courts' imposition of domestic law standards on international treaty law.

The International Centre for Settlement of Investment Disputes (ICSID) and the United Nations Commission on International Trade Law (UNCITRAL) are in the process of reforming their ISDS rules, but the process is likely to take several years.[9] This Note proposes two measures that should be prioritized in the reform process to restore some confidence in ISDS and to gather data that can help reformers diagnose and resolve other problems in the system.

The first measure is to establish a universal code of ethics that defines the meaning of independence and impartiality and has the force of regulation over arbitrators.[10] This code should provide arbitrators

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7. *See, e.g.*, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, arts. 14, 40(2), 52(1)(a), Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159; G.A. Res. 68/109, Arbitration Rules of the U.N. Commission on International Trade Law, art. 11 (Dec. 18, 2013); ARB. RULES OF THE INST. OF THE STOCKHOLM CHAMBER OF COMMERCE, arts. 18-19 (2017), http://sccinstitute.com/media/169838/arbitration_rules_eng_17_web.pdf.

8. *See, e.g.*, G.A. Res. 68/109, *supra* note 7, art. 11; ARB. RULES OF THE INST. OF THE STOCKHOLM CHAMBER OF COMMERCE, *supra* note 7; IBA GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION § 4 (INT'L BAR ASS'N 2014), https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

9. *See, e.g.*, *ICSID Rules and Regulations Amendment Process*, INT'L CTR FOR SETTLEMENT OF INV. DISP., https://icsid.worldbank.org/en/Pages/about/Amendment-of-ICSID-Rules-and-Regulations.aspx (last visited Oct. 10, 2018) ("ICSID launched the current amendment process in October 2016 and invited Member States to suggest topics that merited consideration. In January 2017, ICSID issued a similar invitation to the public . . . The Secretariat has collected these comments and is preparing background papers on topics that have been identified for potential rule amendment . . . . The Centre hopes to publish these papers by early 2018.").

10. Although independence and impartiality are sometimes used interchangeably, they are distinct duties. This Note focuses on measures that strengthen the independence of arbitrators as a prophylactic against partiality. There is considerable concern over the impartiality of

comprehensive guidance as to what constitutes a conflict of interest and what information arbitrators are obligated to disclose. The code should be adopted within arbitration forums by incorporation into their rules and should have the force of regulation rather than serving as "soft law" guidance.

The second step is to establish a mandatory clearance process for any practitioner who chooses to work as an arbitrator. The process will compile disclosures from individual arbitrators with information contributed by arbitration forums, law firms, and other relevant organizations. This will allow disputing parties to perform due diligence through a centralized database, which will offer them superior results to the current methods which rely on word of mouth and incomplete information.

These measures will add necessary transparency to ISDS, lower costs for disputing parties, streamline the selection of arbitrators, reduce the number of frivolous challenges to arbitrators, and may ameliorate some of the demographic issues in the arbitration community. They will also address some of the jurisprudential concerns over the legitimacy of international investment law. The data that emerges from the clearance process may help expose and diagnose other problems in international investment arbitration that remain undetected due to the obscurity of the process.

Part II of this Note will address the problems and concerns that have arisen from the regulatory gaps created by the current regime. Part III will discuss some of the practical and jurisprudential motivations to reform ISDS. Part IV will present the current regime for the selection of arbitrators in investor-state disputes, the soft laws that guide arbitrator conduct, and the role of national courts in interpreting conflicts of interest. Finally, this Note will conclude by proposing two improvements to the process of selecting and appointing arbitrators: (1) developing "hardened" ethical regulations and (2) a clearance process to improve the selection of arbitrators. The roadblocks to implementing these measures will also be considered, including conflicts of law and the confidentiality of arbitral proceedings.

II. Systemic Flaws

Arbitrators must disclose actual conflicts and are encouraged to volunteer information that might lead a disputing party to question their independence and/or impartiality. The loosely regulated disclosure

arbitrators, particularly party-appointed arbitrators. *See generally* Catherine Rogers, Ethics in International Arbitration 323-36 (2014).

regime has raised several concerns regarding the independence and impartiality of arbitrators in ISDS. These concerns include the risk of individuals appearing as arbitrators and counsel on related matters (double hatting), information gaps, conflicts with third-party funders, and demographic inertia.

A. *Double Hats and Issue Conflicts*

The arbitration community is relatively small, and this increases the potential for conflicts with voluntary disclosure as the only safeguard.[11] Although an arbitrator cannot serve on a panel if aware of an actual conflict, there are other factors that might limit their independence and impartiality. For example, there are no rules against individuals filling multiple roles in the community including counsel, arbitrator, and expert witness (this is sometimes termed the "double hat" phenomenon).[12] A practitioner could find himself or herself serving as arbitrator for a case that will create a precedent or somehow affect a current case in which the arbitrator serves as counsel, or affect future matters in which the arbitrator or their firm is likely to serve.[13]

Another problem is "issue conflicts," which can occur when an arbitrator views a particular legal principle in a certain way and decides cases accordingly regardless of facts and circumstances that might alter the application of the principle.[14] In national courts, judges routinely preside over cases that raise the same issue, but judges exist within hierarchies that include various levels of appellate review.[15] A judge's decisions can be tested by experts at several levels, but the grounds for appealing an arbitration decision are narrow and do not lend themselves to arguments based on issue conflicts.[16]

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11. *See* DAVID GAUKRODGER, OECD, APPOINTING AUTHORITIES AND THE SELECTION OF ARBITRATORS IN INVESTOR-STATE DISPUTE SETTLEMENT: AN OVERVIEW 15-16, ¶ 32 (Mar. 2018), https://www.oecd.org/investment/investment-policy/ISDs-Appointing-Authorities-Arbitration-March-2018.pdf; David Caron, *ICSID in the Twenty-First Century: An Interview with Meg Kinnear: Introductory Remarks*, 104 AM. SOC'Y INT'L L. PROC. 413, 421 (2010) (quoting Meg Kinnear: "Frankly, with the explosion of cases, it's awfully difficult to find enough qualified arbitrators who are available, who are not conflicted, and are all of the things you would need in an arbitrator."). *But see* INV. DIV. DIRECTORATE FOR FIN AND ENTER. AFF. OECD, *supra* note 6, at 6-7 (commenting on ICSID statistics for diversity and number of appointed arbitrators).

12. Malcolm Langford et al., *The Revolving Door in International Investment Arbitration*, 20(2) J. INT'L ECON. L. 301 (2017).

13. ROGERS, *supra* note 10, at 318.

14. *Id.* at 320-22.

15. *Id.* at 321.

16. *Id.* at 322-23.

Issue conflict may be a broader problem than double hatting if the definition of an issue conflict is extended to a scenario in which an arbitrator has previously published academic work or made public statements on an issue related to a case that he or she is judging. For example, in *Canfor Corp. v. United States*, the United States challenged the appointment of an arbitrator who had given a speech to a Canadian government council in which he described the U.S. position on softwood lumber to be "harassment."[17] The arbitrator initially refused to resign, but according to involved attorneys, he eventually acceded to the advice of the ICSID Secretariat and left the case.[18]

The opaque nature of arbitral proceedings makes it difficult to quantify the extent of double hatting and issue conflicts, partially because it is uncommon for the decisions of arbitrator challenges to be published.[19] However, a recent paper that quantitatively examined the structure of the investment arbitration community concluded that "the normative concerns with double hatting are partly substantiated. A select but significant group of individuals score highly and continually on our double hatting index."[20]

B. *Self-Regulation and Information Gaps*

A voluntary disclosure regime also leads to information gaps on the part of the arbitrator and disputing parties. Although an arbitrator may honestly intend to disclose potential conflicts, the complexity of legal organizations and law firms may lead to an inadvertent oversight. For example, in *W v. M*, an arbitral award was challenged because the respondent was an affiliate of a company that was a major client for a law firm where a forum-appointed arbitrator was a partner.[21] Although the International Bar Association Guidelines on Conflicts of Interest in International Arbitration (IBA guidelines) list this as a non-waivable

17. Judith Levine, *Dealing with Arbitrator "Issue Conflicts" in International Arbitration*, 61-Apr. DISP. RESOL. J. 60, 64.

18. *Id.* at 64.

19. *Id.* at 63 ("First, the sensitive nature of a challenge often leads to the arbitrator's resignation or withdrawal of nomination. Second, because of the privacy usually associated with arbitration, many arbitral institutions do not publish awards, so they do not become public unless challenged before a court. Finally, most arbitral institutions, including those that do publish final awards in some form, are reluctant to publish decisions on arbitrator challenges, or even reveal to the parties the reasons for such decisions. This means that much of the information about arbitrator challenges comes from anecdotal reports from people who work at arbitral institutions, counsel in the cases, or local media reports.").

20. Langford, *supra* note 12.

21. W Ltd v. M Sdn Bhd [2016] EWHC (Comm) 422 [10] (UK).

"red list" disclosure,[22] the conflict check systems of the arbitrator's firm did not indicate that there was an issue.[23] The English Commercial Court dismissed the challenge on the basis that the arbitrator was not involved with the client's legal work and chiefly used the firm as a source of secretarial and administrative support.[24] The Court stated that under English law a "fair minded and informed observer would not . . . conclude that there was a real possibility that the tribunal was biased."[25] In this case, the Court did consider the IBA guidelines as part of its determination, but ultimately defaulted to the English common law to test for bias because it found that the guidelines were too inflexible to adequately deal with the facts of the case.[26]

Disputing parties are also vulnerable to information gaps in their due diligence efforts. As previously noted, many arbitral decisions remain unpublished or the names of disputing parties and other identifying information are redacted. Under ICSID, parties have ninety days to appoint arbitrators; otherwise, arbitrators are appointed by the forum.[27] Other arbitral rule sets have similar appointment deadlines. This means that if parties do not wish to forfeit their right to appoint, they have a relatively short amount of time in which to execute due diligence and appoint suitable arbitrators.

As illustrated in *Cofely Ltd v. Bingham*, it is entirely possible that significant grounds for bias can remain undetected by concerned parties. In the instant case, a claimant became concerned over an arbitrator's bias after another case showed that the respondent had made fraudulent misrepresentations in its nominations of adjudicators, including the arbitrator in the instant case.[28] The claimant's request for further information led to protracted correspondence and ultimately revealed that in a three-year time period, the arbitrator had been involved in twenty-five out of 137 cases involving the respondent and derived 25% of his income from those appointments.[29]

22. INT'L BAR ASS'N, *supra* note 8, ¶ 1.4.

23. W Ltd v. M Sdn Bhd [2016] EWHC (Comm) 422 [15].

24. *Id.* at 10.

25. *Id.* at 22.

26. *Id.* at 33-37.

27. INT'L CTR. FOR SETTLEMENT OF INV. DISP., ICSID CONVENTION, REGULATIONS AND RULES art. 36 (2006) https://icsid.worldbank.org/en/Documents/resources/2006%20CRR_English-final.pdf.

28. Cofely Ltd. v. Bingham [2016] EWHC 240 [33], [36] (UK).

29. *Id.* at 63, 104.

When the arbitrator refused to recuse himself, the claimant turned to the English Commercial Court.[30] The Court found for the claimant due to the arbitrator's failure to disclose his relationship with the respondent and his belligerence when the claimant requested further information about the relationship.[31] The Court also noted that the respondent (a claims consultant) maintained a "blacklist" which would be of concern to any arbitrator who derived a significant portion of his or her income from involvement in the respondent's cases.[32] Had it been apparent from the start that the respondent favored a particular list of arbitrators, the claimant would have been forewarned and would have saved both time and costs.

C. *Third-Party Funding*

Although it is perceived as cheaper than litigation, arbitration still requires considerable funding. The average total cost of a case is $8 million, and costs can exceed $30 million.[33] An industry has grown around "claim funding" (also termed "alternative litigation funding" or "third party litigation finance"). This describes a scenario in which a third party funds the costs of litigation in exchange for a portion of any settlements, awards, or other benefits from a case.[34] Third-party funders do not face the same obligations to disclose as arbitrators, and the relationship between a funder and an arbitrator may go completely undetected if due diligence is ineffective. National courts have been divided on the issue. Hong Kong and England have not extended national doctrines against third-party funding to international arbitration, but a Singaporean court dismissed the "artificial" differentiation between arbitration and litigation under the reasoning that a law undergirded by public policy considerations should not be pushed aside merely because a proceeding happens privately.[35] Current ISDS rules do not address third-party funding, but ICSID has acknowledged the topic as a

30. *Arbitrator removed for apparent bias (English Commercial Court)*, PRAC. L. ARB., Practice Note 2-623-5204.

31. *Id.*

32. Cofely Ltd. v. Bingham [2016] EWHC (Comm) 240 [108].

33. Gaukrodger & Gordon, *supra* note NOTEREF _Ref511649768 \h * MERGEFORMAT 3, at 19.

34. Jennifer A. Trusz, *Third-Party Funding in International Arbitration and Conflicts of Interest: The Case for Amending Arbitration Rules to Require Disclosure*, 32 ALTERNATIVES TO HIGH COST LITIG. 101, 110 (2014).

35. Elizabeth Chan, *Proposed Guidelines for the Disclosure of Third-Party Funding Arrangements in International Arbitration*, 26 AM. REV. INT'L ARB. 281, 289, 302 (2015).

potential area for reform, particularly for the purpose of conflicts checks.[36]

D. *Demographics*

Although most arbitral conventions do not specify requirements for arbitrators, they are a relatively homogeneous group. Studies of ICSID arbitrators reveal that nearly all are legal professionals and are a mix of former judges, lawyers, and academics.[37] Private practitioners dominate ICSID, and about 40% of arbitrators are specialists in public international law.[38] Arbitration forums tend to be obscure about the demographics of their arbitrators, but the evidence strongly suggests that the typical arbitrator is "pale, male and stale."[39] The homogeneity among arbitrators is reinforced by the phenomenon of "repeat players," which occurs when a party repeatedly appoints the same arbitrator in its disputes.[40] As an example, a 2011 survey of ICSID arbitrators revealed that a group of twelve arbitrators accounted for over a quarter of nominations and were present in 60% of the tribunals in the sample.[41] This "repeat players" phenomenon is due in part to the fact that parties prefer to nominate arbitrators they have previously assessed for suitability. This allows them to meet the limited time frame for selection of arbitrators and reduce the costs associate with due diligence. Consequently, issues that affect a diverse group of people are decided by a particularly narrow set of individuals who are not accountable to public law or scrutiny.

III. DEATH TO ISDS?

ISDS has been portrayed in an increasingly negative light by the media, NGOs, academics, and some states. The EU is advocating for

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36. ICSID, THE ICSID RULES AMENDMENT PROCESS 2 (2017), https://icsid.worldbank.org/en/Documents/about/ICSID%20Rules%20Amendment%20Process-ENG.pdf.

37. Jose Augusto Fontoura Costa, *Comparing WTO Panelists and ICSID Arbitrators: The Creation of International Legal Fields*, 1 OÑATI SOCIO-LEGAL SERIES 1, 16-17 (2011).

38. Gaukrodger & Gordon, *supra* note NOTEREF _Ref511649768 \h * MERGEFORMAT 3, at 44.

39. BERWIN LEIGHTIN PAISNER, DIVERSITY ON ARBITRAL TRIBUNALS, 2-3 (2016), https://www.blplaw.com/media/download/Diversity_on_arbitral_tribunals_-_background_note.pdf. "ICSID investment arbitrators mostly originate from Europe and North America, and approximately 75% come from OECD countries . . . 95 percent of ICSID arbitrators have been male." Gaukrodger & Gordon, *supra* note NOTEREF _Ref511649768 \h * MERGEFORMAT 3, at 44-45.

40. EUR. COMM'N, *The Identification and Consideration of Concerns as Regards Investor to State Dispute Settlement*, ¶¶ 21, 32 (Nov. 20, 2017), http://trade.ec.europa.eu/doclib/docs/2017/november/tradoc_156402.pdf.

41. Costa, *supra* note 37, at 11.

the establishment of an international investment court, and other states have withdrawn from BITs and ISDS conventions. Arbitration forums and conventions must take solid steps to reform the process, not only for the sake of controlling the narrative, but also for the benefits it offers disputing parties. Investors want to be certain that the outcomes of disputes are insulated from political pressure and public opinion. Without this insulation, investors are likely to face higher risks and reduced incentives to make the long-term investments that contribute to the growth of national economies and infrastructure. From a practical standpoint, the establishment of an effective ICS will likely cost more time and money than reforming the already established ISDS process. There is also a strong jurisprudential argument for holding arbitrators to standards of conduct and affirming their legitimacy as arbiters of international law.

A. *ISDS Under Fire*

1. European Union

The EU has strongly stated its support for permanent investment courts to replace ISDS and the European Commission (EC).[42] Among their several goals, the courts will "have tenured, highly qualified judges, obliged to adhere to the strictest ethical standards" and will "prevent disputing parties from choosing which judges rule [] on their case."[43] The EC's objectives for the courts are based on its approach to recent free trade agreements (FTAs), and these agreements contain several significant reforms to the appointment of arbitrators.

The EU-Vietnam FTA requires the Trade Committee, which oversees the operation of the agreement,[44] to establish a list of arbitrators that have a "specialized knowledge and experience of law and international trade."[45] The agreement also contains an internal code of conduct for arbitrators with restrictions on conflicts of interest, disclosure requirements, and confidentiality.[46]

The Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU establishes an ICS that departs from the

42. EUR. COMM'N, *supra* note 5.

43. *Id.*

44. EUR. UNION, GUIDE TO THE EU-VIETNAM FREE TRADE AGREEMENT 23, http://eeas.europa.eu/archives/delegations/vietnam/documents/eu_vietnam/evfta_guide.pdf.

45. Trade Agreement, EU-Viet., chapter 13 art. 23 (unratified as of Aug. 2016), http://trade.ec.europa.eu/doclib/press/index.cfm.

46. Free Trade Agreement, EU-Viet., Annex II Code of Conduct for Arbitrators and Mediators (Feb. 2016), http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154226.pdf.

classic ISDS model in the appointment of judges. Under CETA, the Joint Committee that administers the agreement must appoint fifteen individuals to serve as judges for five-year terms that may be renewed once.[47] These individuals must "possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognized competence" and "have demonstrated expertise in public international law."[48] The agreement expresses a preference for judges who have experience in the fields of international trade or investment law and familiarity with dispute resolution in these same fields.[49] Tribunal members are required to comply with the International Bar Association Guidelines on Conflicts of Interest in International Arbitration,[50] and parties may ask the President of the International Court of Justice to decide a challenge to a tribunal member's independence.[51]

2. Bilateral Investment Treaty Termination

There is growing displeasure with ISDS among some states, which believe that it excessively favors investors. The data from publicly available cases indicates that of the 444 treaty-based disputes concluded by 2015, "36 per cent of cases decided in favour of the State, 26 per cent in favour of the investor and 26 per cent of cases settled."[52] Nonetheless, since the 2000s, several countries (including India, Indonesia, Bolivia, Venezuela, Ecuador, and South Africa) have unilaterally withdrawn from some or all of their investment treaties or allowed them to expire.[53] Some countries, like Venezuela, Bolivia, and Ecuador, have also withdrawn from ICSID.[54] Other countries have stated their support

47. Comprehensive Economic Trade Agreement, Can.-EU, art. 8.23(5) (provisional as of Sep. 21, 2017), http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter.

48. *Id.* art. 8.23(4).

49. *Id.* art. 8.23(4).

50. *Id.* art. 8.30.

51. *Id.* art. 8.30.

52. *Investor-State Dispute Settlement: Review of Developments in 2015*, 2 UNCTAD 1, 1 (June 2016), http://investmentpolicyhub.unctad.org/Publications/Details/144; *see also* CELESTE E. SALINAS QUERO, INVESTOR-STATE DISPUTES AT THE SCC 7 (2017), https://sccinstitute.com/media/178174/investor-state-disputes-at-scc-13022017-003.pdf ("Most awards have been rendered in favor of respondent states. 21% of Arbitral Tribunals have declined jurisdiction and 37% have denied all the investor's claims. In 78% of cases where the investors' claims were denied in full, the respondent state was not found in breach.").

53. Matthews & Ponniya, *supra* note 4.

54. José Carlos Bernal Rivera, *Life after ICSID: 10th Anniversary of Bolivia's Withdrawal from ICSID*, KLUWER ARB. BLOG (Aug. 12, 2017), http://arbitrationblog.kluwerarbitration.com/2017/08/12/life-icsid-10th-anniversary-bolivias-withdrawal-icsid.

for future discussions on the establishment of an international investment court or have included provisions in their FTAs that allow the establishment of investment courts.[55] Discussion and possibilities are not actualities, but they do indicate that states have reserved the right to shift legal power to other forums. In light of the EU's decisions, other states with influential economies may begin to seriously examine the alternatives to ISDS.

A withdrawal from ICSID and investment treaties does not bar investors from arbitrating disputes. Many treaties have ten- to fifteen-year "sunset" clauses that confer the protections of the treaties to investments made before treaty termination, including investment arbitration.[56] Treaties usually include alternative rules to ICSID dispute settlement. But these safeguards are only useful for current investors and future investors are rightfully concerned about how investor protection will be framed when countries renegotiate their investment treaties.

B. *Reform is Preferable to Replacement*

1. Restraining Political Bias and Overreach

One of the primary advantages of ISDS is that it reduces the risk that politics will influence the outcomes for disputing parties. If the EU successfully pursues its goal of creating an ICS, ISDS is likely to take on new political dimensions, because ICS arbitrators will be state-appointed and disputes will be settled in the public eye. Decision-makers who are more exposed to public scrutiny may openly or unconsciously favor state interests over the interests of investors.[57] This represents an additional risk for investors, and its effect is likely magnified because of the difficulty of quantifying political and public pressure. Public adjudication of investor-state disputes may cause a chilling effect that will ultimately slow economic growth if investors believe that they are unlikely to successfully challenge unlawful state actions. By

55. Comm'n on Int'l Trade Law, Settlement of Commercial Disputes Investor-State Dispute Settlement Framework Compilation of Comments Republic of Korea, U.N. Doc. A/CN.9/918/Add.9 (2017), at 2; Comm'n on Int'l Trade Law, Settlement of Commercial Disputes Investor-State Dispute Settlement Framework Compilation of Comments Israel, U.N. Doc. A/CN.9/918/Add.8 (2017), at 3.

56. Samuel W. Cooper et. al., *Current Topics in International Arbitration*, 65 THE ADVOC.: ST. B. OF TEXAS LITIG. SEC. REP. 10, 11 (2013).

57. José E. Alvarez, *To Court or Not to Court*, INST. FOR INT'L L. & JUST., https://www.iilj.org/working-papers/to-court-or-not-to-court (last visited Sept. 25, 2018) (discussing the political pressures that may bias international investment courts).

offering some degree of transparency and taking some steps to reform the more obvious and (perhaps) easily remedied issues in ISDS, arbitration tribunals may be able to restore enough public faith to avoid being shunted aside in favor of investment courts.

Another reason to reform the regulations that govern arbitrators is to avoid overreach by states. For example, the United Arab Emirates recently imposed criminal liability on arbitrators who issue decisions and opinions "in contravention of the requirements of the duty of neutrality and integrity."[58] The penalty for such an action is the disturbingly nonspecific "temporary imprisonment."[59] The law also does not define the scope of integrity and impartiality. This represents an outlier in state exercises of power over arbitration, but it should be sufficiently alarming to the arbitration community and increase support for reform. If arbitrators can demonstrate that they are governed by a transparent, comprehensive code of ethics and that there is a rigorous system to check conflicts, it may be enough to discourage states from taking harsher measures against ISDS.

2. The Cost of Establishing an Investment Court System

Although there is a common sentiment that arbitration is more efficient and less costly than public adjudication, the costs of ISDS are still considerable.[60] But the costs of establishing a new, unprecedented ICS are likely to be considerably higher than those of reforming the established ISDS process. The most significant cost for ICS may be the amount of time that it will take to establish the system, including the time to negotiate its terms and to resolve contradictions between the laws and regulations of the ICS and its member states.[61] Another issue is whether an ICS will be established like ISDS through bilateral

58. John Gaffney, *The Revision of Article 257 of the UAE Penal Code: A problem also for Party-Appointed Experts?*, KLUWER ARB. BLOG (Mar. 10, 2017), http://arbitrationblog.kluwerarbitration.com/2017/03/10/the-revision-of-article-257-of-the-uae-penal-code-a-problem-also-for-party-appointed-experts.

59. *Id.*

60. *See* Trishna Menon & Gladwin Issac, *Developing Country Opposition to an Investment Court: Could State-State Dispute Settlement be an Alternative?*, KLUWER ARB. BLOG (Feb. 17, 2018), http://arbitrationblog.kluwerarbitration.com/2018/02/17/developing-country-opposition-investment-court-state-state-dispute-settlement-alternative (noting that cost is a factor in states' opposition to multilateral investment courts); Jeffery P. Commission, *How Much Does an ICSID Arbitration Cost? A Snapshot of the Last Five Years*, KLUWER ARB. BLOG (Feb. 29, 2016), http://arbitrationblog.kluwerarbitration.com/2016/02/29/how-much-does-an-icsid-arbitration-cost-a-snapshot-of-the-last-five-years; Gaukrodger & Gordon, *supra* note 3, at 19 (discussing the relatively high costs of ISDS and reforms that could potentially reduce these costs).

61. Erin Biel & Mattie Wheeler, *The Uncertain Future of the European Investment Court System*, YALE J. INT'L L. (Dec. 1, 2016), http://www.yjil.yale.edu/the-uncertain-future-of-the-european-

agreements, or by a multilateral agreement. The EU has largely pursued a bilateral approach to establishing an ICS, but this approach is likely to generate inconsistencies in how various courts interpret investment law (which is also a common critique of ISDS), suggesting that an effective ICS must be multilateral.[62] Not only will it take time to establish a multilateral ICS, it will also require considerable funding. If the funding is solely provided by states, this raises a concern for investors because they cannot be certain of their outcomes in a state-funded system. Finally, an ICS would be unique and unprecedented[63] and if serious problems arise from the system, it may take years to detect and resolve them. ISDS, for its flaws, is an established system, and there is a wealth of critical knowledge about its successes and failures that will facilitate its reform.

3. Jurisprudential Considerations

There is also a jurisprudential argument for the reform of the regulations that govern arbitrators. When states decide not to regulate particular areas, the power vacuum is often filled by private regulators. Although this is often viewed as deregulation, some scholars believe that it is a deepening of law and that "it is a form of regulation which can significantly enhance capacity for developing and implementing public-regarding norms."[64] This suggests that there is an opportunity for arbitration conventions and forums to increase their legitimacy in the eyes of the public if effective reform takes place.

Arbitrators have many judge-like qualities. They wield considerable power within tribunals, and there are limited constraints on that power. They are usually selected from an elite body within the legal community, and evidence suggests that parties prefer "repeat players" from that body.[65] The role of arbitrators is to interpret a variety of sources, including treaties, public international law, and national law, to arrive at a decision. Despite the technical differences between an arbitrator

investment-court-system (discussing the compromises required by EU member states to ratify CETA and the legality of an ICS under EU law).

62. Stephan W. Schill, *The European Commission's Proposal of an "Investment Court System" for TTIP*, AM. SOC'Y OF INT'L L. (Apr. 22, 2016), https://www.asil.org/insights/volume/20/issue/9/european-commissions-proposal-investment-court-system-ttip-stepping.

63. Sergio Puig, *The Death of ISDS?*, KLUWER ARB. BLOG (Mar. 16, 2018), http://arbitrationblog.kluwerarbitration.com/2018/03/16/the-death-of-isds.

64. Colin Scott, Fabrizio Cafaggi & Linda Senden, *The Conceptual and Constitutional Challenge of Transnational Private Regulation*, 38 J. L. & SOC'Y 1, 6 (2011), http://onlinelibrary.wiley.com/doi/10.1111/j.1467-6478.2011.00532.x/full.

65. Langford, *supra* note 12.

and a public international judge, it is probably difficult for the average citizen to make that distinction.

Although ISDS is not a public process, its very nature involves matters that concern the public. Critics of ISDS often refer to "regulatory chill," the notion that states do not fully exercise their regulatory power out of fear that investors will claim that regulations have deprived them of their rightful profits.[66] There is also concern that arbitrators are often called to interpret national laws without any public oversight or accountability. Even if an arbitral panel's view of a national law is unique to that dispute (or future disputes that share the view), it is incongruous that a national law would have one interpretation in a nation's courts and quite another in an arbitral tribunal.

The fact that arbitrators are not accountable to the public, but make decisions that can affect the public, raises scrutiny of the legitimacy of their position. By reforming the regulations that govern arbitrators, arbitration conventions and forums create stronger checks and balances. When institutions demonstrate that they have a rigorous process by which to evaluate and resolve conflicts and flaws in their structure, they deepen their legitimacy with those who rely on the institutions and with the public at large.

IV. The Current Regime

A. *ICSID, UNCITRAL, et al.*

Most investor-state disputes are settled pursuant to the rules of ICSID or UNCITRAL.[67] Among other things, these procedural rules govern the appointment of arbitrators to tribunals. Under ICSID, UNCITRAL, and other widely used arbitration rules, the rules on the disclosure of conflicts of interest and ethical conduct require that arbitrators be independent and impartial.[68] Neither of these obligations is well-defined by arbitration rules, placing the burden on arbitrators to determine what should be disclosed. The scope of what must be disclosed is of particular concern to disputing parties because conflicts of interest and ethical violations make up the grounds for challenging an arbitrator's

66. Gus Van Harten & Dayna Nadine Scott, *Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada*, 7 J. Int'l Disp. Settlement 92 (2016).

67. *Arbitral Rules and Administering Institution*, UNCTAD Inv. Pol'y Hub, http://investmentpolicyhub.unctad.org/ISDS/FilterByRulesAndInstitution (last visited Dec. 15, 2017).

68. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *supra* note 7; G.A. Res. 68/109, art. 11, *supra* note 7; Arb. Rules of The Inst. of the Stockholm Chamber of Commerce, *supra* note 7.

appointment or appealing for an award's annulment.[69]

1. ICSID

The World Bank established ICSID in 1966 under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) and shortly thereafter adopted the ICSID Convention Rules and Regulations to govern arbitral proceedings under ICSID (ICSID Rules and Regulations).[70] Since their adoption, the ICSID Rules and Regulations have completed four rounds of amendment, with the final round taking place in April 2006.[71] In October 2016, ICSID initiated a fifth round of amendment and called for comments from member states and the public on potential areas for amendment.[72] ICSID has highlighted the appointment, conduct, and challenge of arbitrators as issues of interest for the amendment process.[73]

Under ICSID, disputing parties are free to select their own arbitrators so long as they are persons of "high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment."[74] To be eligible for selection, arbitrators must sign a declaration in which they disclose any past relationships with the disputing parties and any other circumstances that might compromise their independence and impartiality.[75] The rules do not define what constitutes independence or impartiality beyond the requirement to disclose actual conflicts of interest with the disputing parties, and arbitrators must determine what "other circumstances" to disclose.

2. UNCITRAL

UNCITRAL was established in the same year as ICSID, and although it does not actually administer arbitrations, its Arbitration Rules are

69. *Challenges to arbitrators*, PRAC. L. ARB., Practice Note 5-501-6994.

70. *About ICSID*, ICSID, https://icsid.worldbank.org/en/Pages/about/default.aspx (last visited Sept. 24, 2018).

71. *About ICSID Amendments*, ICSID, https://icsid.worldbank.org/en/Pages/about/Amendment-of-ICSID-Rules-and-Regulations.aspx (last visited Sept. 24, 2018).

72. *Id.*

73. ICSID, *supra* note 36, at 2.

74. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *supra* note 7.

75. INT'L CTR. FOR THE SETTLEMENT OF INV. DISPUTES [ICSID], *ICSID Convention, Regulations and Rules*, at 106-07 (Apr. 2006), https://icsid.worldbank.org/en/Documents/resources/2006%20CRR_English-final.pdf.

widely used by international arbitration forums.[76] UNCITRAL's Arbitration Rules were adopted in 1976 and were revised in 2010.[77] An additional revision in 2013 incorporated UNCITRAL's Rules on Transparency in Treaty-based Investor-State Arbitration. As of 2017, UNCITRAL's Working Group III has been tasked to examine ISDS reform, and the regulations that govern arbitrators have been raised in comments and working papers.[78] Under UNCITRAL's current rules, potential arbitrators must "disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence," and, if selected, must continue such disclosure throughout the proceedings.[79] These rules do not define what constitutes "justifiable doubts" with regards to independence or impartiality.

3. Other Conventions

BITs have significantly increased in number since the 1990s, and over 2,300 are currently in force.[80] A survey of ISDS provisions in BITs showed at least 1,200 different rule sets governing ISDS with variations in procedural approaches and language.[81] There are also a number of arbitration venues, including the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), the International Court of Arbitration of the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), and the Permanent Court of Arbitration (PCA). The procedural rules for each of these venues require arbitrators to voluntarily disclose any circumstances which could create doubts about their independence.[82] As with ICSID and

76. UNCTAD, *supra* note 67.

77. U.N. COMM'N ON INT'L TRADE LAW [UNCITRAL], UNCITRAL Arbitration Rules (as revised in 2010) (Apr. 2011), http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html.

78. U.N. COMM'N ON INT'L TRADE LAW [UNCITRAL], Settlement of Commercial Disputes Investor-State Dispute Settlement Framework Comments from International Intergovernmental Organizations Addendum, at 5, U.N. Doc. A/CN.9/918/Add.7 (July 2017), https://documents-dds-ny.un.org/doc/UNDOC/GEN/V17/040/81/PDF/V1704081.pdf.

79. G.A. Res. 68/109, *supra* note 7, art. 11.

80. U.N. CONF. ON TRADE AND DEV. [UNCTAD], UNCTAD Investment Policy Hub, International Investment Agreements, http://investmentpolicyhub.unctad.org/IIA (last visited Dec. 15, 2017).

81. U.N. COMM'N ON INT'L TRADE LAW, *supra* note 78, at 4.

82. *See* ARB. RULES OF THE INST. OF THE STOCKHOLM CHAMBER OF COMMERCE art. 14(2) (2010), http://www.sccinstitute.com/media/40120/arbitrationrules_eng_webbversion.pdf; INT'L CHAMBER OF COM. ARB. RULES art. 11 (2017), https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_11; THE LONDON CT. OF INT'L ARB. [LCIA] RULES art. 5 (2014), http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx; THE PERMANENT CT. OF ARB. RULES

UNCITRAL, the language of these rules is general, does not define such key terms as "independence" and "justifiable doubt," and leaves what should be disclosed (outside of actual conflicts) to the discretion of arbitrators.

B. *Due Diligence Process*

Legally savvy parties will not take a potential arbitrator's declaration of independence and impartiality at face value and will perform their own due diligence on a candidate. This is important in circumstances in which the arbitration forum appoints arbitrators rather than accepting the disputing parties' nominations, because parties may have no previous knowledge of a forum-appointed arbitrator. Diligence usually includes reviewing an arbitrator's publications and arbitral decisions, interviewing candidates, and "asking around" about their reputation.[83] It may also include a pre-appointment interview during which parties can further confirm a candidate's language skills, employment, qualifications, and overall "fit."[84] The pre-appointment interview creates concerns for many arbitrators, because it could lay the grounds for conflict if an interviewing party uses the event as an opportunity to argue its case or make offers. The Charted Institute of Arbitrators has issued ethical guidelines for interviewing prospective arbitrators, but they do not have the force of law or regulation.[85]

Because the disclosure process is voluntary and because many arbitral decisions and challenges remain unpublished (or redacted) due to confidentiality clauses,[86] there is uncertainty at the root of the due diligence process. This also means that there is uncertainty in the process for challenging arbitrators, because unless a proceeding explicitly adopts ethical guidelines, there is no clear line as to what constitutes a substantive conflict. Although only about 5% of appointments in ICSID proceedings have been challenged as of 2014, there is a sharp upward trend from the 2000s not completely explained by a general increase in

art. 11 (2012), https://pca-cpa.org/wp-content/uploads/sites/175/2015/11/PCA-Arbitration-Rules-2012.pdf.

83. *Selection of party-nominated arbitrators*, PRAC. L. ARB., Practice Note 3-203-6680.

84. *Id.*

85. *Id.*; *see generally* CHARTERED INST. OF ARB., *Interviews for Perspective Arbitrators* (2015), http://www.ciarb.org/docs/default-source/ciarbdocuments/guidance-and-ethics/practice-guidelines-protocols-and-rules/international-arbitration-guidelines-2015/guideline-on-interviews-for-prospective-arbitrators.pdf.

86. GEO. UNIV. L. CTR. LIBR., *International Commercial Arbitration Research Guide*, http://guides.ll.georgetown.edu/c.php (last visited Sept. 25, 2018).

the number of investor-state disputes.[87] This may indicate that disputing parties increasingly doubt arbitrator independence and/or impartiality, or that parties believe that they can convince courts of that doubt.

C. *Soft Law Governance and National Courts*

The legal vacuum created by the generality of arbitration rules is partially filled by guidelines issued by professional organizations. It is also filled, in part, by the jurisprudence that national courts have created in their rulings on appeals of arbitration awards. Professional guidelines are soft law instruments that can only induce voluntary adherence, unless a forum binds its arbitrators to the guidelines or if the procedural rules of an arbitration incorporate them by reference. National courts may look to these soft law instruments for guidance, but they often default to domestic law to determine the legitimacy of a challenge to an arbitrator's independence or impartiality.

1. Professional Organizations

There is no universal code of conduct or set of ethical rules that governs arbitrators outside of the general command to remain independent and impartial. Counsel and arbitrators are instead governed by the ethical regulations required by their national bar associations, but these may not extend to international arbitration matters.[88] Arbitrators may also look to soft law instruments for guidance on their conduct. For example, the International Bar Association (IBA) has issued specific guidelines for disclosing conflicts.[89] Under the guidelines, there is a "traffic light" system which grades conflicts along a range from the non-waivable "red" (i.e., a situation in which an arbitrator has a significant interest in one of the parties) to non-disclosure "green" (i.e., if an arbitrator has published a general opinion on a situation that happens to arise in the arbitration).[90] Additionally, the system addresses "orange" conflicts that, depending on the circumstances of a case, may cause parties to doubt an arbitrator's independence or impartiality.[91] The IBA

87. Meg Kinnear & Frauke Nitschke, *Disqualification of Arbitrators Under the ICSID Convention and Rules*, *in* CHALLENGES AND RECUSALS OF JUDGES AND ARBITRATORS IN INTERNATIONAL COURTS AND TRIBUNALS, 34, 34-35 (Chiara Giorgetti ed., 2015).

88. Rogers, *supra* note 10, at 87-88. Furthermore, national bars may not have the jurisdiction to discipline members who commit ethics violations in international arbitration matters.

89. *See generally* INT'L BAR ASS'N, *supra* note 8.

90. *Selection of party-nominated arbitrators*, *supra* note 83.

91. INT'L BAR ASS'N, *supra* note 8, ¶ 3.

has also issued guidelines to counsel on matters such as *ex parte* communications, preparing witnesses, and how tribunals should handle misconduct by counsel.[92]

Although the IBA guidelines on conflicts of interest are soft law instruments that can only induce voluntary adherence, there is a general respect for them in the arbitration community. In a recent survey by the IBA, the guidelines were referenced by 57% of arbitrations in which a conflict of interest arose.[93] In the same survey, 67% of counsel used the guidelines in appointing arbitrators, and in 69% of the decisions that referenced the guidelines, the decision-maker chose to use them to resolve a conflict of interest issue.[94]

Furthermore, some arbitration forums have granted the guidelines binding effect by incorporating them into the terms of reference at the start of arbitration, or routinely applying them in decisions involving conflicts.[95] But the IBA guidelines are not a universal standard, as demonstrated by the 44% of arbitrators who reported that they did not review or rely on the guidelines to report conflicts.[96] There is also evidence that reliance on the guidelines is not evenly distributed and that professionals in North America and the EU consult them significantly more than their counterparts in Eastern Europe and Latin America.[97]

Other examples of soft law instruments include the "guidance notes" issued by the LCIA[98] and the Chartered Institute of Arbitrators guidelines, both of which generally address the need to disclose conflicts without providing a comprehensive outline of the boundaries of disclosure.[99]

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92. INT'L BAR ASS'N, IBA GUIDELINES ON PARTY REPRESENTATION IN INTERNATIONAL ARBITRATION (May 25, 2013), https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

93. INT'L BAR ASS'N, REPORT ON THE RECEPTION OF THE IBA ARBITRATION SOFT LAW PRODUCTS 31 (Sept. 2016), https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Projects.aspx.

94. *Id.* at 31.

95. *Id.*

96. *Id.* at 35.

97. Elina Mereminskaya, *Results of the Survey on the Use of Soft Law Instruments in International Arbitration*, KLUWER ARB. BLOG (June 6, 2014), http://arbitrationblog.kluwerarbitration.com/2014/06/06/results-of-the-survey-on-the-use-of-soft-law-instruments-in-international-arbitration; INT'L BAR ASS'N, *supra* note 8, at 44.

98. *See generally* LONDON CT. OF INT'L ARB. [LCIA], *Notes for Arbitrators*, http://www.lcia.org//adr-services/lcia-notes-for-arbitrators.aspx (last visited Dec. 10, 2017); LONDON CT. OF INT'L ARB. [LCIA], *Notes for Parties*, http://www.lcia.org//adr-services/lcia-notes-for-parties.aspx (last visited Dec. 10, 2017).

99. CHARTERED INST. OF ARB., *supra* note 85, at art. 1.

2. National Courts

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards permits an appeal to a national court to set aside an arbitral award.[100] The grounds for appeal are narrow and allow parties to plead on the basis that "the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties."[101] This includes challenges to arbitrators, because ethical concerns, like conflicts of interest, touch upon the composition of an arbitral authority.[102]

National courts have formulated jurisprudence on the interpretation of arbitral rules and the obligations they create for arbitrators, particularly the duty to disclose conflicts.[103] Although courts do look to soft law for guidance as to what constitutes a conflict, they may defer to their domestic law tests. In other cases, courts take a hybrid approach and use soft law and domestic law to examine the facts in hopes of achieving a balanced result. The lack of uniform jurisprudence leads to less predictability for arbitrators and disputing parties.[104] Although the jurisprudence of national courts is growing in sophistication, there may still be scenarios in which arbitrators find themselves conflicted in one country or forum and completely devoid of conflict in another.

V. The Only Way Is Ethics[105] (and Mandatory Conflicts Checks)

A. *Universal, Hardened Ethics Code*

Arbitral conventions like ICSID and UNCITRAL should adopt a comprehensive, universal standard for independence and impartiality. The soft law instruments that have acted as guidance must be hardened into regulations that govern and discipline arbitrator conduct. The regulations concerned with conflict must differentiate between whether matters fall under mandatory or voluntary disclosure (similar to the "traffic light" of the IBA guidelines). They should be formulated on a

100. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. I, V, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention].

101. *Id.* art. V.

102. Carrie Menkel-Meadow, *Ethical Ordering in Transnational Legal Practice? A Review of Catherine A. Rogers's* Ethics in International Arbitration, 29 Geo. J. Legal Ethics 207, 219 (2016).

103. U.N. Comm'n on Int'l Trade Law, Note by the Secretariat on the Possible Future Work in the Field of Dispute Settlement: Ethics in International Arbitration, U.N. Doc. A/CN.9/916, at 4-5 (2017).

104. Rogers, *supra* note 10, at 86.

105. *The Only Way Is Ethics*, LexisNexis Blog (Oct. 2, 2014), http://blogs.lexisnexis.co.uk/dr/the-only-way-is-ethics.

consensus basis and should take note of how national courts have responded to arbitral challenges.

For example, the IBA does not consider the statement of legal opinions in public lectures or published writings to be an objective conflict of interest.[106] National courts have generally agreed (with one exception),[107] but in *Canfor*, there was sufficient pressure to cause an arbitrator to resign over his past remarks.[108] If future regulations permit arbitrators to publicly speak or write about issues and serve on tribunals concerning those issues, they must offer a rationale for this permission to reduce inconsistency and give arbitrators more guidance on the gray areas of public speech.

1. From Soft Law to Hard Regulation

As previously discussed, there is strong, but unevenly distributed, support for the IBA Guidelines on Conflicts of Interest. This suggests that arbitrators are willing to be governed by guidelines, but that the promulgation of these guidelines would be more effective if they were hardened from soft law to regulation.

One way to harden guidelines into regulations is for arbitration forums and conventions to explicitly adopt them as part of procedural rules. This will not only give the guidelines binding effect, but it will also provide national courts with legal standards formed by the arbitration community to replace the current process of interpreting arbitration matters through the lens of national law and viewing soft law guidelines as merely advisory. The guidelines can also be accompanied by commentaries from the drafting committee to clarify gray areas and add to the weight of their regulatory power.

To reinforce the regulatory power of the guidelines, arbitrators should be required to pass an examination on the code and take regular classes to update themselves on the latest regulatory developments. Lawyers in the United States and other jurisdictions are required to pass ethics tests and complete continuing education courses to remain in good standing with their bar associations. Certification is not unprecedented in the field of international dispute settlement. Both the Centre for Effective Dispute Resolution (CEDR) and the International

106. INT'L BAR ASS'N, *supra* note 8, ¶ 4.1.1.

107. INT'L COUNCIL FOR COMMERCIAL ARB., REPORT OF THE ASIL-ICCA JOINT TASK FORCE ON ISSUE CONFLICTS IN INVESTOR-STATE ARBITRATION ¶ 108-09 (Mar. 17, 2016), http://www.arbitration-icca.org/media/6/81372711507986/asil-icca_report_final_5_april_final_for_ridderprint.pdf.

108. Levine, *supra* note 17.

Mediation Institute (IMI) offer training courses in mediation.[109] The IMI takes the process a step further with its Qualifying Assessment Program, which requires mediators to meet the standards of the IMI's Independent Standards Committee to qualify as an IMI Certified Mediator.[110] The Chartered Institute of Arbitrators (CIArb) offers, among other things, a diploma in international arbitration.[111]

This Note does not propose that arbitrators should be required to pass a full certification course, but rather proposes that arbitrators must pass an exam in an ethics code to be eligible for appointment.[112] The benefit of mandatory certification is that it reinforces uniform ethical standards that will increase the efficiency of the process by reducing the potential for challenges to arbitrators. Another benefit is that exams and certifications are a means of reminding the community of the importance of ethics and the serious repercussions that can result from a violation.

There are arguments for an "opt-in," rather than mandatory, certification model. Homogeneity is one of the factors that degrades independence and impartiality among arbitrators, and mandatory certification could foreclose efforts to widen the pool of arbitrators and improve demographics.[113] But it is unlikely that a single exam that can be prepared for either through self-study or a short course, and taken for a reasonable administrative fee, will severely foreclose the entry of new arbitrators.

A final way to harden guidelines into regulations is to define penalties for regulatory violations. The current penalty for an arbitrator who is challenged for an undisclosed conflict of interest in ISDS is removal from a tribunal panel and perhaps some loss of reputation. Reputation is important to arbitrators because it determines whether they will be selected to serve on future arbitral panels, and arbitration forums may

109. Georgios Dimitropoulos, Constructing the Independence of International Investment Arbitrators: Past, Present and Future, 36 NW. J. INT'L L. & BUS. 371, 429 (2016).

110. *Id.* at 430.

111. *Core Curriculum for the Diploma in International Commercial Arbitration*, CHARTERED INST. OF ARB., at 6, http://www.ciarb.org/docs/default-source/ciarbdocuments/trainingdevelopment/course-information/curriculums/core-curriculum-for-the-diploma-in-international-commercial-arbitration.pdf (last visited Dec. 15, 2017).

112. If arbitration forums choose to adopt a universal ethical code, they can choose to have the exam administered by a third-party certifier, or agree to grant reciprocity to arbitrators that have passed an exam administered by another forum.

113. Dimitropoulos, *supra* note 109, at 431.

accord themselves the power to sanction arbitrators. But these sanctions are not publicized, and there is no transparent process in place to discipline arbitrators who continue to disregard their duties. The self-regulatory nature of the arbitration community presumes that word-of-mouth and other informal measures will eventually remove such an individual from consideration for future panels. This does not fit into reforms that are aimed at increasing transparency. For ethical guidelines to become effective regulations, they must be accompanied by a disciplinary mechanism that will shift the burden of care toward the arbitrators who financially benefit from participating in matters.

B. *Mandatory, Centralized Conflicts Check System*

Arbitration forums should establish a centralized system to gather relevant information on arbitrators and test for conflicts upon their nomination. Other scholars have proposed "automatic conflicts checks."[114] This Note proposes an expansion of this strategy. The conflicts check would entail a procedure like that used by many law firms to avoid assigning conflicted attorneys to client matters. A potential arbitrator, under mandatory disclosure required by official ethics codes, would list, for example, all legal matters in which he or she had been involved, positions in which he or she has or is currently serving, financial history, and investments. Arbitration forums would also contribute relevant information from cases to the system, including the names of disputing parties, third-party funders, and law firms. Forums could even require disputing parties to add information to the system deemed relevant to the conflicts process, such as the names of the disputing parties' subsidiaries or parent companies.

Disputing parties often prefer that arbitral proceedings remain confidential. Parties and arbitration forums may be reluctant to input potentially confidential information into a conflicts system—they may in fact be legally prevented from this action. A partial solution to preserve confidentiality is to "silo off" the conflicts check system from the rest of a given arbitration forum's operations and limit access to the information. The forum employees who interact with the information should be placed under strict non-disclosure agreements. Disputing parties will receive comprehensive reports from the system that disclose as much information as permitted. For conflicts that must remain confidential, but that the system deems relevant, the report should indicate

114. Trusz, *supra* note 34, at 113; *see also* ROGERS, *supra* note 10, at 340-42 (proposing a self-regulatory model to assess arbitrators using a comprehensive feedback system).

that a confidential conflict exists and provide a "grade" to indicate the severity of the conflict (similar to the "traffic lights" used by the IBA guidelines).

Although this will create additional procedures before a dispute can begin, the benefit is that it offers disputing parties a streamlined mechanism for due diligence and challenges will be easier to dismiss because parties will have been duly forewarned.

Another concern that arises is that this system will require arbitral venues to share information and best practices to refine the conflicts check model. Information-sharing may present a risk to the commercial interests of venues because they compete for clients. However, law firms routinely accomplish this kind of confidential information sharing to avoid conflict, so best practices on this already exist. Furthermore, information sharing is under discussion as a necessary element in avoiding concurrent proceedings on the same issue and consolidating issues for the sake of efficiency.[115]

Currently, there are two tools available for due diligence on arbitrators, the Global Arbitration Review's Arbitrator Research Tool (ART) and the Arbitrator Intelligence Questionnaire (AIQ).[116] ART is a service available to those who subscribe to the Global Arbitration Review (GAR) and is an amalgamation of research from another of GAR's publications and information supplied by arbitrators.[117] It claims to identify the "foremost legal practitioners in business law based upon comprehensive, independent research."[118] The tool does not offer reviews of arbitrator performance, specific information about individual cases, or whether individual arbitrators have worked together.[119]

The AIQ's mission statement is "to promote fairness, transparency, accountability and diversity in arbitrator appointments."[120] The voluntary questionnaire gathers data on individual arbitrations from all involved parties, lawyers, and third-party funders.[121] Arbitration forums

115. U.N. COMM'N ON INT'L TRADE LAW, *Possible Future Work in the Field of Dispute Settlement: Concurrent Proceedings in International Arbitration*, U.N. Doc. A/CN.9/915, at 6-8 (2017).

116. *Arbitration Research Tool*, GLOBAL ARB. REV., http://globalarbitrationreview.com/arbitrator-research-tool (last visited Dec. 1, 2017); *Frequently Asked Questions*, ARB. INTELLIGENCE, http://www.arbitratorintelligence.org/aiq-frequently-asked-questions/#q1 (last visited Dec. 1, 2017).

117. WHO'S WHO LEGAL, http://whoswholegal.com (last visited Dec. 1, 2017).

118. *Id.*

119. *GAR's ART Goes Live!*, GLOBAL ARB. REV. (Mar. 30, 2017), http://globalarbitrationreview.com/article/1138706/gar%E2%80%99s-art-goes-live.

120. ARB. INTELLIGENCE , *supra* note 116.

121. *Id.*

can gain access to the data by agreeing to forward the questionnaire to relevant parties at the end of arbitrations. The questionnaire preserves confidentiality by avoiding identifying information.[122]

Ultimately these tools can provide some insight on best practices for gathering information about conflicts, and they suggest that there is interest in a system that will streamline due diligence and accurately assess conflicts. However, tools based on information gathered on a voluntary basis can never be as complete as a mandatory disclosure regime. The next logical step for arbitration venues is to establish an effective clearance system based on mandatory disclosure and universal standards of independence and impartiality with a hardened code of ethical regulations to define the scope of these standards.

C. *The Positives of Reform*

There are positive incentives for implementing a code of ethics and an effective conflicts process. The costs of ISDS are substantial, and in a typical case, legal counsel and experts represent about 82% of costs.[123] Due diligence makes up a portion of these costs. In the dispute that led to *Cofely*, the claimant had hired the respondent as a "claims consultant" and paid over $1.5 million for assistance with preparing their claim and selecting an arbitrator.[124] By implementing a conflicts system, arbitral forums can lower the time and costs associated with due diligence and restore some faith in the advantages of arbitration over litigation. Costs are also likely to be reduced as the potential for litigation over arbitrator challenges is reduced.

Lowering costs is particularly important to both sides in a dispute. Investors will only pursue claims if they believe that they have a reasonable chance of receiving an award that will cover both their legal costs and a satisfactory amount of their estimated or actual losses. States are leery of overspending public funds on lengthy litigations, especially because they are unlikely to recover costs from a losing claimant.[125] Arbitral forums may even assuage states' concerns over ISDS by implementing a sliding scale for the costs of a conflicts check system to introduce some equity to the process for states with less wealthy economies.

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122. *Id.*

123. EUROPEAN COMM'N, INVESTOR-TO-STATE DISPUTE SETTLEMENT (ISDS) SOME FACTS AND FIGURES 9 (Mar. 12, 2015), http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153046.pdf.

124. Cofely Ltd. v. Bingham [2016] EWHC (Comm) 240 [8] (UK).

125. U.N. COMM'N ON INT'L TRADE LAW, *supra* note 78, at 6-7.

In addition to reducing costs, a conflicts check system reduces information asymmetry. The primary methods to obtain information about prospective arbitrators are personal inquiries and subsequent research, which advantage well-financed parties and legally sophisticated insiders.[126] Less wealthy states that cannot afford top counsel or states that have less experience with arbitration are disadvantaged from the start of an arbitration.[127] This has likely contributed to the increasing mistrust of ISDS by less wealthy states.

Another advantage of the reforms proposed by this Note is that they provide a means of gathering data and diagnosing other problems in ISDS to create targeted and effective solutions. The obscurity of the arbitration process means that there is also no hard data to contradict negative public perceptions and the bombastic statements of national governments. An ethics code provides a diagnostic test for arbitration officials and scholars to assess the health of the system by defining the boundaries of independence and impartiality. A conflicts system provides data to evaluate these boundaries and indicate where further reforms should be made. For example, a conflicts system can aid efforts to improve arbitrator demographics, because parties will no longer need to rely on arbitrators with whom they are familiar to reduce the costs of due diligence. The conflicts system may also break up the "repeat players" club if reformers determine that certain types of issue conflicts or multiple role/double hat scenarios cross ethical boundaries.

Finally, a conflicts system can raise the bar for arbitrator challenges, which will reduce the work of national courts. In challenges that meet the bar to be heard by courts, ethics regulations are likely to move the court's lens of interpretation from national law to standards produced by the consensus of the arbitration community.

D. *Caveats and Concerns*

1. Legal Pluralism

One of the concerns arising from enforcing an ethics code and a universal standard of independence and impartiality is the pluralistic nature of legal systems. For example, in the United States, it is not only legal for lawyers to coach witnesses' testimony, it is expected, and a client might have grounds to sue his or her lawyer if it is discovered that

126. ROGERS, *supra* note 10, at 338.

127. *Id.*

counsel failed to prepare witnesses for trial.[128] In England, a barrister "must not rehearse, practise or coach a witness in relation to his evidence."[129] In investment arbitration, should the code of ethics defer to England's stricter standard or the more relaxed standard of the United States? Strict standards create confidence in the integrity of a process, but they also increase the potential for violations and challenges based on alleged violations, decreasing the efficiency of the process. Relaxed standards have the opposite effects and raise the additional concern voiced by some scholars that international arbitration has taken too many of its characteristics from American litigation.

The counterargument to this is that international arbitration is a legal system in its own right and has both the capability and duty to regulate itself through consensus-based standards. International arbitration is well-suited to consensus-based standards because its very foundation is consensus: participants agree to arbitration via commercial and investment agreements, and the legitimacy of arbitration as a dispute resolution system is bolstered by those contracts and by public law treaties.[130] This is not a perfect solution, because even in a consensus-based model, certain legal traditions will dominate. But national governments can alleviate some of this dominance by participating in ISDS reform. Governments may also attach standards of conduct and best practices to investment treaties. Arbitral tribunals will be obligated to take these standards and best practices into account during proceedings. Of course, if these standards and practices prove to be too restrictive, arbitration may fall out of favor as a dispute settlement mechanism, but this will either result in efforts to save arbitration or a consensus that its time is past.

2. Confidentiality of Arbitral Proceedings

Another concern that arises from the solutions proposed by this Note is that a conflicts check system infringes upon the confidentiality of arbitral proceedings. From the "black box" process used by some

128. Fred Moss, *The Ethics of Witness Preparation: A Peek Inside the Woodshed* https://www.americanbar.org/.../session3_witness_prep_aba_version_4_14.ppt (last visited Oct. 1, 2018) ("A lawyer has an 'ethical duty to prepare a witness.'" (quoting In re Stratosphere Corp. Sec. Litig., 182 F.R.D. 614, 621 (D. Nev. 1998))); Brad Rudin & Betsy Hutchings, *England & U.S.: Contrasts in Witness Preparation Rules*, N.Y. LEGAL ETHICS REP. (Mar. 2006), http://www.newyorklegalethics.com/england-u-s-contrasts-in-witness-preparation-rules.

129. *Part VII - Conduct of Work by Practising Barristers*, BAR STANDARDS BOARD, https://www.barstandardsboard.org.uk/regulatory-requirements/the-old-code-of-conduct/the-old-code-of-conduct/part-vii-conduct-of-work-by-practising-barristers (last visited Dec. 1, 2017).

130. Menkel-Meadow, *supra* note 102, at 243.

forums to nominate and appoint arbitrators,[131] to the redaction of party names in arbitral decisions,[132] there are several confidentiality practices in the arbitration community that hinder the development of an effective conflicts check system.

The degree to which this confidentiality is preserved by arbitration agreements is questionable. For institutional investors, corporations, and other business structures, there are often obligations to report litigation and disputes to shareholders or regulatory agencies. Arbitrations also do not frequently involve sensitive corporate information, and even in cases where they do, redacting the sensitive information would not significantly hinder parties who were simply performing due diligence on arbitrator candidates. There is the argument that being involved in a dispute, particularly one involving a state, could lead to reputational harm for an investor if the dispute is portrayed by the media in a negative light. But this risk also exists for investors outside of disputes.

It is likely that this roadblock will resolve itself in the next few years. UNCITRAL has introduced some transparency measures into its arbitration rules which require the publication of information from proceedings including statements of claim and defense, the names of disputing parties, and the economic sector involved in the dispute.[133] ICSID has also highlighted amending the requirements of its publication rules.[134]

VI. Conclusion

The EU has declared that ISDS is dead and that it is time for an international investment court. Investors are likely to disagree, but it is questionable if they will have enough influence to push back against a legal and political shift led by one of the world's largest economies. Even before this declaration, legal scholars, NGOs, and arbitration conventions were deeply concerned with ISDS reform and restoring faith in its legitimacy and fairness as a process. There are compelling reasons to reform ISDS rather than establishing an ICS. Investment courts are likely to be vulnerable to political pressures and biases, which will increase the risk of investment and may have a "chilling effect" on long-

131. Marcus Birch, *The Appointment and Confirmation of Arbitrators and Adjudicators: Why the Secrecy?*, Prac. L. Arb. Blog (Jul. 1, 2016), http://arbitrationblog.practicallaw.com/the-appointment-and-confirmation-of-arbitrators-and-adjudicators-why-the-secrecy.

132. Geo. Univ. L. Ctr. Libr., *supra* note 86.

133. UNCITRAL, *supra* note 77, arts. 2-3.

134. ICSID, *supra* note 36, at 3.

term international investment. From a practical standpoint, it is probably much easier to reform the already established ISDS system than to negotiate and fund an unprecedented ICS.

There are a number of areas in which UNCITRAL and ICSID have proposed reform, including arbitrator conduct and conflicts of interest. The current regime relies on the discretion and personal knowledge of arbitrators to voluntarily disclose possible conflicts, as well as the due diligence that disputing parties undertake when selecting arbitrators. Due to the obscure nature of the arbitral process, it is difficult to diagnose the severity of the problems that this voluntary regime has generated. But there is evidence from case law and academic studies that investment law arbitrators are a demographically stagnant group, and within that group, a select number are repeatedly assigned to tribunals. This suggests that it is possible that significant conflicts go undetected and introduce bias into arbitral decisions. Even if there is no statistically significant evidence of such bias, the public perception of ISDS is that it is obscure and favors investors,[135] which empowers national governments to terminate BITs and exit ISDS in favor of more public dispute settlement forums.

To reduce the number of undiscovered conflicts and challenges to arbitral awards, and to streamline the selection of arbitrators and reduce costs to parties, ICSID and UNCITRAL should consider the two measures proposed by this Note in their reform efforts. These conventions should adopt a universal code of ethics that defines independence and impartiality and gives specific, targeted guidelines as to what constitutes a mandatory disclosure. This code should have regulatory power so that arbitrators face professional consequences for violating it and so that national courts will be more willing to apply it in arbitral challenges instead of reverting to domestic law. Secondly, arbitration conventions should establish a centralized system for checking conflicts that will compile information collected from arbitrators, cases, and other sources.

In addition to practical benefits, arbitration conventions and forums should adopt these measures out of consideration for the judge-like role that arbitrators play in society. Arbitrators are not accountable to the public, but their decisions affect the public. By establishing an internal system of checks and balances, those who advocate for arbitration as a mechanism to resolve investment law disputes can increase their legitimacy in the eyes of the public and perhaps save ISDS from death.

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135. AMB. MIRIAM SAPIRO, BROOKINGS INST., TRANSATLANTIC TRADE AND INVESTMENT NEGOTIATIONS: REACHING A CONSENSUS ON INVESTOR-STATE DISPUTE SETTLEMENT 8-10 (Oct. 2015), https://www.brookings.edu/wp-content/uploads/2016/07/GlobalViews5Oct2015_FINAL.pdf.