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# Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law

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## **Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law**

*Gus Van Harten*\*

### **I. Introduction**

Investment treaty arbitration is often promoted as a fair, rules-based system and, in this respect, as something that advances the rule of law.<sup>1</sup> This claim is undermined,

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<sup>1</sup> This rule of law-based advocacy is widespread in academic, practitioner, policy, and popular literature on investment arbitration. Examples are found in the work of senior figures in the arbitration world, such as Charles Brower, Jan Paulsson, and Thomas Wälde, and in that of commentators who are (like the current author) more junior, including Ian Laird, Stephan Schill, and Todd Weiler, each of whom has advocated investment treaty arbitration by drawing on values of (usually substantive) fairness and the rule of law and by connecting these values to the use of international arbitration to resolve investor-state disputes. For instance, the late Thomas Wälde described investment treaty arbitration as part of a wider post-war effort ‘to create equal rules for all, to tame the natural asymmetry of sheer power with rules and procedure’ and indeed ‘to create prosperity and peace to prevent a new Hitler or Stalin from emerging’: TW Wälde, ‘The Present State of Research Carried Out by the English-Speaking Section of the Centre for Studies and Research’ in P Kahn and TW Wälde (eds), *New Aspects of International Investment Law* (2007) 63, 95; J Paulsson, *Denial of Justice in International Law* (2005) 265; CN Brower and LA Steven, ‘Who Then Should Judge? Developing the International Rule of Law under NAFTA Chapter 11’ (2001) 2 Chi JIL 193; CN Brower and SW Schill, ‘Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law’ (2009) 9 Chi JIL 471; SW Schill, ‘Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law’, Institute for International Law and Justice Working Paper 2006/6 (Global Administrative Law Series) 4, 31, 36; IA Laird, ‘NAFTA Chapter 11 Meets Chicken Little’ (2001) 2 Chi JIL 223, 229; T Weiler, ‘NAFTA Investment Arbitration and the Growth of International Economic Law’ (2002) 36 Can Bus LJ 405.

however, by procedural and institutional aspects of the system that suggest it will tend to favour claimants and, more specifically, those states and other actors that wield power over appointing authorities or the system as a whole. On the other hand, other states and investors (especially those that bring claims against a powerful state) can expect to be disadvantaged.

To the degree that such perceptions of bias have currency, as is argued here, this arises primarily from the use of arbitration to decide finally questions of public law.<sup>2</sup> First, the novel situation in which claims can be brought by only one class of parties, and only the other class can be found to have violated the treaty, provides investment treaty arbitrators (including those who are state-appointed) with an incentive to favour claimants in order to advance the interests of the industry and their position within it. Secondly, the fact that arbitrators are appointed on a case-by-case basis raises the concern that they will seek to please those who hold power in the key appointing authorities and in the arbitration industry. In both respects, the absence of institutional safeguards of impartiality and independence—especially those of security of tenure, prohibitions on outside remuneration, and an objective method of case-by-case assignment—undermines the normative basis for the adjudicative system’s displacement of other modes of decision-making.

Those who promote investment treaty arbitration usually do so in conjunction with a robust criticism of both domestic courts (as apparently or actually biased against foreign investors) and international diplomacy (as ‘political’ rather than governed by law).<sup>3</sup> Investment treaty arbitration is said to address the limitations of these other forms of decision-making by laying out predictable rules to govern relations between

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<sup>2</sup> JH Cohen and K Dayton, ‘The New Federal Arbitration Law’ (1926) 12 Va LR 265, 281: ‘Arbitration . . . is not the proper method for deciding points of law of major importance involving constitutional questions or policy in the application of statutes’; Julius Cohen was the principal drafter of what became the US Federal Arbitration Act.

<sup>3</sup> See the literature cited in n 1 above. Contrast the discussion of ‘political jurisprudence’ in M Shapiro, ‘Stability and Change in Judicial Decision-Making: Incrementalism or Stare Decisis?’ (1965) 2 Law in Transition Quarterly 134, 134, courts ‘are part of government, they make public policy, and they are an integral part of the law-making and enforcement process which is the central focus of political activity’.

investors and states and by allowing investors to bring claims against states for resolution by a fair process. An initial difficulty with this position, not addressed here but worth reflecting upon, is that investment treaties generally do not establish coherent, non-contradictory rules that are capable of being known and thus followed on a reasonably reliable basis, but rather a set of broadly-framed ideals that have in turn been assigned different and at times conflicting<sup>4</sup> meanings when interpreted by arbitrators. It is an open question whether a lack of clarity or coherence in the standards that regulate states and that implicate investors can be said to undermine the objective of a rules-based system;<sup>5</sup> one's answer may depend for instance on whether one regards standards or rules as more effective at offering guidance in the circumstances<sup>6</sup> and whether one concludes that states should in the present context enjoy the benefits of clarity or predictability as elements of the rule of law. A more immediate concern, though, arises from another aspect of the association of investment treaty arbitration with the rule of law. The problem is that the system appears not to deliver on a core component of fair process, especially the demands of independence (and impartiality)<sup>7</sup> in the final judgment of public law.

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<sup>4</sup> SD Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 Ford LR 1521; WW Burke-White, 'The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System' (2008) 3 Asian Journal of WTO and International Health Law and Policy 199, 209–28.

<sup>5</sup> BZ Tamanaha, *On the Rule of Law: History, Politics, Theory* (2004) 131–3.

<sup>6</sup> A Scalia, 'The Rule of Law as a Law of Rules' (1989) 56 U Chi LR 1175; J Braithwaite, 'Rules and Principles: A Theory of Legal Certainty' (2002) 27 Australian Journal of Legal Philosophy 54.

<sup>7</sup> To avoid repetition, references to judicial 'independence' should be read as 'impartiality and independence' on the basis that the latter is a precondition for the former. See P Pasquino, 'Prolegomena to a Theory of Judicial Power: The Concept of Judicial Independence in Theory and History' (2003) 2 Law and Practice of International Courts and Tribunals 11, 25: '... *independence* of the judicial power has always to be understood as an instrument to achieve the goal of *impartiality*; and that independence has to be conceived of as neutrality, and absence of the subordination of the judge a) from the parties to the conflict, b) from any other power interested in a given resolution of the conflict, and as far as possible c) from the bias of passions and partiality of the judge himself or herself' (emphasis in the original).

Adjudication is often said to advance the rule of law. Needless to say, the rule of law is a concept that is given different meanings, sometimes divergent. However, the concept is widely regarded to include at the procedural level the requirement for a fair decision-making process in circumstances where a government decision affects significantly an individual or specific group, based on the provision of adequate notice and an opportunity to reply, and of a decision by an independent and impartial decision-maker. Just how the rule of law should apply to the benefit of states, as opposed to individuals, where they are subject to review at the international level, is a challenging question<sup>8</sup> and it may be that the implementation of relevant principles should vary where a decision affects people or groups not directly but rather through the vehicle of their state.<sup>9</sup> Yet where it is claimed that the shift to adjudication advances the rule of law, it is also pertinent to ask whether and how procedural components of that concept are reflected in the particular form of adjudication that is on offer. In this chapter, the argument is that investment treaty arbitration falls short in institutional terms due to its unique combination of arbitration and public law, its asymmetrical<sup>10</sup> claims structure, its reliance on executive officials to make case-by-case appointments, and its attenuation of judicial oversight. The focus as such is not

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<sup>8</sup> J Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?', NYU Public Law & Legal Theory Research Paper No 09-01 (January 2009); S Chesterton, 'An International Rule of Law?', *NYU Public Law & Legal Theory Research Paper* No 09-11 (April 2008) 34–8; J Crawford, 'International Law and the Rule of Law' (2003) 24 *Adelaide Law Review* 3, 8; D Zolo, 'The Rule of Law: A Critical Reappraisal' in P Costa and D Zolo (eds), *The Rule of Law* (2007) 40–1.

<sup>9</sup> Waldron, (n 8 above) 13: 'The real purpose of international law and, in my view, of the rule of law in the international realm is not the protection of sovereign states but the protection of the populations committed to their charge.'

<sup>10</sup> Referring specifically to the fact that only one class of parties, investors, brings the claims and only the other class, states, can be ordered to pay damages for a violation of the treaty. Thus, this use of 'asymmetry' differs from other formal uses of the term (as well as from references to asymmetries of power; eg J Atik, 'Repenser NAFTA Chapter 11: A Catalogue of Legitimacy Critiques' (2004) 3 *Asper Rev Int'l Bus. & Trade L.* 215, 220–1) such as in the case of the one-sidedness of a domestic arbitration agreement between a large firm and an individual consumer in which only the individual submits to compulsory arbitration (frequently in a forum that is favourable to the firm) while the firm retains its right to go to court.

on actual bias in investment treaty arbitration but, more appropriately, on institutional and procedural aspects of the system that raise suspicions of bias.

## II. Context

### A. The Uniqueness of Investment Treaty Arbitration

To elaborate on the procedural concerns in investment treaty arbitration it is necessary to outline how the system intertwines public law and international adjudication in order to subject questions of sovereign authority and public budgeting—also referred to here as matters of public law and policy—to international review. What is unique about investment treaty arbitration is the way in which it engages issues of public law, relative to other forms of international adjudication. The system is international and subject to public international law because it is established by treaties between states. Unlike domestic public law, therefore, it is established by agreements between public entities that do not interact with each other within a hierarchical system of sovereign authority and that are not subject to a classical separation of powers.<sup>11</sup> Investment treaties are typically concluded by executive officials of states who present an agreed treaty text for adoption by their respective legislatures or other domestic authorities, often without extensive legislative deliberation and debate.<sup>12</sup> Likewise, the operation of the system relies extensively on processes of international adjudication to interpret and apply the treaties in specific cases and thus to determine the appropriate meaning to be given to silence or ambiguity. The law-making function of the relevant sovereigns<sup>13</sup> is exercised primarily by the executive officers who draft the treaties and secondarily by the arbitrators who interpret and apply them. Domestic legislatures are minor players, relative to the domestic context where public law is elaborated in the national constitution and in detailed statutes and subsidiary instruments, where the

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<sup>11</sup> J Brunnee and SJ Toope, 'An Interactional Theory of International Legal Obligation', University of Toronto Faculty of Law Legal Studies Research Paper No 08-16 (2008) 22.

<sup>12</sup> Increasingly there are exceptions to this, as reportedly in the case of the Uruguay Congress' ratification of that country's BIT with the US in 2006. D Vis-Dunbar, 'Uruguay surprises with ratification of contentious U.S. investment treaty' *Investment Treaty News*, 12 January 2006.

<sup>13</sup> J Waldron, 'The Concept and the Rule of Law', NYU Public Law & Legal Theory Research Paper No 08-50 (November 2008) 29–30.

key role of the courts (outside constitutional law) is to formulate an understanding of legislative intent and interpret the law accordingly, and where the legislature has the opportunity to override or ‘dialogue’ with the courts as it sees fit.<sup>14</sup>

Nevertheless, investment treaty arbitration resembles judicial review in domestic public law to a greater extent than do other modern forms of international adjudication. In this respect, it differs from others contexts in which international arbitration is used. Both international commercial arbitration and inter-state adjudication, for instance, are used typically to resolve disputes arising from reciprocal relationships between the disputing parties (whether between private parties—including, potentially, the state acting in a private capacity—or between sovereigns). Reflecting this formal reciprocity, either disputing party is capable of bringing a claim against the other and of possessing the same legal rights and obligations. In investment treaty arbitration, on the other hand, the disputes arise between a private party and a state in relation to the latter’s assumption and assertion of sovereign authority. Thus, the disputes arise in the context of a regulatory rather than a reciprocal relationship, turning as such on the idea that states may exercise authority and hold responsibilities that no private party can possess.

Investment treaty arbitration also differs from other treaty-based adjudicative regimes, including other international courts and tribunals, by its combination of five characteristics. First, individuals can bring international claims directly against the state in the context of the regulatory rather than a commercial relationship. Secondly, the state’s consent to arbitration is generalized and prospective, extending in effect to any individual or organization that qualifies as an investor under the treaty; it is not limited to disputes arising from a specific relationship or historical event. Thirdly, the primary remedy is a damages award against the state; this is important because, in public law, state liability is usually circumscribed in the light of its implications for government planning and budgeting. Fourthly, unlike other treaties that allow

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<sup>14</sup> PW Hogg and AA Bushell, ‘The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn’t Such a Bad Thing After All)’ (1997) 35 *Osgoode Hall Law Journal* 75; H Koh, ‘Transnational Public Law Litigation’ (1991) 100 *Yale LJ* 2347, 2371; RB Ahdieh, ‘Between Dialogue and Decree: International Review of National Courts’ (2004) 79 *NYU LR* 2029.

individual claims, investment treaties remove the investor's duty to exhaust local remedies, thus causing the system to eclipse the customary role of domestic legal systems, especially domestic courts, in mediating between the international sphere and domestic regulatory relationships. Fifthly, unlike other decisions or awards in public law, investment treaty awards are widely enforceable in many countries with limited opportunity for judicial review. As a result, the arbitrators are authorized to resolve core questions of public law without the prospect of review by an independent court, whether domestic or international.

Considering these features, it is apparent just how far the system has moved from the realm of inter-state adjudication to one in which an international adjudicator can review intensively governmental choices of states.<sup>15</sup> The system delegates to arbitrators the power to define what activities are sovereign and what are not, to decide whether sovereign actors have acted improperly and unlawfully, and to direct the payment of public money or the seizure of public assets on behalf of private actors. The system subjects states to intensive review by tribunals that are established (usually) in a foreign jurisdiction and backed by the coercive power of other states over foreign-owned assets within their own territory. For these reasons, investment treaty arbitration is probably the closest the world has come to an international adjudicative body with compulsory jurisdiction over claims by individuals against states in the regulatory sphere. That is, it is the closest we have come to an international constitutional or administrative court if we understand such a body to be one that would allow individuals directly to initiate adjudicative review of the state's sovereign activity and to obtain a binding determination of the legality of state conduct as well as a precise and powerful remedy.<sup>16</sup> Yet ironically the claims are not resolved by a court at all. They are resolved instead by a system of adjudication that originated in dispute resolution between private parties and between public entities, and that evolved to endorse and satisfy the demands of party autonomy before those of open and independent judging in the liberal democratic tradition.

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<sup>15</sup> A Chayes, 'The Role of the Judge in Public Law Litigation' (1976) 89 Harv LR 1281.

<sup>16</sup> Ahdieh (n 14 above) 2057.

## B. A Caution on Domestic Analogies

The uniqueness of investment treaty arbitration makes it useful but also questionable to examine analogies in domestic law so as to illuminate the system and its intended meaning.<sup>17</sup> The challenge goes beyond the usual hazards of legal transplantation, such as the difficulty of reducing different rules and processes to particular forms despite their varying contexts and histories, the risk of losing sight of the details while searching for a general unifying position, or the possibility that an outsider may discover and borrow only what he or she prefers to find in a particular jurisdiction. These pitfalls are always important to keep in mind.<sup>18</sup> They highlight the importance of examining sources in public international law—above all where they engage the regulatory relationship in ways comparable to investment treaty arbitration—with at least as much priority as domestic sources. Likewise, there are limitations to the utility of domestic law and domestic legal systems as a source of guidance to interpret investment treaties. For example, if one were to look to these sources for an indication of how to interpret a particular treaty, one should presumably begin (and arguably end) with the domestic law of the relevant state parties.<sup>19</sup>

Beyond the question of appropriate sources, there is a further challenge in an attempt to use domestic analogues to inform adjudicative decision-making on the international plane (and perhaps vice versa). An adjudicator who exercises authority over the public law and policy of a state, pursuant to a broadly-framed treaty, must recognize that his or her own sovereign decision-making role is in key respects more determinative than that of a domestic judge. The international adjudicator must often decide the terms of an inter-state agreement in the absence of a mature jurisprudence (whether coming to maturity before or after states have concluded the treaty) and in the absence of a reasonable prospect of review and amendment of the treaty by the state parties. But, faced with individual claims in the absence of a duty to exhaust local remedies, the adjudicator will review sovereign choices in much the same

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<sup>17</sup> Brunnee and Toope (n 11 above) 4 and 6.

<sup>18</sup> P Costa and D Zolo, 'Preface' in Pietro Costa and Danilo Zolo (eds), *The Rule of Law* (2007) xii–xiii.

<sup>19</sup> Differently, Stephan W Schill, 'International Investment Law and Comparative Public Law—An Introduction', Chapter 1 above.

manner that a domestic court reviews legislative, judicial, or executive decisions. Thus, as in domestic judicial review, it may be necessary for the adjudicator to distinguish between different decision-makers and the level of generality of the measures they have established in order to determine, among other things, the appropriateness of deference.<sup>20</sup>

The present study seeks to examine investment treaty arbitration from a perspective of public law that is informed by experiences in both domestic and international law. It does not look in detail at the laws of a specific domestic jurisdiction, however, nor does it seek to clarify treaty language or develop general principles of law to inform the interpretive process in investment arbitration. Rather, the aim here is to highlight certain principles or ‘grounding values’<sup>21</sup> of public law—arising from procedural and institutional components of the rule of law—and to examine investment treaty arbitration in the light of these principles.<sup>22</sup> The implication is not that international adjudication should precisely replicate features of domestic law<sup>23</sup> but rather that a focus on procedural and institutional concerns may offer a more focused framework for using the rule of law as an evaluative concept in the international sphere.<sup>24</sup>

### **III. The Issue of the Rule of Law**

#### **A. The Emphasis on Procedural Fairness**

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<sup>20</sup> JA King, ‘Institutional Approaches to Judicial Restraint’ (2008) 28 OJLS 409; W Burke-White, ‘The Need for Public Law Standards of Review in Investor-State Arbitrations’, Chapter 22 below; M Kumm, ‘Constitutional Democracy Encounters International Law: Terms of Engagement’ NYU Public Law & Legal Theory Working Paper No 47 (2006) 19.

<sup>21</sup> Zolo (n 8 above) 18–19.

<sup>22</sup> EA Young, ‘Toward a Framework Statute for Supranational Adjudication’ (2007) 57 Emory Law Journal 93, 114; D Raab and H Bevers, ‘The International Criminal Court and the Separation of Powers’ (2006) 3 Int Org LR 93, 98–9.

<sup>23</sup> N Krisch, ‘Global Administrative Law and the Constitutional Ambition’, LSE Law, Society and Economic Working Paper 10/2009 (2009) 12–13.

<sup>24</sup> Waldron (n 13 above) 4–5.

Those who invoke the rule of law often do so in order to defend one or another form of adjudication as a preferred method of decision-making.<sup>25</sup> This implies that the relevant form of adjudication is itself consistent with and measurable against criteria associated with the rule of law.<sup>26</sup> Speaking generally, the rule of law is important because of the values it conveys and because it calls on those involved in decision-making to take values seriously.<sup>27</sup> But it is a malleable concept that is easily employed as a political slogan, marketing device, or simple ‘Hurrah!’.<sup>28</sup> It is therefore prudent to consider the purposes of one who invokes the rule of law and the particular glean that has been given to the term. Like freedom or equality or democracy, the rule of law can mean essentially<sup>29</sup> different things to different people, and may be used for obfuscation and manipulation as well as for clarification or guidance.<sup>30</sup>

In this chapter, the focus is on procedural and institutional rather than substantive elements of the rule of law. The focus is also on the fairness of adjudication rather than law-making generally.<sup>31</sup> This focus has been arrived at in an effort to limit engagement with wider debates about investment treaty arbitration in which the rule of law is given a prescriptive meaning and used as platform for substantive comment on investor-state relations. These substantive invocations of the rule of law have different iterations but in the present context they typically advocate a limited role for the state, based on an espoused preference for fairness, individual freedom, and market efficiency. With this usually comes a strong dose of scepticism about the

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<sup>25</sup> N Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* (1994).

<sup>26</sup> Young (n 22 above) 94.

<sup>27</sup> R Fallon, ‘The Rule of Law as a Concept in Constitutional Discourse’ (1997) 97 Col LR 1, 56; N Walker, ‘The Rule of Law and the EU: Necessity’s Mixed Value’ in G Palombella and N Walker (eds), *Relocating the Rule of Law* (2009) 120–1.

<sup>28</sup> S Beaulac, ‘The Rule of Law in International Law Today’ in Palombella and Walker (n 27 above) 222–3; J Waldron, ‘Is the Rule of Law an Essentially Contested Concept (in Florida)’ (2002) 21 Law and Philosophy 137, 139–40; Zolo (n 8 above) 5.

<sup>29</sup> Waldron (n 28 above) 149–53.

<sup>30</sup> AC Hutchison and P Monahan, ‘Introduction’ in AC Hutchison and P Monahan (eds), *The Rule of Law: Ideal or Ideology* (1987) ix: ‘[The rule of law’s] very generality is the reason for its durability and contestibility . . . it is the will-o’-the-wisp of political history’.

<sup>31</sup> On the latter, see D Schneiderman, *Constitutionalizing Economic Globalization* (2008) 206.

motivations and capacity of government to promote social welfare. In terms of international review, the state's role in modern society is typically not said to warrant deference from international adjudicators on the grounds that domestic governments are better able to make regulatory choices or that they have a stronger claim to legitimacy. Indeed, states are at times framed as hostile and illegitimate, and their review by arbitrators as aimed at ameliorating these failings and advancing business freedom as a higher goal: 'the role of investment treaties is to provide an external anchor for economic policies that are in the long-term sensible for national economies and the global economy', as Thomas Wälde put it.<sup>32</sup> By this version of the rule of law, then, it is investment arbitrators who are to decide whether a state's decisions are 'sensible' and to award compensation to business where the state has been found to have encroached on some substantive priority.

As an aside, one criticism of this type of rule of law advocacy for the system is that it constructs an artificial contest between 'misplaced dichotomies' or caricatures and, as such, may miss a good part of current debates about the appropriate role of governments and markets.<sup>33</sup> Its invocation of the rule of law evokes Friedrich Kratochwil's 'frightening prospect of a rule of lawyers who function as "experts" by emasculating politics'.<sup>34</sup> Positioned in contrast to approaches to investment rules that aim 'to freeze politics and inhibit the imagination of alternative futures', David Schneiderman refers to (and criticizes) Franz Neumann's 'social rule of law' whose function was 'to uncover and rectify socioeconomic relations of domination and subordination'.<sup>35</sup> For present purposes, what this highlights is simply a selectivity on the part of many rule-of-law proponents of investment treaty arbitration. It is dubious to claim that the rule of law is clearly aligned with any one set of answers to core

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<sup>32</sup> Wälde (n 1 above) 104.

<sup>33</sup> F Kratochwil, 'Has the "Rule of Law" become a "Rule of Lawyers"?' in Palombella and Walker, (n 27 above) 193. Many who support an active role for the state in economic development also emphasize the role for markets in disciplining economic actors, sparking innovation, and channelling productivity; those who promote foreign investment protection often also recognize a role for regulation and indeed for democratic representation in allowing markets to function and in balancing profit-seeking against other social priorities.

<sup>34</sup> Kratochwil (n 33 above) 194.

<sup>35</sup> Schneiderman (n 31 above) 207-8. See Franz Neumann, *The Rule of Law* (1986).

substantive questions—whether governments should pursue certain outcomes; whether individual rights or interests should take precedence over community concerns; how ideals like democracy, justice, and efficiency should be balanced; whether the mediation of conflicting rights and interests is best resolved through adjudication—because these are among the most contested elements of the rule of the law,<sup>36</sup> leading to myriad thick notions of the concept.<sup>37</sup> There is simply no accepted understanding of what the rule of law means substantively in terms of the role of the state in modern society (or even whether and to what extent the concept extends to notions of substantive justice<sup>38</sup> or whether it refers to a process of reasoning about the normative basis for law)<sup>39</sup>. It is thus questionable to invoke the concept in a substantively prescriptive way without acknowledging the underlying debates.

Partly in an effort to sidestep much of the debate about the substantive choices of states in their regulatory relations with investors, this chapter focuses on procedural aspects of the rule of law. The aim, informed by Judith Shklar’s lively sojourn through theoretical work on the rule of law (contrasting especially with Friedrich Hayek and Roberto Unger), is to avoid treating the concept ‘as a football in a game between friends and enemies of free-market liberalism’.<sup>40</sup> Jeremy Waldron has observed that the procedural content of the rule of law is less widely debated in

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<sup>36</sup> cf Wälde (n 1 above), to eg WW Bishop, ‘The International Rule of Law’ (1961) 59 Mich LR 553, 553; D Kinley, ‘Human Rights, Globalization and the Rule of Law: Friends, Foes or Family?’ (2002–03) 7 UCLA JIL & FA 239, 249, 260; M Perry, *The Constitution, the Courts and Human Rights* (1982) 162; JB Weinstein, ‘The Role of Judges in a Government Of, By, and For the People’ (2008) 30 Cardozo Law Review 1, 33. See also Schneiderman (n 31 above) 207; Tamanaha (n 5 above) ch 8.

<sup>37</sup> J Shklar, ‘Political Theory and the Rule of Law’ in Hutchison and Monahan (n 30 above) 1; A Hutchison, ‘The Rule of Law Revisited: Democracy and Courts’ in D Dyzenhaus (ed), *Recrafting the Rule of Law: The Limits of Legal Order* (1999) 199; Chesterton (n 8 above) 13–14.

<sup>38</sup> P Bergling, *Rule of Law on the International Agenda* (2006) 16.

<sup>39</sup> Brunnee and Toope (n 11 above) 11–12, 18.

<sup>40</sup> Shklar (n 37 above) 16; it is notable that Shklar has been widely misquoted as having claimed in this work that the “‘Rule of Law’ has become meaningless thanks to ideological abuse and general over-use’ (p 1); while Shklar mentioned this at the outset of this work as one position, she did not adopt it as her own and indeed described the position as ‘irrelevant’ from a historical perspective.

academic circles than are substantive notions, and yet it is more widely discussed in public discourse.<sup>41</sup> Perhaps this indicates a greater level of agreement on what the rule of law should mean procedurally, even if procedural fairness is itself a flexible concept (and even if the degree of fairness that a decision-making process demands may vary according to the significance of the decision for those affected, the purpose of the regulatory scheme and the role of the decision-maker within it, the historical practices of the relevant body and jurisdiction, and so on). No doubt, the requirements of independence must also accommodate a range of institutional and regulatory settings for decision-making.<sup>42</sup> Even so, in the light of the common tendency to associate investment treaty arbitration with the rule of law, it is pertinent to examine the system itself in terms of the procedural elements of the concept.

It could be that expectations of procedural fairness should be tempered where it is a state rather than an individual that is said to have been disadvantaged by apparent bias in international adjudication (although, to be clear, my own argument here is that both some investors and some states are disadvantaged by unfairness in investment treaty arbitration, while others benefit). The impetus for demands of fair process emerge historically from manifold encroachments of state power on individuals, encroachments that demand that decision-makers be bound by law and, alongside this, that courts be insulated from improper influence.<sup>43</sup> The rule of law concept evolved as a framework for protecting individuals from the state, and foreign investors (and other foreign nationals) are of course vulnerable to state abuse. In the light of this, there are important questions about the place of the rule of law in the international sphere.<sup>44</sup> With respect to investment treaty arbitration, for example, various questions arise when one seeks to apply a general concept rooted in the relationship between states

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<sup>41</sup> Waldron (n 13 above) 8–9.

<sup>42</sup> eg it is widely accepted that international commercial arbitration would lose much of its utility if it were subjected to judicial requirements of impartiality and independence, although the issue of impartiality and independence may arise in terms of the role of judicial oversight to ensure a fair process. N Japaridze, 'Fair Enough? Reconciling the Pursuit of Fairness and Justice with Preserving the Nature of International Commercial Arbitration' (2008) 36 *Hofstra Law Review* 1415, 1445–6.

<sup>43</sup> Waldron (n 8 above) 3.

<sup>44</sup> Tamanaha (n 5 above) ch 10.

and individuals to the international review of state regulation of private actors, given that neither the analogy of individual-to-state nor that of individual-to-firm necessarily holds.<sup>45</sup>

Yet there are also compelling reasons to expect a high level of independence, and probably other elements of procedural fairness,<sup>46</sup> in investment treaty arbitration. This expectation serves to protect investors and states, but also to support the confidence of the public and of those not represented directly in the adjudicative process but nevertheless affected by it. For one, the use of adjudication to make decisions almost always carries a very high expectation of procedural fairness, including in international arbitration.<sup>47</sup> Moreover, the process here is not simply adjudicative but also both compulsory and exceptionally final in its resolution of public law and its decision-making about state liability. There is limited judicial oversight by domestic courts (and none by any international court) and so little opportunity for the system to piggyback on the institutional independence of established judiciaries through an

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<sup>45</sup> Waldron (n 8 above) 9, 11; Waldron (n 28 above) 18, 24–5.

<sup>46</sup> Tamanaha (n 5 above) 133–5. For instance, in terms of the requirements of notice and an opportunity for reply, individuals or groups whose rights or interests (eg reputational) are at stake in the resolution of investor claims—as well as the interests of other levels of government whose decisions are implicated—have no way to obtain third party status in investment treaty arbitration as would typically be the case in domestic judicial review. An opportunity may exist for such parties to obtain *amicus* standing at the tribunal’s discretion but this does not amount to full party standing with the regular array of participatory rights. As a result, such parties may be denied notice of matters affecting their interests or decisions as well as an opportunity to reply before the decision-maker. In this respect, the selectivity of the individualization of claims in investment treaty arbitration relegates others who are not investors, but are nonetheless affected by investor-state arbitration, to a subsidiary status. See also Alessandra Asteriti and Christian J Tams, ‘Transparency and Representation of the Public Interest in Investment Treaty Arbitration’, Chapter 25 below.

<sup>47</sup> CF Amerasinghe, ‘Reflections on the Judicial Function in International Law’ in TM Ndiaye and R Wolfrum (eds), *Law of the Sea, Environmental Law and Settlement of Disputes* (2007) 123; RW Naimark and SE Keer, ‘International Private Commercial Arbitration: Expectations and Perceptions of Attorneys and Business People’ (2002) 30 *International Business Law* 203, 203–4, noting survey results indicating the ‘overwhelming relative importance of the fairness and justice of the process’ compared to other characteristics of international commercial arbitration, such as cost, speed, arbitrator expertise, and privacy.

appellate process. Also, investment treaty arbitration involves not only the review of decisions that affect the claimant in a specific and discrete way. It extends to polycentric legislative, judicial, and executive decisions and often engages matters of general significance. The redirection of public funds to private actors impacts on those who would benefit from government programmes that are no longer affordable and on those who would benefit from regulatory activity that has been disrupted or deterred.<sup>48</sup> As recognized in domestic law, state liability raises significant concerns about regulatory deterrence,<sup>49</sup> even if the fiscal and regulatory impacts of investment arbitration are difficult to isolate and measure.<sup>50</sup> These aspects of the system—its form, its determinativeness, its purpose, and its outcomes—indicate a need for robust assurances of independence. One could defend an arrangement that lacked such assurances on other grounds, by characterizing it, for instance, as a realist bargain, fair or unfair, between states,<sup>51</sup> or by conceding simply that in the present context ‘domination [is] shedding its legitimating rationalizations’.<sup>52</sup> However, if one asserts that investment treaty arbitration offers a fair, rules-based, and thus superior method of decision-making, then the system is appropriately held to a high standard of independence.

This focus on process does not mean that the rule of law should be stripped of all substantive meaning. There are areas in which the line between process and substance is difficult to draw.<sup>53</sup> It is often said that the rule of law precludes a legislature from enacting laws that delegate authority or regulate conduct using vague language

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<sup>48</sup> Burke-White (n 4 above) 200–1.

<sup>49</sup> Anne van Aaken, ‘Primary and Secondary Remedies in International Investment Law and National State Liability: A Functional and Comparative View’, Chapter 23 below; C Harlow, *State Liability: Tort Law and Beyond* (2004) 59–61.

<sup>50</sup> D Schneiderman, ‘Property Rights and Regulatory Innovation: Comparing Constitutional Cultures’ (2006) 4 IJ Const L 371, 387–8.

<sup>51</sup> EA Posner and JC Yoo, ‘Judicial Independence in International Tribunals’ (2005) 93 Cal LR 1.

<sup>52</sup> M Jay, ‘Foreword’ in Neumann (n 35 above) ix, xiii.

<sup>53</sup> D Dyzenhaus, ‘The Rule of (Administrative) Law in International Law’ (2005) 68 L & CP 127, 130. An example is the duty to provide reasons for a decision as a component of procedural fairness so as to explain the decision to those affected, to discipline the reasoning process of the decision-maker, and to facilitate review of the decision.

because this gives executive officials too much discretion over how their authority should be exercised and does not provide sufficient guidance to regulated actors.<sup>54</sup> The rule of law is also widely understood to include substantive notions of fairness, of which courts are the guardians, even if questions of content remain highly contested. Courts are also usually expected to ensure that statutory decision-makers respect the boundaries of the delegation of their authority and that individuals are protected from arbitrary treatment by public officials.<sup>55</sup> These elements reflect a thin version of the rule of law, one that ‘upholds and supports diversity in moral and political ends’,<sup>56</sup> but with a substantive quality nonetheless.<sup>57</sup> Further, courts have at times asserted their authority to protect individuals from egregious treatment by the state—detention in degrading conditions, for example—on the basis that it violates fundamental values, even in the face of the clear will of the legislature.<sup>58</sup> Yet, when reviewing substantive decisions by other state actors, courts also usually take care to avoid intervening in matters that are appropriately left to decision-makers which are more representative, more expert, or otherwise more able than the courts.<sup>59</sup>

## **B. The Role of Judicial Independence**

A discussion of the relationship between the rule of law and fairness may refer to law-making itself, to decision-making, or to the separation of judicial from other state functions. Fuller’s approach to the rule of law, for example, identified characteristics that constitute laws as general rules and that allow those who are subject to the law to

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<sup>54</sup> The requirements of generality and determinacy are identified by Waldron as elements of the rule of law that should not necessarily apply to benefit states as ‘agencies’ of international law, with particular reference to international human rights, because of the difficulty of predicting all of the ways in which states may contravene individual rights. Waldron (n 8 above) 22–31; Tamanaha (n 5 above) 131–3.

<sup>55</sup> Waldron (n 13 above) 4.

<sup>56</sup> Brunnee and Toope (n 11 above) 22.

<sup>57</sup> AC Hutchison and P Monahan, ‘Democracy and the Rule of Law’ in Hutchison and Monahan (n 30 above) 101.

<sup>58</sup> Zolo (n 8 above) 4.

<sup>59</sup> King (n 20 above); EA Young, ‘Institutional Settlement in a Globalizing Judicial System’ (2005) 54 *Duke LJ* 1143, 1178–9.

follow it. Laws that met certain criteria<sup>60</sup> were said by Fuller to be consistent with the rule of law in a formal sense although the law might be put to a range of purposes and lead to varying outcomes. According to Lacey:<sup>61</sup>

Fuller's was not a dogmatic, substantive natural law position: rather, it was a position which built out from certain valued procedural tenets widely associated with the rule of law . . . It was this universal 'inner morality of law' which provided the necessary connection between law and morality, and not the 'external' or substantive morality which infused the content of law in different ways in different systems.

Fuller's template applies to law-making but is also relevant to decision-making in specific cases or disputes. Any examination of the fairness of a process of decision-making must account for the role and character of that process and its implications for those who are affected by it. Based on ancient sources, procedural fairness in decision-making entails two key principles. First is that of *audi alterem partem*, 'hear the other side', referring to the need to provide notice and an opportunity to reply.<sup>62</sup> Second is the principle of *nemo iudex sua causa*, 'no one shall judge his own cause', referring to the requirement for an unbiased decision-maker.<sup>63</sup> Thus, if the rule of law is invoked to refer to fairness in decision-making, then the independence of the decision-maker is an integral consideration, even if the ways in which independence is advanced may vary.

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<sup>60</sup> Lon Fuller required that laws be coherent, prospective rather than retrospective, public, possible to comply with, reasonably certain and stable in their content, and general in their application. LL Fuller, *The Morality of Law* (revsd edn, 1969) ch 2; MJ Radin, 'Reconsidering the Rule of Law' (1989) 69 Boston University Law Review 781, 784–7.

<sup>61</sup> N Lacey, 'Out of the 'Witches Cauldron'?: Reinterpreting the Context and Re-assessing the Significance of the Hart-Fuller Debate', LSE Law, Society and Economy Working Paper 18/2008 (2008) 18.

<sup>62</sup> Although this chapter focuses on independence in investment treaty arbitration, it may be worthwhile to consider also whether adequate notice and reply is afforded in the system to those who are affected by its decisions and outcomes. See n 46 above.

<sup>63</sup> H Lauterpacht, 'The Grotian Tradition in International Law' (1946) 23 BYBIL 1, reprinted in E Lauterpacht (ed), *International Law: Being the Collected Papers of Hersch Lauterpacht* (1977) Vol 2, 333.

Whether one focuses on the rule of law in law-making or in adjudication, independent courts are typically given a central role. In his definition of the rule of law, Albert Venn Dicey emphasized the importance of the ‘ordinary courts’, by which he meant (rather parochially) the superior courts of England and Wales, whose independence was advanced, among other things, by objective safeguards to protect against outside interference. Joseph Raz noted on judicial independence and the rule of law that ‘the court’s judgment establishes conclusively what is the law in the case before it’ and that, without an independent adjudicator, ‘people will only be able to be guided by their guesses as to what the courts are likely to do, but these guesses will not be based on the law but on other considerations’.<sup>64</sup> Along the same lines, consider the following comment by Hayek on law-making and the courts:<sup>65</sup>

In theory, at least, it is still unquestioned doctrine that the law ought to be general, equal, and certain, and that it ought to be administered by independent judges. This involves not only . . . some degree of separation of powers and the recognition of the principle of *nulla poena sine lege*, but also quite generally that government can not coerce the private citizen in the service of the momentary goals of its policy, but only where it is required by the general rules of law. Indeed . . . the independent judge is not supposed to be concerned with the particular ends the government is pursuing or even to know about them.

These references convey that a commitment to the rule of law in law-making generally, as well as in the specific instance of adjudicative decision-making, is tied to the independence of the courts.<sup>66</sup> On the other hand, where the rules in a supposedly rules-based system are subject to an adjudicative process that lacks independence, it is difficult to describe the system as supportive of the rule of law. Likewise, the role of

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<sup>64</sup> J Raz, ‘The Rule of Law and its Virtue’ (1977) 93 LQR 195, 200–1.

<sup>65</sup> FA Hayek, ‘Freedom and the Rule of Law’ in *Listener* (27 December 1956) 1067–8, reproduced in R Bellamy (ed), *The Rule of Law and the Separation of Powers* (2005) 152.

<sup>66</sup> Waldron (n 13 above) 20–22.

independent courts is a fundamental, or at least widely assumed, component of procedural fairness.<sup>67</sup>

In domestic law, the adjudicative authority to review the state's sovereign decisions, even in its role as ultimate legislator, is assigned to courts so as to insulate that review function from other powers.<sup>68</sup> According to Peter Russell: 'the case for subjecting government itself . . . to legal limits on its authority' is based on the liberal rule of law premise that 'disputes about whether the non-judicial branches of government have exercised their powers in a manner authorized by law must be decided by judges those branches do not control'.<sup>69</sup> To further this separation, and to ensure public confidence, objective safeguards of independence were extended historically to the judicial office. These include the safeguards of appointment of the judge for a set tenure; prohibitions on removal from office other than for cause; guarantees of the judicial salary;<sup>70</sup> and assurances of administrative independence, including control by a court of its docket, assignment of judges to specific cases, and so on.<sup>71</sup> The presence of these safeguards establishes an institutional foundation for the special capacity and legitimacy of judges both to resolve disputes between parties and to review other public decisions. Courts are usually not accountable to a general electorate or staffed by experts in specific fields of regulation. Their conventional strength, creating their 'special competence to interpret public values embodied in authoritative texts',<sup>72</sup> lies in a process that allows for the presentation of evidence and argument by those affected by a decision, that leads to the carefully reasoned evaluation of claims, and that is based on both a detachment from the specific dispute and an institutional separation from other actors.

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<sup>67</sup> Waldron (n 13 above) 7; Tamanaha (n 5 above) 52–3; Crawford (n 8 above) 4 and 11.

<sup>68</sup> WR Lederman, 'The Independence of the Judiciary' (1956) 34 *Canadian Bar Review* 769, 802.

<sup>69</sup> PH Russell, 'Toward a General Theory of Judicial Independence' in PH Russell and DM O'Brien (eds), *Judicial Independence in the Age of Democracy* (2001) 10.

<sup>70</sup> A Hamilton, *The Federalist* (1961) 472. *Reference re Remuneration of Judges of the Provincial Court* [1997] 3 SCR 3, para 131.

<sup>71</sup> NT Nemetz, 'Comment' in A Linden (ed), *The Canadian Judiciary* (1976) 16–17.

<sup>72</sup> O Fiss, 'The Bureaucratization of the Judiciary' (1983) 92 *Yale LJ* 1442, 1443.

The importance of judicial independence is recognized in the many international courts and tribunals that exist beyond investor-state arbitration, including those with jurisdiction and effective power over disputes that arise from regulatory relations between states and individuals. This is the case, in particular, at the European Court of Human Rights, the European Court of Justice, the Inter-American Court of Human Rights, and the International Criminal Court, at which judges are appointed for terms of six to nine years, are subject to restrictions on outside activities that would be incompatible with judicial independence and impartiality as determined by the respective court, and are assigned to specific cases by objective methods such as seniority or rotation.<sup>73</sup> The common element with domestic courts is that the final word on the resolution of specific claims, and the corresponding determination of public law, lies with a decision-maker which enjoys a range of safeguards for its institutional independence and thus an objectively verifiable capacity for fair decision-making.

The longstanding importance of judicial independence is demonstrated by the (here, common law) origins of judicial security of tenure. In England, security of tenure is understood to have originated in the Act of Settlement of 1701 which provided (as of 1714) that judges could no longer be removed at the pleasure of the King, but only on approval of both Houses of Parliament.<sup>74</sup> This was a covenant of the Glorious Revolution and it was achieved only after hard experience in which, for example, Sir Edward Coke—then Lord Chief Justice of the Court of Common Pleas—stood up to

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<sup>73</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights (ECHR)), adopted 4 November 1950, entered into force 3 September 1953, 213 UNTS 222, 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, signed 25 March 1957, entered into force 1 January 1958, 298 UNTS 11, Art 223; Protocol on the Statute of the Court of the European Economic Community, signed 17 April 1957; 298 UNTS 147, Art 4; 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), OEA/Ser P/IX.0.2/80, Vol 1, 98 (1980), Arts 5, 18, 25; Rome Statute of the International Criminal Court, signed 17 July 1998, UN Doc A/CONF.183/9, Arts 36(9)(a), 39(1), 40(2) and (3).

<sup>74</sup> Lederman (n 68 above) 782; R Stevens, 'Judicial Independence in England' in Russell and O'Brien (n 45 above) 159.

James I by refusing to submit the courts to an over-ride by the King and was dismissed from office for doing so.<sup>75</sup> This basis for preserving judicial independence was extended in 1760, when existing judicial appointments were allowed to continue beyond the death of the ruling King or Queen. Provisions for security of tenure were later incorporated into the US constitution<sup>76</sup> and into the constitutions of many other countries<sup>77</sup> as a basis for the separation of the judicial power.<sup>78</sup> In *The Federalist Papers*, Alexander Hamilton wrote of the ‘permanent tenure of judicial officers’ that ‘nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty’.<sup>79</sup> Security of tenure and a guaranteed judicial salary have been described as ‘cardinal centricities of judicial independence’<sup>80</sup> and as ‘an original principle in the basic customary law of the constitution’, whether expressed in an ordinary statute or explicitly in the constitution.<sup>81</sup>

Despite its origins in the formal separation of powers, security of tenure also insulates judges from inappropriate influence by other powerful actors, such as the church, officials of other states or international organizations, and private interests.<sup>82</sup> With respect to private interests, the influence of transnational firms—the most prominent and powerful foreign investors in the present system—has become more relevant as globalization has accelerated and its impacts have deepened. These actors have the

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<sup>75</sup> Lord Denning, ‘The Independence of the Judges’, Address to the Holdsworth Club of the University of Birmingham, 16 June 1950 (1950) 4–7; IR Kaufman, ‘The Essence of Judicial Independence’ (1980) 80 Col LR 671, 673–6.

<sup>76</sup> HJ Abraham, ‘The Pillars and Politics of Judicial Independence in the United States’ in Russell and O’Brien (n 45 above) 25–6.

<sup>77</sup> Montesquieu, *De l’esprit des lois*, bk XI, ch 4, pp 294–6. Lederman (n 68 above) 771; JM Williams, ‘Judicial Independence in Australia’ in Russell and O’Brien (n 45 above) 174–5.

<sup>78</sup> Kaufman (n 75 above) 689–94

<sup>79</sup> Hamilton (n 70 above) 469.

<sup>80</sup> Abraham (n 76 above) 26.

<sup>81</sup> WR Lederman, ‘The Independence of the Judiciary’ in A Linden (ed), *The Canadian Judiciary* (1976) 5.

<sup>82</sup> J Braithwaite, ‘On Speaking Softly and Carrying Big Sticks: Neglected Dimensions of a Republic Separation of Powers’ (1997) 47 University of Toronto Law Journal 305, 307–8.

potential not only to ‘shape global regulatory regimes’<sup>83</sup> but also to influence courts directly in the judicial review of state decision-making.<sup>84</sup> On this, Shimon Shetreet wrote in 1976:<sup>85</sup>

Independence of the judiciary has normally been thought of as freedom from interference by the executive or legislature in the exercise of the judicial function . . . In modern times, with the steady growth of corporate giants, it is of utmost importance that the independence of the judiciary from business or corporate interests should also be secured. In short, independence of the judiciary implies not only that a judge be free from governmental and political pressure and political entanglement but also that he should be removed from financial and business entanglements likely to affect, or rather to seem to affect him in the exercise of his judicial function.

#### **IV Concerns about Independence in Investment Treaty Arbitration**

The absence of security of tenure and other safeguards in investment treaty arbitration, due to its uniqueness as a form of public law arbitration, is important because it raises a serious concern about bias in the system. In particular, it founds an apprehension of bias in favour of claimants (especially where they are likely repeat players or otherwise heavy consumers of legal and arbitration services) and, more specifically, in favour of those states that wield major power over appointing authorities or the system as a whole. In turn, respondent states in general, as well as those investors who bring claims against such powerful states, are likely to be disadvantaged unfairly. This is so for two main reasons. First, based on their governance structure and distribution of voting power, many of the entities that exercise appointing authority under the treaties appear very likely to favour the priorities of major capital-exporting states or foreign investors, or both. Secondly, where only one class of parties brings the claims (in this case investors), arbitrators appointed on a case-by-case basis may be suspected of favouring that class of parties

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<sup>83</sup> Braithwaite (n 82 above) 307.

<sup>84</sup> J Rosen, ‘Supreme Court Inc.’ *New York Times*, 16 March 2008.

<sup>85</sup> S Shetreet, *Judges on Trial* (1976) 17–18.

in order to promote the system and their position within it. Both issues arise from the fact that the arbitrators are appointed on a case-by-case basis and that they typically derive extensive business income from professional services supplied to powerful actors outside the adjudicative function.

### **A. The Inappropriate Influence of Appointing Authorities**

Because investment treaty arbitrators are appointed case-by-case, obvious questions arise about the role of appointing authorities under investment treaties. The appointing authorities exercise various discretionary powers, including the power to appoint the presiding arbitrator where the disputing parties (or party-appointed arbitrators) do not agree on who to appoint, the power to appoint a party-appointed arbitrator where the relevant party does not do so, the power to decide challenges alleging a conflict of interest on the part of an arbitrator (or to determine who should resolve such challenges), and—pursuant to the ICSID Convention—the power to appoint all three members of an annulment tribunal.<sup>86</sup>

Where an adjudicator lacks secure tenure, the appointing authority obviously has much greater influence over how the adjudicative process will unfold, case to case, than where the appointment is made once and for a lengthy period. In the latter circumstance, an appointing authority will no doubt consider how a judicial appointment is likely to alter the ideological inclinations of the bench over a judge's term of office, for example.<sup>87</sup> But the authority is in a position to act on these preferences only at the time of appointment; it cannot adjust its decision on an ongoing basis as it learns of specific claims, the identity of the claimant or respondent,

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<sup>86</sup> eg Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention), adopted 18 March 1965, 575 UNTS 159, Arts 38, 52(3), 58; Arbitration Rules of the United Nations Commission on International Trade Law, UN GA Res 31/98, UN GAOR, 31st Sess, Supp No 17, UN Doc A/31/17, chapter V, section C (1976), Arts 6(2) and (3), 7(2) and (3), and 12 (UNCITRAL Rules); Rules of Arbitration of the International Chamber of Commerce, revised 1 January 1998, Arts 8 and 11(3) (ICC Rules).

<sup>87</sup> E Voeten, 'The Politics of International Judicial Appointments' (2009) 9 Chi JIL 387; R Mackenzie and P Sands, 'International Courts and Tribunals and the Independence of the International Judge' (2003) 44 Harv ILJ 271, 277–9.

the issues raised, the implications of a potential decision, the impact on the appointing authority and its associates, and so on. With case-by-case appointments, an appointing authority is in a position to do all of these things. This is not to say that the resulting decision will necessarily have been based on improper considerations. But it may have been, and clearly the authority is in a far stronger position to manage the allocation of adjudicative power within the system—so as to accentuate disciplines on some states and alleviate them for others, for instance—than if objective safeguards of independence were present. The fact that this is possible in itself founds a credible suspicion of bias. Simply put, case-by-case appointment may be seen to operate in favour of those who wield power in the appointing authority at the expense of those who do not.

To whom are these powers allocated under investment treaties? One would expect that in an impartial and independent system these powers would be assigned to an entity that was reasonably free of apparent bias in favour of investor or state interests (or particular investor or state interests). This is arguably so under the few investment treaties<sup>88</sup> that allocate appointing authority to judges of the International Court of Justice.<sup>89</sup> However, under the great majority of investment treaties, the designated appointing authority leans heavily towards the priorities of the major Western capital-exporting states or international business.

Often the authority lies with the World Bank's International Centre for the Settlement of Investment Disputes (ICSID), at which the relevant powers are held by the Chair of

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<sup>88</sup> eg ASEAN Agreement for the Promotion and Protection of Investments, signed 15 December 1987, 27 ILM 612, Art X(4); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of India for the Promotion and Protection of Investments, signed 14 March 1994, entered into force 6 January 1995, UKTS No 27 (1995); Cmd 2797, Art 9(3)(c)(ii).

<sup>89</sup> Ironically, the prominent arbitrator and proponent of the current system, Jan Paulsson, has criticized the allocation of appointing authority to the ICJ (under a set of arbitration rules applying to disputes between governments and contractors under the Lomé IV Convention) as 'a political rather than a professional solution'. J Paulsson, 'Arbitration Without Privity' (1995) 10 ICSID Rev-FILJ 232, 244-5.

the ICSID Administrative Council<sup>90</sup> or by the ICSID Secretary General.<sup>91</sup> Both are executive officials in an international organization. The former is an *ex officio* position of the World Bank President who is by convention a US national,<sup>92</sup> nominated by the US government and confirmed by the Bank's Board of Directors at which roughly 60 per cent of the voting power is held by Executive Directors of eleven major capital-exporting states.<sup>93</sup> The ICSID Secretary General, conventionally the World Bank's Legal Vice President and General Counsel, although now a separate officer,<sup>94</sup> is a person nominated by the World Bank President and approved by a two-thirds vote of the Administrative Council where states vote on the basis of one vote per member.<sup>95</sup> Thus, appointing authority at ICSID is vested in (1) an official who is customarily chosen by the US Administration with the concurrence of other major capital-exporting states or (2) a person nominated by the official referred to in (1) with the concurrence of the state parties to the ICSID Convention.<sup>96</sup> The difficulty with this is that, given its nomination arrangements, its weighted voting, and its governance structure, it is difficult for an informed outsider to conclude with

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<sup>90</sup> Typically designated by a reference in the investment treaty to the ICSID Rules and, in turn, by the ICSID Convention, (n 86 above) Art 38.

<sup>91</sup> Typically designated by an express provision in the investment treaty; eg North American Free Trade Agreement (NAFTA), signed 17 December 1992; entered into force 1 January 1994, 32 ILM 296 and 605, Art 1124(1).

<sup>92</sup> At present, the office is held by Robert Zoellick (formerly US Trade Representative); formerly it was held by Paul Wolfowitz (formerly US Deputy Secretary of Defense).

<sup>93</sup> Articles of Agreement of the International Bank for Reconstruction and Development (World Bank), as amended effective 16 February 1989, Art V(5)(a). The 11 major capital-exporters are the US, Canada, Germany, France, the UK, Belgium, Spain, the Netherlands, Italy, Switzerland, and Japan. G Van Harten, *Investment Treaty Arbitration and Public Law* (2007) 13, note 6.

<sup>94</sup> L Peterson, 'After 40+ years, ICSID to have its own full-time Secretary General' *Investment Arbitration Reporter*, 18 June 2008.

<sup>95</sup> ICSID Convention (n 86 above) Art 10(1). See also AR Parra, 'New Amendments of the Regulations and Rules of the International Centre for Settlement of Investment Disputes' (2002) 1 *ICSID News* 9.

<sup>96</sup> Appointment of the latter appears less subject to control by capital-exporting states although if a nominee did not receive the required support from the ICSID Administrative Council this presumably would lead to another candidate (or perhaps even the same candidate) being nominated by the World Bank President.

confidence that ICSID will be free of improper bias in favour of certain states or of the private interests that those states favour.<sup>97</sup>

These concerns would remain, but would be less acute, if ICSID were to appoint the adjudicators for a set term, of say seven years, as at other international adjudicative bodies that hear claims by individuals in the regulatory sphere, as well as in the case of domestic courts (although the domestic standards are more rigorous, in that judicial tenure is typically granted for life or until a set retirement age).<sup>98</sup> The concerns would be alleviated further if ICSID appointments were for non-renewable terms; if the adjudicators were assigned in an objective way to specific cases; and if appointments took place as part of a wider process involving discussion of possible candidates among regional groupings of states, with an opportunity for capital-exporters and capital-importers alike to influence the decision. Jan Paulsson criticizes this state-based model of appointments (with particular reference to the WTO Appellate Body) as lacking in legitimacy because it involves the appointment of tribunal members ‘through the political processes of an international organization’.<sup>99</sup> But it is difficult to understand how case-by-case appointments at ICSID (or other appointing authorities in the system) can be described differently, except by noting the more serious failure at ICSID to provide security of tenure for those who are appointed and the consequently more pervasive role of ICSID’s own political processes.

Even so, ICSID is arguably better positioned to make these decisions than other appointing authorities in the system. ICSID is at least accountable to states, most of which are electoral democracies, and its process is relatively open in that: (1) ICSID publicizes the existence of ICSID claims by investors and the identity of arbitrators appointed; (2) ICSID appoints from a roster of arbitrators set by the state parties to the

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<sup>97</sup> D Schneiderman, ‘Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes’, Paper presented to the Law and Society Association and the Canadian Law and Society Association conference on Placing Law, Montreal (30 May 2008) 13–14 (documenting the influence reportedly exercised by the US Department of Justice over the *Loewen* tribunal via communications with the US appointee to that tribunal, retired judge and former US Congressman Abner J Mikva).

<sup>98</sup> Mackenzie and Sands (n 87 above) 279.

<sup>99</sup> Paulsson (1995 article) (n 89 above) 244.

ICSID Convention (although there remains no objective method of assignment to specific cases, and the current roster is too large to make such a process feasible); (3) ICSID decisions are usually released to the public (at least in part); and (4) ICSID annulment tribunals give reasons for their decisions on impartiality challenges to arbitrators. It is doubtful that these characteristics satisfy the standards of openness and accountability of domestic or international courts, but they at least allow a degree of scrutiny of ICSID decision-making that is absent for other appointing authorities acting pursuant to the UNCITRAL Rules, the Rules of the International Chamber of Commerce (ICC Rules), and the Rules of the Stockholm Chamber of Commerce (SCC Rules), in particular.

More troubling is the powerful role that is played under some investment treaties by private organizations, accountable directly to business interests rather than a public body, that do not provide even the most basic assurances of openness and accountability. For example, many treaties<sup>100</sup> assign appointing authority to the ICC. Under the ICC Rules, arbitrators are appointed by the ICC's International 'Court'<sup>101</sup> of Arbitration, the members of which are chosen by the ICC world council of business on the recommendation of the ICC Executive Board.<sup>102</sup> The ICC Rules themselves are under the custody of the ICC and are subject to change according to the ICC's processes (and power relations), beyond the control of the state parties to investment treaties. The ICC has described itself on its website as 'the world business organization', as 'the voice of world business', and as an organization that 'speaks for

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<sup>100</sup> eg Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Bolivia, signed 10 March 1992, entered into force 1 November 1994, Art 9(4); Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of The Netherlands and the Czech and Slovak Republic, signed 29 April 1991, entered into force 1 October 1992, Art 8(4).

<sup>101</sup> The scare quotes are simply to convey that this is not a typical court in the manner of other domestic and international entities bearing the name. As Yves Dezaley and Brant Garth put it, the ICC Court 'is really an oversight committee that reviews arbitration appointments and decisions [and that] appears to be particularly sensitive to the business clientele . . .', Y Dezaley and B Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (1996) 45.

<sup>102</sup> ICC Rules (n 86 above) Arts 1 and 9(3)) and Appendix I (Statutes of the International Court of Arbitration of the ICC, Art 3).

world business whenever governments make decisions that crucially affect corporate strategies and the bottom line'.<sup>103</sup> This demonstrates the obvious point that the ICC is a business organization whose purpose is to further the interests of its membership, much of which consists of foreign investors that have brought or that might bring a claim under an investment treaty, that regularly negotiate investment contracts containing arbitration clauses, that hire ICC officials (including arbitrators) as advisers, and so on.<sup>104</sup>

It is reasonable, then, to suspect that ICC officials, when appointing arbitrators to specific cases or when resolving conflict of interest claims against arbitrators, will tend to favour the interests of investors, on whose behalf the ICC works and lobbies, over the regulatory priorities of states. Where the president of an international tribunal, appointed to decide key questions of public law, is chosen by an arm of the ICC, it is indeed difficult to describe this as anything other than an utter failure to ensure judicial independence 'from business and corporate interests' and to insulate the adjudicator from 'financial and business entanglements likely to affect, or rather to seem to affect him in the exercise of his judicial function'.<sup>105</sup> An analogous situation in the US context might involve a takings dispute between a business entity and a state government being resolved, not by the Supreme Court, but by an arbitration tribunal, the presiding member of which was appointed by the US Chamber of Commerce. To describe this as an independent arrangement for the adjudication of public law would be untenable.

Because of the role played in the system by organizations likely to favour major states or international business—combined with the use of adjudication to make final decisions about matters of great importance to states and their people—the lack of objective safeguards in investment treaty arbitration undermines the claims that the system delivers a fair, rules-based process. According to

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<sup>103</sup> 'What is ICC?' at <<http://www.iccwbo.org/id93/index.html>> (last accessed 15 September 2009).

<sup>104</sup> Dezaley and Garth (n 101 above) 313.

<sup>105</sup> Quoting Shetreet (n 85 above) 17–18

Alexander Hamilton:<sup>106</sup> ‘If the power of making [periodical judicial appointments] was committed either to the executive or legislature there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either.’ Or as Lord Denning said, without secure tenure: ‘The judicial power is simply a part of the executive machine.’<sup>107</sup> Denning was speaking of the domestic separation of powers, but it is reasonable to expect that executive officials at international organizations, whether private or state-based, are also subject to the power dynamics of their own executive machine.

### **B. The Inappropriate Influence of Private Parties**

Security of tenure serves also to insulate adjudicators from powerful private interests. As such, it is a means to ensure that no one can claim credibly that a judge decided a dispute or interpreted the law in order to further his or her own financial opportunities. The absence of this and other safeguards in investment treaty arbitration re-introduces various questions about bias. And here the public law structure of the adjudicative mechanism is particularly relevant. Where only one class of parties (investors) can bring claims against the other class (states), and not vice versa,<sup>108</sup> arbitrators have an apparent interest to interpret the law in ways that facilitate or encourage claims (albeit without undermining the political foundations for the system’s existence). If the arbitrator identifies his or her own interests with those of the arbitration industry—a reasonable assumption in many cases—then he or she may be motivated (or feel obliged) to resolve disputes and interpret the law in ways that grow the arbitration industry, enhance his or her status among gatekeepers within it, and encourage powerful states to value the system so as not to jeopardize the industry’s role.

On the difficulty with using arbitration to resolve finally questions of public law, a stark warning is provided by Yves Dezaley and Brant Garth’s classic empirical study

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<sup>106</sup> Hamilton (n 70 above) 471.

<sup>107</sup> Denning (n 75 above) 1.

<sup>108</sup> Other than in the limited circumstance of a possible counter-claim by the state.

of the international arbitration industry.<sup>109</sup> Although their research did not focus specifically on investment treaty arbitration and its unique characteristics, Dezaley and Garth's findings indicate that competitive pressures in the arbitration industry pose a threat to independence in public law adjudication, all the more so in a system that involves case-by-case appointments and asymmetrical claims. Relevant observations in their study, which was based on extensive interviews with participants in the arbitration industry, include the following:

The operation of the market in the selection of arbitrators . . . provides a key to understanding the justice that emerges from the decisions of arbitrators.<sup>110</sup>

The new generation of [arbitration] technocrats . . . emphasizes their ability to satisfy the consumers in order to gain repeat business.<sup>111</sup>

For the lawyers and their justice, the question is how to affirm the autonomy necessary for legitimacy while at the same time manifesting sufficient fidelity to the economic powers who must in the end find these services worth purchasing and deploying.<sup>112</sup>

It is good arbitration politics to thank business lawyers or other acquaintances who bring nice arbitration matters by letting them have limited access to the arbitration market. This system of exchange of favors is essential to success in arbitration, a career dependent on personal relations.<sup>113</sup>

The growth of the market *in arbitration* is also evident in the competition that can be seen among different national approaches and centers.<sup>114</sup>

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<sup>109</sup> Dezaley and Garth (n 101 above).

<sup>110</sup> *ibid* 9.

<sup>111</sup> *ibid* 194.

<sup>112</sup> *ibid* 70.

<sup>113</sup> *ibid* 124.

<sup>114</sup> *ibid* 7 (emphasis in original).

They [the newcomer arbitrators of the 1980s and 1990s] present themselves . . . as international arbitration professionals, and also as entrepreneurs selling their services to business practitioners . . .<sup>115</sup>

The ICC [International Chamber of Commerce] has . . . become one of the principal places where the ‘politics’ of arbitration is elaborated and expressed. There are innumerable committees and multiple networks of influence that gravitate around this institution. The [ICC International Court of Arbitration], for example, which is really an oversight committee that reviews arbitration appointments and decisions, appears to be particularly sensitive to the business clientele . . .<sup>116</sup>

The multinational companies are in this way investing in the construction of these legal services that serve them.<sup>117</sup>

These findings convey the fact that arbitrators operate in a marketplace in which each supplier of the ‘symbolic capital’ arising from individual reputations has an interest to further his or her own position and that of the industry as a whole.<sup>118</sup> The industry consists of networks of cross-connected players. They affiliate around prominent centres of arbitration such as the ICC. Prominent arbitrators may name each other for appointments and exclude those who are not accepted within the culture. With the passing of the old generation of gentleman arbitrators, the new technocrats are more likely to have an orientation that differentiates and promotes their industry in relation to its competitors (here, domestic courts and international diplomacy).<sup>119</sup> Because arbitrators can earn income from activities beyond the adjudicative role, including from the private practice of investment law, the industry encompasses—although to varying degrees—not only the arbitrators themselves, but also the lawyers and aspiring arbitrators working in or around the system and the assorted experts and

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<sup>115</sup> *ibid* 36.

<sup>116</sup> *ibid* 45.

<sup>117</sup> *ibid* 93.

<sup>118</sup> *ibid* 8 and 18.

<sup>119</sup> *ibid* 50.

commentators who seek work as expert witnesses, advisers, or arbitrators.<sup>120</sup>

Prominent players often sit as arbitrators while advising and representing claimants or respondents and while promoting arbitration clauses in investment contracts, treaties, or arbitration rules.<sup>121</sup>

It must be obvious to anyone working in the industry, as to the informed outsider, that investment arbitration will not thrive unless businesses that own assets abroad consider it worthwhile to bring claims, and unless powerful states continue to see benefits in the system so as not to pull the plug on it.<sup>122</sup> One would expect, then, that the ‘economic powers’ demanding appeasement by the industry include claimants (investors), especially repeat players or firms that negotiate arbitration clauses in their contracts, as well as the major players in appointing authorities. That said, arbitrators can also be expected to avoid favouring blatantly the system’s consumers or overseers in order to protect their claims to autonomy and legitimacy.<sup>123</sup> How arbitrators choose to present themselves as ‘entrepreneurs selling their services’ is likely to depend on the relevant sub-market for appointments (ie investors, states, one or more appointing authorities, or a combination). And, as the degree of connection will vary between individual arbitrators and particular arbitration centres or the industry as a whole, so too will the degree of apparent financial or career-related pressure.<sup>124</sup> Nevertheless, all arbitrators who aspire to future business will have reason to promote the system among prospective claimants while defending it from rejection by the most powerful states.

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<sup>120</sup> *ibid* 49–50; JAF Costa, ‘American and European Investment Arbitrators: A Single Culture?’, Paper presented to the Law and Society Association and the Canadian Law and Society Association Conference on Placing Law, Montreal (30 May 2008) 7–8.

<sup>121</sup> N Majeed, ‘Investor-State Disputes and International Law: From the Far Side’ (2004) 98 *ASIL Proceedings* 30, 31. Dezaley and Garth (n 101 above) 8, noting the role of repeat players, especially large law firms, in the selection of arbitration institutions and in the appointment of arbitrators.

<sup>122</sup> W Mattli, ‘Private Justice in a Global Economy: From Litigation to Arbitration’ (2001) 55 *Int’l Org.* 919, 921–2.

<sup>123</sup> Dezaley and Garth (n 101 above) 70.

<sup>124</sup> *ibid* 34–5.

This provides a basis for suspicion about inappropriate bias in the system. It raises precisely the sorts of concerns that safeguards of independence seek to dispel by removing adjudicators from the market and by positioning them instead as members of a separate institution. As Lederman put it in 1976: ‘The conditions on which [judges] hold office mean that they have no personal career interest to be served by the way they go in deciding cases that come before them.’<sup>125</sup> In the absence of the safeguards, the career interests return with a vengeance, with major consequence in the adjudication of public law.

### C. Actual versus Perceived Bias

Some have argued that concerns about apparent bias in investment treaty arbitration are misplaced because there is no proof of actual bias in the system. This response misconstrues the standards of independence that apply to judges and typically to other adjudicators. It is rarely if ever a requirement in adjudication that actual bias be proven in order to disqualify an adjudicator (although proof of actual bias will of course suffice to disqualify). Rather, the requirement is for an absence of an unacceptable ‘apprehension’ of bias, or ‘appearance’ or ‘suspicion’ or ‘danger’ of bias,<sup>126</sup> so as to recognize that the absence of actual bias, while vital, is not enough. What is also required is a sound basis for an informed outsider to conclude that the adjudicator is sufficiently insulated from inappropriate bias. Where to draw the line as to what perceptions constitute a sufficient basis for doubt may depend on various factors.<sup>127</sup> But only in highly extraordinary circumstances—perhaps where an available pool of expert commercial adjudicators consisted of only one or a few people in a small sector in which everyone worked very closely together—might proof of actual bias be the sole basis for questioning independence.

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<sup>125</sup> Lederman (n 81 above) 11.

<sup>126</sup> eg *R v Gough* [1993] 2 All ER 724; *Reference re Remuneration of Judges of the Provincial Court* (n 70 above) paras 111–12; *Ebner v The Official Trustee in Bankruptcy* [2000] HCA 63; [2000] 205 CR 337. H-L Yu and L Shore, ‘Independence, Impartiality, and Immunity of Arbitrators’ (2003) 52 ICLQ 935, 937.

<sup>127</sup> See discussion at n 42 above, and accompanying text.

The Court of Appeal of England and Wales explained the concern for perceived bias, as well as actual bias, in the *Locabail* decision:<sup>128</sup>

. . . objections and applications based on what, in the case law, is called ‘actual bias’ are very rare, partly (as we trust) because the existence of actual bias is very rare, but partly for other reasons also. The proof of actual bias is very difficult, because the law does not countenance the questioning of a judge about extraneous influences affecting his mind; and the policy of the common law is to protect litigants who can discharge the lesser burden of showing a real danger of bias without requiring them to show that such bias actually exists.

This highlights two problems with a reliance on proof of actual bias as the basis for establishing independence. First, it is unrealistic to expect a party to be able to establish actual bias given the obvious difficulties of doing so. Secondly, it would be unbecoming of the adjudicative process to compel the adjudicator to testify as to his or her state of mind, opinions, etc. Thus, in the well-known words of Lord Hewart, ‘it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done’.<sup>129</sup> In this respect, for example, the Supreme Court of Canada requires ‘that the court or tribunal be reasonably perceived as independent’ and explains that: ‘The reason for this additional requirement was that the guarantee of judicial independence has the goal not only of ensuring that justice is done in individual cases, but also of ensuring public confidence in the justice system.’<sup>130</sup>

Assessing whether a reasonable perception of bias exists requires one to consider indicators of possible bias on the part of the individual adjudicator.<sup>131</sup> That is, are there any direct or indirect connections between the individual adjudicator and other

<sup>128</sup> *Locabail v Bayfield Properties* [2000] QB 451, 471–2.

<sup>129</sup> *R v Sussex Justices, ex p McCarthy* [1924] 1 KB 256, 259.

<sup>130</sup> *Reference re Remuneration of Judges of the Provincial Court* (n 70 above) paras 111–112; *R v Valente* [1985] 2 SCR 673, para 22.

<sup>131</sup> E Gordon *et al*, ‘The Independence and Impartiality of International Judges’, 83 ASIL Proceedings 508, 509 (1989).

interests that raise a concern? Is there evidence of an attitudinal bias arising from what the individual has said or written in the past? Was the individual previously involved in the dispute or in relevant decision-making involving a disputing party? These sorts of questions are addressed or alluded to in many arbitrator codes of conduct<sup>132</sup> and in the submissions made when investment treaty arbitrators are challenged by a disputing party. What one does not see in investment treaty arbitration, but what one should expect when adjudication is used to decide public law, are the safeguards that apply to courts when they are called on to resolve questions of public law. The need for these safeguards ‘follows from the fact that independence is status oriented; the objective guarantees define that status’.<sup>133</sup> Different jurisdictions frame such requirements in different ways, but the safeguards themselves are widely recognized in the liberal democratic tradition of judicial review.<sup>134</sup> They are also widely recognized in statements of international organizations<sup>135</sup> and in the founding instruments of international courts<sup>136</sup> as central components of judicial independence. They do not guarantee judicial purity of mind and complete freedom from

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<sup>132</sup> eg IBA Guidelines on Conflicts of Interest in International Arbitration, 22 May 2004, explanation to General Standard 1, referring to ‘justifiable doubts’ as to the arbitrator’s ‘ability to be impartial or independent’.

<sup>133</sup> *Reference re Remuneration of Judges of the Provincial Court* (n 70 above) para 112, referencing *Valente* (n 130 above) paras 15, 22.

<sup>134</sup> Russell (n 69 above) 1.

<sup>135</sup> UN Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August–6 September 1985; endorsed by GA Res 40/32 and 40/146, UN GAOR, 40th Sess, UN Doc A/RES/40/32 and A/RES/40/146 (1985)), Arts 2, 11–15; Report of the United Nations Secretary General on the Rule of Law and Transnational Justice in Conflict and Post-Conflict Societies, UNSG Report S/2004/616 (2004) 4.

<sup>136</sup> ECHR (n 73 above) Arts 21–3; Treaty of Rome (n 73 above) Art 223; Protocol on the Statute of the Court of the European Economic Community, Art 4; Rome Statute of the International Criminal Court (n 73 above) Arts 35–6, 40, 46; Statute of the International Court of Justice (26 June 1945), Arts 13(1), 16, and 18(1); WTO Dispute Settlement Understanding, Art 17(2).

inappropriate influence.<sup>137</sup> But they are nonetheless widely accepted to be institutional preconditions.<sup>138</sup>

#### **D. Empirical Study of Actual Bias**

A series of related arguments have been made to the effect that the experience in investment treaty arbitration to date reveals the system to be neutral and independent. For instance, it is sometimes said that claimants are frequently unsuccessful and that, even where the claimant is successful, the outcome is usually an award of only a proportion of the compensation originally claimed. Not having analysed the data systematically, I myself would have guessed that tribunals decline jurisdiction in about 20 per cent of cases and find in favour of the claimant in about 50 per cent of the remaining cases, although in a significant minority of these cases the amount awarded is not more than a few million dollars. A more rigorous study of seventy-nine publicly-available awards found that ICSID tribunals rarely declined to hear claims on jurisdictional grounds, that investors who negotiated host-country consents to ICSID jurisdiction on their own initiative [i.e. pursuant to a contract] *hurt* their claims' ability to withstand objections for lack of jurisdiction, and that investors from the richest countries had the most success in securing ICSID jurisdiction.<sup>139</sup> In two detailed studies, Susan Franck found that investors were successful and received damages in twenty of the fifty-two final awards reviewed<sup>140</sup> and that, in forty-two

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<sup>137</sup> M Traynor, 'Judicial Independence: A Cornerstone of Liberty' (2007) 37 *Golden Gate University Law Review* 487, 492; CM Larkins, 'Judicial Independence and Democratization: A Theoretical and Conceptual Analysis' (1996) 44 *AJCL* 605, 613–14; LR Helfer and A-M Slaughter, 'Why States Create International Tribunals: A Response to Professor Posner and Yoo' (2005) 93 *Cal LR* 899, 904.

<sup>138</sup> Russell, (n 69 above) 11.

<sup>139</sup> KS McArthur and PA Ormachea, 'International Investor-State Arbitration: An Empirical Analysis of ICSID Decisions on Jurisdiction' (2009) 28 *Review of Litigation* 559, 563 (emphasis in original). The authors provide descriptive rather than predictive statistics; thus, they describe the pattern that exists in the band of cases examined but do not purport to reveal the full picture or explain the relevant pattern.

<sup>140</sup> SD Franck, 'Empirically Evaluating Claims About Investment Treaty Arbitration' (2007) 86 *North Carolina Law Review* 1, 49 (for the record, this article mis-quotes the present author at p 19).

cases reviewed, there was no statistically significant association between the OECD status or income-level of the state of nationality of a tribunal's presiding arbitrator and certain adjudicative outcomes for OECD/non-OECD states or for states with varying income levels.<sup>141</sup>

Some of the findings in the limited empirical work to date thus appear to support the prospect of some sort of bias within the system in favour of claimants and powerful states, while others appear to refute it. None offers compelling evidence in either respect, however. This is partly due to the limitations of the relevant studies; their necessarily limited samples fall short of what would be required for generalizable results, and the parameters of Franck's study did not account for in-group heterogeneity of OECD countries, in particular.<sup>142</sup> More fundamentally, it is simply very difficult to answer empirically whether claimants or states, or particular players within those categories, would be more or less likely to succeed under a court-based model rather than arbitration, and whether major issues would be decided differently by judges as opposed to arbitrators. Empirical work, quantitative and qualitative,<sup>143</sup> is useful and illuminating of expectations about adjudicative tendencies, but, because we are dealing with complex decision-making in circumstances where there can be no controlled comparator, efforts to prove or disprove actual bias will lead, at best, to tentative findings.<sup>144</sup> Indeed, for this very reason, standards of adjudicative independence demand the absence of perceived bias as well as actual bias.

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<sup>141</sup> SD Franck, 'Development and Outcomes of Investment Treaty Arbitration' (2009) 50 Harv ILJ 435, 460–71.

<sup>142</sup> ie most arbitrators with OECD nationality are likely to originate from the major capital-exporting states in Western Europe or North America whereas many of the OECD countries against whom awards are made are transition or developing states (ie the Czech Republic, Hungary, Mexico, the Slovak Republic, Poland, and Turkey).

<sup>143</sup> See especially Dezaley and Garth (n 101 above).

<sup>144</sup> Thus, Susan Franck's claim (n 141 above) 464, that her findings on arbitrator bias provide 'a powerful narrative that there is procedural integrity in investment arbitration' and undercut 'the argument that development variables inappropriately affect outcome by unfairly harming the developing world or that arbitrators' decisions vary by virtue of their development backgrounds' are over-stated, especially given the limited sample (ie a very small number of applicable cases) for many of her analytical categories and the in-group heterogeneity of OECD countries.

## E. Existing Protections within in the System

In a recent article, Charles Brower and Stephan Schill responded in detail to concerns about apparent bias in investment treaty arbitration.<sup>145</sup> One of their main points<sup>146</sup> was that the argument that there is such a concern ‘disregards that arbitrators are impartial and independent dispute resolvers who interpret and apply the governing law and are subject to a number of mechanisms that can prevent private interests from

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<sup>145</sup> Brower and Schill (n 1 above).

<sup>146</sup> Brower and Schill (n 1 above) present other responses to the concerns expressed here (and elsewhere by the present author) about apparent bias in the system, for which there is insufficient space here for a proper discussion. I note only that their point that investment treaty arbitrators occupy a public office and that the system is not a form of privatized dispute settlement but rather ‘comparable much more to a form of international administrative review than to purely commercial arbitration’ (p 490) mischaracterizes my own argument while also making it more straightforward to establish. It is a mischaracterization because my argument was never that arbitration is ill-suited to the final resolution of public law on grounds that ‘arbitrators . . . do not hold, like tenured judges, a public office’ (p 489). The argument has been that investment treaty arbitrators should be evaluated according to the standards of independence that apply in public law because their adjudicative function, and its surrounding structure, closely resembles that of judicial review in public law and because similar forms of international adjudication clearly aspire to the same standard (eg G Van Harten, ‘A Case for an International Investment Court’, SIEL Inaugural Conference Working Paper No 22/08 (July 2008) 6: ‘investment treaty arbitration is best analogized to judicial review in public law because it involves an adjudicative body having the competence to determine, in response to a claim by an individual, the legality of the use of sovereign authority, and to award a remedy for unlawful state conduct. Alternatively, it could be said that the adjudicative body issues a decision that has important consequences for the state, for the individual, and for others affected by what the decision means for the authority and conduct of the state . . .’) Thus, the inquiry should focus not on the formalistic question of whether arbitrators are holders of a public office (as Brower and Schill maintain) but rather on the character of the function of the arbitrators and the degree to which it resembles judicial review. More importantly, even if one agrees with Brower and Schill’s answer on this point—by putting investment treaty arbitrators in the category of public office holder—the result is to make it more straightforward to argue that the institutional position of the arbitrators should be evaluated against the safeguards that apply to public courts. Brower and Schill’s claim in no way removes the concern that investment treaty arbitrators are vulnerable, like judges or other public office holders, to inappropriate influence from within or outside government, if not protected by the relevant safeguards.

taking precedence over public interests'.<sup>147</sup> They emphasized that investment treaty arbitrators are subject to 'several formal and informal mechanisms that ensure the impartiality and independence of arbitrators'.<sup>148</sup> Among these, they refer to the duty of arbitrators to disclose information that may reveal impartiality, the ability of a disputing party to challenge an arbitrator's appointment before a domestic court, appointing authority, or arbitral institution, and the possibility for public scrutiny based on the dissemination of awards in professional communities and online.

Each of these mechanisms is important to assuage concern about bias. But all apply also in the case of independent courts that decide public law. They are, as such, complementary to and not substitutes for the other safeguards that courts enjoy. One would not say that an automobile was roadworthy because it had an engine, brakes, and chassis, but no wheels or windows. All of a series of components may be essential for the operation of the whole. And, as widely recognized, safeguards like security of tenure are critical preconditions—though not absolute guarantees—to the assurance of judicial independence. To withdraw these components, even while leaving others in place, is to dilute the standard. Brower and Schill's counter-argument, in essence, does not justify the removal of objective safeguards in the case of investment treaty arbitrators. It is really a claim that arbitrators should be subject to a lower standard than the domestic and international courts which carry out similar functions.<sup>149</sup>

Of particular importance for Brower and Schill as a means to protect against impartiality are the reputations of arbitrators and the point that 'appointments . . . are essentially merit-based' in that 'the crucial factor for appointment is not the possible or real bias of an arbitrator' but rather 'his or her reputation for impartial and independent judgement'.<sup>150</sup> An investment treaty arbitrator's reputation, say Brower and Schill, 'is too fragile to risk by biased decisionmaking and therefore works as a

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<sup>147</sup> Brower and Schill (n 1 above) 489.

<sup>148</sup> *ibid* 491.

<sup>149</sup> For further discussion in response to the point that investment treaty arbitration warrants a lower standard of impartiality and independence, see Van Harten (n 146 above) 22–6.

<sup>150</sup> Brower and Schill (n 1 above) 492.

control mechanism that ensures the arbitrators' independence and impartiality'.<sup>151</sup> The difficulty with this point is that, for anyone who must think about how to secure appointments or advance the industry, the key reputational concern is one's status among those with power over appointments and over the wider success of the industry. In investment treaty arbitration, the actors who wield such power cannot be assumed by the outsider to prefer an impartial and independent approach to the resolution of all investor-state disputes. It is likely, rather, that they will prefer approaches that accord with their own interests. Referring to the market for 'merit-based' appointments is thus another way of describing how arbitrators will strive to appease those who have influence in the appointing authorities and over the industry. It is precisely this concern of the untenured adjudicator for his or her reputation in the marketplace that undermines the claim to independence.<sup>152</sup>

## V. Conclusion

Some proponents of investment treaty arbitration are quick to judge the substantive choices of states but reluctant to acknowledge the procedural failings of investment treaty arbitration. Above all, there is a tendency to downplay the system's inattention to well-known safeguards of judicial independence. Yet to defend investment treaty arbitration as a rule of law-based alternative to domestic courts and to international diplomacy is to convey a high expectation of fairness in the system. The process is adjudicative; it is used to decide public law; it is highly determinative; it involves the review of legislative and judicial decisions as well as broad policy decisions of the executive; it circumvents domestic remedies; it leads to state liability involving potentially vast sums; it triggers coercive enforcement in many countries; it may lead to severe losses for investors whose claims fail or who face a costs award. Thus, it is problematic to make the rule of law argument and then to argue that—despite all this—the system need not satisfy the standards of independence that ensure fairness in courts carrying out similar functions.

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<sup>151</sup> *ibid* 492.

<sup>152</sup> Important also is the need to signal one's appeal to the gatekeepers in industry who have personal and professional connections that lead to recommendations for appointment: Dezaley and Garth (n 101 above) 23, 28, 50.

To be clear, the argument in the present chapter is not a criticism of international courts and tribunals that enjoy safeguards of independence, such as the International Court of Justice, the European Courts, or the WTO Appellate Body. Some would strive to tie the fate of investment treaty tribunals to that of other ‘international courts and tribunals’ which must ‘defend themselves on a regular basis against attacks on their legitimacy as mechanisms for resolving disputes about the scope and limits of state sovereignty’.<sup>153</sup> But this is really an attempt to divert attention from the decision of states to replace courts with arbitrators by highlighting instead a wider debate<sup>154</sup> about the appropriate relationship between states and international adjudication. The argument here engages the former issue, not the latter, in that it criticizes investment treaty arbitration for its failure to provide adequate assurances of judicial independence.

Advocates for the system face a quandary. They must support adjudication, asserting its superiority over institutional alternatives in making regulatory choices. But they must defend a particular form of adjudication that eschews the hallmarks of judicial independence. By implication, many rule of law-based defences of the system seek to impose a set of policy prescriptions on some but not all states and to ensure rigorous protections for some but not all foreign investors. Where one or another state or investor stands in the system—in terms of the degree of discipline to which it will be subjected or the level of protection it can expect—will depend on one’s estimation of the attitudes of the relevant appointing authority and of gatekeepers among the arbitrators. Ultimately, the interests of some are likely to be prioritized in ways that are unfair to others. Of course, reasonable people may differ on whether the apparent bias—arising from the allocation of appointing power within ICSID or the ICC, or from the status of claimants within the arbitration industry—seriously erodes the legitimacy of the system as a whole. But, at the very least, the inattention paid by

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<sup>153</sup> Brower and Schill (n 1 above) 471.

<sup>154</sup> eg JK Cogan, ‘Competition and Control in International Adjudication’ (2008) 48 Va JIL 411, 415; ML Movsesian, ‘International Commercial Arbitration and International Courts’ (2008) 18 Duke JCIL 423, 444–8; CA Bradley, ‘The Federal Judicial Power and the International Legal Order’ (2006) *Supreme Court Review* 59; RH Bork, *Coercing Virtue: The Worldwide Rule of Judges* (2003).

many proponents of the system to its institutional failings undermines the normative case that they espouse.