SOURCES OF LEGITIMACY IN INVESTMENT TREATY ARBITRATION: NEUTRALITY, CONSISTENCY AND PUBLIC PERCEPTION

by

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ABSTRACT

Legitimacy of international investment arbitration must be re-conceptualized. As mechanisms of transnational governance, investment tribunals act both as dispute-settlers, and as norm-creators. This necessarily captures the attention of a public broader than the parties; concurrently, it implies that the integrity of the decision-making process and the quality of outcomes must meet a higher threshold.

Escalating new and old concerns, coupled with a series of reforms to the regime, are a result of a stubborn refusal to extend the discussion beyond individual disputes. Against this backdrop, this thesis argues that the neutrality of investment arbitrators and consistency in their interpretation of legal norms may, under circumstances, represent a valuable source of legitimacy.

RÉSUMÉ

La légitimité de l'arbitrage d'investissement international doit être reconceptualisée. En tant que mécanisme de gouvernance transnationale, les tribunaux d'investissement agissent à la fois comme acteurs dans la résolution de différends et créateurs de normes. Cela nécessite de porter attention à un public plus large que les parties ; cela implique aussi que l'intégrité du processus décisionnel et la qualité des résultats doit atteindre un seuil plus élevé.

Les inquiétudes nouvelles et anciennes qui s'intensifient, combinées à une série de réformes du régime, résultent d'un entêtement à refuser d'étendre la discussion au-delà des litiges individuels. Devant une telle présentation des faits, cette thèse avance que la neutralité des arbitres d'investissement et la cohérence de leur interprétation des normes juridiques peut représenter une source précieuse de légitimité.

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INTRODUCTION

Legitimacy concerns have been bedevilling the narrative of investment treaty arbitration since the turn of the 21st century. While these concerns relate to a variety of perceived faults, the mechanism is most often denounced as a secretive procedure that indulges in partisanship and human rights violations.[1] Moreover, the decision of several countries[2] to reject it stands in sharp contrast to the merit it has been credited with in "depoliticizing, legalizing and ultimately pacifying international investment relations."[3]

Historically, sporadic occurrences of arbitration between state entities and foreign enterprises can be traced back to as early as 1930.[4] The privileges and prerogatives attached to sovereign immunity and the absence of a comprehensive international regime governing the protection

[1] See e.g. Barnali Choudhury, "Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?" (2008) 41 Vand J Transnat'l L 775 at 786 [Choudhury, "Recapturing Public Power"]; Gus Van Harten, "Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law" in Stephan W Schill, ed, *International Investment Law and Comparative Public Law* (Oxford Scholarship Online, 2011) 627 at 629–30 [Harten, "Investment Treaty Arbitration"].

[2] This refers but is not limited to Bolivia's (2007), Ecuador's (2009) and Venezuela's (2012) denunciation of the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States,* 18 March 1965, 575 UNTS 159, 4 ILM 532 (entered into force 14 October 1966) [*ICSID Convention*]; Indonesia's (2015) and India's (2016) termination and subsequent renegotiation of bilateral investment treaties without, or with limited investor-state arbitration access; and Canada's and the European Union's project to establish a permanent investment court under the *Canada-European Union Comprehensive Economic and Trade Agreement*, 30 October 2016 [CETA] (see United Nations Conference on Trade and Development, *Investor-State Dispute Settlement* (2013) UNCTAD/DIAE/IA/2013/2 at 20).

[3] Wolfgang Alschner "The Return of the Home State and the Rise of 'Embedded' Investor-State Arbitration" in Shaheeza Lalani & Rodrigo Polanco Lazo, eds, *The Role of the State in Investor-State Arbitration*, vol 3 (Leiden: Brill Nijhoff, 2015) 293 at 299. See also Ibrahim FI Shihata, *Towards a greater depoliticization of investment disputes: the roles of ICSID and MIGA* (Washington, DC: World Bank, 1992) at 1–32.

[4] See e.g. *Lena Goldfields, Ltd v U.S.S.R*. (Award) cited in Arthur Nussbaum, "The Arbitration between the Lena Goldfields, Ltd. and the Soviet Government" (1950–51) 36 Cornell LQ 43; *Soviet Union Societe Europkenne d'Etudes et d'knterprlses. Republique Fkderative de Yougoslavie* (Final Award) cited in Albert J van den Berg, "New York Convention of 1958: Refusals of Enforcement" (2007) 18:2 ICC Intl Ct of Arb Bull 1.

of foreign investors are but two of many factors that contributed to the unlikelihood of finding these two categories of parties engaged in the same adjudicatory proceedings. Consequently, diplomatic negotiations were often the only avenue that a foreign enterprise could pursue against the host state, provided the claim was espoused by its government. The economic expansion that followed World War II triggered the beginning of a gradual change in the landscape of investor-state disputes. The post-war revival of the global markets marked a turning point in inter-state commerce, evidenced by the substantial number of trade agreements concluded since 1959 between capital exporting and capital importing nations. Concurrently, states began to yield the absolute character of their immunity to commercial considerations by agreeing to arbitrate with private parties before a neutral forum in order to attract investment and to ensure that their enterprises receive fair, equitable, and non-discriminatory treatment abroad on reciprocal terms. Since the 1980s, dispute resolution provisions binding states to arbitrate with foreign enterprises became a standard feature of bilateral investment treaties ("BITs").[5]

Today's investment treaty arbitration holds a curious position in the international setting in which it operates: it is both a well-integrated mechanism of transnational governance and a highly controversial anomaly from the point of view of public law.[6] Arbitral decisions play a central role in the development of the international trade regime, by shaping and refining the standards and principles applicable to the investor-state relationship. At the same time, they impact socio-cultural, economic and environmental policies – areas whose regulation has been

[5] Gary Born, "A New Generation of International Adjudication" (2012) 61:4 Duke LJ 775 at 793, 833.

[6] See Fabien Gélinas, "Arbitration as Transnational Governance: Legitimacy beyond Contract" in A Claire Cutler & Thomas Dietz, eds, *The Politics of Private Transnational Governance by Contract* (New York: Routledge, 2017) 133 at 133–45 [Gélinas, "Arbitration as Transnational Governance"].

traditionally reserved to states.[7] Against this backdrop, it is increasingly difficult to justify the degree of control that parties retain over the constitution of tribunals and the confidentiality of proceedings and awards.[8] Over the last decade, several reforms have been made in recognition of the mechanism's distinctive nature, the most notable being to the ICSID regime.[9] Although this allayed some concerns, it also exacerbated others, showing how laborious it is to remedy the alleged legitimacy deficit. There is a growing anxiety that private adjudicators can re-write the rule of law through their decisions and that the publication of awards only aids them in their purpose.[10] It thus becomes apparent that investment treaty arbitration's struggle with its critics are caused by the wider audience that it has attracted – namely, civil society.[11] Attempting to identify which category of interests is, or should be most relevant in the legitimacy debate would be a fruitless exercise – both the parties' and the non-parties' perception of the

[7] See generally James Crawford, "Similarity of Issues in Disputes Arising under the Same or Similarly Drafted Investment Treaties" in Emmanuel Gaillard & Yas Banifatemi, eds, *Precedent in International Arbitration* (Paris: Juris Publishing, 2008) 97 at 97–103.

[8] It is worth noting in this respect that disputes are governed by arbitration rules that were either designed for, or inspired by international commercial arbitration: e.g. *UNCITRAL Arbitration Rules*, GA Res 65/22, UNCITRAL, 2010, Supp No 17, UN Doc A/65/465 (2010) [*UNCITRAL Rules*]; *International Centre for the Settlement of Investment Disputes Convention, Regulations and Rules*, ICSID/15/Rev (2006) [*ICSID Rules*] [*Additional Facility Rules*].

[9] E.g. Rule 6 (2) of the *ICSID Rules* and article 13 (2) of the *Additional Facility Rules* (disclosure requirements for arbitrators); Rule 48 (4) of the *ICSID Rules* and article 53 (3) of the *Additional Facility Rules* (publication of awards); Rule 41 (5) of the *ICSID Rules* and article 45 (6) of the *Additional Facility Rules* (*amicus curiae* possibility).

[10] See e.g. Stephan W Schill, "Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator" (2010) 23 Leiden J Intl L 401 at 403 [Schill, "International Economic Order"].

[11] Similarly, see Harlan G Cohen et al, "Introduction" in N Grossman, HG Cohen, A Follesdal & G Ulfstein, eds, *Legitimacy and International Courts* (forthcoming in Cambridge University Press) 1 at 1–28 [Cohen, "Introduction"].

mechanism, whether informed or misinformed, may be equally legitimizing or delegitimizing.[12]

In light of this broader global context, investment treaty arbitration must garner reasonable acceptance from its wider audience.[13] It is therefore necessary to ask what the requirements of legitimacy are and how they may translate beyond the parties to the arbitral process. Quite evidently, any answer must take into consideration that a consensus on the meaning of legitimacy has not been reached and for good reason: it is a multifaceted and fluid concept that describes the expectations of a relatively heterogenous public in relation to the nature and functions performed by the mechanism at a given moment.[14] In relation to these expectations, it must be taken into consideration that the creation of law necessarily entails higher scrutiny over the decision-making process than does the mere assertion of the law.[15]

The premise of this thesis is that investment tribunals may themselves generate legitimacy through neutrality and consistency, provided that these elements are conceptualized in a way that acknowledges the audience that the mechanism attracts as a form of transnational governance. This will be argued in four chapters that take a predominantly hermeneutic approach, focusing on leading literature and case law, as well as on existing empirical data.

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[12] A most relevant example is the decision of several countries to reform or denounce the mechanism altogether as a result of public pressure, *inter alia* (see *supra* note 2). See also Stephan W Schill, "Universal Arbitration: An Aspiration within Reach or a Sisyphean Goal? Developing a Framework for the Legitimacy of Int'l Arbitration" in Albert J van den Berg, ed, *Legitimacy: Myths, Realities, Challenges* (Alphen aan den Rijn: Kluwer Law International, 2015) 789 at 803 [Schill, "Universal Arbitration"] (expressing a similar opinion).

[13] 'Reasonable acceptance' is used here to contrast the idea of 'absolute legitimacy.'

[14] This research will not provide a formal definition of legitimacy, nor adopt one of the many that have been proposed in the literature. The absence of an agreement on its meaning illustrates precisely the fact that legitimacy issues in investment treaty arbitration stem from differences in perception regarding its transnational nature in general and the functions it performs, in particular.

[15] See generally Jost Delbruck, "Exercising Public Authority Beyond the State: Transnational Democracy and/or Alternative Legitimation Strategies?" (2003) 10:1 Ind J Global Leg Stud 29 at 29–43.

The first chapter sets the stage for the discussion by addressing how legitimacy in investment treaty arbitration should be understood. Contemporary literature has long been preoccupied with the inability of international adjudicative bodies to fit constitutional and democratic models of authority. It will be argued that investment treaty arbitration need not align itself with these theoretical projections in paradigmatic terms, as neutrality and consistency play a sufficiently important role in its legitimacy.

The second chapter elaborates on the element of neutrality. By analysing selected sets of legal rules and ethical standards, it will identify the right of parties to appoint arbitrators as an element of legitimacy. It will then address the issue of merit-based appointments and assess the viability of several alternatives to the formation of the tripartite tribunal, as proposed by scholars.

The third chapter stresses the importance of consistency in treaty interpretation for meeting the normative expectations of the wider audience. While it is true that the public perception of investment treaty arbitration's legitimacy is ultimately influenced by outcomes, consistency is a standard of quality that is commonly expected of investment tribunals. Given the regulatory function of awards, consistency may promote legal certainty and, implicitly, build trust in the mechanism. Accordingly, this chapter will also evaluate whether mechanisms such as an appellate body may bring a contribution.

Finally, the fourth chapter analyses the project for a permanent investment court under the *Canada-European Union Comprehensive Economic and Trade Agreement*, which stands against the findings of this research. More precisely, it will question whether its adjudicators and proposed appellate tribunal can meet the legitimacy threshold that investment treaty tribunals allegedly fail to meet.

I. THE CONCEPT OF LEGITIMACY IN INVESTMENT TREATY ARBITRATION

A. PRELIMINARY REMARKS

Every so often, scholarship resurrects an epoch of legal thought that "tends to push its consequences into extremes and to manifest sooner or later certain harmful tendencies."[16] In recent years, it has been a state-centred ideology that contests modern international adjudicative bodies as acceptable higher authorities.[17] Two conceptions converge to suggest that investment tribunals are not legitimized to interfere with the sovereign power of the state to regulate. The first is nested in a constitutional theory of adjudication. The second emphasizes the democratic principle of popular participation in decision-making processes. It should not come as a surprise that, until recently, the dominant approach taken in the literature has been to legitimize investment arbitration through the idea of state consent – the instinctive reaction is to argue that investment treaties are instruments by which states ascribe authority to arbitrators to review legislation and to issue enforceable awards. Yet, this approach has limited explanatory power. While state consent is a formal source for the authority of any international adjudicative body, it does not provide sufficient justification for the broader legitimacy that is required of them.[18] Investment tribunals are no exception. It is necessary to note at this stage that the legitimacy of any exercise of authority, however it may be defined, is essentially a matter of gaining the acceptance of its audience.[19]

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[16] William E Butler, ed, *On the History of International Law and International Organization. Collected Papers of Sir Paul Vinogradoff* (Clark, New Jersey: The Lawbook Exchange, Ltd, 2009) at 129.

[17] See generally Armin von Bogdandy & Ingo Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (New York: Oxford University Press, 2016) at 119–52 [Bogdandy & Venzke, "In Whose Name?"].

[18] See Santiago Montt, *State Liability in Investment Treaty Arbitration. Global Constitutional and Administrative Law in the BIT Generation* (Portland: Hart Publishing, 2009) at 142–44.

[19] See generally Christopher A Thomas, "The Uses and Abuses of Legitimacy in International Law" (2014) 34:4 Oxford J Leg Stud 729 at 729–58.

The first section of this chapter will show that the ambition to assess legitimacy in terms of models of political authority stems from the inability to recognize investment treaty arbitration as a form of adjudication that operates in a transnational context.[20] This qualification is essential for understanding that the mechanism creates a specific form of governance which generates specific expectations concerning both the integrity of the process ("input legitimacy") and the quality of outcomes ("output legitimacy").[21] Accordingly, the second section will address legitimacy in investment treaty arbitration as a bi-dimensional concept in which neutrality and consistency play the central role in meeting the expectations of its wider audience.

B. THEORETICAL DISCOURSES

1. Constitutional Legitimacy

The theoretical basis of contemporary constitutional states is a classic framework used for assessing the legitimacy of international investment tribunals. Scholars have adopted two main views regarding this matter: the first focuses on the place of the mechanism within a system ('the formal point of view'), while the second focuses on how the mechanism works ('the substantive point of view'). Whether investment arbitration is constitutionally legitimate depends on what the starting point for the discussion is.

[20] See Gélinas, Arbitration as Transnational Governance, *supra note* 6 at 139–41.

[21] This terminology is borrowed from the work of David Easton (David Easton, *A Systems Analysis of Political Life* (New York: John Wiley, 1965)). In their original meaning, "input legitimacy" refers to popular participation in political decision-making processes, while "output legitimacy" refers to the performance of the institution. They are used here to reflect that, in investment treaty arbitration, the relevant input and output are neutrality and consistency. For a similar approach, see Gélinas, Arbitration as Transnational Governance, *supra note* 6 at 139; Nienke Grossman, "The Normative Legitimacy of International Courts" (2013) 86 Temp L Rev 61 at 68, 80 [Grossman, "Normative Legitimacy"].

From a formal point of view, constitutional legitimacy is secured by a hierarchized system of authorities.[22] It is useful to recall here the role that is assigned to the judiciary in separation of powers (or checks and balances) based systems. Courts have authority to ascertain and apply state-enacted law, as well as to engage in a creative law-making exercise, based on general principles and past experiences, and – perhaps more importantly – to review public policies.[23] Notwithstanding, positive law is mostly determined by legislative intent. It follows that the controversy that investment tribunals are not legitimate from a separation of powers perspective is intimately related to a growing preoccupation for preserving the regulatory autonomy of states.[24] Once states consent to the jurisdiction of investment tribunals, the dispute is taken out of the hands of individual legislatures.[25] This is true for most international adjudicative bodies, which function based on the consent model.[26] It has been agreed since the 1648 Peace of Westphalia, that any limitation to sovereignty had to be "traced up to the

[22] See David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (New York: Cambridge University Press, 2008) at 3–4, 9, 207–19.

[23] *Cf* Lon L Fuller & Kenneth I Winston, "The Forms and Limits of Adjudication" (1978) 92:2 Har L Rev 353 at 372 [Fuller & Winston, "Forms and Limits"].

[24] For a colourful, yet effective representation of this preoccupation, see Jan Paulsson, *The Idea of Arbitration* (Oxford: Oxford University Press, 2013) at 237: "[R]ex has a thorn in his side: international tribunals. Rex insists that he respects the rule of law. But by 'law' he means the rules that need to be put into place to further his policies, which are proclaimed to be in the national interest. He finds it intolerable that an external authority should be allowed to determine what is lawful, or that international obligations accepted by his dubious predecessors should be given effect" [Paulsson, "Idea of Arbitration"].

[25] Armin von Bogdandy & Ingo Venzke, "Beyond Dispute: International Judicial Institutions as Lawmakers" (2011) 12:5 Germ L Rev 979 at 993–94 [Bogdandy & Venzke, "Beyond Dispute"]. See also Mattias Kumm, "The Legitimacy of International Law: A Constitutionalist Framework of Analysis" (2004) 15:5 Eur J Intl L 907 at 914: "[t]his means that, though states have consented to the treaty as a framework for dealing with a specific range of issues, once they have signed on, the specific rights and obligations are determined without their consent by these treaty-based bodies."

[26] Gélinas, Arbitration as Transnational Governance, *supra note* 6 at 134–35.

consent of the nation itself."[27] However, even though this ideology set the foundations of international law, it lacks the necessary vitality to legitimize modern international adjudication.

As mentioned earlier, investment tribunals substitute national courts' review of state measures, as well as act as law-makers by developing the international investment regime through their jurisprudence. The exercise of these functions in the absence of control mechanisms to prevent abuses of power is seen as a cause of distress.[28] Unsurprisingly, the prevailing approach has thus been to argue that investment tribunals exceed their mandate by re-writing law through their decisions. The essence of the criticism can be expressed in the words of the late Cedric Barclay: "They're not meant for posterity, they're meant for the two parties."[29] By this token, investment arbitrators should limit their mandate to applying the (existing) law to the facts of each case and exercise deference towards the "primary decision-makers."[30] States and their courts are believed to be better placed to decide matters of public interest.[31]

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[27] Julian Ku & John Yoo, *Taming Globalization: International Law, the U.S. Constitution, and the New World Order* (Oxford Scholarship Online, 2015) at 41–2.

[28] Schill, Universal Arbitration, *supra* note 12 at 820–21.

[29] Albert J van den Berg, ed, "Quo Vadis Arbitration?" in *50 Years of the New York Convention: ICCA International Arbitration Conference*, vol 14 (Alphen aan den Rijn: Kluwer Law International, 2009) 635 citing Cedric Barclay at 635–36.

[30] See Stephan W Schill, "Deference in Investment Treaty Arbitration: Re-conceptualizing the Standard of Review" (2012) 3:3 J Intl Disp Sett 577 at 606. See also René Urueña, "Subsidiarity and The Public – Private Distinction in Investment Treaty Arbitration" (2016) 79 Law & Contemp Probs 99 at 99–121 (considering that deference is a practical application of the principle of subsidiarity – as formulated by European Union law). See also Chester Brown, "The Inherent Powers of International Courts and Tribunals" (2006) 76:1 Brit YB Intl L 195 at 242 (describing the troubled relationship between various international courts and the states when the latter are a party to the dispute).

[31] *Cf* Jan Paulsson, "International Arbitration Is Not Arbitration" (2008) 2008:2 Stock Intl Arb Rev 1 at 16; Thomas W Wälde, "Procedural Challenges in Investment Arbitration under the Shadow of the Dual Role of the State: Asymmetries and Tribunals' Duty to Ensure, Pro-actively, the Equality of Arms" (2010) 26:1 Arb Intl 3 at 38.

One needs no special powers of observation to notice that this discourse is built on narrow understandings of the familiar doctrine. However, a few words must be said with respect to the call for deference. It implies that investment tribunals should not seriously challenge state measures as their legitimacy could be affected precisely for infringement of sovereignty. This is paradoxical. A judicial review that is overly deferent to legislative intent undermines an important desideratum that undergirds today's constitutional systems, i.e. to have independent adjudicative power.

From a substantive point of view, constitutional legitimacy is based on the mechanism's ability to associate itself with constitutional values.[32] One such value that investment tribunals have been successfully promoting over time is the *rule of law*. The first generation of BITs was characterized by generality and ambiguity – particularly because of states' inability to reconcile their interests.[33] In its judgment of 1970 in the *Barcelona Traction* case, the International Court of Justice ("ICJ") accurately observed the inhibiting effect of politics on the development of the investment regime:

> Considering the important developments of the last half-century, the growth of foreign investments and the expansion of the international activities of corporations, in particular of holding companies, which are often multinational, and considering the way in which the economic interests of States have proliferated, it may at first sight appear surprising that the evolution of law has not gone further and that no generally accepted rules in the matter have crystallized on the international plane. Nevertheless, a more thorough examination of the facts shows that the law on the subject has been formed in a period characterized by an intense conflict of systems and interests. It is essentially bilateral relations which have been concerned, relations in which the rights of both the State exercising diplomatic protection and the State in respect of which protection is sought have had to be safeguarded. Here as elsewhere, a body of rules could only have developed with the consent of those concerned.

[32] See e.g. Schill, Universal Arbitration, *supra* note 12 at 818–20.

[33] See generally Joost Pauwelyn & Manfred Elsig, "The politics of treaty interpretation: variations and explanations across international tribunals" in Jeffrey C Dunoff & Mark A Pollack, eds, *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (New York: Cambridge University Press, 2012) 445 at 445–73.

> The difficulties encountered have been reflected in the evolution of the law on the subject.[34]

This no longer holds true. Since the depoliticization of investment disputes, arbitral tribunals have been gradually transforming inchoate rules into a coherent regime for its users. More interestingly, their legal interpretations take part in a more general discourse about the meaning of various rights and obligations, which may, or may not be directly affected by their decisions – especially in those areas of law where states have been lax.[35] Here, too, critics have found it necessary to argue that the *rule of law* should only exist as postulated by the state and its authorities.[36] To the contrary, this goes against the core of the value in question: "*lex rex*," not "*rex lex*."[37] This basic determination facilitates the understanding that the *rule of law* can – and should be – furthered in the transnational context.

2. Democratic Legitimacy

Democratic models of authority have firmly established themselves as the primary point of reference for the legitimacy of international investment tribunals. Since party-appointed

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[34] *Case concerning the Barcelona Traction, Light and Power Company, Limited*, Judgment of 5 February 1970, [1970] ICJ Rep 3 at para 89.

[35] See Gélinas, Arbitration as Transnational Governance, *supra* note 6 at 140–41; Bogdandy & Venzke, Beyond Dispute, *supra* note 25 at 984–87. It is worth noting that the regulation of human rights raises complex questions regarding the allocation of authority (e.g. *By whom should these rules be defined?)*, respectively, the fragmentation of law (e.g. *Should these rules afford the same substantive protection, or should they be tailored across the different areas of law?*). This will be addressed in more detail in the third chapter of this thesis.

[36] See Schill, Universal Arbitration, *supra* note 12 at 820–21.

[37] Samuel Rutherford & George Buchanan, *Lex, rex, or, The law and the prince: a dispute for the just prerogative of king and people* ... (Edinburgh: Robert Ogle and Oliver & Boyd, 1843). It should be noted that, beyond the point that is made, we do not share the views expressed in this book.

adjudicators are not elected by the people, nor directly accountable to them, their role is seen as counter-majoritarian.[38]

Before we proceed, it is important to distinguish between democratic values and democratic methods, i.e. means of ensuring the observance of these values. From a substantive point of view, the baseline of democracy is the idea of self-determination: every individual has the right to choose his political preference.[39] This entails a presumption that the will of the state – as a political organ and decision-maker – corresponds to that of the people. What is more, while individuals are at the centre stage, the separation of powers provides security for the exercise of their rights. From a formal point of view, "representation," "participation," "accountability" or "deliberation" are typically expected from the political power, rather than from the judiciary.[40] In most domestic legal systems, judges are not elected by the people and fewer cries are heard regarding their democratic legitimacy.[41]

In investment treaty arbitration, issues arise whenever there is a dichotomy between the will of the state and the will of its citizens. This occurs, for example, when there is a suspicion that the government will set aside people's right to determine what their interests are in favour of an outcome that is advantageous from an economic point of view.[42] For the process to be

[38] The preoccupation with introducing parliamentary-like mechanisms is common to most international institutions and adjudicative bodies. See Thomas Kleinlein, "On Holism, Pluralism, and Democracy: Approaches to Constitutionalism beyond the State" (2011) 21:4 Eur J Intl L 1075 at 1082ff.

[39] See Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument*, revised ed (New York: Cambridge University Press, 2005) at 75 [Koskenniemi, "Apology to Utopia"].

[40] See Grossman, Normative Legitimacy, *supra note* 21 at 87. See also JHH Weiler, "The Geology of International Law – Governance, Democracy and Legitimacy" (2004) 64 Heidelberg J Intl L 547 at 560.

[41] For a detailed discussion on why domestic courts are designed as "non-majoritarian institutions," see Gráinne de Búrca, "Developing Democracy Beyond the State" (2008) 46:nnn Colum J Transnat'l L 101 at 111–12.

[42] See e.g. *Gabriel Resources Ltd and Gabriel Resources (Jersey) v Romania*, ICSID Case No ARB/15/31 (International Center for the Settlement of Investment Disputes) [*Gabriel Resources v Romania*]. Similarly, see

legitimate, some commentators believe that there must be an electoral connection between the arbitrators and those whose interests are affected by the outcome.[43]

This belief is misguided. More precisely, it confuses a democratic method for a democratic value – even though, admittedly, they cannot be perfectly separated. The right to self-determination implies that decision-makers take into account all interests that are affected.[44] Electoral vote does not necessarily guarantee this and thus its absence should not imply that the mechanism is incapable of rendering democratic results. To the contrary, "lawmaking by independent international tribunals is potentially *more* democratic than international law made by executives of powerful states,"[45] who often unilaterally impose their own interests. Further on this point, the effects of arbitral decisions are not territorially limited to the host state, but may impact a variety of others that have not been party to the initial dispute. If the arbitral process were to be democratized through electoral vote, rather than quality of outcomes, a form of universal suffrage would be required. For now, this idea is quixotic and will probably remain as such.

Similar to the discussion on constitutional legitimacy, the relevant question in this context is not *if* a mechanism of transnational governance can ensure the observance of democratic values, but *to what extent*? The following section shows that where the typical characteristics

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Vattenfall AB and others v Federal Republic of Germany, ICSID Case No ARB/12/12 (International Center for the Settlement of Investment Disputes).

[43] See Andreas von Staden, "The democratic legitimacy of judicial review beyond the state: Normative subsidiarity and judicial standards of review" (2012) 10:4 NYU Intl J Cont L 1023 at 1025, 1032.

[44] This is also referred to as the requirement of "generality" (see e.g. Bogdandy & Venzke, Beyond Dispute, *supra note* 25 at 996–97). Whether it is in investment tribunals' mandate to have a say on how the interests of non-participants are affected, particularly in human rights related matters, is highly debatable (see *supra* note 35).

[45] Eyal Benvenisti & George Downs, "Prospects for the Increased Independence of International Tribunals" in Armin von Bogdandy & Ingo Venzke, eds, "Beyond Dispute: International Judicial Institutions as Lawmakers" (2011) 12:5 Germ L Rev 1057 at 1081 [Eyal & Downs, "Prospects for the Increased Independence"].

of a democratic (or constitutional) decision-making process are not present, neutrality and consistency may play a role in its "legitimization."[46]

C. Role of Legitimacy

1. Input Legitimacy: Neutrality of Arbitrators

From a state-centred perspective, investment treaty arbitration's input legitimacy is predominantly characterized through its formal source of authority. Depending on the preferred ideology, this may concern executive state consent or an electoral connection. However, the diversity of criticism levelled against investment tribunals indicates quite clearly that legitimacy is defined more by how those tribunals operate *in concreto* and less by how they are given authority *in abstracto*. One of the most relevant example in this respect concerns a deeply ingrained perception that investment arbitrators are either pro-state, or pro-investor biased.[47] There is no question that bias is first and foremost an issue of neutrality – which in this thesis will refer to the requirements of *independence* and *impartiality*. By and large, the former relates to the external characteristics, i.e. the extent to which the adjudicator is institutionally insulated from threats or incentives that can influence his judgment, while the latter relates to the state of mind, i.e. the extent to which the adjudicator can base his decision on objective reasons.[48] At the domestic level, the precise content of each requirement varies, to some degree, from one

[46] *Cf* Andreas Follesdal quoted in Cohen, Introduction, *supra* note 11 at 9 (considering that "the 'illusion' of democracy [sustained by the application of democratic methods] may indirectly buoy legitimacy by securing broader public support").

[47] See generally Susan D Franck & Lindsey E Wylie, "Predicting Outcomes in Investment Treaty Arbitration" (2015) 65:459 Duke LJ 459; United Nations Conference on Trade and Development, Recent Developments in Investor-State Dispute Settlement, (2014) IIA Issue Note (1), UNCTAD/WEB/DIAE/PCB/2014/3 at 10.

[48] Fabien Gélinas, "The Dual Rationale of Judicial Independence" in A Marciano, ed, *Constitutional Mythologies: New Perspectives on Controlling the State* (New York: Springer, 2011) 135 at 138 [Gélinas, "Dual Rationale of Judicial Independence"].

legal system to another.[49] A judge may be considered neutral in one country, but not necessarily in another.[50] Nevertheless, party-appointments are generally viewed as going against a basic principle of adjudication: that one cannot be judge in one's own cause.[51] Professor Fabien Gélinas clarifies that:

> [t]he most obvious common denominator in the adoption of the principle through time was most likely an understanding that adjudication requires a "third" party. … Refinements about the meaning of "third party" in this context pertain to the same logic: one may be a third party in the formal sense but nevertheless be assimilated to one of the first two parties because of one's interest in the outcome.[52]

Insofar as investment treaty arbitration is concerned, suspicions of bias arise as early as the constitution of the tribunal. Some commentators question the parties' search for a neutral investment arbitrator as being genuine,[53] while others go as far as contending that arbitrators themselves should be "… attuned to the fact that they are agents of the contracting states party rather than independent trustees of the values encapsulated by the investment treaty regime."[54]

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[49] *Ibid* at 6–7: "… the following requirements can be said to capture the principle of judicial independence as we know it in the domestic context: neutral appointment, security of tenure, financial independence and administrative autonomy …. They [the requirements] are not universally imposed by domestic legal systems, let alone guaranteed by written or unwritten constitutional norms, and they are probably not fully met in any legal system."

[50] E.g. Database for Institutional Comparisons in Europe (DICE Database*), Judge selection in highest courts, 2013 – 2014* (2015), online: <www.cesifo-group.de/DICE/fb/eDS2hMVy> (showing different levels of involvement of state authorities in the nomination of judges).

[51] See Gélinas, Dual Rationale of Judicial Independence, *supra* note 48 at 142–47; Paulsson, Idea of Arbitration, *supra note* 24 at 149–50, 163–64.

[52] Gélinas, Dual Rationale of Judicial Independence, *supra* note 48 at 146–47.

[53] Darius J Khambata, "Who are the arbitrators? Tensions between party autonomy and diversity" in Albert J van den Berg, ed, *Legitimacy: Myths, Realities, Challenges* (Alphen aan den Rijn: Kluwer Law International, 2015) 612 at 626.

[54] Jürgen Kurtz, "Building Legitimacy Through Interpretation in Investor-State Arbitration: On Consistency, Coherence, and the Identification of Applicable Law" in Zachary Douglas, Joost Pauwelyn & Jorge E Viñuales, eds, *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford Scholarship Online, 2014) 257 at 258.

The main approach taken in the literature in response to this matter has been to describe investment arbitrators as "public authorities."[55] By this token, "an arbitrator who is given comprehensive jurisdiction over a claim filed under an investment treaty is as much an official of the State as judges who are appointed for life by a government or directly by voters."[56] However, this kind of association acts as a double-edged sword. On the one hand, it could legitimize investment arbitrators to evaluate state measures and deliver awards that have an impact on public interest. On the other hand, it could also reinforce suspicions of partisanship as in most legal systems public authorities are typically authorized to act for or on behalf of the state.

In a similar vein, some commentators put forth the idea of investment arbitrators as holders of "international public authority," whose function is akin to constitutional or administrative adjudication.[57] Accordingly, they would be legitimized – at least in part – by the fact that states recognize their contribution to social regulation by voluntarily enforcing even those decisions that are against their interests.[58] The most obvious defect in this latter approach is that it too tries to analogize investment treaty arbitration with various domestic processes. It is not to say that that this kind of intellectual exercise is inherently wrong for attempting to explain an international adjudicative body through more familiar institutions; rather, it is problematic

[55] See e.g. Schill, International Economic Order, *supra note* 10 at 419; Charles N Brower & Stephan W Schill, "Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?", (2009) 9:2 Chicago J Intl L 470 at 489–90: "[t]he consent to arbitration in investment treaties is itself a sovereign act of the state. Consequently, the basis of the arbitrators' authority in investment-treaty cases is founded in a public office which is conferred upon them based on international treaties" [Brower & Schill, "Is Arbitration a Threat or a Boon?"].

[56] Gus Van Harten, "The public-private distinction in the international arbitration of individual claims against the state" (2007) 56:2 ICLQ 371 at 379 [Harten, "The public-private distinction"].

[57] Bogdandy & Venzke, In Whose Name?, *supra note* 17 at 113–14. See also Valentina Vadi & Lukasz Gruszczynski, "Standards of Review in International Investment Law and Arbitration: Multilevel Governance and The Commonweal" (2013) 16:13 J Intl Econ L 613 at 618–19.

[58] *Ibid*.

when crucial differences between the analogized processes are overshadowed by their similarities – as is the case here. Although investment tribunals assess whether states act in conformity with their treaty obligations, this can hardly be equated with constitutional or administrative review. It is necessary to note that the scope and limits of either type of review differ between and within legal systems.[59] For example, some empower ordinary courts to hold that a statute is unconstitutional,[60] while others recognize this prerogative only to the highest judiciary or a separate authority.[61] At the domestic level, therefore, the legitimacy of an authority to review certain categories of state measures is embedded in the legal, social and political context in which it operates. By contrast, there is no general agreement among states as to how and by whom this authority should be exercised at the international level. Furthermore, the approach under discussion is also anachronistic insofar as it suggests that states are completely free to choose whether or not to enforce an international decision. To the contrary, failure to voluntarily comply normally amounts to breaching a treaty obligation.[62] It is safe to assume that states enforce awards because of the economic and reputational costs that are at stake, not because they acknowledge investment tribunals as some kind of international constitutional or administrative authorities. In any event, there is little gain in adopting a

[59] See Esther Pozo Vera, "An inventory of EU Member States' measures on access to justice on environmental matters. The Aarhus Convention: how are its access to justice provisions being implemented?" (2008), online: <www.ec.europa.eu/environment/aarhus/pdf/conf/milieu.pdf> at 3 (comparing various models of administrative review in Europe). See also Victor Ferreres Comella, "The European model of constitutional review of legislation: Toward decentralization?" (2004) 2:3 Intl J Cont L 461 at 461–62 (comparing various models of constitutional review in Europe and the United States).

[60] E.g. *Constitution of Greece*, 18 April 2001, online: <www.refworld.org/docid/4c52794f2.htm> at art 93 (4); *Constitution of the Portuguese Republic*, 25 April 1976, online: <www.refworld.org/docid/3ae6b5520.html> at art 204.

[61] E.g. *Constitution of the Republic of France*, 4 October 1958, online: <www.refworld.org/docid/3a e6b594b.h tml> at art 62; *Constitution of Romania*, 8 December 1991, online: <www.refworld.org/docid/3ae6b53c4.html> at art 146.

[62] Notably, see *ICSID Convention*, *supra* note 2, at arts 53 (1) and 54 (1).

terminology that requires more explanatory effort than necessary and does little to bring an input of legitimacy to the arbitral process. Instead, it could be said that investment arbitrators base their public power in the law that they apply and interpret, rather than in a formal authorization given to them by the state.[63] Unfortunately, this understanding is not one that is easily accepted – the law is seldom seen as a standalone source of legitimacy and, in any event, is not entirely neutral itself, even if it aspires to be.[64]

Notwithstanding these scholarly debates, the arbitrators' *independence* and *impartiality* may bring an input of legitimacy to investment treaty arbitration to the extent that they fulfil the prerequisites not only of a fair trial, but also of an apolitical rule of law.[65] As will be shown in the second chapter of this thesis, the kind of neutrality that is needed for this purpose is one that "reconciles" the power of investment tribunals with that of the state – which now retains significantly less control over the process.[66] At the same time, who makes the decision matters just as much as what is decided. An award is always assessed against another. The following sub-section will thus argue that the legitimacy of the mechanism is equally determined by the quality of outcomes – specifically, by consistent legal reasoning.

[63] Professor Fabien Gélinas also shares this view.

[64] While this merits a longer discussion, for the purpose of this thesis it suffices to clarify first, that in contrast to state law, which can be politically opportunistic, arbitrator-made law is (more) neutral; and second, that this law is potentially a better source of legitimacy, provided one can overcome the idea that investment tribunals operate in an autopoietic system.

[65] See Stephan W Schill, "Ordering Paradigms in International Investment Law: Bilateralism—Multilateralism—Multilateralization" in Zachary Douglas, Joost Pauwelyn & Jorge E Viñuales, eds, *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford Scholarship Online, 2014) 109 at 136–37 [Schill, "Ordering Paradigms"].

[66] Gélinas, Dual Rationale of Judicial Independence, *supra note* 48 at 153.

2. Output Legitimacy: Consistency of Arbitral Awards

Legitimacy critics of investment treaty arbitration irresistibly remind us of inconsistent outcomes and rationales. One commentator argues that "[r]ather than creating certainty for foreign investors and Sovereigns, the process of resolving investment disputes through arbitration is creating uncertainty about the meaning of those rights and public international law."[67] Similarly, another points out that "investor-state dispute settlement does not produce the stable and predictable rules of the road that some had anticipated. For those who value stability and predictability above all else, these inconsistent decisions [on the existence, scope, or implications] … are distressing."[68] The wellspring of the 'distress' relates to the different approaches that investment tribunals have adopted over time regarding the interpretation of clauses such as "fair and equitable treatment," "most favored nation" or "necessity."[69]

At this stage, it becomes pertinent to ask whether one-shot tribunals should even be consistent in their legal reasoning. Literature provides many responses to this question, only two of which will be discussed here.

The preferred view is that consistency is needed to achieve a degree of "unity" or "uniformity" of the international investment regime. It correctly acknowledges that investment tribunals are not simply dispute-settlers, but politically significant bodies whose decisions shape the law: notwithstanding their *ad hoc* nature, they are more reactive to the normative expectations of

[67] Susan D Franck, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions" (2005) 73:4 Fordham L Rev 1521 at 1523 [Franck, "The Legitimacy Crisis"].

[68] José E Alvarez, *The Public International Law Regime Governing International Investment* (The Hague: Martinus Nijhoff Publishers, 2011) at 352–53.

[69] See generally Kenneth J Vandevelde, "A Unified Theory of Fair and Equitable Treatment" (2010) 43:43 Intl L & Pol 43 at 43–106.

both the parties and the public than states.[70] Yet, what is meant by "unity" or "uniformity?" Although most often used interchangeably, the choice of terminology conceals a particular understanding of what is expected of investment tribunals. The unity of law is primarily opposed to the allegedly malignant effects of the existing myriad of fragmented regimes. This conception is nested in a longstanding pursuit of avoiding normative conflict at the international level.[71] The uniformity of law is more readily used in the European Union context and expresses the desideratum that Member States interpret and apply its law in the same manner in order to reach a set of social, political and economic goals.[72] In the investment context, both unity and uniformity are invoked to encourage the perpetuation of an already established rule – whether good or bad.[73] As Larry Alexander explained, this implies that "though a previous case was decided incorrectly, it [the tribunal] must, nevertheless, through operation of the practice of precedent following, decide the case confronting it in a manner that it otherwise believes is incorrect."[74]

While we are perfectly aware of the desirability of legal certainty in law, investment arbitrators cannot simply posit the normative content of a clause without engaging in any argumentative

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[70] E.g. *M.C.I. Power group L.C. and New Turbine Inc. v Republic of Ecuador*, (Decision on Annulment), (2009) ICSID Case No ARB/03/6 (International Center for the Settlement of Investment Disputes), at para 24: "the responsibility for ensuring consistency in the jurisprudence and for building a coherent body of law rests primarily with the investment tribunals."

[71] ILC, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission on the work of its fifty-eighth Session* (2006), A/CN.4/L.682 at 31–4.

[72] *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, 13 December 2007, 2007/C 306/01 at art 3.

[73] See Moshe Hirsch, "The Sociology of International Investment Law" in Zachary Douglas, Joost Pauwelyn & Jorge E Viñuales, eds, *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford Scholarship Online, 2014) 143 at 160–64; Mariel Dimsey, *The resolution of international investment disputes*, vol 1 (Utrecht: Eleven International Publishing, 2008) at 110.

[74] Larry Alexander, "Constrained by Precedent" (1989) 63:1 S Cal L Rev 3 at 4.

effort. Irrespective of legal tradition, case-based reasoning is a common feature of judicial development.[75] In its most basic form, it has more to do with treating like cases alike, than it has with the authoritativeness of past decisions. Naturally, this entails the possibility of contesting and departing from previously decided interpretations.

The second view, albeit less popular, claims that the rhetoric of the rule of law is used as an excuse to serve hidden interests and, as such, investment tribunals should not preoccupy themselves with this.[76] Rather than pursuing consistency, "they should focus on making a sound decision in the case at hand, not to strengthen rules and aim for grander, largely wooden rule-of-law ideals."[77] In essence, this view is based on two unarticulated assumptions: first, that the rule of law has an instrumental, rather than an intrinsic value; and second, that investment tribunals are, in most cases, not capable of furthering the rule of law and simultaneously adjudicating.[78]

Although, admittedly, legislators pass bills, statutes and other regulations that sometimes have nothing to do with the rule of law, this is not a sound reason for confining investment arbitration to a dispute-settling function. In any event, regardless of whether we accept that investment tribunals are mechanisms of transnational governance, their 'primary' function, i.e. adjudication, is, in fact, a form of social ordering.[79] What differentiates them from other forms

[75] Gélinas, Arbitration as Transnational Governance, *supra* note 6 at 135.

[76] Thomas Schultz, "Against Consistency in Investment Arbitration" in Zachary Douglas, Joost Pauwelyn & Jorge E Viñuales, eds, *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford Scholarship Online, 2014) 297 at 307–08 [Schultz, "Against Consistency"]. See also Robert M Cover, "The Supreme Court, 1982 Term -- Foreword: Nomos and Narrative" (1983) 97 Harv L Rev 4 at 40–4, 53 (suggesting that judicial interpretation "kills" legal traditions and competes with state-made law).

[77] Schultz, *supra* note 76 at 298–99.

[78] *Ibid* at 307–08: "In most situations, the outcome is the result of a choice of which of these two functions (instant case *v* rule of law) should prevail."

[79] Fuller & Winston, Forms and Limits, *supra* note 23 at 357.

of social ordering is a unique "burden of rationality"[80] that constrains decisions and projects them beyond the particular case. Thus, decisions not only clarify the meaning of the applicable rules, but may also create new ones that guide or even mandate the conduct of future or potential parties. Normally, a rule of law that is the product of reason should be preferred over one that is grounded in some formal authorization given to the legislative branch to regulate. Of course, that is not to say that state law is inherently irrational. To explain this rather simplistically, we can imagine the investment arbitrator as that new student who just came in and competes against the class president in trying to sell an idea to his peers. The chances of him winning against someone who already benefits from a vote of confidence depend on how trustworthy he comes across and how coherent his speech is.

The output legitimacy of the arbitral process depends on the ability of the investment arbitrator to carry out his argumentative burden. This can be done through principled decisions of sufficient abstraction that provide a point of reference, rather than infallible rules.[81] The advantage of this is that it has the potential to stabilize the expectations of both parties and the public while leaving scope for the state to regulate. What challenges must be overcome in relation to this is developed in the third chapter of the thesis.

[80] *Ibid* at 366. See also Gélinas, Arbitration as Transnational Governance, *supra* note 6 at 140: "This unique reliance on reason and principle provides adjudication with its own kind of legitimacy, which is markedly different from the democratic legitimacy many people think about when they become nostalgic about the waning of the state."

[81] Gélinas, Arbitration as Transnational Governance, *supra* note 6 at 139–41.

D. SUMMARY

This chapter set the theoretical basis of the thesis by discussing the main doctrinal approaches regarding the conceptualization of legitimacy in investment treaty arbitration.

The first section showed that the inability of a mechanism of transnational governance to meet domestic models of authority does not render it illegitimate. In this respect, it was necessary to clarify that the call for deference to the state expresses a view of constitutional legitimacy that is strictly from a top-down perspective and, similarly, the idealization of popular participation defines democratic legitimacy only from a bottom-up one. Neither approach speaks to the societal values on which these models are based. These include the rule of law and the principle that all those whose interests are affected should be taken into account. We then argued that, at the transnational level, investment tribunals have been safeguarding these values and, consequently, may be considered constitutionally and democratically legitimate – at least, from this point of view. Far from being merely academic debates, this type of discourse echoes a recent nationalistic resistance of the public to the perceived consequences of globalism. To combat them often feels like tilting at windmills.

The second section argued that arbitration's features – neutrality and consistency – may act as an authentic source of legitimacy, provided that two conditions are met. On the one hand, neutrality and consistency must be contemplated beyond the disputing parties. A transnational decision maker is, of course, subject to transnational scrutiny. On the other hand, neutrality and consistency must be of approximate value. The first corresponds to the input legitimacy of investment treaty arbitration and has something to do with the integrity of the process, while the second corresponds to the output legitimacy and has something to do with its efficiency. As will be shown in the following two chapter, they are mutually dependent.

II. NEUTRALITY BEYOND THE ARBITRAL PROCESS

A. PRELIMINARY REMARKS

If investment tribunals are to legitimize themselves through a neutrality that goes beyond the disputing parties' understanding of independence and impartiality, one must see whether the legal framework in which they function is reflective of this aim. Accordingly, the first part of this chapter will investigate this through a comparative analysis of selected institutional rules and guiding principles that are applicable to this matter. The issue of merit-based appointments will then be raised in light of two challenges made against investment arbitrators.[82] The prevailing criticism is that, by acting as counsel in one dispute and as an adjudicator in another, investment arbitrators are both *law users* and *law creators*.[83] The negative connotation attached to their professional mobility increases whenever their "dual role" is combined with the fear that they may cater to the interests of the disputing parties in order to secure reappointments in future disputes.[84] Literature is abundant in propositions to reform the mechanism that draw on a certain preference for a judge-like investment arbitrator. The extent to which these doctrinal

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[82] Ghana's challenge against Emmanuel Gaillard in *Telekom Malaysia Berhad v The Republic of Ghana*, PCA Case No HA/RK 2004, 667 (Permanent Court of Arbitration) [*Telekom Malaysia v Ghana*], regarding his concurrent service as counsel in *Consortium RFCC v Royaume du Maroc*, ICSID Case No ARB/00/6 (International Center for the Settlement of Investment Disputes) [*RFCC v Morrocco*]; Poland's challenge against Stephen M Schwebel in *Eureko B.V. v Republic of Poland*, IIC 98 (UNCITRAL) [*Eureko v Poland*], for having previously acted as counsel in *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic* (*formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v Argentine Republic)*, ICSID Case No ARB/97/3 (International Center for the Settlement of Investment Disputes) [*Vivendi v Argentina*].

[83] See Schill, International Economic Order, *supra* note 10 at 420. *Cf* David D Caron "Investor State Arbitration: Strategic and Tactical Perspectives on Legitimacy" (2009) 32 Suffolk Transnat'l L Rev 513 at 522 (suggesting that the expertise of both counsel and arbitrators is required "to maintain a system that inspires confidence in its users").

[84] See e.g. Gus Van Harten, "Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration" (2012) 50:1 Osgoode Hall LJ 211 at 219.

solutions are compatible with a transnational form of adjudication will be discussed in the final part of this chapter.

B. LEGAL FRAMEWORK AND ETHICAL STANDARDS

1. Meaning of Neutrality under the ICSID and the UNCITRAL Arbitration Rules

Assuming that investment treaty arbitration is not *eo ipso* perverted by bias, as many of the commentators that we have reviewed suggest, an evaluation of arbitrators' neutrality, or lack thereof, must be preceded by a few considerations on what kind of qualifications, if any, the law requires of them so as to ensure the integrity of the process. According to article 14 (1) of the ICSID Convention, "[p]ersons designated to serve on the Panels shall be 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."[85] The vacuous wording of the provision is unfortunate – by itself, it conveys nothing about the meaning of neutrality in disputes that are governed by the ICSID regime. It is thus left entirely to the disputing parties to choose the threshold of integrity the investment tribunal must meet for their respective dispute.[86] The same can be said about the UNCITRAL framework. The latter, however, was originally designed for international commercial arbitration[87] – a realm where it is perfectly acceptable for the parties to decide on all aspect of the dispute, including, up to a point, the degree of independence and

[85] *Supra* note 2. Because of its similar wording, article 2 of the *Statute of the International Court of Justice*, 18 April 1946, 33 UNTS 993 has often been used as a parallel. However, it must be corroborated with article 17: "No member of the Court may act as agent, counsel, or advocate in any case."

[86] At least, until a challenge is made.

[87] See *supra* note 8.

impartiality of their adjudicators. By contrast, investment treaty arbitration is "a creature of public international law."[88]

The criteria for disqualification are slightly more telling. Article 57 of the ICSID Convention provides that:

> A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14. A party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV.

Read in conjunction with article 14 (1) of the ICSID Convention, the wording implies that the existence of bias must be nearly obvious. Most ICSID tribunals have preferred this interpretation. The *Amco* Tribunal, for example, expressed the view that "the challenging party must prove not only facts indicating the lack of independence but also that the lack is "manifest" or "highly probable," not just "possible" or "quasi-certain"."[89] If an appearance of bias is not a sufficient ground for disqualifying an investment arbitrator, the logical conclusion that follows is that the ICSID only requires an appearance of neutrality. At the opposite, article 12 (1) of the UNCITRAL Rules states that "[a]ny arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence."[90] While, ultimately, both frameworks apply "the reasonable third person" test,[91] they impose

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[88] Dimitrij Euler et al, *Transparency in international investment arbitration: a guide to the UNICTRAL Rules on Transparency in Treaty-Based Investor-State Arbitration* (Cambridge: Cambridge University Press, 2015) at 2.

[89] *Amco Asia Corp v Republic of Indonesia*, (Decision on the Proposal to Disqualify an Arbitrator), (1982) ICSID Case No ARB/81/1 (International Center for the Settlement of Investment Disputes) in Michael W Tupman, "Challenge and Disqualification of Arbitrators in International Commercial Arbitration" (1989) 38:1 ICLQ 26 at 45.

[90] *Supra* note 8.

[91] August Reinisch & Christina Knar, "Conflict of interest in international investment arbitration" in Anne Peters & Lukas Handschin, eds, *Conflict of Interest in Global, Public and Corporate Governance* (Cambridge: Cambridge University Press, 2012) 103 at 108.

different thresholds. It could be argued that the latter is more congruent with the transnational nature of the mechanism: given that the integrity of the process is judged through a broader spectre of expectations, the standard for disqualification would be best based on a possibility, rather than certainty, that the investment arbitrator is biased.

A discussion of the meaning of neutrality under the ICSID and UNCITRAL rules cannot overlook the role that investment arbitrators themselves play in its assessment. We speak here of their continuing duty to disclose any circumstance that might preclude them from exercising an independent (and impartial) judgment.[92] It cannot go unnoticed that both regimes envisage the disputing parties as the primary stakeholders, who may agree, for example, that an investment arbitrator who had previously served as counsel for one of them or both is nevertheless neutral.[93] And he may indeed be. However, for the investment arbitrator to extend his legitimacy beyond the disputing parties, he would have to ask himself whether these circumstances can be considered as acceptable by the broader audience mentioned earlier.[94] If the answer is positive, he would then have to prioritize the legitimacy of the mechanism over his own financial gain. Is it reasonable to expect this of the investment arbitrator when the law itself is silent and therefore seemingly permissive? Taking into consideration what has thus far been presented in this thesis, it would so appear.

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[92] Rule 6 (2) of the *ICSID Arbitration Rules* and articles 11–3 of the *UNCITRAL Rules*.

[93] E.g. *Burlington Resources Inc. v Republic of Ecuador (formerly Burlington Resources Inc. and others v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador))*, (Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña), (2013) ICSID Case No ARB/08/5 (International Center for the Settlement of Investment Disputes) [*Burlington v Ecuador* Challenge].

[94] In a similar vein, see Howard Mann et al, *Comments on ICSID Discussion Paper, Possible Improvements of the Framework for ICSID Arbitration*, (2004) online: <www.iisd.org/pdf/2004/investment_icsid_response.pdf> at 11 (arguing that ICSID's proposal to adopt the "justifiable doubts" standard is insufficient).

2. (In)Existence of an Ethical Code and the IBA Guidelines on Conflicts of Interest

The only corpus of rules that can be equated to a code of ethics for investor-state arbitrations is the IBA Guidelines on Conflicts of Interest in International Arbitration ("IBA Guidelines").[95] While the institutional frameworks analyzed above merely prescribe the requirements of independence and impartiality, these guiding principles may be used to give more texture to their meaning. Notably, they provide a list of non-exhaustive circumstances that might compromise the integrity of the process and divides them into categories, depending on their gravity. Interestingly, the Red List, which encompasses the most serious of them, distinguishes between two types of situations: non-waivable and waivable. The former corresponds to "situations deriving from the overriding principle that no person can be his or her own judge," while the latter relates to those that are "serious but not as severe."[96] Instances where an arbitrator has either given legal advice, or regularly does so for one of the parties – presumably, including as counsel – can be the object of a waiver if the potential conflict of interest is known by all parties and arbitrators and all parties expressly agree that the person in question may nevertheless serve as arbitrator.[97]

For the purpose of this discussion, it is important to correlate this with the continuing duty to disclose, as envisaged in General Standard 3. Prior to accepting an appointment, as well as throughout the proceedings, the arbitrator must inquire whether he finds himself in a situation, such as those exemplified in the list, which may, "in the eyes of the parties" (emphasis added), give rise to doubts as to his independence and impartiality.[98] It should not come as a surprise that here too the prioritized interests are those of the disputing parties – the IBA Guidelines

[95] International Bar Association, *IBA Guidelines on Conflicts of Interest in International Arbitration*, London: IBA, 2014 [*IBA Guidelines*].

[96] *Ibid* at 17.

[97] *Ibid* at 10, 20–2.

[98] *Ibid* at 6.

were originally designed for international commercial arbitration.[99] The 2014 revision stipulating that they may also be applied to investment disputes did not come with a substantial change in this regard. Rather, it formalized an existing practice. Investment tribunals had already been using the IBA Guidelines and its precursors as interpretative instruments. The *Vivendi* Tribunal, for example, relied on the 1987 IBA Rules of Ethics for International Arbitrators, which incorporate the UNCITRAL "justifiable doubts" standard, to lower the threshold imposed by article 57 of the ICSID Convention, reasoning that:

> The term "manifest" might imply that there could be circumstances which, though they might appear to a reasonable observer to create an appearance of lack of independence or bias, do not do so manifestly. In such a case, the arbitrator might be heard to say that, while he might be biased, he was not manifestly biased and that he would therefore continue to sit. As will appear, in light of the object and purpose of Article 57 we do not think this would be a correct interpretation.[100]

The present version of the IBA Guidelines maintains this standard.[101] Once a challenge is made, the assessment is based on whether the existing circumstances give rise to justifiable doubts as to the arbitrator's independence and impartiality, from the point of view of an informed reasonable third person.[102] Insofar as disputes governed by the ICSID Convention and Arbitration Rules are concerned, tribunals have generally preferred a literal reading of the text. The *Burlington* Tribunal was of the opinion that:

> The IBA Guidelines, which are not binding in an ICSID challenge, have been recognized as useful guidance in prior cases. While it is true that these rules or guidelines may serve as useful references, the Chairman is bound by the

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[99] *Ibid* at 3.

[100] *Vivendi v Argentina*, *supra* note 82, Decision on the Challenge to the President of the Committee (2001), at para 20. See also *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, (Decision on Claimant's Proposal to Disqualify Professor Campbell McLachlan, Arbitrator), (2010) ICSID Case No ARB/07/26 (International Center for the Settlement of Investment Disputes), at para 43.

[101] *IBA Guidelines*, *supra* note 95 at 6 (expressly admitting having derived the standard set in article 12 of the *UNCITRAL Model Law on International Commercial Arbitration 1985: with amendments as adopted in 2006* (Vienna: United Nations, 2008) [*UNCITRAL Model Law*].

[102] *Ibid* at 17.

> standard set forth in the ICSID Convention. Accordingly, this decision is made in accordance with Articles 57 ... .[103]

By contrast, some ICSID tribunals adopted a middle position. The reasoning goes that article 57 of the Convention requires the challenging party to show that a reasonable third person would find that there is "an evident or obvious appearance of lack of impartiality or independence."[104]

This brief overview shows that, even though the IBA Guidelines may give depth to the meaning of neutrality in investment treaty arbitration, they do not recognize that the disputing parties' and the public's understanding of the arbitrator's independence and impartiality differ on key aspects, including on the "dual role" issue. The consequences of this can be inferred from the case study that follows.

C. ISSUE: MERIT-BASED APPOINTMENTS

1. Case Study

We shall start with a case that is representative of the typical issues that are associated with investment arbitrators who act in both capacities, i.e. counsel and adjudicator. In the case of *Ghana v Telekom Malaysia*,[105] conducted under the UNCITRAL Rules, the Respondent challenged Emmanuel Gaillard before the arbitral tribunal for having been concurrently serving as counsel in proceedings regarding the annulment of the award made in *RFCC v Morocco*.[106]

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[103] *Burlington v Ecuador* Challenge, *supra* note 93 at para 69. See also *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v Argentine Republic (formerly Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v Argentin)*, (Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal), (2007) ICSID Case No ARB/03/19 (International Center for the Settlement of Investment Disputes), at para 34.

[104] *Caratube International Oil Company LLP & Mr. Devincci Salah Hourani v Republic of Kazakhstan*, (Decision on the Proposal for Disqualification of Mr. Bruno Boesch), (2014) ICSID Case No ARB/13/13 (International Center for the Settlement of Investment Disputes), at para 57.

[105] *Supra* note 82.

[106] *Ibid*.

Ghana had intended to rely on this award to build its defense and thus argued that the arbitrator's participation in the proceedings in question precluded him from making an independent and impartial decision in the case at hand. The remaining arbitrators decided not to change the composition of the tribunal. Relief was also sought from the Secretary-General of the Permanent Court of Arbitration, who rejected the challenge on grounds that are not made public. Ghana then brought the matter before the District Court of The Hague. It contended that because of his involvement as counsel to RFCC, Gaillard "will not be able as an arbitrator to be an unbiased participant in consultations with his fellow arbitrators, or appearances will at any rate be against him"[107] and invoked General Standard 2 on Conflicts of Interest of the IBA Guidelines to support this position. In its judgment of 18 October 2004, the District Court of the Hague found that the two roles were incompatible under the existing circumstances and, consequently, held that in order to keep his position as arbitrator in *Telekom Malaysia v Ghana*, Gaillard would have to resign as counsel in the annulment proceedings of the other case.[108] To reach this conclusion, it applied article 1033 of the Dutch Code of Civil Procedure according to which the arbitrator shall be disqualified if, from an objective point of view, there are justifiable doubts in respect of his independence and impartiality.[109] This is the equivalent of article 12 of the UNCITRAL Rules that the arbitral tribunal and the Secretary-General of the Permanent Court of Arbitration presumably applied. Even though Gaillard subsequently resigned from his role as counsel, Ghana filed a second motion to challenge, objecting against the conditional character of the first decision. The court confirmed its previous decision, albeit not the legal reasoning behind it. It suggested that although, in its opinion, there was no

[107] District Court of the Hague (Civil Law Section – Provisional Measures Judge), Decision of 18 October 2004, online: <www.italaw.com/documents/TelekomMalaysiaChallengeDecision.pdf> at 4 (The Netherlands).

[108] *Ibid* at 7.

[109] *Ibid* at 6.

appearance of bias, the "double hatting" is best avoided in international disputes, in order to maintain confidence in the process.[110]

This case is notable for at least two reasons. First, it shows that the same standard of assessment may nevertheless lead to different results. While a test based on "justifiable doubts" suits investor-state disputes more than one based on "manifest lack of …," it is equally important to determine what constitutes acceptable practice in investment treaty arbitration, as opposed to international commercial arbitration. Second, the case brings into discussion the issue of timing. Certain inner convictions, such as views concerning the interpretation of a legal rule, may never be changed.[111] By no means could Emmanuel Gaillard's resignation from his concurrent position as counsel have automatically restored his impartiality, if it was indeed affected. However, for practical purposes, both national and international regulations admit that impartiality may be recovered following the passing of a certain period of time.[112]

The following case illustrates the so-called "due process of law issues"[113] that are caused by the fact that the investment arbitrators create rules that they can later use as counsel. In *Eureko*

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[110] District Court of the Hague (Civil Law Section – Provisional Measures Judge), Decision of 5 November 2004, online: <www.italaw.com/documents/TelekomMalaysiaChallengeDecision.pdf> at paras 7, 11 (The Netherlands). See also *Saint-Gobain Performance Plastics Europe v The Bolivarian Republic of Venezuela,* (Decision on Claimant's Proposal to Disqualify Mr. Bottini from the Tribunal under Article 57 of the ICSID Convention), (2013) ICSID Case No ARB/12/13 (International Centre for Settlement of Investment Disputes), at para 84 (considering that the "double hat" role could undermine the arbitrator's credibility as counsel and vice versa, were he to take a different view of the issue).

[111] This is sometimes referred to as an "issue conflict" (see generally Joseph R Brubaker, "The Judge Who Knew Too Much: Issue Conflicts in International Adjudication" (2008) 26 BJIL 111 at 111–52). Given its unsettled meaning, we refrain from examining the matter in these terms.

[112] *Cf* International Court of Justice, *Practice Direction VII*, 2013, online: <www.icj-cij.org/documents/index.php ?p1=4&p2=4&p3=0>.

[113] Thomas Buergenthal, "The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law" (2006) 22:4 Arb Intl 495 at 495–99.

v Poland,[114] the Respondent made two appeals against the award. Only the second is relevant to this analysis. One of the arbitrators, Stephan Schwebel, had been acting as counsel to the investor in *Vivendi v Argentina*[115] – an ICSID case that although not related, raised the same legal question, i.e. the interpretation of the fair and equitable treatment standard.[116] This scenario mirrors the above, but only in one aspect. Schwebel invoked the *Eureko* award on behalf of his client against Argentina. Poland relied on this fact to argue before the Brussels Court of Appeal that, as arbitrator, Schwebel had not decided the dispute it had been a party to impartially, but with a view to use it as persuasive authority in his capacity as counsel in another case.[117] In its decision of 29 October 2007, the court declined to consider the merits of this claim because the Respondent had failed to comply with a procedural obligation., leaving the issue of bias unsettled.[118]

Our remarks on *Telekom Malaysia v Ghana* apply to this case as well. In addition, it can be said that, even though Poland's challenge might have been a dilatory tactic, such circumstances are undoubtedly troubling from the point of view of the public – especially when the party against whom an award is made and subsequently used is the state.

2. Doctrinal Solutions: permanent tenure; joint party-appointments; neutral-body appointments; list-based appointments

It is said that the root of all evil in investment treaty arbitration is that it is based on a commercial model despite its distinctiveness and, specifically, that party-appointed arbitrators

[114] *Supra* note 82.

[115] *Ibid*. See also Gabriel Bottini, "Should Arbitrators Live on Mars? Challenge of Arbitrators in Investment Arbitration" (2009) 32:2 Suffolk Transnat'l L Rev 341 at 349–50.

[116] Philippe Sands, "Conflict and conflicts in investment treaty arbitration: Ethical standards for counsel" in Chester Brown & Kate Miles, eds, *Evolution in Investment Treaty Law and Arbitration* (Cambridge: Cambridge University Press, 2011) 17 at 30–1.

[117] *Ibid.*

[118] *Ibid.*

are "for-profit adjudicators, not tenured judges."[119] One solution that has been proposed is the establishment of a permanent international investment court. Professor Gus Van Harten, among others, believes that institutionalisation is the only way to ensure the kind of independence and impartiality that is required to resolve public law disputes.[120] According to him, security of tenure insulates the judge from the incentive or pressure to be consonant with the interests of the disputing parties and is thus a necessary administrative guarantee of neutrality. Furthermore, the longer the term of tenure, the more independent and impartial the judge will be.[121] This suggests that, in contrast to domestic court systems, investment treaty arbitration is a form of puppetry.

Other academics condemning the unilateral appointment of investment arbitrators have proposed less drastic reforms to the mechanism. In particular, Professor Jan Paulsson advanced the idea that the disputing parties should either choose the arbitrator(s) jointly, or entrust the task to a neutral institution.[122] This is thought to be consistent with what he calls the "fundamental premise of arbitration,"[123] namely, that both parties must have confidence in the adjudicator(s). Nevertheless, recognizing that taking the right to select the arbitrator entirely out of the hands of the parties can be met with great resistance, Professor Paulsson also proposed several more convenient alternatives, such as having the appointment made from a predetermined list of qualified professionals. The rationale is that:

> When composed judiciously by a reputable and inclusive international body, with built-in mechanisms of monitoring and renewal, such a restricted list may

[119] Gus Van Harten, *Sold Down the Yangtze: Canada's lopsided investment deal with China* (Toronto: James Lorimer & Company, 2015) at 203.

[120] Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford Scholarship Online, 2009) at 168–69 [Harten, "Public Law"]. See also Choudhury, Recapturing Public Power, *supra* note 1 at 782.

[121] *Ibid.*

[122] Jan Paulsson, "Moral Hazard in International Arbitration" (2010) 25 ICSID Rev 339 at 349 [Paulsson, "Moral Hazard"].

[123] *Ibid*.

> have undeniable advantages. Parties may freely select any one of a number of arbitrators, but each potential nominee has been vetted by the institution and is less likely to be beholden to the appointing party … An example is that of the international body created in 1985 as the Court of Arbitration for Sport ("CAS"), which has its seat in Lausanne.[124]

The following section considers whether any of these four solutions is viable.

3. Assessment of Doctrinal Solutions

There is no doubt that there is a growing trend in favor of institutionalizing investment treaty arbitration. Canada and the European Union await the birth of the CETA investment court, while Ecuador envisages one tailored for BITs concluded between Latin American states.[125] If permanent tenure is taken as a prerequisite for any adjudicator's independence and impartiality, the need to reform investment treaty arbitration can hardly be objected to. However, it is not. Merit-based ad hoc appointments need not have a negative connotation. Investment arbitrators are primarily selected based on their reputation for independence and impartiality and this usually works against the incentive to decide in favor of either party. Furthermore, awards are discussed within the arbitral community, as well as by the public, whose scrutiny acts as an additional layer of guarantee against bias.[126]

With respect to the solutions proposed by Professor Paulsson, it cannot go unnoticed that they are primarily directed to appease the disputing parties. From the point of view of the public, joint appointments may cause more harm than good. For example, in the case of *Gabriel*

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[124] *Ibid* at 352.

[125] *Supra* note 2. This trend is not new. The BIT between Egypt and the Syrian Arab Republic (1997) and the BIT between Jordan and the Syrian Arab Republic (2001) provide that the disputes are to be decided by the "Arab Investment Court" (see United Nations Conference on Trade and Development, *Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking* (2006) UNCTAD/ITE/IIT/2006/5 at 138, fn 143).

[126] Brower & Schill, Is Arbitration a Threat or a Boon?, *supra* note 55 at 491–92 (characterizing these as "informal control mechanisms"). See also William W Park, "Arbitrator Integrity: The Transient and the Permanent" (2009) 46 San Diego L Rev 629 at 653.

Resources v Romania,[127] the investor had signed a contract to conduct cyanide gold mining operations in a UNESCO World Heritage candidate site. Even though the Romanian judiciary repeatedly struck down the operations on grounds relating to illegality, the government pushed for the continuation of the project, presumably because of its own financial interest in the deal. In such an instance, where the Claimant and the Respondent would seek to reach a profitable settlement, a jointly appointed tribunal would further the perception that the mechanism is a "parallel system of justice"[128] that authorizes the violation of societal values.

The possibility of having the investment arbitrator appointed by a neutral institution may meet its purpose only if the appointing authority itself benefits from an irreproachable neutrality. Pursuant to article 38 of the ICSID Convention, the Chairman of the ICSID Administrative Council and the ICSID Secretary-General may, under different circumstances, fulfil this role. It has been argued that, because these positions are occupied by an officer of the World Bank – an organization that is largely steered by the major capital-exporting states, the arbitrator will be selected in accordance with the will of those states.[129] Who should the appointing authority then be? Should it be the International Court of Justice, whose own judges have been criticized for espousing the claims of their appointing states?[130] Or, perhaps, the Permanent Court of Arbitration, which is under controversy for indulging "self-appointment?"[131]

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[127] *Supra* note 42.

[128] Claudia Ciobanu, *Row over Romania's land of Dracula and gold spill onto new international stage*, online: Reuters <www.reuters.com/article/us-romania-mine-idUSKBN13426G>.

[129] Harten, Public Law, *supra* note 120 at 168–69.

[130] Paulsson, Moral Hazard, *supra* note 122 at 348. See also Chiara Gioretti, *Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals* (Leiden: Brill Nijhoff, 2015) at 7–8.

[131] See e.g. *Case concerning the "Enrica Lexie" Incident between the Italian Republic v The Republic of India*, (Order Request for the Prescription of Provisional Measures), (2015) PCA Case No 2015–28 (Permanent Court of Arbitration), at para 14 (Judge Vladimir Golitsyn appointing himself as President of the tribunal).

List-based appointments also pose problems of their own. First, who should decide which arbitrators are to be included on the list? Surely, here too, the authority itself must meet the neutrality threshold imposed by the public. Then, what criteria should arbitrators satisfy in order to be qualified? In any event, wouldn't this method of selection create a "club-like community of elites"[132] and increase the risk of reappointments? The Court of Arbitration for Sport, referred to by Professor Paulsson as an example, has been criticized precisely for this reason.[133] In ICSID disputes, the parties may appoint persons who have been designated by the Contracting States and the Chairman of the ICSID Administrative Council to serve on a Panel of Arbitrators for a six-years renewable term. The profile of these arbitrators is no different from what the rules require of those that are appointed from outside the "list," i.e. high moral character, expertise and ability to make an impartial and independent judgment.[134] Needless to say, their legitimacy is also questioned, despite (or because of) the fact that they are endorsed by the states.[135]

D. SUMMARY

There are two basic conclusions that may be inferred from what has been discussed above. First, the rules and principles regarding the independence and impartiality of the investment arbitrator, as well as their interpretation by tribunals, neglect to a large extent the perception of

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[132] Jonathan Bonnitcha, Lauge N Skovgaard Poulsen & Michael Waibel, *The Political Economy of the Investment Treaty Regime* (New York: Oxford University Press, 2017) at 64 [Bonnitcha et al, "The Political Economy"]. See also Charles N Brower & Charles B Rosenberg, "The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption that Party-Appointed Arbitrators Are Untrustworthy Is Wrongheaded" (2013) 29:1 Arb Intl 7 at 12–3.

[133] See Antonio Rigozzi, "Challenging awards of the Court of Arbitration for Sport" (2010) 1:1 J Intl Disp Sett 217 at 237–38.

[134] See articles 13, 14 (1), 31 (2) and 40 (2) of the *ICSID Convention*, *supra* note 2.

[135] The majority of the arbitrators on a tribunal must not consist of nationals of the state party to the dispute and of the state whose national is a party to the dispute (see article 39 of the *ICSID Convention* and rule 1 (3) of the *ICSID Arbitration Rules*).

the public. This assertion also applies to the solutions that have been proposed by scholars. Second and in relation to this, neutrality is not defined, from a substantive point of view, by its external guarantees, such as security of tenure, but by the quality of the legal reasoning on which decisions are based.

The first part of this chapter showed that there is no general standard for assessing independence and impartiality in investment treaty disputes. Furthermore, while the "justifiable doubts" threshold is preferable, the objective test it is associated with refers to a reasonable third party that has knowledge of all the relevant information. This evokes a person who has some legal background and most of the audience to which tribunals must answer to with their legitimacy do not. It would be an exaggeration to argue that disqualification should be based on an 'uninformed' reasonable third person test. Certain situations, however, give rise to an assumption of bias that is nearly insurmountable, regardless of what standard of assessment is employed. This is the case with the "double hatting," as evidenced by the two situations that have been analyzed in the "Case study" sub-section.

The second part of this chapter focused on the issue of party appointments. The dominant approach is to reform the mechanism either entirely, based on the model of the traditional judicial office, or in part, by tempering the level of control exercised by the disputing parties over the process. The solutions proposed can strengthen, but not guarantee independent and impartial adjudicators, whether they be called judges or arbitrators. At the end of the day, after all measures of precaution have been taken, neutrality ought to be reflected in the reasoning of an award.

III. CONSISTENCY BEYOND THE ARBITRAL PROCESS

A. PRELIMINARY REMARKS

Beyond the immediate dispute, the effects of the arbitral award manifest themselves in two forms: immediately, on the public regulatory schemes, programs, legislation or judicial decisions it reviews; and mediately, on the expectations it generates about the investment regime. Therefore, investment treaty arbitration disputes are often labeled as "regulatory disputes."[136] Because of this particularity, the legitimacy of the mechanism is highly dependent on the ability of investment arbitrators to sell their decisions as good law, i.e. decision that turns normative problems into determinate outcomes in a way that is coherent and improves legal certainty.

The purpose of this chapter is to show that this can be achieved through consistency in legal interpretation, which requires principled decisions. The first part will clarify the implications of this type of consistency, as opposed to one that blindly creates "uniformity" or "unity," and review its potential limitations. We will then proceed to an examination of the "normative ripples"[137] that the cases of *CMS v Argentina*,[138] *LG&E v Argentina*[139] and *Enron v Argentina*[140] allegedly caused. Widely considered to have left an indelible stain on the mechanism's legitimacy, these three cases best exemplify the consequences of inconsistent

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[136] Harten, The public-private distinction, *supra* note 56 at 376.

[137] José Enrique Alvarez & Gustavo Topalian, "The Paradoxical Argentina Cases" (2012) 6:3 World Arb & Mediation Rev 491 at 493.

[138] *CMS Gas Transmission Company v The Republic of Argentina*, (Award), (2005) ICSID Case No ARB/01/8 (International Center for the Settlement of Investment Disputes) [*CMS v Argentina*].

[139] *LG&E Capital Corp., and LG&E International, Inc. v Argentine Republic*, (Decision on Liability), (2006) ICSID Case No ARB/02/1 (International Center for the Settlement of Investment Disputes) [*LG&E v Argentina*].

[140] *Enron Corporation and Ponderosa Assets, L.P. v Argentine Republic*, (Award), (2007) ICSID Case No ARB/01/3 (also known as: *Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v The Argentine Republic*) (International Center for the Settlement of Investment Disputes) [*Enron v Argentina*].

legal reasoning and the interplay between the immediate and the mediated effects that they produce. What is more, the composition of tribunals, such as these, includes prominent scholars whose views on the mechanism in general, and on the interpretation of legal rules in particular, are reflected in the decisions they make.[141] The reforms that they propose in the academic context are thus not to be taken lightly. Accordingly, the second part of this chapter is dedicated to their assessment.

B. LEGAL CERTAINTY AND SCOPE OF MANDATE

1. Meaning of Consistency

It would be pointless to inquire about the meaning of consistency in investment treaty arbitration by looking at the ICSID and the UNCITRAL frameworks. Apart from stating that awards are only binding on the disputing parties, the rules are silent in this regard.[142] Notwithstanding, consistent case law is a *sine qua non* of the rule of law. Both civil law and common law legal traditions recognize that a rule must be used in all the cases to which it is applicable, in a manner that neither positively, nor negatively distinguishes their treatment based on "arbitrary whim, fear, or favor unprovided for in the rule itself."[143] This translates into a duty to treat like cases alike, which is incumbent on all adjudicative bodies. Its end goal is to create legal certainty – individuals must able to ascertain their rights and obligations. What is more, the interpretation of the law must not only look at the past, but also consider the future. Accordingly, it is by default within the mandate of an adjudicative body to replace an obsolete rule with a new one. In investment treaty arbitration, this is the crux of the problem. Investment tribunals do not benefit from either a 'democratic,' or a 'constitutional' presumption of

[141] In a similar vein, see Gélinas, Arbitration as Transnational Governance, *supra* note 6 at 139 (observing that there is an emerging "culture of arbitration").

[142] Article 53 (1) of the *ICSID Convention*, *supra* note 2, and article 34 (2) of the *UNCITRAL Rules*, *supra* note 8.

[143] Anthony De Jasay, "Review Essay. On Treating Like Cases Alike" (1999) 1:1 Indep Rev 107 at 113.

legitimacy, as do national courts. At the same time, arbitral awards are part of a more extensive discourse about the content of the law and of the rule of law than judicial decisions.[144] Therefore, the argumentative burden that they bear is particularly onerous.

Earlier in this thesis, we identified the potential legitimizing effect of principled decisions in investment treaty arbitration. Admittedly, the terminology that we have chosen may cause some confusion. Principled decisions "does not refer to principles of substantive justice, but is a matter of the rules that define the intelligibility of the arguments presented to the adjudicators."[145] Although they could eventually materialize in law in the traditional sense by creating rules that are either perceived as a form of customary law, or included in future investment or trade agreements, principled decisions should be viewed primarily in light of the interpretative function that they fulfil. This is best explained if we consider the two levels at which the mechanism functions.

At a micro level, principled decisions must bring a degree of coherence within the investment regime. Even though there are more than 3,000 BITs, their provisions are similar, if not identical.[146] This does not mean that they should be applied in the same manner. To the contrary, investment tribunals must take into account all the relevant circumstances under which the agreements were concluded, as well as the social, political and economic features of each dispute. It follows that differing outcomes in comparable situations should not be readily taken as proof of the mechanism's inefficiency as long as they are determined by differences in fact and law.[147] Furthermore, when departing from a widely accepted interpretation

[144] Gélinas, Arbitration as Transnational Contract, *supra* note 6 at 140.

[145] *Ibid*.

[146] Adrian M Johnston & Michael J Trebilcock, "Fragmentation in international trade law: insights from the global investment regime" (2013) 12:4 World Trade Rev 621 at 622.

[147] *Cf* Schill, Ordering Paradigms, *supra* note 65 at 1103.

regarding the meaning of a legal rule, investment tribunals must provide reasons for such departure. Consistency, as we have mentioned, leaves room for contestation and rival meanings.

At a macro level, principled decisions must bring a degree of 'synchronization' with other regimes. As one commentator described, investment treaty arbitration does not exist in "clinical isolation."[148] Because awards are often made at the edge of regimes, it is necessary that they communicate shared values and structure the decision context. Most tribunals are aware of this objective and have demonstrated willingness to bring public law values in the private setting by referring to the case law of the International Court of Justice, or of the European Court of Human Rights, for example.[149] However, this should not be understood as requiring tribunals to be subservient to the reasoning of these courts; nor that they themselves should agree with such reasoning.[150] Legal certainty is not contingent on the unity of sources, nor on the unity of their application, but on the extent to which those that are subject to the law are provided with direction as to how to regulate their conduct. In respect of transnational adjudication, this determination presupposes conciliating the meaning of the various rights and obligations that exist at the micro and at the macro level.

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[148] Grossman, Normative Legitimacy, *supra* note 21 at 101.

[149] E.g. *CMS v* Argentina, *supra* note 138 at para 330. The Tribunal invoked the International Court of Justice's interpretation regarding the most favored nation clause in the *Case concerning the Gabčikovo-Nagymaros Project (Hungary v Slovakia)*, Judgment of 25 September 1997, [1997] ICJ Rep 40–1 at paras 51–2; *Técnicas Medioambientales Tecmed, S.A. v The United Mexican States*, (Award), (2003) ICSID Case No ARB (AF)/00/2 (International Center for the Settlement of Investment Disputes), at paras 122ff (invoking the European Court of Human Rights' case law on lawful expropriation).

[150] *Contra Wintershall Aktiengesellschaft v Argentine Republic*, (Award), (2008) ICSID Case No ARB/04/14 (International Center for the Settlement of Disputes), at para 189 (referring to tribunal's analysis of the International Court of Justice's case law as "a welter of inconsistent and confusing dicta").

Taking into consideration all of the above, how successful investment tribunals are in carrying out their argumentative burden depends on the reasons they provide for their decisions. Lacunar interpretations that purposively avoid issues such as what the limit is to the state's right to regulate may be condemned for undermining the sovereign power, but could also be criticized for being of low quality.[151]

2. Limitations of Consistency

Many features of the investment regime and, specifically, of the arbitration mechanism, are considered limitations in the way of a consistent case law. In particular, tribunals are said to be beset by three problems. First, according to the rules governing investment disputes, awards are binding only upon the parties. Second, the investment regime is fragmented into bilateral and multilateral agreements. Third, there is no (consistent) methodology of interpretation. By discussing them in turn, we will show that consistency in investment treaty arbitration is not a pointless pursuit.

With respect to the provisions providing that awards have only *inter partes* effects,[152] it must be stated at the outset that they cannot be interpreted as prohibitions against case-based reasoning.[153] The disputing parties themselves, including states, invoke past decisions in the arguments they make before the tribunals. This perceived limitation is more related to the fact that there is no binding precedent (or *stare decisis*) in investment treaty arbitration.[154]

[151] See *CMS v Argentina*, *supra* note 138, Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic (2007), at para 97.

[152] *Supra* note 141.

[153] See *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*, (Decision of the Tribunal on Objections to Jurisdiction), (2004) ICSID Case No ARB/02/6 (International Center for the Settlement of Investment Disputes), at para 97 (arguing that "the provision[s] might be regarded as directed to the res judicata effect of awards rather than their impact as precedents in later cases") [*SGS v Philippines*].

[154] See Marc Jacob, "Precedents: Lawmaking Through International Adjudication" in Armin von Bogdandy & Ingo Venzke, "Beyond Dispute: International Judicial Institutions as Lawmakers" (2011) 12:5 Germ L Rev 1001

Accordingly, there is a sense that if the arbitrators are not constrained by earlier decisions, one cannot expect them to be consistent. Investment arbitration practice contradicts this misconception. Tribunals have been referring to each other's decisions, albeit on different considerations. Recognizing that certainty is an imperative of the rule of law, some tribunals have found that they are under a duty to follow case-established solutions, subject to compelling grounds, such as the specifics of the investment agreement and the facts of the dispute.[155] This type of reasoning is unsurprising if we look at the composition of the tribunals. Professor Gabrielle Kaufmann-Kohler, for example, served as the Presiding Arbitrator in one of the cases that adopted this approach.[156] As an academic she expressed the view that although investment arbitrators may not have a legal obligation to follow past decisions, they are under a "moral obligation to strive for consistency and predictability."[157] By contrast, other tribunals have denied that any such obligation exists, but have nevertheless relied on previous awards as a supplementary means of interpretation in the sense of articles 32 of the Vienna Convention of the Law of Treaties ("VCLT"), read in conjunction with article 38 (1) d) of the Statute of the International Court of Justice.[158] Approaches such as the latter bring the problem of

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at 1007 [Jacob, "Precedents"]. See also Andrea K Bjorklund, "Investment Treaty Arbitral Decisions as Jurisprudence Constante" (2010) 7:1 TDM 265, online: <www.transnational-dispute-management.com> at 265–80.

[155] *Saipem S.p.A. v The People's Republic of Bangladesh*, (Decision on Jurisdiction and Recommendation on Provisional Measures), (2007) ICSID Case No ARB/05/07 (International Center for the Settlement of Investment Disputes), at para 67. *Cf Hochtief A.G. v Argentine Republic*, (Decision on Jurisdiction), (2011) ICSID Case No ARB/07/31 (International Center for the Settlement of Investment Disputes) at paras 57–8 (recognizing the need for consistency, but refusing to refer to past decisions without further grounds).

[156] *Ibid*.

[157] Gabrielle Kaufmann-Kohler, "Arbitral Precedent: Dream, Necessity or Excuse?" (2006) 23:3 Arb Intl 357 at 373. This view is drawn from Lon L Fuller's work (see Lon L Fuller, *The Morality of Law* (Yale University Press, 1964)).

[158] E.g. *Caratube International Oil Company LLP v The Republic of Kazakhstan*, (Decision Regarding Claimant's Application for Provisional Measures), (2009) ICSID Case No ARB/08/12 (International Center for the Settlement of Investment Disputes), at para 73.

methodology to the forefront of our discussion.

Investment tribunals generally adhere to the fundamental rules of treaty interpretation as prescribed by the VCLT. Article 31 (1) provides that a treaty must be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object."[159] The following paragraphs of the same provision clarify what aspects may be taken into consideration for determining the context, while article 32 authorizes resort to supplementary means of interpretation such as, but not limited to, the preparatory work of the agreement and the circumstances under which it was concluded.[160] In its entirety, the VCLT is widely considered to have structured a unitary system of treaty interpretation. In spite of this, the use of the methods it prescribes varies considerably among international adjudicative bodies, investment tribunals included. For example, the object and the purpose of a treaty is most often inferred from its preamble. BITs invariably declare the state's commitment to "to protect and to promote investments." Some tribunals have interpreted this exclusively in favour of the investor's interests,[161] while others have determined that "to protect investments is to protect the general interest of development and of developing countries."[162] This shows how the same technique of interpretation can nevertheless lead to opposite conclusions. Although consistency in methodology of interpretation undeniably facilitates

[159] *Vienna Convention on the Law of Treaties*, 1155 UNT. 331, 8 ILM 679 (entered into force 27 January 1980).

[160] *Ibid*.

[161] E.g. *Noble Ventures, Inc. v Romania*, (Award), (2005) ICSID Case No ARB/01/11 (International Center for the Settlement of Investment Disputes), at para 52.

[162] *Amco Asia Corp v Republic of Indonesia*, (Decision on Jurisdiction), (1983) ICSID Case No ARB/81/1 (International Center for the Settlement of Investment Disputes), at para 23 cited in Christopher H Schreuer, "Diversity and Harmonization of Treaty Interpretation in Investment Arbitration" (2006) 3:2 TDM 1, online: <www.transnational-dispute-management.com> at 3.

consistency in case law, it is not by itself a guarantee of this. "[L]'interprétation est un art, non une science."[163]

As concerns the fragmentation of the investment regime, the belief is that consistency may only be achieved inasmuch as the rights and obligations contained in the BITs are substantively the same. This is partly true and in accordance with what has thus far been discussed. Nevertheless, the textual resemblance of the various investment agreements indicates that there is, in fact, a high degree of substantive identity between them. BITs were negotiated based on models that have proven compatible with the states' foreign investment policies. In time, this practice converged in a "whole [which] function[s] largely in an equivalent way to a multilateral system of law, even though the governing law is enshrined in bilateral treaties applied and interpreted by one-off arbitral tribunals."[164] The meaning of the fair and equitable standard, among other, has been developed largely through decisions that were made under unrelated treaties. It follows that fragmentation in the investment regime is but an apparent one.[165]

C. ISSUE: REGULATORY FUNCTION OF AWARDS

1. Case Study

Conflicting decisions are a normal occurrence in judicial development practice, whether national or international. This is because the certainty of the rule of law rests not only on

[163] Serge Sur, «L'Interpretation en droit international public» (Paris: 1974) at 83 cited in M Fitzmaurice, Olufemi A Elias, Panos Merkouris, eds, *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (Leiden: Martinus Nijhoff Publishers, 2010) at 8.

[164] Stephan W Schill, "W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law" (2011) 22:3 Eur J Intl L 875 at 893. See also Jeffery P Commission, "Precedent in Investment Treaty Arbitration. A Citation Analysis of Developing Jurisprudence" (2007) 24:2 J Intl Arb 129 at 132 (noting that the investment regime [emphasis] is primarily developed through case law).

[165] Stephan W Schill, "Public or Private Dispute Settlement? The Culture Clash in Investment in Investment Treaty Arbitration and its Impact on the Role of the Arbitrator" in Todd Weiler & Freya Baetens, eds, *New Directions in International Economic Law: In Memoriam Thomas Wälde* (Leiden: Martinus Nijhoff Publishers, 2011) 23 at 31.

consistent legal reasoning, but also on divergent opinions. Critical discourse regarding the proper interpretation of a rule is one way by which that rule is given effect and integrated in its context. This is particularly important in those areas of law that are underdeveloped. As Professor Paulsson once noted, "[t]he corpus of decided cases in the field of international investment arbitration is of recent vintage"[166] and there is no one-interpretation-fits all solution to the legal issues that are raised before the tribunals. Nevertheless, departing from a previous interpretation may prove detrimental to the legitimacy of the mechanism under certain circumstances, as the often-quoted Argentine cases show.

The central question the arbitrators had to answer in a string of cases against Argentina, was whether the Respondent had breached its obligations towards the investors out of a "state of necessity," following its economic collapse. For the purpose of this thesis, we will provide a brief account of only three of them. The basis of the defense was that according to the Argentina – United States BIT, general international law and Argentine domestic law, necessity constituted an exemption from state responsibility and that the conditions for such exemption were met. In *CMS*, the tribunal was not persuaded by the argument. It observed that "the state of necessity under domestic law does not offer an excuse if the result of the measure in question is to alter the substance or the essence of contractually acquired rights"[167] and reached a similar conclusion with respect to customary international law, as well as the governing BIT.[168] As concerns the latter, it reasoned that "[t]he Treaty is clearly designed to protect investments at a time of economic difficulties or other circumstances leading to the adoption of adverse measures by the Government,"[169]

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[166] Jan Paulsson, "International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law" (2006) 3:3 TDM 1, online: <www.transnational-dispute-management.com> at 4.

[167] *CMS v Argentina*, *supra* note 138 at para 217.

[168] *Ibid* at paras 251, 308ff.

[169] *Ibid* at para 354.

circumstances which the tribunal found not to be sufficiently severe. The tribunal in *LG&E*, on the other hand, was of the opposite view.[170] While affirming that Argentina "went too far by completely dismantling the very legal framework constructed to attract investors,"[171] it nevertheless considered that that measures it had taken were necessary to avoid a "full economic collapse."[172] No reference was made to the previous decision in relation to this issue.[173] The *Enron* tribunal followed *CMS*, arguing that:

> … in the context of investment treaties there is still the need to take into consideration the interests of the private entities who are the ultimate beneficiaries of those obligations, as explained by the English court case in OEPC noted. The essential interest of the Claimants would certainly be seriously impaired by the operation of Article XI or state of necessity in this case.[174]

As can be observed, in the cases of *CMS* and *Enron*, an extensive interpretation of the object and of the purpose of the investment agreement led to a restrictive interpretation of the state of necessity. The tribunal in *LG&E* took a converse approach. The fact that the outcomes of these disputes are different is problematic from several points of view that are in close connection.

First, the decisions were delivered in a relatively short time frame. Rival interpretations help build legal certainty, but in such a circumstance, they may also affect the legitimacy of the mechanism. This is especially true if the decisions in questions are not adequately reasoned. It cannot go unnoticed that, in the *Enron* case, the tribunal rejected the Respondent's argument on the ground that they were "not convincing."[175] What is more, albeit coming to the conclusion

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[170] *LG&E v Argentina*, *supra* note 139 at paras 99, 206, 226ff.

[171] *Ibid* at para 139.

[172] *Ibid* at para 162.

[173] See *Sempra Energy International v The Argentine Republic*, (Award), (2007) ICSID Case No ARB/02/16 (International Center for the Settlement of Investment Disputes), at paras 407–12 (the only tribunal acknowledging the existence of other conflicting decisions on Argentina's plea of necessity).

[174] *Enron v Argentina*, *supra* note 140 at para 342.

[175] *Ibid* at paras 293–313 (see especially paras 303ff).

that there were other alternatives available to the emergency legislation Argentina had passed, it did not explain what measures would have constituted such an alternative. The tribunal merely stated that "[in] [a] rather sad world[,] comparative experience in the handling of economic crises, [sic] shows that there are always many approaches to address and correct such critical events, and it is difficult to justify that none of them were available in the Argentine case."[176] Considering the composition of the tribunals, this kind of "abbreviation"[177] of the legal reasoning has been perceived as arbitrary. Professor Albert van den Berg arbitrated in both *LG&E* and *Enron*.[178] In a later case that was brought against Argentina, the Respondent claimed that the arbitrator's "abrupt change of mind between the time of the … decisions, which Berg never even tried to explain through a separate opinion"[179] was a clear indication that his independence and impartiality were compromised. One must recall in this respect that the input and the output legitimacy of the mechanism are interdependent. Accordingly, whether the "change of mind" regarding the interpretation of the facts and/or rules was determined by circumstances other than bias will be judged by the public against the reasoning, or lack thereof, behind the decision.

2. Doctrinal Solutions: appellate mechanism; preliminary ruling mechanism; global investment treaty

The inconsistent outcomes of the Argentine cases, among others, have reinforced doubts about the mechanism's ability to stabilize the normative expectations of its users. While some are of

[176] *Ibid* at para 308.

[177] Schill, Ordering Paradigms, *supra* note 65 at 1099.

[178] Francisco Rezek sat in both *CMS* and *LG&E*.

[179] United States District Court for the District of Columbia, Petition to Vacate or Modify Arbitration Award, Case No 08-0485 (RBW) 21 March 2008 at para 75. This concerned the case of *The BG Group Plc. v The Republic of Argentina*, UNCITRAL (International Chamber of Commerce). The challenge was first raised before the International Chamber of Commerce, the Appointing Authority, who rejected it without providing reasons. Argentina characterized this decision as an "excess of powers." It suffices here to observe that the legitimacy of the mechanism may also be affected by its interaction with 'outside actors.'

the opinion that states should entirely renounce settling their disputes with investors through arbitration, others have proposed a variety of reforms.

The most popular solution that has been put forward is to introduce institutional control mechanisms, such as an appellate or a preliminary ruling body. The common belief is that this would not only improve consistency in investment arbitration case law, but also mitigate the risk of tribunals following "bad precedent."[180] Contrary to judicial decisions, the "substantive correctness"[181] of the investment award can be assessed only in exceptional circumstances and depending on the applicable rules. For arbitrations that take place under the ICSID framework, this possibility is excluded. An award may only be reviewed in light of the grounds provided by article 52 of the ICSID Convention, which preclude an examination of the merits.[182] In *CMS v Argentina*, the Annulment Committee recalled that:

> In the circumstances, the Committee cannot simply substitute its own view of the law and its own appreciation of the facts for those of the Tribunal. Notwithstanding the identified errors and lacunas in the Award, it is the case in the end that the Tribunal applied Article XI of the Treaty. Although applying it cryptically and defectively, it applied it.[183]

An investment award that is made in arbitrations governed by the UNCITRAL Rules can be reviewed on the merits according to the law at the place of arbitration or at the place of enforcement. This departs from the international standards outlined in the UNCITRAL Model

[180] Jacob, Precedents, *supra* note 154 at 1023.

[181] David D Caron, "Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction Between Annulment and Appeal" (1991) ICSID Rev-Foreign Investment LJ 21 at 24.

[182] *Supra* note 2. See also article 53 of the *ICSID Convention*.

[183] *CMS v Argentina*, *supra* note 138, Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic (2007), at para 136. See also *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v* Romania, (Decision on Annulment), (2016) ICSID Case No ARB/05/20 (International Centre for Settlement of Investment Disputes), at paras 121–22.

Law and the New York Convention.[184]

Against this backdrop, there is an increasing demand for setting up an appellate mechanism. Recently negotiated investment agreements include the obligation to establish a body that brings coherence in the decisions rendered by the tribunals.[185] Some commentators even envisage a centralized mechanism of review that would either be established under multilateral convention,[186] or organized under an independent international institution, such as the Permanent Court of Arbitration.[187] In a different vein, others believe that inconsistency would be better addressed through prevention. Drawing on the successful integration of the preliminary ruling procedure in the European Union context, it has been suggested that a permanent specialized body entrusted with this kind of function could guarantee the "harmonization"[188] of the investment regime without undermining the arbitrators' adjudicative powers, as an appellate body would. Whilst the European Court of Justice's rulings are binding on national courts in their final decisions, there is no consensus as to whether or not a similar effect is desirable in investment treaty arbitration.[189]

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[184] Articles 6 and 34 of the *UNCITRAL Model Law*, *supra* note 101; Article V of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention")*, 10 June 1958, 330 UNTS 3 (entered into force on 7 June 1959).

[185] ICSID Secretariat, *Possible Improvements of The Framework for ICSID Arbitration* (Discussion Paper of 22 October 2004), online: <www.icsid.worldbank.org/en/Documents/resources/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf> at paras 21–2.

[186] Susan D Franck, "The Nature and Enforcement of Investor Rights Under Investment Treaties: Do Investment Treaties Have a Bright Future" (2005) 12:47 UC Davis L Rev 47 at 94.

[187] Franck, The Legitimacy Crisis, *supra* note 67 at 1620–22. See generally Harten, Public Law, *supra* note 120.

[188] Cristopher H Schreuer, "Preliminary Rulings in Investment Arbitration" (2008) 5:3 TDM, online: <www.transnational-dispute-management.com> at 5; See also Gabrielle Kaufmann-Kohler, "Annulment of ICSID Awards in contract and Treaty Arbitrations: Are There Differences?" in Emmanuel Gaillard & Yas Banifatemi, eds, *Annulment of ICSID Awards* (New York: Juris Publishing, 2004) 189 at 223.

[189] *Ibid.* In this sense, parallels have been also made with the International Court of Justice' advisory opinions.

The first two solutions expand on the features of the mechanism. By contrast, the third and final that is presented in this sub-section highlight the correlation between inconsistency and the large number of bilateral and multilateral investment agreements. The argument is that a global investment treaty that extends beyond the states' political and geographical boundaries would provide arbitrators with a fully comprehensive substantive basis for the decisions that they make.[190] This idea is but one in a long list of disillusions. Ever since the dusk of the Second World War, numerous attempts to set out this kind of an instrument have failed. The 1995 project for a Multilateral Agreement in Investment, for instance, never came into force.[191]

3. Assessment of Doctrinal Solutions

Both the disputing parties and the public judge the output legitimacy of an adjudicative body by its ability to deliver "substantive justice."[192] Therefore, the decisions of courts are subject to vertical control that can take the form of an appellate review, a preliminary ruling, or both, depending on how a judicial system is organized.[193] Nevertheless, a system of adjudication that is not hierarchal should not be taken as a fatality flawed. A standalone decision does not automatically have a law-making effect, as a legislative act does. To the contrary, such an effect is dependent upon a condition: that the adjudicators as well as the users of the system accept the legal reasoning on which a decision is based.[194] Professor Gélinas pointed out in this sense

[190] See Dimsey, *supra* note 73 at 218–20.

[191] For a detailed discussion of the reasons why this project, among others, was never concluded, see Armand de Mestral, "Investor-State Arbitration Between Developed Democratic Countries" (2015) in Centre for International Governance Innovation (CIGI), Investor-State Arbitration Series (Paper No 1) 1 at 15 [de Mestral, "Investor-State Arbitration"]; UN, *World Investment Report 2015 – Reforming International Investment Governance* (UN, 2015) at 122.

[192] Grossman, Normative Legitimacy, *supra* note 21 at 96.

[193] Fabien Gélinas, "Investment Tribunals and the Commercial Arbitration Model: Mixed Procedures and Creeping Institutionalisation" in MW Gehring & M-C Cordonier Segger, eds, *Sustainable Development in World Trade Law* (The Hague: Kluwer Law International, 2005) 577 at 582 [Gélinas, "Investment Tribunals"].

[194] *Ibid*.

that "[t]he lack of a hierarchy of tribunals creates situation in which a decision becomes a leading case not because of some power formally granted to the arbitrators or status conferred on their awards, but by virtue of the authority, now laid bare, wielded by their reasoning."[195] This not only creates a competition between investment tribunals,[196] but also acts as a restraint on how they interpret the legal issues that are brought before them.[197] The tribunal in the case of *SGS v Philippines*, among others,[198] rightfully observed that the coherence of investment arbitration case law cannot result from unpersuasive decisions.[199] It also stressed that, even if there was a hierarchy of tribunals, "there is no good reason for allowing the first tribunal in time to resolve issues for all later tribunals."[200] It is important that we remind ourselves here that an adjudicators obligation to improve the certainty of the rule of law is not synonymous with making the meaning of a legal rule definitive.

Taking the above into consideration, the success of either an appellate body, or a preliminary ruling authority depends on how they would be structured.[201] If these mechanisms are organized under the multitude of agreements that exist, there is a risk of aggravating inconsistencies in the investment regime if they act independently from each other.[202] In other

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[195] *Ibid* at 583.

[196] *Ibid*. *Cf* Schultz, Against Consistency, *supra* note 76 at 301–02 (arguing that investment arbitrators do not consciously aim for consistency, but follow what the "social practice" in the field is).

[197] Gélinas, Arbitration as Transnational Governance, *supra note* 6 at 142.

[198] E.g. *Mondev International Ltd. v United States of America* (Award), (2002) ICSID Case No ARB(AF)/99/2 (International Center for the Settlement of Investment Disputes), at para 119: "While possessing a power of appreciation … the Tribunal is bound by the minimum standard as established in State practice and in the jurisprudence of arbitral tribunals. It may not simply adopt its own idiosyncratic standard of what is 'fair' or 'equitable' without reference to established sources of law."

[199] *SGS v Philippines*, *supra* note 153 at para 97.

[200] *Ibid*.

[201] This also refers to the extent of the review, respectively, the binding or persuasive nature of the ruling, the time and cost-effectiveness, the appointment method and, implicitly, the independence and impartiality securities.

[202] See Dimsey, *supra* note 73 at 183.

words, there would have to be consistency between the appellate and/or preliminary ruling bodies themselves. Needless to say, the project to concentrate this type of control into a hegemonic authority would be very difficult to implement, as well as raise serious questions with respect to its constitutional and democratic legitimacy.

The proposal for a global investment treaty is unarguably the least viable solution. On the one hand, it requires herculean efforts to negotiate such an agreement, as history shows us. On the other hand, if the aim is to put in place a law that each tribunal interprets in the same way, the provisions would have to settle the meaning of the fair and equitable standard, the most favored nation treatment and other alike, as well as clarify whether the standard of interpretation is restrictive or extensive. Otherwise, an ambiguous global treaty would be no better than a myriad of BITs.

D. SUMMARY

This chapter has shown the difficult task that investment arbitrators are charged with as transnational adjudicators. Their decisions must be generalizable, yet not ambiguous, so that they may be applied to cases that are similar. At the same time, investment arbitrators must demonstrate awareness that the disputes that are brought before them involve complex issues of public international law. This requires a careful balancing of the various rights and obligations of the parties on one side, and of the interests of the broader public, on the other side. Accordingly, when questions arise with respect to human rights or state responsibility, it is not only useful, but also necessary that they look for guidance into the case law of other international adjudicative bodies. This is not to say that they do not have the expertise to decide on such matters themselves. To the contrary, investment arbitrators are not a "new breed"[203] of

[203] *Contra* Giorgio Sacerdoti, "From Law Professor to International Adjudicator: The WTO Appellate Body and ICSID Arbitration Compared, a Personal Account" in David D Caron, Stephan Schill, Abby Cohen Smutny &

adjudicators – many of them have served as judges of the International Court of Justice, for example. Rather, we believe that when a departure is made from a well-established interpretation of a rule, it should be reasoned and based on the particularities of the relevant factual and legal situation.

Notwithstanding the lack of a vertical authority to overlook their decisions, investment tribunals have been building a consistent case law, either because they acknowledge this as a prerequisite for their legitimacy, or out of fear of reputational costs. What an appeal or a preliminary ruling mechanism could additionally do is to "institutionalize" their decisions.[204] Institutionalization, as we will see in the final chapter of this thesis, enhances the legitimacy of an adjudicative body, without necessarily improving its efficiency.

IV. CETA AND THE PROMISE OF LEGITIMACY

A. PRELIMINARY REMARKS

An often-heard argument is that the criticism of investment treaty arbitration stems mostly from developing states' shared dissatisfaction with the outcomes of their disputes. Indeed, most ICSID cases feature respondents from Latin America – notably, Argentina and Venezuela – Eastern Europe and Central Asia.[205] Whether the mechanism is a suitable dispute settlement forum for this category of actors has therefore been a central question of the legitimacy

Epaminontas E Triantafilou, eds*, Practising virtue: inside international arbitration* (Oxford: Oxford University Press, 2015) 204 at 206–07.

[204] Gélinas, Investment Tribunals, *supra* note 193 at 591.

[205] See ICSID Secretariat, *The ICSID Caseload – Statistics* (Issue 2016-2), online: <www.isdsblog.com/category/reports-statistics/>. See also United Nations Conference on Trade and Development*, Investor–State Dispute Settlement and Impact on Investment Rulemaking*, UNCTAD/ITE/IIA/2007/3 at 8 (on claims brought against states from Latin America).

debate.[206] Developed states, however, find it equally uncomfortable to have the exercise of their sovereign powers scrutinized against the rights of foreign enterprises.[207] The first cases that were brought against Canada and the Unites States under the North American Free Trade Agreement ("NAFTA")[208] provoked a virulent reaction to agreements that allow investors to unilaterally challenge domestic policies.[209] More recently, in the public hearing initiated by the European Commission in 2014, regarding the inclusion of investment treaty arbitration in the Transatlantic Trade and Investment Partnership ("TTIP"), the civil society of the Member States made its position clear: 97% of the participants rejected this proposal.[210]

Against this backdrop, it would appear that both developing and developed states find it necessary to either reform, or renounce investment treaty arbitration as a means for settling investor-state disputes. The CETA two-tiered investment court, consisting of a permanent tribunal and an appeal tribunal,[211] departs from traditional treaty-based arbitration. Notwithstanding what has been discussed throughout this thesis, it would be premature to conclude that a court-like arbitration mechanism does not satisfy the legitimacy threshold imposed by the public without looking at how it is organized. Accordingly, the following sections will question whether the quasi-permanent adjudicators benefit from additional neutrality guaranties and whether the appellate tribunal could bring a higher degree of consistency in case law than 'traditional' ad hoc tribunals have.

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[206] See Jan Paulsson, "The Power of States to Make Meaningful Promises to Foreigners" (2010) 1:2 J Intl Disp Sett 341 at 350.

[207] For a detailed discussion, see de Mestral, Investor-State Arbitration, *supra* note 191.

[208] *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can TS 1994 No 2 (entered into force 1 January 1994).

[209] See de Mestral, Investor-State Arbitration, *supra* note 191 at 4–5; Andrea K Bjorklund, "Contract without Privity: Sovereign Offer and Investor Acceptance" (2001) 2:1 Chicago J Intl L 183 at 185ff.

[210] Bonnitcha et al, The Political Economy, *supra* note 132 at vi.

[211] Articles 8.27, 8.28 and 8.29 of CETA, *supra* note 2.

B. QUASI-PERMANENT ADJUDICATORS: A GUARANTEE OF NEUTRALITY?

The introduction of a multilateral standing tribunal that replaces ad hoc arbitration has long been called for in investor-state disputes.[212] Security of tenure, as discussed in the second chapter of this thesis, is widely perceived as an indispensable feature of an independent and impartial judiciary. The tribunal CETA sets out to establish essentially follows the template of the International Court of Justice. It will be comprised of fifteen adjudicators: five nationals of the European Union, five of Canada and five nationals from third countries, who must have demonstrated expertise in the relevant fields, including dispute resolution, and qualify for appointment to judicial office in their respective countries or, in the alternative, be jurists of recognised competence.[213] They will serve for a five-year term, which can be renewed once, save for the first generation of adjudicators whose mandate will extend to an additional year.[214] The President, or the Vice-President of the Tribunal, who will act as appointing authorities, will be nationals of third countries.[215] Subject to the disputing parties' agreement that their case be heard by a sole adjudicator, cases will normally be decided by "divisions" of three members formed by a national of the European Union, a national of Canada and chaired by one national of a third country.[216]

To all appearances, the drafters of CETA may be credited for setting up a mechanism that eliminates party-appointed arbitrators, yet preserves an important characteristic of modern

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[212] See General Secretariat of the Council of Europe, *Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (*CETA*) between Canada and the European Union and its Member States*, 27 October 2016, online: < http://data.consilium.europa.eu/doc/document/ST-13541-2016-INIT/en/pdf> at 6 (expressing the European Union's and Canada's aspiration to further create a "Multilateral Investment Court" that can be open to accession by any country).

[213] Article 8.27 of CETA, *supra* note 2.

[214] *Ibid*.

[215] *Ibid*.

[216] *Ibid*.

investment dispute-settlement, i.e. the investor's direct right of action.[217] Nevertheless, the proposed system of appointment may equally be criticized for tilting the balance of power back into the hands of the states.[218] Concerns have already been expressed that the members of the tribunal will be biased in favour of the respondent, to whom they owe their position.[219] The text of the Agreement addresses this issue in a limited manner. It incorporates the IBA Guidelines by reference and provides that the adjudicator will be prohibited from having any connection with the governments of the kind that creates "an appearance of bias and shall not be influenced by self-interest, outside pressure, political considerations, public clamour, loyalty to a Party, or fear of criticism."[220] At the same time, a person who receives remuneration from a government will still be eligible to adjudicate in one of the divisions, save for other circumstances that would render that person incompatible.[221] It is difficult to guess at this stage what kind of activities a "jurist of recognized competence" can engage in against remuneration by a government will create an appearance of bias. Would a professor whose research is funded by the government be able to meet the threshold of neutrality, for example?

This brings to the forefront of the discussion a distinct, but closely related issue: the remuneration of tribunal members for their services as adjudicators. Financial security is

[217] The disputing parties will be able to choose the adjudicators only from the fifteen tribunal members named in advance by the CETA member states. This situation also limits the possibility to appoint a person who has expertise in a certain matter, which is desirable in investor-state disputes, given the complexity of the legal issues that may arise (*ibid* at article 29.7).

[218] The fact that the European Union can unilaterally decide whether the Member State against whom the claim is filled or itself will be the respondent is also seen as an unfair advantage (see article 8.21 of CETA, *supra* note 2).

[219] See Eyal & Downs, Prospects for the Increased Independence, *supra* note 45 at 1059 (affirming that situations when only the state has a say in the appointment of the adjudicator(s) give the impression of an agency relationship and of "surrogate law-making").

[220] Paragraph 11 of Annex 29-B (Code of conduct for arbitrators and mediators) of CETA, *supra* note 2. Former arbitrators are also required to avoid appearances of bias. However, it is unclear what actions they should refrain from and for how long. Moreover, no sanction is prescribed (*ibid* at para 16).

[221] *Ibid.* See explanatory note no 8 to art 8.27.

another element that is perceived as a fundamental requirement of judicial independence and impartiality. The members of CETA tribunal are to be paid a monthly retainer fee whose determination is left with the CETA Joint Committee, which may additionally transform this into a regular salary.[222] This suggests that until there is a steady inflow of cases, the adjudicators will be paid on a case by case basis. The text does not clarify, however, from what sources will the regular payment be made, nor how much, if at all, would the disputing parties have to contribute in comparison to the member states to the Agreement.[223]

Another important departure from investment treaty arbitration is that the members of the tribunal cannot act as counsel in any pending or new investment dispute under CETA or any other international agreement.[224] This is remarkable insofar as it avoids the issues that are typically associated with the "double hatting." The CETA Code of Conduct provides that the adjudicator has a continuing duty to disclose, among other:

> … any financial interest in an administrative proceeding, a domestic court proceeding or another panel or committee proceeding that involves issues that may be decided in the proceeding for which the candidate is under consideration, … any past or existing financial, business, professional, family or social relationship with the interested parties in the proceeding, or their counsel, … public advocacy or legal or other representation concerning an issue in dispute in the proceeding or involving the same matters.[225]

Furthermore, challenges to the adjudicator's independence and impartiality will be decided by the President of the International Court of Justice, not by the remaining members of the division, as is the case with investment treaty arbitration.[226] Nevertheless, the provisions in question leave room for interpretation in two respects. First, what of the person who had

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[222] *Ibid* at art 8.27 paras 12, 14, 15 and 8.28 para 7 (this applies to the members of the appellate tribunal as well).

[223] For a detailed discussion, see Charles-Emmanuel Côté, "An Experienced, Developed Democracy: Canada and Investor-State Arbitration" in Armand de Mestral, ed, *Second Thoughts: Investor State Arbitration between Developed Democracies* (Ottawa: Center for International Governance Innovation, 2017) 89 at 113.

[224] Article 8.30 para 1 of CETA, *supra* note 2.

[225] *Ibid* at paras 4.1 (a), 3, 4 of Annex 29-B (Code of conduct for arbitrators and mediators).

[226] *Ibid* at art 8.30 para 3.

previously acted in this capacity for one of the governments? Surely, this would raise some suspicions of bias, especially if that person had repeatedly represented a state either in investor-state disputes related to other agreements, or in any other international proceeding. Second, will a member of the tribunal be able to continue to arbitrate ICSID or UNCITRAL investment disputes?

Finally, the system of appointment under the CETA could prove problematic for the Member States of the European Union. On the one hand, a national of a country that suffers from a democratic deficit may not be viewed as a (sufficiently) legitimate adjudicator. As Professor Armand de Mestral noted, "[t]he administration of justice is not thought to be of the highest standard in Bulgaria and Romania … and the idea of having to submit all arbitrations to the friends of the president of a corrupt country will not be appealing to investors."[227] On the other hand, there are historical tensions between many European nations, particularly in the Balkan region, that could affect the disputing parties' and the public's confidence in the process. Although this may be considered a frivolous reason for questioning the neutrality of an adjudicator, it is worth taking into account that this risk exists.

C. APPELLATE TRIBUNAL: A GUARANTEE OF CONSISTENCY?

The CETA appellate tribunal is similar in structure to the tribunal 'of first instance,' namely, it will be comprised of six members – two national of the European Union, two nationals of Canada and two nationals of third countries – who serve in panel of three members and must qualify for the highest judicial office in their respective countries or be "*jurists of recognised competence*."[228] This is presumably thought to ensure that the mechanism is both neutral and

[227] de Mestral, Investor-State Arbitration, *supra* note 191 at 22 and 27.

[228] Articles 8.28, 8.29 of CETA, *supra* note 2. Annex 29-B (Code of conduct for arbitrators and mediators) applies to them as well.

representative. In addition to the grounds set out in article 52 of the ICSID Convention, the appellate tribunal will be able to review decisions for "errors in the application or interpretation of applicable law"[229] and "manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law."[230] Nevertheless, the tribunal cannot determine the legality of a measure taken by the respondent state under its domestic law. The text clarifies that:

> For greater certainty, in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of a Party as a matter of fact. In doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party.[231]

The scope of this prohibition is twofold: first, it is intended to protect the autonomy of the European Union legal order[232] and second, and it reaffirms the states' sovereign power to regulate in general.[233] How this will unfold in practice remains to be seen. Furthermore, the appellate adjudicators, like the other members of the permanent tribunal, will base their interpretation of CETA on the Vienna Convention on the Law of Treaties and on the rules and principles of international law that are applicable between the states party to the Agreement.[234] Although the appellate body could ensure that CETA is interpreted more consistently than other

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[229] *Ibid* at art 8.28 para 2 (a).

[230] *Ibid* at art 8.28 para 2 (b).

[231] *Ibid* at art 8.31 para 2.

[232][232] See Opinion of the European Economic and Social Committee on investor protection and investor to state dispute settlement in EU trade and investment agreements with third countries, 27 May 2015, OJ C 332, 8.10.2015 at para 1.17: "Private arbitration courts have the capacity to make rulings which do not comply with EU law ... . For this reason, the EESC feels that it is absolutely vital for compliance of ISDS with EU law to be checked by the ECJ in a formal procedure for requesting an opinion, before the competent institutions reach a decision and before the provisional entry into force of any IIAs, negotiated by the EC."

[233] See article 8.9 of CETA, *supra* note 2. This type of provision is usually included in investment agreements, whether bilateral or multilateral.

[234] *Ibid* at art 8.31 para 1.

investment treaties are, it is doubtful that the legal reasoning of these adjudicators will be built from scratch.[235] Even if barred from resorting to the case law of ICSID tribunals, for example, it would be very difficult to prevent them from importing standards into CETA and, in any event, it would be undesirable to do so.[236] As long as the decision is principled, there is no reason for excluding it from consideration.

One provision of the text is particularly controversial. According to article 8.31 (3), the CETA Joint Committee, i.e. the European Union and Canada, have the discretion to adopt binding interpretations of the Agreement. This enable them to exert an unusual high degree of control over the adjudicative process that can hardly be characterized as consistent with the notion of independent justice.

D. SUMMARY

CETA creates an institutionalized mechanism for the settlement of investor-state disputes that, at first glance, fulfils all the requirements that are needed for it to be considered legitimate or, at least, more legitimate than ad hoc investment treaty arbitration. However, as was stressed throughout this thesis, permanent tenure can do only so much – it shields an adjudicator from external pressure or incentives, but cannot guarantee his neutrality in absolute terms. His independence and impartiality depend to a great extent on what kind of other security he is provided with. In the same vein, an appellate body can improve the consistency in the interpretation of the law inasmuch as it also produces principled decisions.

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[235] *Cf* Armand de Mestral, "Investor-State Arbitration and its Discontents: Options for the Government of Canada" (2016) in Centre for International Governance Innovation (CIGI), Investor-State Arbitration Series (Paper No 14) 1 at 4.

[236] A CETA adjudicator who had interpreted similar legal issues under other investment agreements as an arbitrator will be naturally predisposed to either adopt a similar view, or look at the case law of arbitral tribunals.

The states parties to the Agreement have a monopoly on the selection of the members of the tribunal and of the appeal body. This does not mean that they will take advantage of this position to exert their influence on the adjudicator. What is problematic, from our point of view, is that this kind of system of appointment does not appear to strike a balance between the expectations of the disputing parties on one side, and of the public, on the other side, regarding the integrity of the process. Adjudicators that are chosen exclusively by democratically elected governments may be more trusted by civil society, but may also be perceived by the investors as agents of the states. Furthermore, one cannot help but observe that the decision to institutionalize investor-state disputes is paradoxical. One of the main reasons why states turned to ad hoc arbitration was to prevent the tribunals from making law.[237] An institutionalized case law has this effect, especially in a smaller group of actors, such as the member parties to CETA. In spite of this, there appears to be no sanction for unsound decisions.[238] What is more, reputational costs have a significantly lower impact on tenured adjudicators than on arbitrators. Whether the lack of accountability will negatively influence how the members of the tribunal and of the appellate body carry out their mandate will be determined by time.

[237] Gélinas, Investment Tribunals, *supra* note 193 at 585.

[238] *Ibid*: "… institutionalisation without legitimation and accountability is best avoided. For the creeping institutionalisation of legal processes also has a dark side: it entrenches the economic and social value of the specialised knowledge created and possessed by a community of experts whose interests clearly lie in further entrenchment."

CONCLUSION

The challenge to the legitimacy of investment treaty arbitration is born out of deep-seated concerns that transnational forms of governance saliently introduce common rules for the states and their citizens. It has always been difficult for international adjudicative bodies to provide justification for the powers that they exercise. Their decisions shape expectations, which they must later meet, and can impact policies across jurisdictions. Such effects naturally invite suspicion when one cannot easily determine in whose name the decisions are made.[239] This is even more true in respect of ad hoc tribunals, whose transient nature would appear to absolve them from any kind of responsibility towards the people and the state in general. Let us also remind ourselves that the setting in which arbitral tribunals function has changed drastically over the last decade. Professor Philip Abrams once observed that:

> There is a state-system: a palpable nexus of practice and institutional structure centred in government and more or less extensive, unified and dominant in any given society. There is, too, a state-idea, projected, purveyed and variously believed in in different societies at different times.[240]

The costs of globalization may be considered to be reflected in a growing reluctance to accept any form of interference in the regulation of society that comes from external actors, whether from regional and super-regional organizations, such as the European Union and the World Trade Organization, or from international courts. This is closely related to the nationalistic impetus that we are witnessing today in Europe and in North America, in particular. It has become less tolerable, in this context, to allow foreign enterprises to challenge the sovereign state. By the same token, it has become more and more accepted that for society there is but one rule of law – that stemming from the state. This raises the difficult question of the source

[239] See Bogdandy & Venzke, In Whose Name?, *supra* note 17 at 21–2.

[240] Philip Abrams, "Notes on the Difficulty of Studying the State (1977)" (1988) 1:1 J Hist Soc 58 at 58.

of legitimacy of a mechanism of transnational governance. Is state consent sufficient in a state-centered world? Evidently, it is not, otherwise there would not be any legitimacy debate.

The premise of this thesis is that neutrality and consistency, which are the basic characteristic of adjudication, can constitute authentic sources of legitimacy for investment treaty arbitration, provided that they are conceptualized with regard, first, to the expectations of both the disputing parties and the broad public that also scrutinizes the integrity and efficiency of the process, and, second, to their interdependence. This approach takes into consideration a very basic fact, namely, that legitimacy is primarily a matter of perception. If the arbitrator is not *perceived* as independent and impartial, his decision may be considered bias, notwithstanding that it is well-reasoned. Conversely, if the decision is not principled and therefore reasoned, the arbitrator may be *perceived* as biased, notwithstanding that he is neutral.

Furthermore, we observed that the legitimacy threshold imposed upon these adjudicators is exceedingly difficult to meet. On the one hand, it is expected that they be 'clean-slate,' meaning that an arbitrator must not only not have any relationship with the parties, but must also not consider how a legal issue has been previously interpreted either by him, or by other tribunals. On the other hand, it is expected that the reasoning on which a decision is based be consistent with past cases. There is an obvious tension between these two requirements that cannot be relieved by simply reforming the mechanism, as the CETA project proposes. The burden of legitimizing falls primarily on the arbitrators themselves.

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