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James Gerard Devaney

Selecting Investment Arbitrators: Reconciling Party Autonomy and the International Rule of Law

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[*Please note: This is a work in progress.*]

Selecting Investment Arbitrators: Reconciling Party Autonomy and the International Rule of Law

James Gerard Devaney[*]

Abstract:

This paper focuses on one particular issue which has arisen in the course of the ongoing debate on the reform of investor-State dispute settlement (ISDS), namely that of the appointment of arbitrators. Taking as its starting point that there now exists tentative consensus that the present system for the appointment of arbitrators either causes or exacerbates certain problematic aspects of the current ISDS system, the paper explores one option for reform, namely the introduction of an independent panel for the selection of investment arbitrators. In doing so, it is argued that a shift in the normative basis of the rules governing appointments is required in order to accommodate the principles of party autonomy and the international rule of law. Such reform, while not completely removing the initiative that parties presently enjoy, is the most efficient way to introduce rule of law considerations such as a measure of judicial independence into the current appointments system. This, it is argued, would in turn help to address some of the problematic features of the appointment of arbitrators in ISDS.

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1. Introduction

With the multilateral debate on reform of the current system of investor-State dispute settlement (ISDS) in full swing,[1] a broad consensus seems to be emerging around a certain number of issues. Participants in the multilateral process have reached tentative agreement that some kind of reform is necessary[2] with regard to concerns over, inter alia, the repeat appointment of arbitrators,[3] 'double-hatting'[4] and a lack of diversity among those who act as arbitrators.[5] The focus of the present paper is one particular issue which has arisen in the course of discussions to date, namely that of the process of appointment of arbitrators in ISDS. Concerns have been expressed that, while parties cherish the control that they have in the appointment process, the current way that this is managed is either causing or exacerbating problematic aspects of the current ISDS system, contributing to its much-discussed 'legitimacy crisis'.[6]

This paper does not seek to re-tread old ground regarding whether well-known criticisms of the current system of ISDS are warranted. Much has been written elsewhere,[7] and there is little value in regurgitating such debates here. Rather, this paper takes as its starting point that participants in the current ISDS system accept that there exist certain problematic issues surrounding the appointment of arbitrators, related mainly to independence, impartiality and lack of representativeness, which require attention. The paper also assumes that, at least in the foreseeable future, there will not be sufficiently widespread agreement for the immediate creation

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[1] See the latest Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session (New York, 1-5 April 2019) 9 April 2019, A/CN.9/970. At this session the Secretariat was requested to undertake preparatory work on a number of topics including, inter alia, the '[s]election and appointment of arbitrators', see https://uncitral.un.org/sites/uncitral.un.org/files/acn9_970_as_sub_1.pdf.

[2] See generally Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (Vienna, 29 October – 2 November 2018) 9 November 2018, A/CN.9/964.

[3] See PluriCourts Investment Treaty and Arbitration Database (PITAD), available at: https://pitad.org – data shows that each year only 11% of arbitral appointments are first time appointments, see also Sergio Puig, 'Social Capital in the Arbitration Market' European Journal of International Law (2014), 25(2), 387; Malcolm Langford, Daniel Behn and Runar Lie, 'The Revolving Door in International Investment Arbitration', Journal of International Economic Law 20, (2017) 301-331.

[4] Langford, Behn and Lie, *ibid*, have shown that 47% of cases involve at least one arbitrator acting in another case; see also; Nathalie Bernasconi-Osterwalder and Martin Dietrich Brauch, 'Is "Moonlighting" a Problem? The Role of ICJ Judges in ISDS' IISD Commentary (2017) and Daniel Behn, Runar Lie, 'The Ethics and Empirics of Double Hatting' ESIL Reflection, Vol. 6, Issue 7, 24 July 2017.

[5] Sergio Puig, *supra* note 3; Joost Pauwelyn, 'The Rule of Law Without the Rule of Lawyers? Why Investment Arbitrators are from Mars, Trade Adjudicators from Venus', American Journal of International Law Vol. 109, 4, (2015) 760-805.

[6] See, for instance, Jose E. Alvarez et al (eds), *The Evolving International Investment Regime* (OUP 2011), Claire Balchin et al (eds), *The Backlash Against Investment Arbitration* (Kluwer 2010), Susan D. Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' Fordham Law Review, 73, (2005) 1521.

[7] See, for example, Malcolm Langford & Daniel Behn, 'Managing Backlash: The Evolving Investment Treaty Arbitrator?' European Journal of International Law, Vol. 29, 2, (2018) 551-580; Langford, Behn and Lie, *supra* note 3; Anthea Roberts, 'UNCITRAL and ISDS Reforms: Moving to Reform Options … the Politics', EJIL: Talk! November 8, 2018, International Bar Association, 'Consistency, efficiency and transparency in investment treaty arbitration', A report by the IBA Arbitration Subcommittee on Investment Treaty Arbitration, November 2018, Freya Baetens, 'The European Union's Proposed Investment Court System: Addressing Criticisms of Investor-State Arbitration While Raising New Challenges' 43 Legal Issues of Economic Integration (2016) 367, Piero Bernardini, 'Reforming Investor–State Dispute Settlement: The Need to Balance Both Parties' Interests' 32 ICSID Review – Foreign Investment Law Journal (2017) 38, Charles N Brower and Stephan W Schill, 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?' 9 Chicago Journal of International Law (2009) 471, Katharina Diel-Gligor, *Towards Consistency in International Investment Jurisprudence: A Preliminary Ruling System for ICSID Arbitration* (Brill 2017).

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of a Multilateral Investment Court (MIC) or Appellate Body (AB),[8] and as such examines the practical and normative case for one particular alternative option for reform.

In doing so, it will be argued that a shift in the normative basis of the appointments system is required. To elaborate, the current rules on the appointment of arbitrators are undergirded by the principle of party autonomy which privileges the preferences of parties above all else in the process. However, this normative basis, in large part, is the source of certain problematic aspects of the current system of appointment of arbitrators in ISDS. The paper argues that the nature of international investment arbitration requires that rule of law considerations also be taken into account.

The best way to accommodate the principles at play in the current system, namely party autonomy and the international rule of law, is through the introduction of an independent selection panel for investment arbitrators. Such a body, whilst not completely removing the initiative that parties currently have to put individuals forward as their candidate to become an arbitrator, would be the most efficient way to introduce rule of law considerations such as a measure of judicial independence into the current appointments system in ISDS, which would in turn help to ameliorate some of the problematic features of the current appointments system.

2. The Current Appointments Practice in ISDS

The standard rules which govern the appointment of arbitrators at present are based squarely on the principle of party autonomy.[9] Mirroring international investment law more generally, with its decentralized nature and range of dispute settlement fora and procedural rules, there is no one common process for the appointment of arbitrators by parties. Rather, the exact process for the selection and appointment of arbitrators will depend on the treaty or contract provisions indicating the preferred or default fora.[10] But in the vast majority of cases it is the parties themselves who select the arbitrators for the settlement of an investment dispute in which they are involved.

Under both ICSID and UNCITRAL rules, parties typically each appoint one arbitrator to form a three-member tribunal. The co-arbitrators then (under the UNCITRAL rules[11]) appoint the third arbitrator or (under the ICSID rules[12]) the parties themselves do so by mutual agreement. Not only do parties

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[8] See most recently the Submission of the European Union and its Member States to UNCITRAL Working Group III, 18 January 2019, 'Establishing a Standing Mechanism for the Settlement of International Investment Disputes', available at: http://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157631.pdf. See more generally the work of the European Commission at; http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608. See also Rob Howse, 'Designing a Multilateral Investment Court: Issues and Options' 36 Yearbook of European Law (2017) 209, Michele Potestà, 'Investment Arbitration, Challenges And Prospects For The Establishment Of A Multilateral Investment Court: Quo Vadis Enforcement?' Austrian Yearbook on International Arbitration 2018 (2018).

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

[10] Note by the Secretariat, 'Arbitrators and decision makers: appointment mechanisms and related issues', 30 August 2018, A/CN.9/WG.III/WP.152, para 5.

[11] Article 9(1) UNCITRAL Rules.

[12] Article 37(2)(b) ICSID Rules; Christoph H. Schreuer, Loretta Malintoppi, August Reinisch & Anthony Sinclair, *Articles 37, 38 and 39 – Composition of Tribunal*, The ICSID Convention: A Commentary (2nd ed.), Cambridge University Press, p. 475 (2009) see further ICSID Review – Foreign Investment Law Journal, Vol. 25, No. 2 – Special Focus Issue on Appointing Arbitrators (2010).

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have the ability to appoint (at least one) arbitrator, they can do so for whatever reasons they deem most appropriate. The factors that parties take into account when considering which individual to appoint as 'their' arbitrator need not be set out in any transparent form, or in fact given at all.[13]

Admittedly, things are different at the annulment stage of proceedings in the ICSID context, where parties have no say in the constitution of the Annulment Committee. Instead, under the certain (limited) circumstances in which annulment can be sought under Article 52 of the Washington Convention, 'the Chairman shall forthwith appoint from the Panel of Arbitrators an *ad hoc* Committee of three persons.'[14] Likewise, the monopoly of parties over the selection of arbitrators is circumscribed in the minority of cases in which Appointing Authorities may play a role.[15] Appointing Authorities are provided for under both the ICSID[16] and UNCITRAL Rules,[17] and typically involve the use of lists to appoint an arbitrator where the parties are unable to do so.

Nevertheless, in the vast majority of cases in practice (leaving aside for the moment more recent comprehensive trade and investment agreements which envisage a different appointments system involving the use of a list procedure), under the traditional ISDS approach party autonomy is very much the guiding principle. This system necessarily elevates the importance of the position of the presiding arbitrator who will bear the burden of deciding the case one way or another in the absence of agreement among the other arbitrators, whether appointed jointly by the parties or in some other manner.[18] The importance of the presiding arbitrator in this respect can hardly be exaggerated, and is why it is suggested from time to time that the existence of this arbitrator is sufficient to ensure the independence of the tribunal as a whole.[19] For the purposes of this paper, however, it suffices to note that the fact the presiding arbitrator is not appointed by the parties in the same way that the other arbitrators has not prevented the formation of the general consensus among users of the system relating to a 'possible lack of independence and impartiality of decision makers, or of the perception thereof'.[20] With this in mind, it is to such problematic aspects of the current appointments system that we now turn our attention.

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[13] Secretariat Note on Appointments, *supra* note 10, para 7.

[14] See Article 52(3) ICSID Convention; see also; https://icsid.worldbank.org/en/Pages/process/Post-Award-Remedies-Convention-Arbitration.aspx.

[15] See the figures set out in Note by the Secretariat, 'Submissions from International Intergovernmental Organizations and additional information: appointment of arbitrators', 19 February 2018, A/CN.9/WG.III/WP.146, at paras 11 and 44.

[16] For a description of the procedure at ICSID and UNCITRAL see; Secretariat Note, *ibid,* paras 30-40 and 46-56 respectively.

[17] *Ibid*.

[18] See generally Chiara Giorgetti, *The Arbitral Tribunal: Selection and Replacement of Arbitrators*, Litigating International Investment Disputes: A Practitioner's Guide (Chiara Giorgetti ed.), Brill / Nijhoff, pp. 145-172 (2014); David Branson, *Sympathetic Party-Appointed Arbitrators: Sophisticated Strangers and Governments Demand Them*, pp. 367-393.

[19] Joseph M. Matthews, 'Difficult Transitions Do Not Always Require Major Adjustment - It's Not Time to Abandon Party-Nominated Arbitrators in Investment Arbitration', ICSID Review – Foreign Investment Law Journal, Vol. 25, No. 2 – Special Focus Issue on Appointing Arbitrators (2010) 363.

[20] Report of Working Group III, 36th Session, *supra* note 2, para 66, on 'perception' c.f. Susan D. Franck, 'Development and Outcomes of Investment Treaty Arbitration' Harvard International Law Journal (2009) 50(2) 435 and Michael Waibel and Yanhui Wu, 'Are Arbitrators Political? Evidence from International Investment Arbitration' (2017) Working Paper.

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3. Problematic Aspects of the Current Appointments Practice in ISDS

Criticisms of the current system of ISDS relating to a possible lack of independence and impartiality of decision-makers, or at the very least a perception of the system as such, which have been the subject of significant scholarly attention in recent times,[21] as well as being acknowledged at the multilateral level,[22] are by now well-known. What is important to emphasise at this juncture is the extent to which the traditional party-driven approach to appointments in the context of ISDS contributes to, or exacerbates to some extent, these criticisms.

Issues of independence and impartiality arise (at least partly) as a result of the practices of repeat appointments[23] and double-hatting,[24] facilitated by the current appointments practice which grants almost total discretion to the parties as to who to put forward as 'their' arbitrator. In the simplest of terms, a party using its prerogative to repeatedly appoint the same individual as an arbitrator or counsel in cases in which it is involved is said to engender a dangerous relationship of co-dependency which is detrimental to that individual's independence and impartiality in the subsequent proceedings. Likewise, the practice of individuals fluidly moving between different roles in the arbitral process is regularly singled out as being potentially problematic in this context. Sands, one of the most prominent voices against such practices concisely encapsulates the concern that exists in relation to this issue:

> '[I]t is possible to recognise the difficulty that may arise if a lawyer spends a morning drafting an arbitral award that addresses a contentious legal issue, and then in the afternoon as counsel in a different case drafts a pleading making arguments on the same legal issue. Can that lawyer, while acting as arbitrator, cut herself off entirely from her simultaneous role as counsel? The issue is not whether she thinks it can be done, but whether a reasonable observer would so conclude. Speaking for myself, I find it difficult to imagine that I could do so without, in some way, potentially being seen to run the risk of allowing myself to be influenced, however subconsciously.'[25]

Furthermore, and again facilitated by the current appointments process, a lack of diversity among decision-makers is said to undermine ISDS.[26] In the context of recent multilateral discussions under the auspices of UNCITRAL this lack of diversity, in terms of gender and geographical distribution[27] (but also broader considerations such as age, ethnicity, language and legal background) was generally seen by States as being a weakness in the current system which prevents better understanding of the policy considerations of States, local laws and international

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[21] See references above at footnote 7.

[22] Draft Report, 6 November 2018, Secretariat Note on Appointments, *supra* note 10, para 37.

[23] See references above at footnote 3.

[24] See references above at footnote 4.

[25] Phillipe Sands, 'International Courts and Tribunals and the Independence of the International Judge', 44 Harvard International Law Journal 271 (2003), 31-32.

[26] Report of Working Group III, 36th Session, *supra* note 2, para 91 et seq.

[27] Studies have shown that 74% of arbitrators are from Western States, see Malcolm Langford, Daniel Behn and Runar Lie, *supra* note 3, 301-332; see also UNCTAD, 'World Investment Report 2018: Investment and New Industrial Policies (UN 2018)', Ksenia Polonskaya, 'Diversity in the Investor-State Arbitration: Intersectionality Must Be Part of the Conversation' Melbourne Journal of International Law (2018) 9, 296, Gabrielle Kaufmann-Kohler and Michele Potestà, 'The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards' CIDS Supplemental Report (2017).

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law more generally.[28] In particular, the record of female representation on arbitral tribunals has been described by one prominent commentator as 'remarkably poor' and is a factor in and of itself which justifies reform of the current appointment system.[29]

The operation of the principle of party autonomy, coupled with parties' preference for 'expertise and experience' as they seek to maximise their chances of success in any dispute,[30] is a direct cause of concerns regarding independence, impartiality, and representativeness. That said, wresting any modicum of parties' ability to choose is likely to meet fierce resistance. As such, in the following sections reform is proposed which attempts to strike a balance between allowing parties input in, and ownership of, the appointments process (something which has been described as 'an element in ensuring a successful outcome of the dispute'[31]) whilst also addressing valid concerns regarding independence, impartiality and representativeness.[32]

4. The Rule of Law and an Independent Panel for the Scrutiny of Investment Arbitrators (IPSIA)

> 'Just as the state of the rule of law is of critical importance to the wellbeing of a nation, so in the world today is the health of the international rule of law critical to the wellbeing of the global society in which we live. Both nationally and internationally *the quality of the rule of law is in turn dependent upon the quality of the judiciary who have the responsibility of upholding the rule of law*. Yet very little attention has been given by academics or others as to how international judges are nominated and appointed, though this obviously would have an immense influence on the quality of the decisions of the courts and tribunals to which they are appointed.'[33]

The previous sections have shown that the current rules that govern the appointment of arbitrators in investment arbitration are governed by the principle of party autonomy. However, this normative basis for the current rules, it is argued, is insufficient and ultimately what creates, or at least exacerbates, certain problematic aspects of ISDS. While the principle of party autonomy may be fit to govern appointments in the context of international commercial arbitration, it is inappropriate by itself in the context of international investment law. [34] Investment arbitration involves

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[28] Report of Working Group III, 36th Session, *supra* note 2, para 92; see also Secretariat Note on Appointments, *supra* note 10, para 20. See further, Anthea Roberts, *Is International Law International?* (OUP 2017).

[29] Successive studies have shown that only somewhere between 3 and 10% of ICSID arbitrators are female: Gus Van Harten, 'The (Lack of) Women Arbitrators in Investment Treaty Arbitration' (2011), *All Papers*, Paper 3, available at: https://digitalcommons.osgoode.yorku.ca/all_papers/34 found 3%; Susan D. Franck, 'Empirically Evaluating Claims about Investment Treaty Arbitration', North Carolina Law Review (2007), 86(1) 1 found 3%, Lucy Greenwood and C. Mark Baker, 'Is the Balance Getting Better? An Update on the Issue of Gender Diversity', Arbitration International (2015) 31(3), 413 found 5.63%, Sergio Puig, *supra* note 3, found 7%; see also ISDS Academic Forum Working Group 7 Paper, 'Empirical Perspectives on Investment Arbitration: What Do We Know? Does it Matter?', Malcolm Langford, Daniel Behn and Laura Létourneau-Tremblay, 15 March 2019. See most recently: Taylor St. John, Daniel Behn, Malcolm Langford, and Runar Lie, 'Glass Ceilings and Arbitral Dealings: Gender and Investment Arbitration' (2018) PluriCourts Working Paper.

[30] Or what St. John, Behn, Langford and Lie*, ibid,* term the 'prior experience norm'; see also Report of Working Group III, 36th Session, *supra* note 2, para 93.

[31] Report of Working Group III, 36th Session, *ibid*, para 95.

[32] Report of Working Group III, 36th Session, *ibid*, para 98.

[33] Lord Woolf, *Foreword,* in MacKenzie et al (eds) *Selecting International Judges* (OUP 2010).

[34] Martin Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law' European Journal of International Law, 17(1), (2006) 121, 139–45; Gus Van Harten, 'Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law' in S. Schill, *International Investment Law and Comparative Public Law,* (OUP 2010) at 15.

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subjecting matters of public law and public policy to international review by an arbitral tribunal.[35] Not only that, should the arbitral tribunal find that the public policy enacted by a sovereign State contravened its international obligations, it may issue a binding award against that State, the principal remedy being monetary compensation which is, in the simplest of terms, public money.[36]

Accordingly, it is argued that the private or commercial principle of party autonomy is not sufficient to govern the process of the appointment of arbitrators in international investment arbitration which, although not exclusively public,[37] is at the very least a hybrid of public and private in nature.[38] Investment arbitration may be modelled on commercial arbitration, but today it is 'in fact, fundamentally different from international commercial arbitration, despite the use in both proceedings of common principles and concepts.'[39] Consequently, in light of its hybrid nature, the international rule of law must also play a role in international investment arbitration, including in the appointment of arbitrators.[40]

Space restrictions prevent extensive consideration of the principle of the rule of law, its application at the international level in general, as well as its relevance for international investment arbitration more specifically. However, certain assumptions can be made here without fear of contradiction. First of all, the rule of law, although developed in the domestic legal context, applies to the international legal order.[41] While the rule of law may play a different role at the

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[35] Eric De Brabandere, *Investment Treaty Arbitration as Public International Law,* (CUP 2014); Van Harten, *ibid*, at 5-7, 15; William Burke-White, 'The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System' Asian Journal of WTO and International Health Law and Policy (2008) 199.

[36] Van Harten, *ibid*, at 6, 7, 15; Wiliam Burke-White, 'The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System' Asian Journal of WTO and International Health Law and Policy (2008) 199. On the spending of public money in international investment and commercial arbitration see Gary B. Born 'Confidentiality in an Age of Transparency: Challenges for Investment Arbitrators' in Catherine A. Rogers and Roger P Alford, *The Future of Investment Arbitration* (OUP 2009).

[37] On this point, see the excellent exploration of the public or private nature of the investment treaty arbitration regime in, Jose E. Alvarez, 'Is Investor-State Arbitration "Public"?' 7 Journal of International Dispute Settlement (2016), 534-574, Anthea Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' 107 American Journal of International Law (2013) 45, Jose E. Alvarez, '"Beware: Boundary Crossings" – A Critical Appraisal of Public Law Approaches to International Investment Law' 17 The Journal of World Investment and Trade (2016) 171-228.

[38] Alvarez, 'Is Investor-State Arbitration "Public"?', *ibid*, see also Anthea Roberts, 'State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority' 55 Harvard International Law Journal (2014) 1, Zachary Douglas, 'The Hybrid Foundations of Investment Treaty Arbitrations' 74 British Yearbook of International Law (2003) 151, Anthea Roberts 'Triangular Treaties: The Extent and Limits of Investment Treaty Rights' 56(2) Harvard International Law Journal (2015) 353, or for an even more forceful defence of the public nature of investment treaty arbitration see Eric De Brabandere, *supra* note 31 at 5, Stephan W. Schill, 'Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach' 52 Virginia Journal of International Law (2011) 57.

[39] *Ibid*.

[40] Van Harten, *supra* note 34, at 4. Similarly, Robert McCorquodale, 'Defining the International Rule of Law: Defying Gravity?' International and Comparative Law Quarterly (2016) Vol. 65, at 297 lists 'the settlement of disputes before an independent legal body' as one of the 'objective[s] of the international rule of law'. What is relevant for our present purposes in the context of this paper, is the procedural and institutional aspects of the rule of law, rather than the substantive aspects of the rule of law. This should be contrasted with international investment scholarship which rather considers rule of law issues from a substantive or thick point of view, for instance considering the effect that the FET standard could have in improving the quality of the rule of law at the national level; see, for an excellent example, Velimir Živković, 'International Rule of Law through International Investment Law – Strengths, Challenges and Opportunities', KFG Working Paper Series, No. 16, May 2018.

[41] Nicholas W. Barber, 'The Rechtsstaat and the Rule of Law' 53 University of Toronto Law Journal (2003) 443, 452; James Crawford, *International Law and the Rule of Law* (2003) Adelaide Law Review, 3, page 11, Crawford argues that, at least to the extent that international law 'approximate[s] a system of public order between

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international level (not protecting the individual from the power of the State, but protecting 'the interests of the parties involved as well as the legitimacy of the arbitration process as a whole'[42]), the remarkably broad acceptance of this principle (despite its so-called 'conceptual emptiness'[43]) is not only important in and of itself, but rather also provides the justification for the inductive task of attempting to identify its conceptual content.[44] By way of illustration, the international rule of law enjoys the near universal support of States, [45] and is routinely referenced by the United Nations Security Council.[46]

Secondly, a central component of the rule of law, which applies at the international level, is judicial independence. From Dicey[47] to Raz[48] and Hayek[49], all of those writing about the rule of law envisage some form of judicial independence component. At the international level, too, judicial independence is recognised in a wide range of contexts.[50] As one commentator has put it, the international rule of law is 'widely regarded to include at the procedural level the requirement…of a decision by an independent and impartial decision-maker.'[51] Obviously, at the international level, the rule of law does not require one single court to settle disputes of all kinds, but rather 'requires that a dispute can be settled before an independent body, which neither needs to be a court (so called) nor by one body with overarching jurisdiction over all matters.'[52] While nomenclature may

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States as legal orders in their own right, or to the extent that it performs tasks of adjudication, assessment or review of domestic decision-making in areas or matters in which international law itself prescribes compliance with the rule of law', the rule of law and its attendant requirements must be observed. This is clearly the case for international investment law, which operates both as a system of public order between States and also involves a certain element of assessment or review of domestic decision-making in areas where international law prescribes compliance with the rule of law.

[42] Van Harten, 'Investment Treaty Arbitration, Procedural Fairness…' at 14; Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (2004) 133-5.

[43] Crawford, *supra* note 37, at 11; Sir Arthur Watts, 'The International Rule of Law' (1993), The International Rule of Law, German Yearbook of International Law, 15.

[44] Živković, *supra* note 40.

[45] See Declaration on Principles of International Law Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, UN GA Resolution 2625 (XXV) (1970) emphasising the 'paramount importance of the Charter of the United Nations in the promotion of the rule of law among nations', Declaration on the Rule of Law at the National and International Levels 2012, UN GA Resolution 67/1, (2012) A/Res/67/1, Robert McCorquodale, *supra* note 40, 277.

[46] Between 1998 and 2006 being mentioned in 69 different resolutions, see Jeremy Farrall, United Nations Sanctions and the Rule of Law (CUP 2007) 22.

[47] Albert Dicey, A V Dicey, *Introduction to the Study of the Law of the Constitution* (1885), Ch IV.

[48] Joseph Raz, 'The Rule of Law and its Virtue' (1977) 93 LQR 195, 200-1.

[49] Friedrich Hayek 'Freedom and the Rule of Law' in *Listener* (27 December 1956) 1067-8.

[50] Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, Arts 21(3) and 23(1); Rules of the European Court of Human Rights, Rules 4, 24(2)(e), 26(1), 27; Treaty Establishing the European Economic Community, Art 223; Code of Conduct of the European Court of Justice, Art 5; Rules of Procedure of the European Court of Justice, Arts 6, 11(b), and 11(c); Statute of the Inter-American Court of Human Rights, OAS Res 448 (IX-0/79), Arts 5, 18, 25; Rome Statute of the International Criminal Court, Arts 36(9)(a), 39(1), 40(2) and (3).

[51] Van Harten, 'Investment Treaty Arbitration, Procedural Fairness…' at 4. Similarly, McCorquodale, *supra* note 40, at 297 lists 'the settlement of disputes before an independent legal body' as one of the 'objective[s] of the international rule of law'.

[52] *Ibid* at 298, see also: Thomas Bingham, *The Rule of Law* (Penguin 2010), Chapter 8.

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not be important, the act of judicial or arbitral decision-making is, carrying with it 'a very high expectation of procedural fairness', including judicial independence.[53]

But what standard of judicial independence is applicable in the context of international investment arbitration? Is it the same standard of judicial independence that applies to domestic courts or permanent international courts such as the International Court of Justice? The answer to this question is clearly no. In fact, the degree of judicial independence required by the rule of law in each context is inherently variable.[54] Accordingly, whilst parties' exclusive control over the appointments process may not be appropriate, complete renunciation of this prerogative is not necessary either. This most likely requires further elaboration.

That under the current ISDS system arbitrators are appointed by parties to the dispute underlies the (understandable) general perception that party-appointed arbitrators are somehow less independent and impartial than judges appointed through some other process to permanent courts.[55] The role of arbitrators in investment arbitration, however, is not the same as that of judges on a permanent court, and as such it should not be surprising that their appointment processes are also different.[56] This too likely means that judicial standards of independence and impartiality (such as, for example, the Burgh House Principles which include, inter alia, security of tenure, and prohibitions on extra-judicial activity[57]) are not currently suited to the context of investment arbitration.

The institution of party-appointed arbitrators is a 'consensual deviation from the ordinary norms governing the operation of the international adjudicatory mechanisms…[which] represents a trade-off between two competing sets of values and interests…' – namely party autonomy and judicial independence.[58] Nevertheless, an appropriate balance can be found between these principles by amending the current rules in order to create an independent panel for the scrutiny of investment arbitrators, which, while leaving the initiative as to arbitral appointments with the parties (and as such preserving the principle of party autonomy) could also allow for other (international rule of law) considerations to be injected into the process.

The exact standard of independence against which candidates are scrutinised is not one which should be imposed from above by the drafters of IPSIA's constitutive instrument, but rather should be one which is developed by IPSIA itself throughout the course of its operation, whether that be in the form of a general statement as to the operation of the tribunal as was the case with the Article

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[53] Van Harten, 'Investment Treaty Arbitration, Procedural Fairness…' at 14; Chittharanjan Amerasinghe, 'Reflections on the Judicial Function in International Law' in Thomas Mensah, Tafsir Ndiaye et al (eds) *Law of the Sea, Environmental Law, and Settlement of Disputes* (2007) 123.

[54] Van Harten, 'Investment Treaty Arbitration, Procedural Fairness…' at 13, McCorquodale, *supra* note 40 at 291.

[55] Yuval Shany, 'Squaring the Circle? Independence and Impartiality of Party-Appointed Adjudicators in International Legal Proceedings' 30 Loyola of Los Angeles International and Comparative Law Review (2008) 473.

[56] Nana Japaridze, 'Fair Enough? Reconciling the Pursuit of Fairness and Justice with Preserving the Nature of International Commercial Arbitration' Hofstra Law Review (2008), 36(4) 1415, Andreas F. Lowenfeld, *The Party-Appointed Arbitrator in International Controversies: Some Reflections,* 30 Texas International Law Journal (1995), 59, 65.

[57] Burgh House Principles on the Independence of the International Judiciary, available at: http://www.ucl.ac.uk/laws/cict/docs/burgh_final_21204.pdf, Shany, *supra* note 51, at 485.

[58] *Ibid*.

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255 Panel,[59] or through the reasoned decisions in individual cases over time. The development of an appropriate standard of judicial independence is something which has been undertaken recently in the 2019 Opinion of the Court of Justice of the European Union regarding the compatibility of the Comprehensive Economic and Trade Agreement (CETA) between the European Union and Canada.[60] In this case, a number of EU Member States including Belgium had called into question whether the dispute settlement mechanism envisioned in Section F of Chapter Eight of CETA was, inter alia, compliant with the required standard of judicial independence applicable in the EU legal order.

Judicial independence in this context finds expression in Article 47 of the Charter of Fundamental Rights of the European Union which is binding upon the European Union,[61] but which is not defined in a particularly detailed manner, providing only the right to an 'independent and impartial tribunal previously established by law'. As such, the CJEU was tasked with evaluating the proposed dispute settlement mechanism under CETA to assess whether or not the standard of judicial independence had been met, and in doing so had to flesh out exactly what judicial independence means in this context. In doing so, the CJEU in particular highlighted the 'hybrid' nature of the CETA Tribunal and Appellate Body, having characteristics of judicial bodies as well as 'a number of elements that continue to be based on traditional arbitration mechanisms in relation to investments'[62] as not being determinative. Rather, the CJEU enumerated a number of factors which it said counted in favour of the parties having created an 'independent, impartial and permanent' investment tribunal system as they had explicitly intended, including Articles 8.27, 8.27.7 and 8.28.5 which provide for; the establishment of a permanent tribunal of 15 members, divisions of which will hear cases on a rotation basis, ensuring that the composition of the divisions is random and unpredictable and the same random allocation of individuals for the Appellate Tribunal respectively.[63]

The CJEU divided the requirement of judicial independence into two separate elements, namely external and internal. External independence, according to the CJEU, 'presupposes that the body concerned exercises its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any sources whatsoever, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions.'[64] To this end, the judges highlighted the importance of a number of factors which protect this external independence, including protections against removal, and a level of remuneration commensurate to the importance of the task undertaken.[65]

[59] Third Activity Report of the Panel provided for by Article 255 of the Treaty on the Functioning of the European Union, Brussels, 13 December 2013, S/1118/2014, at 17.

[60] Opinion 1/17, 30 April 2019, ECLI:EU:C:2019:3, available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=213502&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1480188.

[61] Opinion 1/15 (*EU-Canada PNR Agreement*) of 26 July 2017, EU:C:2017:592, paragraph 67, and judgment of 27 February 2018, *Western Sahara Campaign UK*, C-266/16, EU:C:2018:118, paragraph 46.

[62] Opinion 1/17, *supra* note 60, Para 193.

[63] *Ibid*, para 195.

[64] *Ibid*, para 202.

[65] Para 202, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the judicial system)*, C-216/18 PPU, EU:C:2018:586, paragraphs 63 and 64.

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Internal independence, on the other hand, the CJEU links to impartiality and 'seeks to ensure that an equal distance is maintained from the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings'.[66] In achieving internal independence the judges emphasised the importance of 'objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law.'[67] Having defined both the internal and external elements of judicial independence, the CJEU then expounded upon the implications of their operation, stating that:

> Those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, in order to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it.[68]

Ultimately, the CJEU concluded that the agreement envisaged is compatible with the requirement of independence.[69] While much could be written on the CJEU's approach, and its attempts to accommodate its previous dicta in *Achmea,*[70] what is relevant for our purposes is that the CJEU made an attempt to flesh out the applicable standard of independence for the purposes of Article 47 of the Charter of Fundamental Rights of the EU. This is a notably high standard which the typical ISDS tribunal would most likely struggle to meet. How this definition will be received by States and how it will operate in practice remains to be seen, but the central point remains: no one-size-fits-all definition of judicial independence can be developed. For each specific context an applicable standard should be developed and fully fleshed out. That said, IPSIA would not have to start completely from scratch, since it is suggested that the standard for independence and impartiality developed in the context of challenges to arbitrators provides significant useful guidance in this respect.[71]

In making the case for the establishment of an independent panel for the selection of arbitrators, a number of constitutive elements must be considered, including (4.a) the creation and role given to the Panel, (4.b) appointment of members of the Panel, (4.c) the initiative to propose candidates, (4.d) the process for scrutinising candidates, and (4.e) the advisory nature of its work.

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[66] Opinion 1/17, *supra* note 60, para 203.

[67] *Ibid*.

[68] *Ibid*, para 204.

[69] *Ibid*, para 244.

[70] Case C-248/16, Slowakische Republik (Slovak Republic) v. Achmea BV [2018], ECLI:EU:C:2018:158.

[71] See, for reference, Meg Kinnear, and Frauke Nitschke, 'Disqualification of Arbitrators under the ICSID Convention and Rules' in Chiara Giorgetti, *Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals,* (Martinus Nijhoff 2015) pp. 59, Federica Cristani, *Challenge and Disqualification of Arbitrators in International Investment Arbitration: An Overview,* The Law and Practice of International Courts and Tribunals 13 (2014) 159, Karel Daele, *Saint Gobain v. Venezuela* and *Blue Bank v Venezuela: The Standard for Disqualifying Arbitrators Finally Settled and Lowered,* ICSID Review, Vol. 29, No. 2 (2014) 296-305, Baiju Vasani and Shaun Palmer, *Challenge and Disqualification of Arbitrators at ICSID: A New Dawn?* ICSID Review, Vol. 30, No. 1 (2015) 194-216, International Bar Association Guidelines on Conflicts of Interest in International Arbitration, Adopted by Resolution of the IBA on Thursday 23 October 2014, available at: http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx, Meg Kinnear, *Challenge of Arbitrators at ICSID – An Overview,* Proceedings of the Annual Meeting (American Society of International Law), Vol. 108 (April 2014), pp. 412.

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a) The Creation and Role of IPSIA

There is nothing ground-breaking about any suggestion that a body other than the parties themselves could play some sort of role in the selection of arbitrators. Advisory bodies which scrutinise judicial appointments exist both at the international and domestic levels.[72] Likewise, commentators in the past have advocated breaking parties' stranglehold on the appointment of arbitrators. Perhaps the most prominent example in this regard is Jan Paulsson who, framing the issue in terms of 'moral hazard', [73] argued that the only real way to tackle this issue is to abolish the current practice of party-appointments altogether.[74] However, Paulsson is by no means alone, with other commentators such as Sardinha arguing that the use of such a 'detached institution or authority in overseeing the appointment process…[could] help reduce the broader systemic perception or outward appearance of bias from the vantage point of the opposing party, of the co-arbitrators, and, particularly in highly contested investor-state disputes, of the public.'[75] This same commentator has argued that resort to an independent institution 'could prove to be particularly effective in curbing any unconscious bias on the part of arbitrators towards their appointing party, without resorting to the abolishment of the practice of party-appointed arbitrators altogether…'.[76]

The precise role of IPSIA would need to be made clear to parties from the very beginning, and its objectives and working methods transparently set out. IPSIA's role would be to scrutinise candidates and to facilitate that the highest-qualified individuals are appointed to investment arbitral tribunals. Undoubtedly, the introduction of such a body playing this role would mark a break with practice to date which has left parties' discretion more or less unfettered in this regard. However, the creation of similar advisory bodies, such as the Article 255 Panel of the EU and Advisory Committee of the International Criminal Court, act as precedent for making such a break from long-running practice.

To elaborate, the decision to establish the Article 255 Panel was the culmination of a longer process towards recognising that some objective criteria should be applied when assessing the suitability of judicial candidates, as well as subjecting them to some sort of scrutiny by an independent body. [77] The significance of the institution of this practice cannot be understated, given the decades-long practice that preceded the Article 255 Panel whereby individual Member States essentially exercised their sovereign right to put forward whichever candidates they liked with minimal scrutiny (which led to a situation in which no candidate for the Court of Justice was

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[72] See Ruth Mackenzie et al, *Selecting International Judges: Principles, Process and Politics* (OUP 2010), John Bell, *Judiciaries Within Europe: A Comparative Review* (CUP 2006).

[73] Jan Paulsson, 'Moral Hazard in International Dispute Resolution' ICSID Review Vol. 25, Issue 2, (2010) 340; see also; Albert Jan van den Berg, 'Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration' in Mahnoush Arsanjani and others (eds), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Martinus Nijhoff, 2011) 821, 834; Seth H Lieberman, 'Something's Rotten in the State of Party-Appointed Arbitration: Healing ADR's Black Eye that is "Nonneutral Neutrals"' Cardozo Journal of Conflict Resolution (2004) 5, 215, 216; Hans Smit, 'The Pernicious Institution of the Party-Appointed Arbitrator', Columbia FDI Perspectives (2010) 33.

[74] Paulsson, *ibid*, at 347-8.

[75] Elisa Sardinha, 'Party-Appointed Arbitrators No More' 17 The Law and Practice of International Courts and Tribunals (2018) 117, 133.

[76] *Ibid*.

[77] Henri de Waele, 'Not Quite the Bed that Procrustes Built' in Michal Bobek, *Selecting Europe's Judges* (OUP 2015), 25; established by the Treaty of Lisbon in 2005. The operating rules of the Panel were established through Council Decisions 2010/124 EU and 2010/125/EU.

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ever rejected, as far as we know).[78] The situation was broadly similar with regard to the establishment of the Advisory Panel in the context of the ECHR in 2010.[79] As such, it could be said that we can observe a similar normative shift from party autonomy to a greater emphasis on the rule of law component of judicial independence in these contexts. These examples also illustrate that the introduction of such mechanisms is far from being beyond the realms of possibility.

An independent panel for the scrutiny of investment arbitrators could be introduced in a number of ways, including: amendment of existing investment agreements, incorporation in new investment agreements, amendment of the various procedural rules such as the ICSID Arbitration Rules, and an opt-in Mauritius Convention type mechanism.[80] It is suggested that the latter may be the most straightforward mechanism for the introduction of IPSIA[81] and that it could to a large extent replicate the best practice of existing advisory bodies such as the 255 Panel and the Advisory Committee of the ICC.

In very simple terms this would mean that parties to an investment dispute could first of all decide upon an individual that they wish to put forward as their candidate, before the IPSIA would scrutinise and present a recommendation on the individual's suitability. The parties could then take this recommendation into account before appointments were made in the usual manner (whether that be jointly by the parties, or through an Appointing Authority or otherwise).[82] Whilst IPSIA's recommendation would be non-binding, practice of the other advisory bodies shows us that in practice such recommendations can nevertheless have significant practical effect, an issue to which we will return at section 4.e.

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[78] Jean-Marc Sauvé, 'Le rôle du comité 255 dans le sélection du juge de l'Union', in Allan Rosas, Egil Levits, and Yves Bot (eds), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law* (Asser Press/Springer 2013) 102–3, see also Karen J Alter, *The European Court's Political Power* (OUP 2010) 126.

[79] Although the ECHR itself contains certain provisions on the appointment of its judges, it is only rather recently that there have been relevant developments with regard to the establishment of an advisory body. In practice, the appointment system set out in the ECHR had come in for criticism (see Koen Lemmens, '(S)electing Judges for Strasbourg: A Disappointing Process?' in in Michal Bobek, *Selecting Europe's Judges* (OUP, 2015), 98; in fact, it had even been suggested that some judges had been elected who were unfit for office, see Norbert Paul Engel, 'More Transparency and Governmental Loyalty for Maintaining Professional Quality in the Election of Judges to the European Court of Human Rights' Human Rights Law Journal (2012) 32, 448. This Panel of seven experts examines those individuals put forward by States as candidates for the ECHR. In accordance with this resolution, before giving three names to the PACE the State should submit them to the Advisory Panel, which has the power to request information from States, who will examine them and make a recommendation.

[80] See Submission of the European Union and its Member States to UNCITRAL Working Group III, 18 January 2019, 'Establishing a standing mechanism for the settlement of international investment disputes', paras 35, 36.

[81] Although of course one would hope for more enthusiastic uptake in the context of IPSIA given that the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014) has, as of 2019, only attracted five parties, namely Cameroon, Canada, Gambia, Mauritius and Switzerland, see http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention_status.html. For a related proposal see Gabrielle Kaufmann-Kohler and Michele Potestà, 'Can the Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in Connection with the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism?' Geneva Centre for International Dispute Settlement (2016).

[82] Tomáš Dumbrovsky, Bilyana Petkova and Marijn Van Der Sluis, 'Judicial appointments: The Article 255 Panel and selection procedures in the Member States' Common Market Law Review (2014), 51, Issue 2, 457.

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b) Appointment of Members of the Panel

IPSIA could consist of full-time members whose sole job it would be to scrutinise and provide recommendations on parties' proposed candidates. The exact number of members required could be based on projections of the workload of the Panel.[83] The obvious challenge in this regard would be finding suitable candidates who would be both available, as well as qualified (and sufficiently independent and impartial) to perform the role. Similarly challenging will be identifying exactly how members of the IPSIA could be appointed.

In other contexts, such as with the Article 255 Panel or the Advisory Committee of the ICC, there exist representative or executive bodies through which Member States can exercise the function of appointing such individuals. The seven members of the Article 255 Panel are selected by the European Council, acting on the initiative of the President of the Court of Justice of the European Union, from former members of the Court of Justice and General court, individuals who have been judges of national supreme courts, and lawyers of recognised competence. [84] One of the seven members is proposed by the European Union's representative body, the European Parliament.

Members of the Advisory Committee of the ICC, on the other hand, are 'designated by the Assembly of States Parties by consensus on recommendation made by the Bureau of the Assembly also made by consensus…' [85] In the absence of an obvious centralised body in the investment law context to perform this role, other alternatives would need to be explored. For instance, Members of the Panel could be appointed by the President of the International Court of Justice,[86] in consultation with any other Appointing Authority or relevant non-State actor, in accordance with public and transparent criteria.

In creating an advisory panel to scrutinise arbitral appointments in the context of ISDS, it would be absolutely essential that the Members of the body are appointed in a manner that ensures complete confidence in the panel. A lack of transparency in the appointment of members of both international[87] and domestic advisory bodies has been cited as a consistent problem due to the fact that 'eligibility rules for acceding to…judicial selection bodies are [often] notably vague', and significant discretion is usually left to the executive in this regard.[88] However, if parties were to be encouraged to relinquish the control they currently have over the appointments process and make use of this mechanism, it would be essential that clear and transparent selection criteria for its Members as well as transparency in the process itself were put in place.

In this regard, it is suggested that lessons can be learned from those criteria utilised before the Article 255 Panel and ICC Advisory Committee. For instance, none of the relevant provisions of the Treaty on the Functioning of the European Union (TFEU) mention any factors which should be taken into account when selecting members of the Article 255 Panel such as geographic representation or gender. In contrast, the selection criteria for the selection of members of the ICC Advisory

[83] Submission of the EU, *supra* note 80, para 16.

[84] It is notable that only one woman was included in the original seven members of the Panel, and indeed that only one more woman has ever served on the Panel subsequently.

[85] See Report of the Bureau on the establishment of an Advisory Committee on nominations of judges of the International Criminal Court, New York, 12-21 December 2011, ICC-ASP/10/36, Annex, C. 12. Annex, A.1.

[86] Submission of the EU, *supra* note 80, para 21.

[87] Lemmens, *supra* note 79.

[88] de Waele, *supra* note 77, 35.

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Committee specifically require that the Committee reflect 'the principal legal systems of the world and an equitable geographical representation, as well as a fair representation of both genders, based on the number of States Parties to the Rome Statute.'[89] A similar formulation could be utilised with regard to the selection of members of IPSIA, as it is essential that public, transparent criteria are publicised and adhered to in order to not simply transplant the current problems with the transparency of the appointments in ISDS to IPSIA.

c) The Initiative to Propose Candidates

It is suggested that parties could retain the initiative in terms of proposing candidates for arbitral tribunals, whilst scrutiny of candidates' qualifications, potential conflicts of interest, and representativeness is built in to the current system. Such a procedure could strike a balance between two the two (at times competing) principles outlined above, namely legitimate rule of law-based concerns related to the current party-driven process for the appointment of arbitrators in ISDS, and the (perceived) benefits that parties see in retaining autonomy in this process.

In international legal scholarship a debate has played out over whether parties should continue to enjoy sole control over the appointment of arbitrators. For instance, as mentioned above, Jan Paulsson has been the most prominent voice in support of ending a purely party-driven appointment process. Paulsson, who questions whether parties in fact enjoy a 'fundamental right' to name their own arbitrator,[90] contests the logic of the commonly held view that 'my nominee will help me win the case',[91] arguing that this mentality is nonsensical due to the fact that, by this logic, the party's nominee is cancelled out by the other party's nominee and as such the parties can only have mutual confidence in one member of the tribunal, if at all. Consequently, Paulsson argues that the only 'decent' solution is that arbitrators should be appointed by a neutral body.[92] Such arguments, of course, stand in apparent opposition to the preference expressed by parties to retain control over the appointments process.[93]

Tufte-Kristensen has examined this preference, pointing out that sociological studies suggest that the notion of control over the process is the primary reason that the current system of appointment continues to be perceived as attractive by parties.[94] Other high-profile commentators have rejected any suggestion of reforming the current party-driven appointments system.[95] Brower and Rosenberg, for example, have argued that the legitimacy and attractiveness of the current system of ISDS is inextricably linked with parties' right (which has existed for 'decades, even

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[89] See Report of the Bureau, *supra* note 85.

[90] Paulsson, *supra* note 73, 348.

[91] *Ibid* at 349.

[92] *Ibid* at 351.

[93] See, in the context of mainly commercial arbitration, School of International Arbitration at Queen Mary, University of London, 'International Arbitration Survey: Current and Preferred Practices in the Arbitral Process' (2012), 5.

[94] Johan Tufte-Kristensen, 'The unilateral appointment of co-arbitrators' Arbitration International (2016) 32, 483, 495.

[95] For other supporters of party-appointed arbitrators see: Gary B Born, *International Commercial Arbitration* (Kluwer Law International 2014, 2nd Edition) 1807-808; Charles N Brower and Charles B Rosenberg, 'The Death of the Two-Headed Nightingale', Arbitration International 29 (2013) 7, 25; V V Veeder, 'The Historical Keystone to International Arbitration: The Party-Appointed Arbitrator - From Miami to Geneva', Proceedings of the Annual Meeting (American Society of International Law) 107 (2013) 387, 401.

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centuries') to choose their own arbitrators.[96] It is contended that party-appointed arbitrators are essentially self-policing in terms of impartiality due to the fact that, in the open market of appointments, they rely on being seen as credible for future work.[97] As Mourre has written:

> '[P]arties want to appoint arbitrators who will be listened [to] and respected within the tribunal. And parties know that the standing and reputation of experienced international arbitrators depend from their capacity to exercise independent judgment when deliberating with their colleagues. As a consequence, party-appointed arbitrators tend to be selected more for their reputation of impartiality and integrity than for their supposed willingness to support their appointing party's thesis.'[98]

Lawyers in the employ of parties typically expend significant energy scrutinising the records of candidates that they may put forward as their choice of arbitrator, including 'the backgrounds of arbitrators, their relationship with the parties, published works and prior appointments before nominating them for arbitral appointments.'[99] As such, the argument goes that the current system of party-appointment, whereby parties typically put forward 'someone with the maximum predisposition towards my client, but with the minimum appearance of bias',[100] is the best means for the appointment of arbitrators due to the fact that 'potential arbitrators effectively "stand for election" by parties every time a new case is brought.'[101]

Given the strength of feeling on both sides of this debate that has been raging for more than a decade, it seems difficult to conclude that there is any sort of consensus as to whether the abolition of party-appointments would be wise, even if it were possible. Nevertheless, it is argued that a procedure could be envisaged for IPSIA which represents a good compromise. In allowing parties to maintain the right of initiative in terms of selecting their candidate, they would still feel ownership of the process, as well as retaining one of the most popular aspects of the current ISDS system. Simultaneously, doing so in the knowledge that parties' proposed candidates would be subjected to interview and scrutiny against transparent criteria, informed by the international rule of law, practice suggests that positive reform could nevertheless be introduced into the system. Aware that an independent panel of experts would examine issues such as track record, possible bias and past publications, issues of repeat appointments or independence could be weeded out before they arise. The configuration of the IPSIA in this way could ensure that the 'benefits of the current system, such as its flexibility and neutrality' that stakeholders have emphasised they would

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[96] Brower and Rosenberg, *ibid*, 8.

[97] *Ibid*, page 14, see also; Alexis Mourre, 'Are unilateral appointments defensible? On Jan Paulsson's Moral Hazard in International Arbitration' Kluwer Arbitration Blog (5 October 2010) 59; Daphna Kapeliuk, 'The Repeat Appointment Factor – Exploring Decision Patterns of Elite Investment Arbitrators', Cornell Law Review Vol. 96, No. 1 (2010), 90.

[98] Alexis Mourre, 'Are unilateral appointments defensible? On Jan Paulsson's Moral Hazard in International Arbitration' (2010) Kluwer Arbitration Blog (5 October 2010) 59; see also Kapeliuk, *ibid*, 90.

[99] Michael Waibel, 'Arbitrator Selection: Towards Greater State Control' in Andreas Kulick, *Reassertion of Control over the Investment Treaty Regime* (CUP 2016), 344.

[100] Martin Hunter, 'Ethics of the International Arbitrator', Arbitration International (1987) 53, 219, 223.

[101] Brower and Rosenberg, *supra* note 95, 24.

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like to preserve,[102] would be, whilst real, meaningful scrutiny of candidates in accordance with rule of law considerations is introduced.

d) The Scrutiny of Candidates

But how exactly would scrutiny of candidates work in practice, and against which criteria would they be assessed? In very basic terms, any process of scrutiny of candidates put forward by parties would necessarily require the submission of supporting documents to IPSIA. By way of illustration, the Advisory Committee of the ICC takes into account 'written material submitted by the candidates in the form of statements of qualifications and curricula vitae.'[103] A similar process can be easily envisioned for IPSIA, whereby it could consider parties' justifications for putting forward the individual, the individual's own motivations, their publications (academic or otherwise) and any other relevant information.[104] In the case that IPSIA felt it lacked certain information, it could be endowed with the power to request information from the parties, although a binding power of subpoena finds no parallel in practice and is unlikely to find support. [105]

It would be essential that the criteria against which candidates are then assessed are made clear. In the context of the Article 255 Panel, whilst the formal operating rules do not explicitly lay out the criteria against which the Article 255 panel will assess candidates, and the provisions in the Treaties remain rather vague,[106] the Panel itself has subsequently, through one of its Activity Reports made these criteria more explicit, stating that:

> '[t]he panel's assessment of these criteria is therefore made on the basis of six considerations: the candidate's legal expertise; his or her professional experience; ability to perform the duties of a Judge; language skills; aptitude for working as part of a team in an international environment in which several legal systems are represented; finally, his or her impartiality and independence must of course be beyond doubt.'[107]

In a broadly similar manner, the ICC Advisory Committee's assessment is 'based on the requirements of article 36, paragraphs 3 (a), (b) and (c), of the Rome Statute, (which require 'established competence in criminal law and procedure, and the necessary relevant experience, whether as a judge, prosecutor, advocate or in other similar capacity, in criminal proceedings', 'an excellent knowledge of and [fluency] in at least one of the working languages of the Court' and capability to undertake full-time work for the full term.) It is suggested that a combination of these requirements, with the necessary modifications to ensure knowledge of both public international and investment law, could be drawn up in the context of IPSIA. [108] To reiterate, it is essential that an

[102] Secretariat Note on Appointments, *supra* note 10, para 37, see also Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session (New York, 25 June – 13 July 2018) 14 May 2018, A/CN.9/935.

[103] Report of the Advisory Committee on Nomination of Judges on the work of its third meeting, New York, 8-17 December 2014, ICC-ASP/13/22, Annex 1, 3.

[104] de Waele, *supra* note 77, 36, see Second Activity Report of the Panel provided for by Article 255 of the Treaty on the Functioning of the European Union, Brussels, 26 December 2012, 5091/13, COUR 2 JUR 5, 9–10.

[105] de Waele, *ibid*.

[106] See Articles 253, 254 TFEU.

[107] Third Activity Report, *supra* note 59, 17.

[108] With regard to the applicable standard, see references at note 71.

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explicit provision that IPSIA take into account gender balance and geographical representation be included in these criteria.[109]

Leaving aside for now the applicable standard of independence that IPSIA ought to develop, which was discussed above at the beginning of Section 4, it is useful to dwell a little further on the exact role that IPSIA would play and to devote some words to considering the types of situations that it may encounter. In simple terms, we can expect the role of IPSIA would necessarily change in the course of assessing individual candidates before it against objective criteria. To elaborate, in relation to the proposed appointment of certain individuals, say, any of the 'power brokers' included in the top 25 of Puig's work,[110] for a run-of-the-mill investment dispute (if such a thing exists), there would be little need to examine whether such a candidate had the relevant legal expertise or practical experience. Such individuals would easily be able to demonstrate appropriate expertise and experience, and pressing the individual to substantiate their credentials in this regard would be a waste of IPSIA's time. That said, for such individuals, who are regularly simultaneously involved in multiple disputes in one form or another, pertinent international rule of law questions could perhaps be asked with regard to that individual's impartiality or independence. Would it be appropriate for that individual to act as an arbitrator in that case given that in the past they have worked with the firm representing one of the parties? More mundanely, is it appropriate for that particular individual to take on their 61st investment arbitration? How does that individual expect to schedule a hearing for this dispute, given their myriad other commitments? And further, could that individual really be expected to engage fully with this particular case, or would it perhaps be necessary to rely on a research assistant to draft documents on behalf of that individual?[111]

In different circumstances, however, the role that IPSIA could play would potentially be very different. For instance, there may genuinely be cases in which the legal expertise or experience of an individual may be open to question. This may particularly be the case more often if calls to diversify the current pool of individuals routinely called upon to act as arbitrators are actually heeded. In such situations, IPSIA members could probe the individual's knowledge of substantive aspects of investment or public international law in the same way that substantive aspects of EU law are probed before the Article 255 Committee. An individual's experience in managing cases, too, (an undervalued skill to have in international dispute settlement) could also be further explored. Indeed much has been made of such skills before the Advisory Committee of the ICC, with regard to experience in handling different aspects of criminal trials.

Practice highlights the importance of in-person interviews for the functioning of such advisory bodies. For instance, the Advisory Committee of the ICC has decided that '[t]he Committee's consistent experience has been that the interviews with candidates have revealed important elements relating to how they fulfil the requirements of article 36 of the Rome Statute and to the relevance of their professional experience to the work of the Court, which were not detected in the written submissions.'[112] Similar interviews are carried out in the context of the Article 255 process,[113]

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[109] A position which finds support in Negotiating Directives for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes, 20 March 2018, 12987/17.

[110] Puig, *supra* note 3 at 387.

[111] Malcolm Langford, Daniel Behn and Runar Lie, 'Who Writes Arbitral Awards?' (2018) PluriCourts Working Paper.

[112] Third Activity Report, *supra* note 59, D.

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which inform deliberations (in private) before a reasoned recommendation is made to the Member State of the candidate in question.[114] The positive or negative nature of this recommendation is kept confidential, again for fear of discouraging applicants or damaging the individual in question's reputation.[115] In contrast, the ICC Advisory Committee prepares 'information and analysis, of a technical character, strictly on the suitability of the candidates' which is then circulated to all States Parties and observers in sufficient time to allow for votes are cast at the Assembly of States Parties. The identities of the candidates and a short report on the Committee's findings are also made publicly available in separate reports.[116]

It is essential that transparency is ensured at every stage of the scrutiny process.[117] For example, the identity of interviewees should be made public, and a public report given of the reasoned recommendation. Whilst the Article 255 Panel is in many ways a good example for how such an advisory body could operate, in practice it is less than transparent in its operation in several key areas. Controversially, the entire process through which candidates are interviewed takes place in private. Increased transparency has been mooted but so far resisted, the apparent justification being considerations related to the applicants' privacy,[118] and concerns that a public process would have a 'chilling effect' in the sense of dissuading certain individuals from putting themselves forward for the job.[119]

In terms of timescale for this process, a 30-day turnaround could be a realistic target for IPSIA.[120] Looking again to a relevant comparator, data shows that between 2010 and 2013 the average amount of time for a candidate to be considered by the Article 255 Panel of the EU was just 64 days, with 30% of cases being concluded in less than 45 days.[121] And in fact, it has been suggested that one factor in slowing up this process was indolence on the part of Member States.[122] Indolence is not something that has been identified as a cause of delay in the context of investment arbitration (unlike requests for bifurcation and arbitrator challenges for example[123]) and as such there is no

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[113] See Point 7 of Panel's Operating Rules.

[114] Should it be necessary, the President of the Council may call on the president of the panel to elaborate on any aspect of the reasoned recommendation, Point 5 of the operating rules.

[115] de Waele, *supra* note 77, 38.

[116] See Report of the Bureau on the establishment of an Advisory Committee on nominations of judges of the International Criminal Court, New York, 12-21 December 2011, ICC-ASP/10/36, Annex, C. 12 which states 'Information and analysis presented by the Committee is to inform the decision-making of States Parties and is not in any way binding on them or on the Assembly of States Parties.' See Report of the Bureau, *supra* note 41.Annex, C. 12.

[117] Indeed, in this regard, States have already expressed Preliminary Views that selection criteria utilised by appointing authorities should be published by arbitral institutions as well as explanations for the selections they make (A/CN.9/935, para. 66).

[118] Final report of the Discussion Circle on the Court of Justice at the European Convention, Brussels, 25 March 2003, CONV 636/03, Point 6.

[119] Alberto Alemanno, 'How Transparent is Transparent Enough?' in Michal Bobek, *Selecting Europe's Judges* (OUP 2015), 211.

[120] This is the same time period within which ICSID seeks to complete the appointments process, see; https://icsid.worldbank.org/en/Pages/process/Selection-and-Appointment-of-Tribunal-Members-Convention-Arbitration.aspx; Meg Kinnear, *Appointment to Arbitral Tribunals at ICSID*, ABA SIL International Arbitration Committee Newsletter, American Bar Association, Vol. 1, No. 1 (2013).

[121] Second Activity Report, *supra* note 104.

[122] de Waele, *supra* note 77, 36.

[123] See ISDS Academic Forum Working Group 7 Paper, *supra* note 24, at 21.

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reason to suggest that the introduction of the IPSIA procedure will necessarily lead to greater delay in the resolution of an investment dispute between two parties motivated to do so.

e) The Advisory Nature of the Panel's Work

One of the key elements of any proposal to introduce scrutiny of arbitral candidates by an independent body in accordance with rule of law considerations is of course whether that body's findings would bind the parties. It is suggested that, given the complete control that parties have over appointments at this point in time, it is unlikely that they would agree to put themselves at the mercy of an independent body that could constrain their discretion to appoint their arbitrators through a binding decision. Indeed, analogous advisory bodies at both the international and domestic levels almost exclusively issue recommendations rather than binding decisions.[124]

For example, the recommendation of the 255 Panel is just that, a recommendation without binding force, and the Council does not formally have to follow the recommendation of the 255 Panel. In practice, however, this has not been how the system has operated. In fact, it has even been said that in reality the 255 Panel 'holds a *de facto* veto power.'[125] This setup, whereby the independent body tasked with scrutinising candidates for judicial office is formally advisory but practically respected is replicated in a number of domestic legal systems.[126]

The 255 Panel has played an active role since its establishment. In the period between 2010 and 2013 the Panel made unfavourable recommendations in relation to seven out of 67 candidates that it examined. Although the process remains confidential, the Panel has indicated that reasons for the negative assessment of a candidate in practice have included a lack of relevant professional experience[127] and lack of relevant legal knowledge.[128] The fact that none of the candidates who had been given an unfavourable opinion by the 255 Panel ever went on to become a judge underlines the practical power that it possesses. [129]

Similarly, at the ICC scrutiny has been conducted of, and non-binding recommendations made regarding,[130] a number of judges since its first meeting in 2013. At its second meeting, the first time that there had been judicial elections since its establishment, the Advisory Committee was tasked with assessing two candidates, one of whom was Leslie Van Rompaey, who had been put forward by Uruguay. After having examined the relevant documentation, and conducting an in-person interview with the candidate, the Committee raised concerns that the candidate had not himself conducted criminal proceedings, and questioned the candidate's oral proficiency in English.[131] Subsequently, the candidate was withdrawn by Uruguay before votes could be case. This was not an isolated incident, with the Advisory Committee raising concerns as to judges' abilities in

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[124] *Ibid.*

[125] *Ibid.*

[126] *Ibid.*

[127] Second Activity Report, *supra* note 104, 14.

[128] Third Activity Report, *supra* note 59, 20.

[129] *Ibid*, 48.

[130] See Report of the Bureau, *supra* note 85, Annex, C. 12 which states 'Information and analysis presented by the Committee is to inform the decision-making of States Parties and is not in any way binding on them or on the Assembly of States Parties.'

[131] Report of the Advisory Committee on Nominations of Judges on the work of its second meeting, The Hague, 20-28 November 2013, ICC-ASP/12/47, Annex 1, at paras 17 and 18.

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subsequent years,[132] and as with the Article 255 Panel, no judge ever given a negative recommendation by the Advisory Committee has ever gone on to become a judge at the ICC, either being withdrawn by their State or losing in the early rounds of elections.

5. Interim Evaluation

Ultimately, the crucial question is whether the introduction of IPSIA will in fact serve to address the problematic aspects of the current system set out above. In response, it is suggested that the introduction of IPSIA would be a step in the right direction in terms of addressing certain important issues. For instance, the specific guidance given to the parties to put forward candidates with geographical and gender considerations in mind could begin to resolve the current problematic issue of a lack of representativeness among decision-makers. Likewise, knowing that the individuals they put forward will have to account for their track record of previous appointments, affiliations, publications and stated views will act as an extra level of scrutiny informed by considerations of the international rule of law and inevitably open up the pool of individuals who ultimately become decision-makers.

Such hopes are not merely utopian, in light of practice in other areas. Aside from the actual scrutiny of the application and the interview process itself, there are other positive aspects of setting out in clear terms the standards against which candidates will be judged. In contrast to past practice, the fact that objective criteria are spelled out provides a degree of transparency that should bring greater predictability to the process in the future, and parties should be clearer on what IPSIA will value and, it can be hoped, adjust their own thinking when selecting a candidate in the first place.[133] For instance, one of the most interesting aspects of the introduction of the 255 Panel has been its knock-on effect on judicial selection processes at the domestic level. As Dumbrovsky, Petkova and Van Der Sluis have stated, since the introduction of the Panel, 'many Member States have strengthened the procedural guarantees of screening candidates at the national level.'[134] This form of top-down, knock-on effect on the practice of parties in their deliberations over who to put forward could also be a consequence of the institution of the IPSIA.

Finally, a word of caution; one should not paint too rosy a picture of the potential creation of IPSIA. As pointed out above, several difficult procedural hurdles would need to be cleared before it became a reality. Even if some sort of consensus for reform of the current system of ISDS was found at the multilateral level,[135] it is clear that convincing parties to relinquish their current level

[132] See, for instance, the concern raised regarding Maria Natércia Gusmão Pereira of Timor-Leste, whose proficiency in English the Committee also had concerns about, Mindia Ugrekhelidze of Georgia who the Committee raised concerns regarding 'whether the candidate's professional experience was of relevance to the judicial work of the Court under article 36, paragraph 3(b)(i) of the Rome Statute and consequently whether the candidate's qualifications met all the requirements of the Statute for a judge at the International Criminal Court', and Emmanuel Yaw Benneh of Ghana whose professional experience was also questioned, and finally Toma Birmontien of Lithuania, see Report of the Advisory Committee on Nominations of Judges on the work of its second meeting, The Hague, 20-28 November 2013, ICC-ASP/12/47, Annex 1. More recently, in 2017 the Advisory Committee expressed concern with regard to the Mongolian candidate, Chagdaa Khosbayar's proficiency in English, see Report of the Advisory Committee on Nominations of Judges on the work of its sixth meeting, New York, 4-14 December 2017, ICC-ASP/16/7, Annex 1.

[133] de Waele, *supra* note 77, 50; Alter, *supra* note 78, 127.

[134] Dumbrovsky, Petkova and Van Der Sluis, *supra* note 82, 456.

[135] It is perhaps worth mentioning in passing that the need for independent scrutiny of decision-makers would not disappear with the creation of a MIC. In fact, in such circumstances it is argued that IPSIA should be integrated into the MIC structure, providing independent scrutiny in the same manner as the Article 255 Panel

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of control over appointments will be an uphill battle. And even if such agreement could be found, the absence of a centralised representative or executive body which could appoint members to oversee the operation of IPSIA presents a major challenge. This paper proposes a remedial solution, but it is in no way perfect. In this vein, we should note that IPSIA would be free from any democratic control, and as such its legitimacy could easily be called into question, especially if the manner in which it operated fell in any way short in terms of transparency or due process.[136]

6. Conclusion

The central contention of this paper is that, whether or not support is found for the creation of a MIC or AB, the introduction of an IPSIA could potentially address some of the current weaknesses in the current system of appointments in ISDS. It is suggested that, regardless of the outcome of the current multilateral process under the auspices of UNCITRAL, some form of independent scrutiny of appointments is an inevitability. As such, it is incumbent upon us to push for the most robust reforms possible, and to ensure that independence and impartiality in accordance with the international rule of law and representativeness of decision-makers is entrenched in these reforms.

In doing so, transparency must be the guiding principle in order to ensure that IPSIA, or any MIC or AB, is seen as legitimate by parties, assuring them that it is not some 'bloodthirsty secret judicial fraternit[y] that, following esoteric and arcane rituals...admits...new acolytes into the ranks of the transnational judicial priesthood.'[137] If we are to ask parties to make concessions with regard to current monopoly on the appointment of arbitrators, it is essential that the transparency and ethics of the appointments process under that body must be exemplary, whilst also avoiding any suspicion of 'cronyism and other forms of corruption' which have mired the current system of ISDS.[138]

does for the Court of Justice of the European Union and the Advisory Committee does for the International Criminal Court.

[136] *Ibid*, 457.

[137] Michal Bobek, 'The Changing Nature of Selection Procedures to the European Courts', in Michal Bobek, *Selecting Europe's Judges* (OUP 2015), page 5.

[138] Paulsson, *supra* note 73, 354.

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The Kolleg-Forschungsgruppe "The International Rule of Law – Rise or Decline?" examines the role of international law in a changing global order. Can we, under the current significantly changing conditions, still observe an increasing juridification of international relations based on a universal understanding of values, or are we, to the contrary, rather facing a tendency towards an informalization or a reformalization of international law, or even an erosion of international legal norms? Would it be appropriate to revisit classical elements of international law in order to react to structural changes, which may give rise to a more polycentric or non-polar world order? Or are we simply observing a slump in the development towards an international rule of law based on a universal understanding of values?

The Research Group brings together international lawyers and political scientists from five institutions in the Berlin-Brandenburg region: Freie Universität Berlin, Hertie School of Governance, Humboldt-Universität zu Berlin, Universität Potsdam and Social Science Research Center Berlin (Wissenschaftszentrum Berlin). An important pillar of the Research Group consists of the fellow programme for international researchers who visit the Research Group for periods up to two years. Individual research projects pursued benefit from dense interdisciplinary exchanges among senior scholars, practitioners, postdoctoral fellows and doctoral students from diverse academic backgrounds.

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