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An Independent Panel for the Scrutiny of Investment Arbitrators: An Idea Whose Time has Come?

James Devaney

Abstract

This article focuses on one particular issue which has arisen in the course of the ongoing debate on the reform of investor-State dispute settlement (ISDS), namely that of the appointment of arbitrators. Taking as its starting point that there now exists tentative consensus that the present system for the appointment of arbitrators either causes or exacerbates certain problematic aspects of the current ISDS system, the article explores one option for reform: the creation of an independent panel for the scrutiny of arbitral appointments is proposed. Such a body is the most desirable way to introduce necessary scrutiny into the current appointments system, which will in turn help to address some of the criticisms levelled at ISDS more generally, while at same time not removing completely the initiative that parties currently have to put individuals forward as their candidates to become an arbitrator.

Keywords: ISDS, Arbitrators, Appointment, Reform

1 Introduction

The process for the appointment of arbitrators in ISDS is an issue which has arisen in the course of the ongoing multilateral debate on reform of the system.¹ Concerns have been expressed that the party-centric method of appointments is either causing or exacerbating problematic aspects of the current ISDS system, contributing to its ‘legitimacy crisis.’² It is in this context that the present article makes the practical and normative case for one particular option for reform, namely the creation of an independent panel for the selection of investment arbitrators (IPSIA).

Under the proposals advanced below, parties to an investment dispute would retain the initiative to propose individuals who they wish to act as ‘their’ arbitrator. Subsequently, this choice would be scrutinised by IPSIA which would present a recommendation on the individual’s suitability. The parties could then take this recommendation into account before appointments were made in the usual manner (whether that be jointly by the parties, or through an Appointing Authority or otherwise).³ While the recommendation of IPSIA would be non-binding, practice of the other advisory bodies strongly suggests that in practice such recommendations can nevertheless have significant practical impact, and could have beneficial effects in relation to repeat appointments, double-hatting and a lack of representativeness among arbitrators.

¹ See the Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session (New York, 1-5 April 2019) 9 April 2019, A/CN.9/970 and earlier its thirty-sixth session (Vienna, 29 October – 2 November 2018) 9 November 2018, A/CN.9/964. Parts of this discussion are based on James Devaney, “Selecting Investment Arbitrators: Reconciling Party Autonomy and the International Rule of Law”, KFG Working Paper Series, No. 33.

² See, Jose E. Alvarez et al (eds), *The Evolving International Investment Regime* (OUP 2011), Claire Balchin et al (eds), *The Backlash Against Investment Arbitration* (Kluwer 2010), Susan D. Franck, ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions’ *Fordham Law Review*, 73, (2005) 1521.

³ Tomáš Dumbrovsky, Bilyana Petkova and Marijn Van Der Sluis, “Judicial appointments: The Article 255 Panel and selection procedures in the Member States” *Common Market Law Review* (2014), 51, Issue 2, 457.

2 The Current Appointments Practice in ISDS and its Criticisms

The rules which govern the appointment of arbitrators at present are based squarely on the principle of party autonomy.⁴ Mirroring the decentralized nature of international investment law more generally, there is no one common process for the appointment of arbitrators by parties. Rather, the exact process for the selection and appointment of arbitrators will depend on the treaty or contract provisions indicating the preferred or default fora.⁵ Nevertheless, in the vast majority of cases it is the parties themselves who select the majority of the arbitrators for the settlement of an investment dispute in which they are involved.

Under both ICSID and UNCITRAL rules, parties typically each appoint one arbitrator to form a three-member tribunal. The co-arbitrators then (under the UNCITRAL rules) appoint the third arbitrator or (under the ICSID rules) the parties do so themselves by mutual agreement.⁶ Provided that the mandatory procedural requirements are met, the factors that parties take into account when considering which individual to appoint as ‘their’ arbitrator need not be set out in any transparent form, or in fact given at all.⁷

Criticisms of the current system of ISDS relating to the impence and impartiality of arbitrators are by now well-known, having been both acknowledged at the multilateral level⁸ and the subject of significant scholarly attention.⁹ What is important to emphasise at this

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

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

⁶ Article 37(2)(b) ICSID Rules, Article 9(1) UNCITRAL Rules.

⁷ Secretariat Note on Appointments, *supra* note 13, para 7. C.f. See Article 52(3) ICSID Convention, and Appointing Authorities, See the figures set out in Note by the Secretariat, ‘Submissions from International Intergovernmental Organizations and additional information: appointment of arbitrators’, 19 February 2018,

⁸ Draft Report, 6 November 2018, Secretariat Note on Appointments, *supra* note 13, para 37.

⁹ Report of Working Group III, 36th Session, *supra* note 1, para 66, on ‘perception’ c.f. Susan D. Franck, “Development and Outcomes of Investment Treaty Arbitration” *Harvard International Law Journal* (2009) 50(2) 435.

juncture is the extent to which the traditional party-driven approach to appointments in the context of ISDS contributes to, or exacerbates to some extent, these criticisms.

Issues of independence and impartiality arise (at least partly) as a result of the practices of double-hatting¹⁰ and repeat appointments,¹¹ facilitated by the current appointments practice which grants almost total discretion to the parties as to who to put forward as their arbitrator. Furthermore, and again facilitated by the current appointments process, a lack of diversity among decision makers is said to undermine ISDS.¹² In the context of recent multilateral discussions under the auspices of UNCITRAL this lack of diversity, in terms of gender and geographical distribution¹³ (but also broader considerations such as age, ethnicity, language and legal background) was generally seen by States as being a weakness in the current system which prevents better understanding of the policy considerations of States, local laws and international law more generally.¹⁴ In particular, the record of female representation on arbitral tribunals has been described by one prominent commentator as ‘remarkably poor’ and is a factor in and of itself which justifies reform of the current appointment system.¹⁵

¹⁰ Malcolm Langford, Daniel Behn and Runar Lie, “The Revolving Door in International Investment Arbitration”, *Journal of International Economic Law* (2017) 20, 301-331, have shown that 47% of cases involve at least one arbitrator acting in another case; see also; Nathalie Bernasconi-Osterwalder and Martin Dietrich Brauch, “Is ‘Moonlighting’ a Problem? The Role of ICJ Judges in ISDS” IISD Commentary (2017).

¹¹ See PluriCourts Investment Treaty and Arbitration Database (PITAD), available at: <https://pitad.org> – data shows that each year only 11% of arbitral appointments are first time appointments, see also Sergio Puig, “Social Capital in the Arbitration Market”, *European Journal of International Law* (2014), 25(2), 387.

¹² Report of Working Group III, 36th Session, *supra* note 1, para 91 et seq.

¹³ Studies have shown that 74% of arbitrators are from Western States, see Malcolm Langford, Daniel Behn and Runar Lie, *supra* note 26, 301-332; see also UNCTAD, “World Investment Report 2018: Investment and New Industrial Policies (UN 2018)”, Ksenia Polonskaya, “Diversity in the Investor-State Arbitration: Intersectionality Must Be Part of the Conversation” *Melbourne Journal of International Law* (2018) 9, 296, Gabrielle Kaufmann-Kohler and Michele Potestà, “The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards” CIDS Supplemental Report (2017).

¹⁴ Report of Working Group III, 36th Session, *supra* note 1, para 92; see also Secretariat Note on Appointments, *supra* note 13, para 20.

¹⁵ Successive studies have shown that only somewhere between 3 and 10% of ICSID arbitrators are female: Gus Van Harten, “The (Lack of) Women Arbitrators in Investment Treaty Arbitration” (2011), *All Papers*, Paper 3, available at: http://digitalcommons.osgoode.yorku.ca/all_papers/34 found 3%; Susan D. Franck, “Empirically Evaluating Claims about Investment Treaty Arbitration” *North Carolina Law Review* (2007), 86(1) 1 found 3%, Lucy Greenwood and C. Mark Baker, “Is the Balance Getting Better? An Update on the Issue of Gender Diversity” *Arbitration International* (2015) 31(3), 413 found 5.63%, Sergio Puig, *supra* note 27, found 7%; see also ISDS Academic Forum Working Group 7 Paper, “Empirical Perspectives on Investment Arbitration: What Do We Know? Does it Matter?”, Malcolm Langford, Daniel Behn and Laura Létourneau-Tremblay, 15 March 2019. See most recently: Taylor St. John, Daniel Behn, Malcolm Langford, and Runar Lie. “Glass Ceilings and Arbitral Dealings: Gender and Investment Arbitration” (2018) PluriCourts Working Paper.

The operation of the principle of party autonomy, coupled with parties' preference for 'expertise and experience' as they seek to maximise their chances of success in any dispute,¹⁶ is a direct cause of concerns regarding independence, impartiality, and representativeness. That said, wresting any modicum of parties' ability to choose is likely to meet fierce resistance. As such, in the following sections reform is proposed which attempts to strike a balance between allowing parties input in, and ownership of,¹⁷ the appointments process while also addressing valid concerns regarding independence, impartiality and representativeness.¹⁸

3 An Independent Panel for the Scrutiny of Investment Arbitrators (IPSIA)

While the principle of party autonomy may be fit to govern appointments in the context of international commercial arbitration, it is inappropriate in the context of international investment law.¹⁹ Investment arbitration involves subjecting matters of public law and public policy to international review by an arbitral tribunal.²⁰ Not only that, should the arbitral tribunal find that the public policy enacted by a sovereign State contravened its international obligations, it may issue a binding award against that State, the principal remedy being monetary compensation which is, in the simplest of terms, public money.²¹

¹⁶ Or what St. John, Behn, Langford and Lie, *ibid*, term the 'prior experience norm'; see also Report of Working Group III, 36th Session, *supra* note 1, para 93.

¹⁷ Report of Working Group III, 36th Session, *ibid*, para 95.

¹⁸ Report of Working Group III, 36th Session, *ibid*, para 98.

¹⁹ Martin Loughlin, "Investment Treaty Arbitration as a Species of Global Administrative Law", *European Journal of International Law*, (2006) 17(1), 121, 139–45; Gus Van Harten, "Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law" in S. Schill, *International Investment Law and Comparative Public Law*, (OUP, 2010) at 15.

²⁰ Eric De Brabandere, *Investment Treaty Arbitration as Public International Law*, (CUP 2014); Van Harten, *ibid*, at 5-7, 15.

²¹ Van Harten, *ibid*, at 6, 7, 15; On the spending of public money in international investment and commercial arbitration see Gary B. Born 'Confidentiality in an Age of Transparency: Challenges for Investment Arbitrators' in Catherine A. Rogers and Roger P Alford, *The Future of Investment Arbitration* (OUP 2009).

Accordingly, the private or commercial principle of party autonomy is not sufficient to govern the process of the appointment of arbitrators in international investment arbitration which, although not exclusively public,²² is at the very least a hybrid of public and private in nature.²³ Consequently, in light of its hybrid nature, the international rule of law must also play a role in international investment arbitration, including in the appointment of arbitrators.²⁴

This is not the place for extensive consideration of the principle of the rule of law, its application at the international level in general, or its relevance for international investment arbitration. However, two issues can be taken for granted. First of all, the rule of law, although developed in the domestic legal context, applies to the international legal order.²⁵ While the rule of law may play a different role at the international level,²⁶ the remarkably broad acceptance of this principle (despite its so-called ‘conceptual emptiness’²⁷) is not only important in and of itself, but rather also provides the justification for the inductive task of attempting to identify its conceptual content.²⁸

²² Jose E. Alvarez, ‘Is Investor-State Arbitration “Public”?’ 7 *Journal of International Dispute Settlement* (2016), 534-574, Anthea Roberts, ‘Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System’ 107 *American Journal of International Law* (2013) 45.

²³ Alvarez, ‘Is Investor-State Arbitration “Public”?’ *ibid.*, Zachary Douglas, ‘The Hybrid Foundations of Investment Treaty Arbitrations’ 74 *British Yearbook of International Law* (2003) 151, Stephan W. Schill, ‘Enhancing International Investment Law’s Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach’ 52 *Virginia Journal of International Law* (2011) 57.

²⁴ Van Harten, *supra* note 36, at 4. Similarly, Robert McCorquodale, ‘Defining the International Rule of Law: Defying Gravity?’ *International and Comparative Law Quarterly* (2016) Vol. 65.

²⁵ Van Harten, *supra* note 36, at 4, for a fuller discussion see Devaney, *supra* note 1 at 9.

²⁶ Van Harten, *supra* note 36 at 14, Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (2004) 133-5.

²⁷ James Crawford, ‘International Law and the Rule of Law’ (2003) *Adelaide Law Review*, 3, 11, Sir Arthur Watts, ‘The International Rule of Law’ (1993), *German Yearbook of International Law*, 15.

²⁸ See Declaration on Principles of International Law Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, UN GA Resolution 2625 (XXV) (1970) Declaration on the Rule of Law at the National and International Levels 2012, UN GA Resolution 67/1, (2012) A/Res/67/1. FN 46 - Between 1998 and 2006 being mentioned in 69 different resolutions, see Jeremy Farrall, *United Nations Sanctions and the Rule of Law* (CUP 2007) 22., Velimir Živković, ‘International Rule of Law through International Investment Law – Strengths, Challenges and Opportunities’, KFG Working Paper Series, No. 16, May 2018,

Secondly, a central component of the rule of law, which applies at the international level, is judicial independence. From Dicey²⁹ to Raz³⁰ and Hayek³¹, most of those writing about the rule of law envisage some form of judicial independence to be part of the concept. At the international level, too, judicial independence is recognised in a wide range of contexts.³² Obviously, the rule of law does not require one single court to settle disputes of all kinds, but rather ‘requires that a dispute can be settled before an independent body, which neither needs to be a court (so called) nor by one body with overarching jurisdiction over all matters.’³³ In short, the act of judicial or arbitral decision-making carries with it ‘a very high expectation of procedural fairness’, including judicial independence.³⁴ The standard of independence that the IPSIA should apply is an issue we will return to below at Section 3.4.

With this in mind, it is argued that an appropriate balance can be found between the principles of party autonomy and the rule of law by amending the current rules in order to create IPSIA which, whilst leaving the initiative as to arbitral appointments with the parties (and as such preserving the principle of party autonomy) could also allow for other (international rule of law) considerations to be injected into the process. A number of constitutive elements must be considered, including (4.1) the creation and role given to the Panel, (4.2) appointment of members of the Panel, (4.3) the initiative to propose candidates, (4.4) the process for scrutinising candidates, (4.5) the transparent nature of its work and (4.6) the advisory nature of its work.

²⁹ Albert Dicey, *Introduction to the Study of the Law of the Constitution* (1885), Ch IV.

³⁰ Joseph Raz, “The Rule of Law and its Virtue” (1977) 93 LQR 195, 200-1.

³¹ Friedrich Hayek “Freedom and the Rule of Law” in *Listener* (27 December 1956) 1067-8.

³² Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, Arts 21(3) and 23(1); Rules of the European Court of Human Rights, Rules 4, 24(2)(e), 26(1), 27; Treaty Establishing the European Economic Community, Art 223; Code of Conduct of the European Court of Justice, Art 5; Rules of Procedure of the European Court of Justice, Arts 6, 11(b), and 11(c); Statute of the Inter-American Court of Human Rights, OAS Res 448 (IX-0/79), Arts 5, 18, 25; Rome Statute of the International Criminal Court, Arts 36(9)(a), 39(1), 40(2) and (3).

³³ McCorquodale, *supra* note 42, at 298.

³⁴ Van Harten, *supra* note 36, at 14;

3.1 The Creation and Role of IPSIA

There is nothing ground-breaking about any suggestion that a body other than the parties themselves could play some sort of role in the selection of arbitrators. Advisory bodies which scrutinise judicial appointments exist both at the international and domestic levels.³⁵

Likewise, commentators in the past have advocated breaking parties' stranglehold on the appointment of arbitrators.³⁶ For example, Sardinha has argued that the use of such a 'detached institution or authority in overseeing the appointment process...[could] help reduce the broader systemic perception or outward appearance of bias from the vantage point of the opposing party, of the co-arbitrators, and, particularly in highly contested investor-state disputes, of the public.'³⁷ While the idea that a body other than the parties may play a role in the appointment of arbitrations is nothing novel, what is new is the proposal for the creation of an independent panel for the selection of investment arbitrators, in the form of IPSIA.

The precise role of IPSIA would need to be made clear to parties from the very beginning, and its objectives and working methods transparently set out. IPSIA, which would be complementary to, and not a replacement for, existing processes for the challenge and disqualification of arbitrators,³⁸ would be tasked with scrutinising candidates and facilitating that the highest-qualified individuals are appointed to investment arbitral tribunals.

³⁵ See Ruth Mackenzie et al, *Selecting International Judges: Principles, Process and Politics* (OUP 2010), John Bell, *Judiciaries Within Europe: A Comparative Review* (CUP 2006).

³⁶ Jan Paulsson, "Moral Hazard in International Dispute Resolution" *ICSID Review* (2010) Vol 25, Issue 2, 340, 347-8; see also; Albert Jan van den Berg, "Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration" in Mahnouch Arsanjani and others (eds), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Martinus Nijhoff 2011) 821, 834; Seth H Lieberman, "Something's Rotten in the State of Party-Appointed Arbitration: Healing ADR's Black Eye that is 'Nonneutral Neutrals'" *Cardozo Journal of Conflict Resolution* (2004) 5, 215, 216.

³⁷ Elisa Sardinha, "Party-Appointed Arbitrators No More", *The Law and Practice of International Courts and Tribunals* (2018) 17, 117, 133.

³⁸ Although, it is logical to imagine that weeding out potential issues at the appointment stage would reduce the number of challenges, see generally Article 57, 58, 14(1) ICSID Convention, UNCITRAL Arbitration Rules, Article 12(1)(2010); UNCITRAL Model Law on International Commercial Arbitration, art. 12(2) (1994); LCIA Arbitration Rules, art. 10.1 (2014); SCC Arbitration Rules, art. 15(1) (2010), see generally Chiara Giorgetti, *Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals*, (2015, Martinus Nijhoff)

Undoubtedly, the introduction of such a body playing this role would depart from practice to date, however the creation of similar advisory bodies, such as the Article 255 Panel of the EU and Advisory Committee of the ICC, act as precedent for making such a break from long-running practice.

To elaborate, the decision to establish the Article 255 Panel was the culmination of a longer process towards recognising that some objective criteria should be applied when assessing the suitability of judicial candidates, as well as subjecting them to some sort of scrutiny by an independent body.³⁹ The significance of the institution of this practice cannot be understated, given the decades-long practice that preceded the Article 255 Panel whereby individual Member States essentially exercised their sovereign right to put forward whichever candidates they liked with minimal scrutiny (which led to a situation in which no candidate for the Court of Justice was ever rejected, as far as we know).⁴⁰ The situation was broadly similar with regard to the establishment of the Advisory Panel in the context of the ECHR in 2010.⁴¹ As such, it could be said that we can observe a similar normative shift from party autonomy to a greater emphasis on the rule of law component of judicial independence in these contexts. These examples also illustrate that the introduction of such mechanisms is far from being beyond the realms of possibility. Admittedly, these bodies serve to scrutinise appointments to permanent judicial bodies, rather than ad hoc appointments. Nevertheless, it is argued that the operation of these bodies can be adapted so as to operate in an efficacious manner in the context of individual arbitrator appointments in the manner illustrated below at Section 3.4.

³⁹ Henri de Waele, “Not Quite the Bed that Procrustes Built” in Michal Bobek, *Selecting Europe’s Judges* (OUP, 2015), 25; established by the Treaty of Lisbon in 2005. The operating rules of the Panel were established through Council Decisions 2010/124 EU and 2010/125/EU.

⁴⁰ Jean-Marc Sauvé, “Le rôle du comité 255 dans le sélection du juge de l’Union”, in Allan Rosas, Egil Levits, and Yves Bot (eds), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law* (Asser Press/Springer 2013) 102–3.

⁴¹ Koen Lemmens, ‘(S)electing Judges for Strasbourg: A Disappointing Process?’ in in Michal Bobek, *Selecting Europe’s Judges* (OUP, 2015), 98.

An independent panel for the scrutiny of investment arbitrators could be introduced in a number of ways, including: amendment of existing investment agreements, incorporation in new investment agreements, amendment of the various procedural rules such as the ICSID Arbitration Rules, and an opt-in Mauritius Convention type mechanism.⁴² It is suggested that the latter may be the most realistic mechanism for the introduction of IPSIA⁴³ and that it could to a large extent replicate the best practice of existing advisory bodies such as the 255 Panel and the Advisory Committee of the ICC.

3.2 Appointment of Members of the Panel

IPSIA could consist of members whose sole job would be to scrutinise and provide recommendations on parties' proposed candidates. The exact number of members required could be based on projections of the workload of the Panel.⁴⁴ IPSIA members would be drawn from the ranks of serving and retired judges and arbitrators with significant experience of both investment and public international law, and a willingness to set aside their ability to act as counsel or arbitrator in order to perform the supremely important function of helping to safeguard the legitimacy of the system as a whole. The obvious challenge in this regard would be finding suitable candidates who would be both available, as well as qualified (and sufficiently independent and impartial) to perform the role. In this regard, in the interests of avoiding recreating the same kinds of independence and impartiality issues in this context,

⁴² See Submission of the European Union and its Member States to UNCITRAL Working Group III, 18 January 2019, "Establishing a standing mechanism for the settlement of international investment disputes", paras 35, 36.

⁴³ Although of course one would hope for more enthusiastic uptake in the context of IPSIA given that the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014) has, as of 2019, only attracted five parties, see http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention_status.html. For a related proposal see Gabrielle Kaufmann-Kohler and Michele Potestà, 'Can the Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in Connection with the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism?' Geneva Centre for International Dispute Settlement (2016).

⁴⁴ Submission of the EU, *supra* note 68, para 16.

not only must members declare any potential conflict of interest at the time of appointment, they should also undertake to avoid acting as an arbitrator for a period of between 18 months and three years following their appointment to IPSIA.

Similarly challenging will be identifying exactly how members of the IPSIA could be appointed. In other contexts, such as with the Article 255 Panel or the Advisory Committee of the ICC, Member States can exercise the function of appointing such individuals through representative or executive bodies.⁴⁵ In the absence of an obvious centralised body in the investment law context to perform this role, other alternatives would need to be explored. For instance, Members of the Panel could be appointed by the President of the International Court of Justice,⁴⁶ in consultation with any other Appointing Authority or relevant non-State actor, in accordance with public and transparent criteria.

It is absolutely essential that the IPSIA Members are appointed in a manner that ensures complete confidence in the panel. A lack of transparency in the appointment of members of both international⁴⁷ and domestic advisory bodies has been cited as a consistent problem due to the fact that ‘eligibility rules for acceding to...judicial selection bodies are [often] notably vague’, and significant discretion is usually left to the executive in this regard.⁴⁸ In this regard, it is suggested that lessons can be learned from the selection criteria for the selection of members of the ICC Advisory Committee which specifically require that the Committee reflect ‘the principal legal systems of the world and an equitable geographical representation, as well as a fair representation of both genders, based on the number of States Parties to the Rome Statute.’⁴⁹ A similar formulation could be utilised with regard to the selection of

⁴⁵ See Report of the Bureau on the establishment of an Advisory Committee on nominations of judges of the International Criminal Court, New York, 12-21 December 2011, ICC-ASP/10/36, Annex, C. 12. Annex, A.1.

⁴⁶ Submission of the EU, *supra* note 37, para 21.

⁴⁷ Lemmens, *supra* note 67.

⁴⁸ de Waele, *supra* note 65, 35.

⁴⁹ See Report of the Bureau, *supra* note 71.

members of IPSIA, as it is essential that public, transparent criteria are publicised and adhered to in order to not simply transplant the current problems with the transparency of the appointments in ISDS to IPSIA.

3.3 The Initiative to Propose Candidates

In international legal scholarship a debate has played out over whether parties should continue to enjoy sole control over the appointment of arbitrators. For instance, as mentioned above, Jan Paulsson has been the most prominent voice in support of ending a purely party-driven appointment process. Paulsson, who questions whether parties in fact enjoy a ‘fundamental right’ to name their own arbitrator,⁵⁰ contests the logic of the commonly held view that ‘my nominee will help me win the case’,⁵¹ arguing that this mentality is nonsensical due to the fact that, by this logic, the party’s nominee is cancelled out by the other party’s nominee and as such the parties can only have mutual confidence in one member of the tribunal, if at all. Consequently, Paulsson argues that the only ‘decent’ solution is that arbitrators should be appointed by a neutral body.⁵² Such arguments, of course, stand in apparent opposition to the preference expressed by parties to retain control over the appointments process.⁵³

Tufte-Kristensen has examined this preference, pointing out that sociological studies suggest that the notion of control over the process is the primary reason that the current system of appointment continues to be perceived as attractive by parties.⁵⁴ Other high-profile

⁵⁰ Paulsson, *supra* note 59, 348.

⁵¹ *Ibid* at 349.

⁵² *Ibid* at 351.

⁵³ School of International Arbitration at Queen Mary, University of London, “International Arbitration Survey: Current and Preferred Practices in the Arbitral Process”, (2012), 5.

⁵⁴ Johan Tufte-Kristensen, “The unilateral appointment of co-arbitrators”, *Arbitration International* (2016) 32, 483, 495.

commentators have rejected any suggestion of reforming the current party-driven appointments system.⁵⁵ Brower and Rosenberg, for example, have argued that the legitimacy and attractiveness of the current system of ISDS is inextricably linked with parties' right (which has existed for 'decades, even centuries') to choose their own arbitrators.⁵⁶ Some commentators contend that party-appointed arbitrators are essentially self-policing in terms of impartiality due to the fact that, in the open market of appointments, they rely on being seen as credible for future work.⁵⁷

Lawyers in the employ of parties typically expend significant energy scrutinising the records of candidates that they may put forward as their choice of arbitrator, including 'the backgrounds of arbitrators, their relationship with the parties, published works and prior appointments before nominating them for arbitral appointments.'⁵⁸ As such, the argument goes that the current system of party-appointment, whereby parties typically put forward 'someone with the maximum predisposition towards my client, but with the minimum appearance of bias',⁵⁹ is the best means for the appointment of arbitrators due to the fact that 'potential arbitrators effectively "stand for election" by parties every time a new case is brought.'⁶⁰

Given the strength of feeling on both sides of this debate that has been raging for more than a decade, it seems difficult to conclude that there is any sort of consensus as to whether the

⁵⁵ For other supporters of party-appointed arbitrators see: Gary B Born, *International Commercial Arbitration* (Kluwer Law International 2014, 2nd Edition) 1807-808; Charles N Brower and Charles B Rosenberg, "The Death of the Two-Headed Nightingale" *Arbitration International* (2013) 29, 7, 25; VV Veeder, "The Historical Keystone to International Arbitration: The Party-Appointed Arbitrator - From Miami to Geneva" *Proceedings of the Annual Meeting (American Society of International Law)* (2013) 107 387, 401.

⁵⁶ Brower and Rosenberg, *ibid*, 8.

⁵⁷ *Ibid*, page 14, see also; Alexis Mourre, "Are unilateral appointments defensible? On Jan Paulsson's Moral Hazard in International Arbitration" *Kluwer Arbitration Blog* (5 October 2010) 59.

⁵⁸ Michael Waibel, "Arbitrator Selection: Towards Greater State Control" in Andreas Kulick, *Reassertion of Control over the Investment Treaty Regime* (CUP 2016), 344.

⁵⁹ Martin Hunter, "Ethics of the International Arbitrator" *Arbitration International* (1987) 53, 219, 223.

⁶⁰ Brower and Rosenberg, *supra* note 81, 24.

abolition of party-appointments would be wise, even if it were possible. Nevertheless, a procedure could be envisaged for IPSIA which represents a good compromise. In allowing parties to maintain the right of initiative in terms of selecting their candidate, they would still feel ownership of the process, as well as retaining one of the most popular aspects of the current ISDS system. Simultaneously, doing so in the knowledge that parties' proposed candidates would be subjected to interview and scrutiny against transparent criteria, informed by the international rule of law, practice suggests that positive reform could nevertheless be introduced into the system. Aware that an independent panel of experts would examine issues such as track record, possible bias and past publications, issues of repeat appointments or independence could be weeded out before they arise. The configuration of the IPSIA in this way could ensure that the 'benefits of the current system, such as its flexibility and neutrality' that stakeholders have emphasised they would like to preserve,⁶¹ would be, whilst real, meaningful scrutiny of candidates in accordance with rule of law considerations is introduced.

3.4 The Scrutiny of Candidates

But how exactly would scrutiny of candidates work in practice? In simple terms, the role of IPSIA would necessarily change in the course of assessing individual candidates before it. In relation to the proposed appointment of certain individuals, say, any of the 'power brokers' included in the top 25 of Puig's work,⁶² for a run-of-the-mill investment dispute (if such a thing exists), there would be little need to examine whether such a candidate had the relevant legal expertise or practical experience. Such individuals would easily be able to demonstrate

⁶¹ Secretariat Note on Appointments, *supra* note 13, para 37, see also Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session (New York, 25 June – 13 July 2018) 14 May 2018, A/CN.9/935.

⁶² Puig, *supra* note 27.

appropriate expertise and experience, and pressing the individual to substantiate their credentials in this regard would be a waste of IPSIA's time.

That said, for such individuals, who are regularly simultaneously involved in multiple disputes in one form or another, pertinent questions could perhaps be asked with regard to their impartiality or independence. Would it be appropriate for them to act as an arbitrator in that case given that in the past they have worked with the firm representing one of the parties? More mundanely, is it appropriate for them to take on their 61st investment arbitration? How do they expect to schedule a hearing for this dispute, given their myriad other commitments? And further, could they really be expected to engage fully with this particular case, or would it perhaps be necessary to rely on a research assistant to draft documents on behalf of that individual?⁶³

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

Any process of scrutiny of candidates put forward by parties would necessarily require the submission of supporting documents to IPSIA. By way of illustration, the Advisory

⁶³ Malcolm Langford, Daniel Behn and Runar Lie, 'Who Writes Arbitral Awards?' (2018) PluriCourts Working Paper.

Committee of the ICC takes into account ‘written material submitted by the candidates in the form of statements of qualifications and curricula vitae.’⁶⁴ A similar process can be easily envisioned for IPSIA, whereby it could consider parties’ justifications for putting forward the individual, the individual’s own motivations, their publications (academic or otherwise) and any other relevant information.⁶⁵ In the case that IPSIA felt it lacked certain information, it could be endowed with the power to request information from the parties, although a binding power of subpoena finds no parallel in practice and is unlikely to find support.⁶⁶

It would be essential that the criteria against which candidates are then assessed are made clear. In the context of the Article 255 Panel, whilst the formal operating rules do not explicitly lay out the criteria against which the Article 255 panel will assess candidates, and the provisions in the Treaties remain rather vague,⁶⁷ the Panel itself has subsequently, through one of its Activity Reports made these criteria more explicit, stating that:

‘[t]he panel’s assessment of these criteria is therefore made on the basis of six considerations: the candidate’s legal expertise; his or her professional experience; ability to perform the duties of a Judge; language skills; aptitude for working as part of a team in an international environment in which several legal systems are represented; finally, his or her impartiality and independence must of course be beyond doubt.’⁶⁸

In a broadly similar manner, the ICC Advisory Committee’s assessment is ‘based on the requirements of article 36, paragraphs 3 (a), (b) and (c), of the Rome Statute, which require ‘established competence in criminal law and procedure, and the necessary relevant experience, whether as a judge, prosecutor, advocate or in other similar capacity, in criminal

⁶⁴ Report of the Advisory Committee on Nomination of Judges on the work of its third meeting, New York, 8-17 December 2014, ICC-ASP/13/22, Annex 1, 3.

⁶⁵ de Waele, *supra* note 65, 36, see Second Activity Report of the Panel provided for by Article 255 of the Treaty on the Functioning of the European Union, Brussels, 26 December 2012, 5091/13, COUR 2 JUR 5, 9–10.

⁶⁶ de Waele, *supra* note 65, 36.

⁶⁷ See Articles 253, 254 TFEU.

⁶⁸ Third Activity Report of the Panel provided for by Article 255 of the Treaty on the Functioning of the European Union, Brussels, 13 December 2013, S/1118/2014, at 17.

proceedings’, ‘an excellent knowledge of and [fluency] in at least one of the working languages of the Court’ and capability to undertake full-time work for the full term. A combination of these requirements, with the necessary modifications to ensure knowledge of both public international and investment law, could be drawn up in the context of IPSIA. Additionally, it is essential that an explicit provision that IPSIA take into account gender balance and geographical representation be included in these criteria.⁶⁹

Practice highlights the importance of in-person interviews for the functioning of such advisory bodies. For instance, the Advisory Committee of the ICC has decided that ‘[t]he Committee’s consistent experience has been that the interviews with candidates have revealed important elements relating to how they fulfil the requirements of article 36 of the Rome Statute and to the relevance of their professional experience to the work of the Court, which were not detected in the written submissions.’⁷⁰ Similar interviews are carried out in the context of the Article 255 process,⁷¹ which inform deliberations (in private) before a reasoned recommendation is made to the Member State of the candidate in question. The positive or negative nature of this recommendation is kept confidential, again for fear of discouraging applicants or damaging the individual in question’s reputation.⁷² In contrast, the ICC Advisory Committee prepares ‘information and analysis, of a technical character, strictly on the suitability of the candidates’ which is then circulated to all States Parties and observers in sufficient time to allow for votes are cast at the Assembly of States Parties. The identities of the candidates and a short report on the Committee’s findings are also made publicly available in separate reports.⁷³

⁶⁹ A position which finds support in Negotiating Directives for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes, 20 March 2018, 12987/17.

⁷⁰ Third Activity Report *supra* note 94.

⁷¹ See Point 7 of Panel’s Operating Rules.

⁷² de Waele, *supra* note 65, 38.

⁷³ See Report of the Bureau, *supra* note 71. Annex, C. 12.

In terms of timescale for this process, a 30-day turnaround could be a realistic target for IPSIA. Looking again to a relevant comparator, data shows that between 2010 and 2013 the average amount of time for a candidate to be considered by the Article 255 Panel of the EU was just 64 days, with 30% of cases being concluded in less than 45 days.⁷⁴ And in fact, it has been suggested that one factor in slowing up this process was indolence on the part of Member States – something which one would imagine would not be an issue in the investment law context with two parties willing and actively participating in the process.⁷⁵

But what standard of judicial independence is applicable in the context of international investment arbitration? Is it the same standard of judicial independence that applies to domestic courts or permanent international courts such as the International Court of Justice?

The answer to this question is almost certainly no. In fact, the degree of judicial independence required by the rule of law in each context is inherently variable.⁷⁶

Accordingly, whilst parties' exclusive control over the appointments process may not be appropriate, complete renunciation of this prerogative is not necessary either. This most likely requires further elaboration. That under the current ISDS system arbitrators are appointed by parties to the dispute underlies the (understandable) general perception that party-appointed arbitrators are somehow less independent and impartial than judges appointed through some other process to permanent courts.⁷⁷ The role of arbitrators in investment arbitration, however, is not the same as that of judges on a permanent court, and as such it should not be surprising that their appointment processes are also different.⁷⁸ This

⁷⁴ Second Activity Report of the Panel provided for by Article 255 of the Treaty on the Functioning of the European Union, Brussels, 26 December 2012, 5091/13, COUR 2 JUR 5, 9–10.

⁷⁵ de Waele, *supra* note 65, 36.

⁷⁶ Van Harten, *supra* note 36, at 291.

⁷⁷ Yuval Shany, "Squaring the Circle? Independence and Impartiality of Party-Appointed Adjudicators in International Legal Proceedings" 30 *Loyola of Los Angeles International and Comparative Law Review* (2008) 473.

⁷⁸ Nana Japaridze, "Fair Enough? Reconciling the Pursuit of Fairness and Justice with Preserving the Nature of International Commercial Arbitration" *Hofstra Law Review* (2008), 36(4) 1415.

too likely means that judicial standards of independence and impartiality⁷⁹ are not currently suited to the context of investment arbitration.

The exact standard of independence against which candidates are scrutinised is not one which should be imposed from above by the drafters of IPSIA's constitutive instrument, but rather should be one which is developed by IPSIA itself throughout the course of its operation, whether that be in the form of a general statement as to the operation of the tribunal as was the case with the Article 255 Panel,⁸⁰ or through the reasoned decisions in individual cases over time.

3.5 The Advisory Nature of the Panel's Work

One of the key elements of any proposal to introduce scrutiny of arbitral candidates by an independent body in accordance with rule of law considerations is of course whether that body's findings would bind the parties. Given the complete control that parties have over appointments at this point in time, it is unlikely that they would agree to put themselves at the mercy of an independent body that could constrain their discretion to appoint their arbitrators through a binding decision. Indeed, analogous advisory bodies at both the international and domestic levels almost exclusively issue recommendations rather than binding decisions.⁸¹

For example, the recommendation of the 255 Panel is just that, a recommendation without binding force, and the Council does not formally have to follow the recommendation of the 255 Panel. In practice, however, this has not been how the system has operated. In fact, it has

⁷⁹ FN 57 - 57 Burgh House Principles on the Independence of the International Judiciary, available at: http://www.ucl.ac.uk/laws/cict/docs/burgh_final_21204.pdf, Shany, *supra* note 51, at 485.

⁸⁰ Third Activity Report *supra* note 94, para 193.

⁸¹ *Ibid.*

even been said that in reality the 255 Panel ‘holds a *de facto* veto power.’⁸² This setup, whereby the independent body tasked with scrutinising candidates for judicial office is formally advisory but practically respected is replicated in a number of domestic legal systems.⁸³

The 255 Panel has played an active role since its establishment. In the period between 2010 and 2013 the Panel made unfavourable recommendations in relation to seven out of 67 candidates that it examined. Although the process remains confidential, the Panel has indicated that reasons for the negative assessment of a candidate in practice have included a lack of relevant professional experience⁸⁴ and lack of relevant legal knowledge.⁸⁵ The fact that none of the candidates who had been given an unfavourable opinion by the 255 Panel ever went on to become a judge underlines the practical power that it possesses.⁸⁶

Similarly, at the ICC scrutiny has been conducted of, and non-binding recommendations made regarding,⁸⁷ a number of judges since its first meeting in 2013. At its second meeting, the first time that there had been judicial elections since its establishment, the Advisory Committee was tasked with assessing two candidates, one of whom was Leslie Van Rompaey, who had been put forward by Uruguay. After having examined the relevant documentation, and conducting an in-person interview with the candidate, the Committee raised concerns that the candidate had not himself conducted criminal proceedings, and questioned the candidate’s oral proficiency in English.⁸⁸ Subsequently, the candidate was withdrawn by Uruguay before votes could be cast. This was not an isolated incident, with the

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Second Activity Report, *supra* note 103, 14.

⁸⁵ Third Activity Report, *supra* note 94, 20.

⁸⁶ Ibid, 48.

⁸⁷ See Report of the Bureau, *supra* note 71, Annex, C. 12 .

⁸⁸ Report of the Advisory Committee on Nominations of Judges on the work of its second meeting, The Hague, 20-28 November 2013, ICC-ASP/12/47, Annex 1, at paras 17 and 18.

Advisory Committee raising concerns as to judges' abilities in subsequent years,⁸⁹ and as with the Article 255 Panel, no judge ever given a negative recommendation by the Advisory Committee has ever gone on to become a judge at the ICC, either being withdrawn by their State or losing in the early rounds of elections.

4 Interim Evaluation

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

Such hopes are not merely utopian, in light of practice in other areas. Aside from the actual scrutiny of the application and the interview process itself, there are other positive aspects of setting out in clear terms the standards against which candidates will be judged. In contrast to

⁸⁹ See, for instance, the concern raised regarding Maria Natércia Gusmão Pereira of Timor-Leste, whose proficiency in English the Committee also had concerns about, Mindia Ugrekhelidze of Georgia who the Committee raised concerns regarding 'whether the candidate's professional experience was of relevance to the judicial work of the Court under article 36, paragraph 3(b)(i) of the Rome Statute and consequently whether the candidate's qualifications met all the requirements of the Statute for a judge at the International Criminal Court', and Emmanuel Yaw Benneh of Ghana whose professional experience was also questioned, and finally Toma Birmontien of Lithuania, see Report of the Advisory Committee on Nominations of Judges on the work of its second meeting, The Hague, 20-28 November 2013, ICC-ASP/12/47, Annex 1. More recently, in 2017 the Advisory Committee Expressed concern with regard to the Mongolian candidate, Chagdaa Khosbayar's proficiency in English, see Report of the Advisory Committee on Nominations of Judges on the work of its sixth meeting, New York, 4-14 December 2017, ICC-ASP/16/7, Annex 1.

past practice, the fact that objective criteria are spelled out provides a degree level of transparency that should bring greater predictability to the process in the future, and parties should be clearer on what IPSIA will value and, it can be hoped, adjust their own thinking when selecting a candidate in the first place.⁹⁰ For instance, one of the most interesting aspects of the introduction of the 255 Panel has been its knock-on effect on judicial selection processes at the domestic level. As Dumbrovsky, Petkova and Van Der Sluis have stated, since the introduction of the Panel, ‘many Member States have strengthened the procedural guarantees of screening candidates at the national level.’⁹¹ This form of top-down, knock-on effect on the practice of parties in their deliberations over who to put forward could also be a consequence of the institution of the IPSIA.

Of course, one should not paint too rosy a picture of the potential creation of IPSIA. As pointed out above, several difficult procedural hurdles would need to be cleared before it became a reality. Even if some sort of consensus for reform of the current system of ISDS was found at the multilateral level, it is clear that convincing parties to relinquish their current level of control over appointments will be an uphill battle. And even if such agreement could be found, the absence of a centralised representative or executive body which could appoint members to oversee the operation of IPSIA presents a major challenge. This paper proposes a remedial solution, but it is in no way perfect. In this vein, we should note that IPSIA would be free from any democratic control, and as such its legitimacy could easily be called into question, especially if the manner in which it operated fell in any way short in terms of transparency or due process.⁹²

⁹⁰ de Waele, *supra* note 65, 50.

⁹¹ Dumbrovsky, Petkova and Van Der Sluis, *supra* note 3, 456.

⁹² *Ibid*, 457.

5 Conclusion

The central contention of this paper is that the introduction of an IPSIA could address some of the current weaknesses in the current system of appointments in ISDS. As an aside, should support coalesce around proposals for the creation of a MIC, one could easily see how IPSIA, in the form proposed, could be adapted to provide the same independent scrutiny functions for the judicial appointees to such a body. However, regardless of the outcome of the current multilateral process under the auspices of UNCITRAL, it now seems certain that some form of independent scrutiny of appointments is an inevitability. As such, it is incumbent upon us to push for the most robust reforms possible, and to ensure that independence and impartiality in accordance with the international rule of law and representativeness of decision-makers is entrenched in these reforms.

In doing so, transparency must be the guiding principle in order to ensure that IPSIA is seen as legitimate by parties, assuring them that it is not some ‘bloodthirsty secret judicial fraternit[y] that, following esoteric and arcane rituals...admits...new acolytes into the ranks of the transnational judicial priesthood.’⁹³ If we are to ask parties to make concessions with regard to current monopoly on the appointment of arbitrators, it is essential that the transparency and ethics of the appointments process under that body must be exemplary, whilst also avoiding any suspicion of ‘cronyism and other forms of corruption’ which have mired the current system of ISDS.⁹⁴

⁹³ Michal Bobek, ‘The Changing Nature of Selection Procedures to the European Courts’, in Michal Bobek, *Selecting Europe’s Judges* (OUP, 2015), page 5.

⁹⁴ Paulsson, *supra* note 59, 354.