A COLLABORATIVE FRAMEWORK TO REGULATE ARBITRATOR PRACTICE IN INVESTOR-STATE ARBITRATION: THE CASE OF OIL AND GAS DISPUTES

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Declaration:

Dedication:

This thesis is dedicated to the memory of my father,
who left us so suddenly during my studies, and
to my mother for her support that enabled me to achieve this work, and
to my wife and my daughter
who have provided me much encouragement and motivation; for that, I am thankful.

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Praise be to Allah, Lord of the Universe, for His Grace all through my life and through the time of research, writing and completing this work.

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Table of Content:

Abbreviations:

AIA	The Association for International Arbitration
AIAC	The Asian International Arbitration Centre
ADR	Alternative Dispute Resolution
BIT	Bilateral Investment Treaty
CAFTA	The Central American Free Trade Agreement
CEPMLP	The Centre for Energy, Petroleum and Mineral Law & Policy
CETA	Comprehensive Economic Trade Agreement
CIArb	The Chartered Institute of Arbitrators
CMTP	Certified Mediator Training Program
CPD	Continuing Professional Development
CPTPP	The Comprehensive and Progressive Agreement for Trans-Pacific Partnership
CRCICA	The Cairo Regional Centre for International Commercial Arbitration
EAL	The Institute for Energy Law - The Energy Arbitrators List
EC	The European Commission
ECJ	European Court of Justice
EJTN	European Judicial Training Network
EU	European Union
E&P	Exploration and Production
FDI	Foreign Direct Investment
GSA	The Gas Sale Agreements
H.G.	The host government
HKIAC	Hong Kong International Arbitration Centre
IBA	International Bar Association
ICCA	International Council for Commercial Arbitration

ICC International Chamber of Commerce

ICDR International Centre for Dispute Resolution

ICJ International Court of Justice

ICSID International Centre for the Settlement of Investment Disputes

ICS Investment Court System

ICEA International Centre for Energy Arbitration

IEL Institute for Energy Law

IEC International Electrotechnical Commission for Worldwide Standardization

IGO Inter-Governmental Organisations

IMI International Mediation Institute

IO International Organisation

IOC International Oil Company

IPIG International Public Interest Group

ISA Investor-State Arbitration

ISDS Investor-State Dispute Settlement

ISO International Organization for Standardization

ITO International Trade Organization

JAEPA Japan-Australia Economic Partnership Agreement

KAPSARC King Abdullah Petroleum Studies and Research Centre

LCIA London Court of International Arbitration

IIA International Investment Agreement

LNG Liquefied Natural Gas

MAA Maritime Arbitration Association

MA-QAP Mediation Advocacy Qualifying Assessment Program

NGO Non-governmental organisation

NOC	National Oil Company
OECD	Organisation for Economic Co-operation and Development
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PSC	Production Sharing Contract
PTRR	Post-Tax Rate of Return
QAP	Qualifying Assessment Program
RR	Responsive Regulation
SCC	The Stockholm Chamber of Commerce
SIAC	The Singapore International Arbitration Centre
SPE	The Society of Petroleum Engineers
TPR	Transnational private regulation
TRSS	Transnational regulatory standard-setting
TTIP	Transatlantic Trade and Investment Partnership
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
US/ USA	United States/ United States of America
WPC	World Petroleum Council
WTO	World Trade Organisation

Figures and Tables:

Abstract:

Investor-state arbitration comes under increasing criticism regarding arbitrators' integrity, suggesting that arbitrators favour investors in their decisions in oil and gas disputes. This constitutes a great challenge for the legitimacy of the investor-state arbitration. Accordingly, some oil and gas countries have withdrawn from the system and (ICSID) membership. In view of that issue, this thesis represented a comprehensive analysis of the disqualifications to the independence and impartiality of arbitrators in oil and gas investment disputes. This analysis asserted that from the total of (34) arbitrators' disqualifications in oil and gas disputes there were (25) disqualifications submitted by respondents' states. The disqualifications were based on repeated appointments, arbitrator professional relationships and deciding similar legal issues in prior cases in oil and gas disputes. This indicated that there was a small elite number of arbitrators were selected often. Also, the thesis analysed the regulatory framework that governs such disqualifications and confirmed that there were inequities in the disqualification standards of arbitration rules applied to determine the disqualification of arbitrators. Indeed, successful arbitrators' disqualifications were higher under the (UNCITRAL) rules than under the (ICSID) rules. From the total (34) disqualifications requests in oil and gas disputes only (4) successful disqualifications requests were under the (ICSID) cases and (19) disqualifications were rejected. These findings support the aim of research for developing a collaborative framework to regulate arbitrator practice in investor-state arbitration that will be used as a guide to identify more professional arbitrators for oil and gas disputes in investor-state arbitration.

Thus, the primary objective of this thesis was to propose the creation of an independent third-party certifier body based on transitional private regulation (TPR). Establishing a certification scheme for arbitrators could combat the concerns of states and investors about arbitrators' integrity and strengthen the regulatory legal framework, improve arbitrators' selection and appointment, and enlarge the arbitrators' pool in oil and gas disputes. The thesis proposal aligned with the recent movement of (ICSID) and (UNCITRAL) toward professional regulation by introducing a collaborative code of conduct for arbitrators in investment arbitration. Finally, this thesis hoped to influence these efforts and encourage states and the investor-state arbitration community to take steps to create professional certifications to maintain the legitimacy of the regime and resort confidence in the system and continue to promote the growth of the global economy.

Chapter 1: Introduction

1.0. Background of The Study:

1.1. Defining The Key Concepts:

In the new global economy, investor-state arbitration (ISA) has become a vital mechanism for settling investor-state disputes through international arbitral institutions.[1] The term Investor-state arbitration is defined as a mechanism through which foreign investors may obtain a binding adjudication of their claims against host states that have either violated investment agreement obligations or breached their contractual commitments or national foreign investment laws.[2] Further, the expansion of investor-state arbitration was based on ratification of (Washington Convention)[3] by states which led to the creation of the International Centre for the Settlement of Investment Disputes (ICSID).[4] However, the (ISA) system has been under severe attack since 2007 regarding the legitimacy crisis that received a considerable attention from legal scholars.[5] These criticisms were directed to arbitrators' independence and impartiality and bias. Despite the fundamental nature of independence and impartiality, the scope and meaning changes over time and the implementation are not uniform or consistent and does not guarantee consistent decisions outcomes.[6] Accordingly, the definition of bias is that a bias involves a systematic departure from a genuine norm or standard of correctness.[7] Thus, a biased person is defined as a person is disposed to systematically depart from a norm

[1] Arbitral institutions such as the International Centre for the Settlement of Investment Disputes (ICSID), the International Chamber of Commerce Court of Arbitration (ICC), the London Court of International Arbitration (LCIA) and the Stockholm Chamber of Commerce (SCC), as well as *Ad hoc* tribunals such as the United Nations Commission on International Trade Law (UNCITRAL).
[2] Rahul Donde and Julien Chaisse, 'The Future of Investor-State Arbitration: Revising the Rules' in Julien Chaisse, Tomoko Ishikawa and Sufian Jusoh (eds), *Asia's Changing International Investment Regime, International Law and the Global South* (Springer Nature Singapore Pte Ltd 2017).p.212.
[3] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (entered into force 14 October 1966) ('ICSID Convention')
[4] Sergio Puig, 'Emergence & Dynamism in International Organizations: ICSID, Investor-State Arbitration & International Investment Law' (2013) 44 Georgetown Journal of International Law 531.p.597
[5] Michael Faure and Wanli Ma, 'Investor-State Arbitration: Economic and Empirical Perspectives' (2020) 41 Michigan Journal of International Law 1.p.19
[6] Jacomijn J Van Haersolte-Van Hof, 'Impartiality and Independence: Fundamental and Fluid' (2021) 37 Arbitration International 599.p.606-610
[7] Thomas Kelly, *Bias: A Philosophical Study* (Oxford University Press 2022).p.4

or standard of correctness.[8] Therefore, the arbitrators who decide investor-state arbitration cases are obligated to be independence and impartial which constitute the core of arbitrators' integrity.[9] Catherine Rogers observed that international arbitration relies on the impartiality of arbitrators as one of its primary sources of legitimacy.[10] However, the arbitrators' integrity is affected by arbitrators' conflicts of interest, which usually fall into two categories: lack of independence and lack of impartiality.[11] The conflict of interest is defined as a situation where a person entrusted with determining the outcome of a case has a personal interest in that outcome.[12] The arbitrator is subject to conflict of interest during the arbitral process that could undermine their independence and impartiality. As Richard Mosk has argued that investor-state arbitration has come under increasing criticism due to questions regarding arbitrator integrity.[13]

Primarily, the term independence refers to the absence of improper connections,[14] means that the international arbitrator has no inappropriate relationship with the parties,[15] while impartiality addresses matters related to prejudgment.[16] In other words, impartiality refers to the absence of bias towards one of the parties.[17] In its basic understanding, independence means that adjudicators take their decisions free from any external control or pressure and manipulation.[18] Impartiality refers to the absence of bias or predisposition towards a specific party or a specific legal question that has to be decided upon in a given case.[19]

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[8] ibid.p.101
[9] William Park, 'Arbitrator Integrity: The Transient and the Permanent' (2009) 46 San Diego Law Review 629.p.638
[10] Catherine A Rogers, 'Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct' (2005) 41 Stanford Journal of International Law 53.p.120.
[11] Park (n 9).p.635
[12] James D Fry and Juan Ignacio Stampalija, 'Forged Independence and Impartiality: Conflicts of Interest of International Arbitrators in Investment Disputes' (2014) 30 Arbitration International 189.p.193
[13] Richard M Mosk, 'Attorney Ethics in International Arbitration' (2010) 5 Berkeley J. Int'L L. Publicist.p.35
[14] Park (n 9).p.635
[15] Fry and Stampalija (n 12).p.193
[16] Park (n 9).p.635
[17] Fry and Stampalija (n 12).p.193
[18] Stefanie Schacherer, 'Independence and Impartiality of Arbitrators A Rule of Law Analysis' (2018) <https://archive-ouverte.unige.ch/unige:107171>.p.5
[19] ibid.p.6

1.2. Defining The Appearance of Bias Test:

The impartiality is a more subjective notion and concerns an arbitrator's state of mind to the parties and the issues in dispute.[20] Whereas, the independence is subjected to an objective test because it is possible to determine the relationship between the arbitrator and the party.[21] An objective test is employed to make determination as when a business or financial relationship exists.[22] However, if the objective test is not satisfied, bias will be assumed, and the arbitrator will be removed. When the appearance of bias is sufficient, the presence of actual bias is not required, and circumstances may give rise to a party's concern about a lack of independence subsequently raising doubts about the arbitrator's impartiality.[23] By contrast, the concept of impartiality is usually connected to an arbitrator's actual or apparent bias, which is something more abstract, being a state of mind that can only be proven through facts.[24] Courts consequently review the facts and circumstances in which arbitrators exercised their functions before inferring whether there was bias, and the courts have consequently relied upon a finding of apparent bias rather than actual bias in determining arbitrator impartiality.[25]

On the other hand, the appearance of bias test is applied in the (ISA) disputes which are conducted either under the framework of the (UNCITRAL) Rules[26] or the (ICSID) Convention.[27] Regarding the threshold applicable for challenging an arbitrator on the grounds of lack of impartiality, Article 12 of the (UNCITRAL) Rules uses the threshold 'justifiable doubts' establishing an objective standard test of appearance of bias.[28] The challenging party

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[20] James Ng, 'When the Arbitrator Creates the Conflict: Understanding Arbitrator Ethics through the IBA Guidelines on Conflict of Interest and Published Challenges' (2015) 2 McGill Journal of Dispute Resolution 23.p.25
[21] Datuk Rajoo, 'Importance of Arbitrators' Ethics and Integrity in Ensuring Quality Arbitrations' (2013) 6 Contemp. Asia Arb. J. 329.p.333
[22] Ronan Feebily, 'Neutrality, Independence and Impartiality in International Commercial Arbitration, a Fine Balance in the Quest for Arbitral Justice' (2019) 7 PENN St. J.L. & INT'l AFF 88.p.95
[23] ibid.p.95
[24] Rajoo (n 21).p.333
[25] Feebily (n 22).p.94
[26] The UNCITRAL Arbitration Rules ('UNCITRAL Arbitration Rules') (December 2013)
[27] Stavros Brekoulakis and Anna Howard, 'Impartiality and the Construction of Trust in Investor-State Dispute Settlement' (2023) 00 ICSID Review - Foreign Investment Law Journal 1.p.5
[28] ibid.p.5

does not need to prove the arbitrator's actual lack of impartiality; establishing the appearance of lack of impartiality is sufficient.[29] Further, under the (ICSID) Convention the Articles 14(1) and Article 57 requires that the threshold for disqualification is a 'manifest lack' of an arbitrator to 'exercise independent judgment', which encompasses impartial judgment.[30] The (ICSID) tribunals have applied tests similar to the 'justifiable doubts' which is similarly an objective one and one for which the appearance of bias is also sufficient.[31]

In this context, an important case is (*Halliburton Company v Chubb Bermuda Insurance Ltd).*[32] In this case, parties failed to agree on the third arbitrator as chairman, due to his multiple appointments involving Chubb that did not disclose to Halliburton and asked for his removal for apparent bias.[33] The English Supreme Court determined that the arbitrator owed a duty to disclose to Halliburton and by failing to do the arbitrator had breached his duty of disclosure and there was a real possibility of bias.[34] However, the Court proceeded that there is no basis for inferring unconscious bias in the form of subconscious ill-will. As such, the Court concluded that there was no real possibility of bias in the eyes of the objective observer, and accordingly dismissed Halliburton's appeal.[35] The Supreme Court held that this objective test of the appearance of bias is similar to the test of "justifiable doubts", but is not necessary the same as those of English law which involving the fair-minded and informed observer, requires objectivity and detachment in relation to the appearance of bias.[36] Further, the Court held that there is a disclosure obligation under English law encompassed under section 33 of the English Arbitration Act which is perhaps the most welcome contribution of this case.[37]

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[29] ibid.p.5
[30] ibid.p.5
[31] ibid.p.5-6
[32] *Halliburton v Chubb* [2020] UKSC 48. The dispute was about the Deepwater Horizon explosion in 2010 in the Gulf of Mexico, the largest marine oil spill on record.
[33] Samuel Yee Ching Leung and Alex Chun Hei Chan, 'The Duties of Impartiality, Disclosure, and Confidentiality: Lessons from a London-Seated Arbitration' (2021) 37 Arbitration International 667.p.668-669
[34] ibid.p.674
[35] ibid.p.674
[36] Van Haersolte-Van Hof (n 6).p.603-604
[37] ibid.p.605

1.3. The Research Problem:

This thesis considers that the problem of legitimacy crisis in the (ISA) is linked to the selection and appointment of arbitrators as one of important reason for the legitimacy criticisms. Arbitral panels generally consist of two party-appointed arbitrators and a chairperson appointed either by the parties' agreement, by the two party-appointed arbitrators or by an appointing authority.[38] Parties naturally tend to select an arbitrator with what they perceive is a predisposition towards them in terms of legal or cultural background.[39] To guarantee the arbitrator's independence, they are required to disclose information that could reasonably lead to disqualification.[40] Thus, the right to challenge the impartiality of an arbitrator grants the disputing parties control over the composition of the tribunal and contributes to the legitimacy of (ISA).[41]

Malcolm Langford, Daniel Behn and Maria Chiara Malaguti have stated that concern with the selection and appointment of arbitrators has been central in the legitimacy crisis surrounding investor-state disputes.[42] The regime has been criticised for the outsized role of litigating parties in appointments, the absence of transparency in the appointment procedure, the potential for conflicts of interests, and the lack of gendered and geographic diversity in selection.[43] They further indicated that the selection and appointment were named one of five initial topics for concrete reform discussions.[44] Further, William Park has stated that a large part of the critique about arbitrator integrity aims at the current party-selection system, suggesting that arbitrators favour claimant-investors leads to a systemic bias favouring

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[38] Borzu Sabahi, Ian A Laird and Giovanna E Gismondi, 'International Investment Law and Arbitration: History, Modern Practice, and Future Prospects' (2017) 1 International Investment Law and Arbitration 1.p.32
[39] ibid.p.32
[40] ibid.p.32
[41] ibid.p.34
[42] Malcolm Langford, Daniel Behn and Maria Chiara Malaguti, 'The Quadrilemma : Appointing Adjudicators in Future Investor-State Dispute Settlement' [2019] Academic Forum on ISDS Concept Paper 2019/12 <https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/papers/langford-behn-malaguti-models-trade-offs-isds-af-isds-paper-12-draft-14-october-2019.pdf>.p.1
[43] ibid.p.1
[44] ibid.p.2

investors.[45] Also, Gus Van Harte stated that, unfortunately, some arbitrators seem to act aggressively when protecting investors while downplaying the implications for the respondent state. This converts investment treaty arbitration into a regime favouring business against other individuals and the community as a whole.[46] As Stefanie Schacherer stated that (ISA) remains in a state of legitimacy crisis and much of the criticism is focussed on who is deciding investment dispute cases who are biased in favour of big multinational companies and have no regard for conflicts of interest.[47] Further, Gus Van Harte argued that arbitrators are financially dependent on executive governments and on prospective claimants— and thus not independent in the manner of a judge because investment treaty arbitration is one-sided in that only investors bring claims and only states are ordered to pay damages for breach of treaty. That is, as merchants of adjudicative services, arbitrators have a financial stake in furthering the system's appeal to claimants and, as a result, the system is tainted by an apprehension of bias in favour of allowing claims and awarding damages against governments.[48] Nonetheless, the current *ad hoc* party-dominated model of selection and appointment remains a concern, and it is the subject of different reform processes.[49] For example, the abolishment of party-appointed arbitrators, introducing an appeal mechanism in (ICSID), establishing an international investment court, and introducing binding codes of conduct for arbitrators.

Furthermore, to link the criticisms above with this thesis that focus on the oil and gas disputes that has long been a leader in promoting the resolution of industrial disputes through

[45] Park (n 9).p.657
[46] Gus Van Harten, 'Approaches and Interpretations', *Investment Treaty Arbitration and Public Law* (Oxford University Press 2007).p.150-151
[47] Schacherer (n 18).p.1
[48] Gus Van Harten, 'The Businessman's Court', *Investment Treaty Arbitration and Public Law.* (Oxford University Press 2007). p.152-153
[49] Langford, Behn and Malaguti (n 42).p.1

binding arbitration.[50] The well-known oil and gas disputes[51] have played a critical role in promoting the acceptance of (ISA) in the oil and gas industry.[52] However, the study by Tom Childs, have argued that the surge in the number of investment treaty arbitrations brought by international oil companies (IOCs) has provoked a backlash against the investment treaty system on the part of several oil-producing states. For example, Venezuela in 2012 withdrew from the (ICSID) Convention. These developments call into question the future of the investment treaty system in the oil and gas industry.[53] Also, certain states involved in many oil and gas disputes, such as Nigeria, Egypt, Uganda and South Africa, have also begun to demonstrate a less investor-friendly approach to arbitration as a means of resolving disputes with investors.[54] Similarly, Elisabeth Eljuri and Clovis Trevino study have shown that in response to many arbitration claims against States, some Latin American States have taken steps to isolate themselves and withdraw from the system.[55] For example, the reaction of Bolivia, Venezuela and Ecuador, which have already withdrawn from (ICSID), could encourage other countries to reconsider their membership.[56] Notably, most of these states disputes were related to oil and gas in investor-state arbitration. Also, Andrew Chukwuemerie has stated that the reason for the antipathy of many developing countries towards international arbitration is because it hardly believes that they have had a fair deal in international arbitration deciding their natural resources disputes. This antipathy has been greatest to disputes arising

[50] James M Gaitis and others, 'Oil & Gas Arbitration' (2017) <https://www.ccaarbitration.org/wp-content/uploads/Oil-Gas-Arbitration.pdf>. accessed 1 May 2021.p.1
[51] See the cases: *Saudi Arabia v. Arabian American Oil Co. (ARAMCO)* (1963) 27 ILR 117: *The Ruler of Qatar v. International Marine Oil Co. Ltd*. (1953) 20 ILR 534: *Petroleum Development Ltd. v. The Sheikh of Abu Dhabi* (1951) 18 ILR 144.
[52] Gaitis and others (n 50).p.1
[53] Tom Childs, 'The Current State of International Oil and Gas Arbitration' (2018) 13 Texas Journal of Oil, Gas, And Energy Law.p.21
[54] Sylvia Noury, Leilah Bruton and Annie Pan, 'Resource Nationalism in Africa - The Next Wave? Trends in Investor-State Disputes in the Energy and Natural Resources Sector in Africa' (2016) 13 Transnational Dispute Management (TDM) 319.p.2
[55] Elisabeth Eljuri and Clovis Trevino, 'Energy Investment Disputes in Latin America : The Pursuit of Stability' (2015) 33 Berkeley Journal of International Law 306.p.345
[56] Kenneth Stein, 'Exxon-Venezuela Arbitration Dispute: Next Steps and Impact on Future Investor-State Disputes under ICSID' (2011) 4 The Journal of World Energy Law & Business 380.p.389

out of foreign investments in oil and gas.[57] Further, the oil and gas industry disputes in investor-state arbitration rely on individual arbitrators who are beyond the control of any state or supranational organisation.[58] Therefore, the need to sustain the confidence of States in the different regions of the world in (ICSID) arbitrations can therefore not be overemphasised.[59]

2.0. Literature Review:

2.1. Studies on Integrity and Legitimacy Crisis:

Previous research in integrity in international commercial arbitration has highlighted that we care about ethics and transparency in arbitration because it is better to ensure legitimacy general public acceptance that any rule-based system is authoritative and binding.[60] Further, Catherine Rogers proposed that multiple codes can be calibrated and appended to the specific rules of arbitral institutions then they become contractually binding on arbitrators.[61] Also, the study of Doak Bishop and Margrete Stevens suggests that a body like the International Bar Association (IBA) establish a process of the draft code to be adapted and incorporated by reference into arbitral institutions' rules.[62] However, research in integrity in investor-state arbitration, as discussed in (1.3), have argued that (ISA) has come under increasing criticism regarding arbitrator integrity,[63]and the selection and appointment of arbitrators in investor-state.[64] William Park has stated that the critique about arbitrator integrity aims at the current party-selection system.[65]

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[57] Andrew I Chukwuemerie, 'Commercial and Investment Arbitration in Nigeria's Oil and Gas Sector' (2003) 4 J. World Investment 827.p.827
[58] Fernando Dias Simões, 'Powered by Expertise: Selecting Arbitrators in Energy Disputes' (2015) 8 Journal of World Energy Law and Business 501.p.504
[59] Chukwuemerie (n 57).p.866
[60] Charles N Brower, 'Keynote Address: The Ethics of Arbitration: Perspectives from a Practicing International Arbitrator' (2010) 5 Berkeley Journal of International Law Publicist 1.p.1
[61] Rogers, 'Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct' (n 10).p.111
[62] R Doak Bishop and Margrete Stevens, 'The Compelling Need for a Code of Ethics in International Arbitration: Transparency, Integrity and Legitimacy', *Arbitration Advocacy in Changing Times, ICCA Congress Series No. 15* (2011).p.25
[63] Mosk (n 13).p.35
[64] Langford, Behn and Malaguti (n 42).p.1
[65] Park (n 9).p.657

On the other hand, supportive studies of investor-state arbitration system in the literature such as Malcolm Langford and Daniel Behn study claim that individual arbitral decisions are not as expansive or pro-investor as imagined; arbitral tribunals provide a relatively predictable legal framework. Thus, any efforts to restate or re-balance international investment dispute resolution should be resisted.[66] Also, the study of Charles Brower and Stephen Schill has argued that investment treaties arbitration do not unilaterally favour investors' interests over competing public policy choices and do not institutionalise a pro-investor bias.[67] Further, the study claims this critique disregards that arbitrators are impartial and independent dispute resolvers who interpret and apply the governing law and are subject to mechanisms that can prevent private interests from taking precedence over public interests.[68]

2.2. Studies on Reforms Proposals:

An extensive body of literature focuses on the arbitrators' disqualification in investor-state arbitration and its suggested reforms. These studies have considered several institutional reforms proposals to respond to arbitrators' integrity problems in investor-state arbitration.

2.2.1. Institutional Reform:

Firstly, Gabriel Bottini has stated that the tool parties have to address integrity and the arbitrator's lack of independence or impartiality is essentially the challenge procedure.[69] Thus, the study has suggested the establishment of a permanent appellate body with jurisdiction over investment matters.[70] Similarly, Chiara Giorgetti has suggested a solution by adopting stricter arbitrator challenge rules and enlarging the pool of arbitrators instead of abolishing the arbitrator selecting system.[71]

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[66] Malcolm Langford and Daniel Behn, 'Managing Backlash: The Evolving Investment Treaty Arbitrator?' (2018) 29 European Journal of International Law 551.p.552

[67] Charles N Brower and Stephen W Schill, 'Is Arbitration a Threat or a Boom to the Legitimacy of International Investment Law?' (2009) 9 Chi. J. Int'l L. 471.p.476

[68] ibid.p.489

[69] Gabriel Bottini, 'Should Arbitrator Live on Mars - Challenge of Arbitrators in Investment Arbitration' (2009) 32 Suffolk Transnat'l L. Rev. 341. p.341

[70] ibid. p.365-366

[71] Chiara Giorgetti, 'Who Decides Who Decides in International Investment Arbitration' (2013) 35 U. Pa. J. Int'l L. 431,486.p.437

Secondly, other studies recognise the need to adopt a code of conduct as institutional reform for investor-state arbitration. The study of Loretta Malintopp has recommended a code of conduct specific to investment arbitration.[72] The study of Federica Cristani has confirmed the need to introduce specific rules or codes of conduct that should be enacted under the guidance and leadership of the (ICSID) conventions.[73] Thirdly, Maria Nicole has offered a proposal for clear, quantitative rules on conflicts of interest and suggests procedural modifications of arbitrator appointments and challenges.[74] The study suggested that (ICSID)-specific guidelines on conflicts of interest be implemented without revising the (ICSID) Convention.[75]

Further, the European Commission proposed to include an Investment Court System (ICS) in the investment chapters of the (EU) Free Trade Agreements (FTAs), such as the Transatlantic Trade and Investment Partnership (TTIP), the (EU)–Vietnam (FTA) and the Comprehensive Economic Trade Agreement (CETA) with Canada.[76] It further provides for establishing a two-tiered system of tribunals, comprising first instance and appellate bodies. In addition, it allows for appellate review as of right on issues of law and fact.[77]

However, scholars have long debated the drawbacks of institutional reform in investor-state arbitration for regulating international arbitrators. For example, a much-debated question brought by Henry Gabriel and Anjanette Raymond is whether the codification of ethical rules imposes limitations on the parties to select arbitrators or the capacity of the arbitrators to

[72] Loretta Malintoppi, 'Independence, Impartiality, and Duty of Disclosure of Arbitrators' in Christoph Schreuer Peter Muchlinski, Federico Ortino (ed), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008).p.826-827
[73] Federica Cristani, 'Challenge and Disqualification of Arbitrators in International Investment Arbitration: An Overview' (2014) 13 The Law and Practice of International Courts and Tribunals 153.p.177
[74] Maria Nicole Cleis, 'Disqualification Decisions under the ICSID Convention and Arbitration Rules', *The Independence and Impartiality of ICSID Arbitrators* (Brill 2017).p.224-225
[75] ibid.p.251
[76] Freya Baetens, 'The EU's Proposed Investment Court System (ICS): Addressing Criticisms of Investor-State Arbitration While Raising New Challenges' (2016) 43 Legal Issues of Economic Integration 367.p.368
[77] N Jansen Calamita, 'The Challenge of Establishing a Multilateral Investment Tribunal at ICSID' (2017) 32 ICSID Review 611.p.611-612

depend on their own professional decision. Also, whether this codification affects the flexibility of the arbitral process, which is one of its leading attractions.[78]

Further, Chan Leng Sun claims a paradox and risk in arbitral institutes and organisations trying to regulate quantitative or detailed guidelines on what may or may not be considered bias for arbitrators. The study explains that this will create confusion and inconsistencies with court decisions and even a risk of clashing.[79] Also, a study by Richard Mosk claims that codes of conduct or ethics may not be particularly effective in controlling arbitrator misconduct and would have little effect to enhance the confidence and integrity of the international arbitration system.[80] Furthermore, there has been little agreement on the proposal of an appellate mechanism. August Reinisch suggests that an appellate mechanism in (ICSID) arbitration faces some practical difficulties. Since Article 53 of the (ICSID) Convention expressly provides that (ICSID) awards shall be binding on the parties and shall not be subject to any appeal, an appellate system would probably require an amendment of the (ICSID) Convention.[81] Further, Georgios Dimitropoulos explained that these proposed reforms go either in the direction of a further judicialisation of investment arbitration or returning to the old status quo with the hope that this time it will work.[82] Therefore, some studies have considered reform proposals that focus on the arbitration community- the arbitrators- by introducing control mechanisms for arbitrators instead of any institutional reform. The control mechanisms reform such as certifications can offer a mechanism that will focus on arbitrator quality and competence to

[78] Henry Gabriel and Anjanette Raymond, 'Ethics for Commercial Arbitrators: Basic Principles and Emerging Standards' (2005) 5 Wyoming Law Review 453.p.469–470
[79] Chan Leng Sun, 'Arbitrators' Conflict of Interest: Bias by Any Name' (2007) 1 SAcLJ 245,266.p262–263
[80] Richard M Mosk, 'Attorney Ethics in International Arbitration' (2010) 5 Berkeley Journal of International Law Publicist.p.35-37
[81] August Reinisch, 'The Future of Investment Arbitration' in Christina Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press 2009).p.910
[82] Georgios Dimitropoulos, 'Constructing the Independence of International Investment Arbitrators: Past, Present and Future' (2016) 36 Northwestern Journal of International Law & Business 371.p.418-419

reduce the risk of bias, enhance integrity of arbitrators and foster the confidence of the parties in investor-state arbitration.

2.2.2. Arbitrators' Regulatory Control Mechanism Reform:

The term control mechanism has been defined as techniques or mechanisms in engineered artefacts, whether physical or social, whose function is to ensure that an artefact works the way it was designed to work.[83] Lord Hacking suggested a control mechanism similar to feedback system in mediation to be set up by arbitration institutes could be effective, fair and open feedback procedures.[84] However, I believe that an open or publicly feedback system could add more negativities to investor-state system especially in the contexts of feedback and how the fear of public feedback might influence arbitrators decisions. Similarly, Doak Bishop and Margrete Stevens have argued that the investment dispute resolution has not developed fully institutionalised feedback mechanisms or adopted sufficient internal rules to ensure that feedback will necessarily be taken into account. Nevertheless, informal means have evolved to provide feedback to the actors within the investment arbitration framework.[85] Catherin Rogers has suggested the need to reconsider some of the control mechanisms that have been advocated for regulating arbitrator conduct such as licensing or certification procedures.[86] In this context, the study by Georgios Dimitropoulos proposes a control system combining of recognition of pre-existent private systems and a quality mark system through the introduction of a certification system.[87] Further, a study by Datuk Sundra Rajoo argues that ethics and integrity - independence and impartiality- are not the only criteria that ensure the quality of arbitrators.[88]

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[83] W Michael Reisman, 'The Breakdown of the Control Mechanism in Icsid Arbitration' (1989) 1989 Duke Law Journal 739.p.740-741

[84] David Hacking, 'Arbitration Is Only as Good as Its Arbitrators' in P Perales Viscasillas &V Rogers S. Kröll, L.A. Mistelis (ed), *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* (Kluwer Law International 2011). p.227-229

[85] R Doak Bishop and Margrete Stevens, 'A Systemic Perspective of the Foreign Investment Dispute Settlement System: Feedback, Adaptation and Stability', *Contemporary Issues in International Arbitration and Mediation The Fordham Papers (2011)* (Brill | Nijhoff 2012).p.37

[86] Rogers, 'Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct' (n 10).p.121

[87] Dimitropoulos (n 82).p.427

[88] Rajoo (n 21).p.341

There are other elements such as the characteristics and personalities of arbitrators, the compatibility of tripartite arbitral tribunals, the age, gender, experience and the qualifications of an Arbitrator. Also, it is relevant that arbitrators possess adequate knowledge and experience of arbitration and the arbitral procedure, including efficiently administering the arbitration process, the ability to arrive at and draft a reasoned award on time, and having legal and industry-specific expertise.[89] On the other hand, the study of August Reinisch argued that list systems, as in (ICSID), are usually not a reliable mechanism to ensure the highest quality of appointees. As with many other list systems, the internal appointment process of States is often politically determined, and factors other than expertise and integrity may be decisive for the nomination of individual persons.[90]

Therefore, this thesis argues that the certifications scheme will enhance the arbitrators' integrity and foster the confidence of oil and gas industry in investor-state arbitration. The reason to support certifications as a control mechanisms reform is to enlarge the pool of arbitrators in oil and gas from different countries. At the same time, enhance the selection system of the arbitrator in oil and gas by partially replacing reputation and word of mouth recommendations or lists for selecting arbitrators in oil and gas. Also, it will respond to diffusate states in oil and gas about arbitrators' bias and integrity by focusing on the quality of arbitrators and enhance the legitimacy which encourages states to submit disputes to the investor-state arbitration system. Theorists in the sociology of professions note that professions tend to enact regulations and develop credentials, such as voluntary certifications, as they grow and build institutions to address concerns about service quality that inevitably emerge in the absence of clear standards for professional practice.[91] Thus, the arbitration profession may need to engage in dialogue about ways in which the quality of professional service can be improved

[89] ibid.p.343
[90] Reinisch (n 81).p.908-909
[91] Mark Gough and Kyle Albert, 'Who Supports Professional Certification? Insights from Employment Arbitration' (2019) 57 British Journal of Industrial Relations 850.p.851

and made more consistent either by mechanisms of quality assurance-based or compliance-based.

2.3. Identification of Research Gaps:

The research studies in investment arbitration to date have tended to focus on institutional reform rather than enhancing the arbitrators' communities and providing mechanisms to regulate arbitrators. To the knowledge of this thesis, only a few studies such as the study by Georgios Dimitropoulos have been carried out on control mechanisms which suggested that a combining control system of recognition of pre-existent private system and quality mark system through certification system to regulate arbitrators in investor-state arbitration. Further, to the knowledge of this thesis, no theoretical studies on control mechanism in investor-state arbitration have been found which support this reform. Also, no previous studies have considered regulating arbitrators in oil and gas arbitration in the investor-state system. Although the oil and gas industry has depended on investor-state arbitration to resolve disputes, the studies on arbitrators' disqualifications in oil and gas investment disputes, to the knowledge of this research, has not been found.

Therefore, the central thesis of this research is to fill the gap in the current literature about the integrity of arbitrators in oil and gas disputes in investor-state arbitration. Also, to advance the understanding of this topic and offer an effective mechanism for regulating oil and gas arbitrators in investor-state arbitration. The studies related to regulating arbitrators in international arbitration within oil and gas disputes are vastly understudied. To correct this imbalance, this study provides new insights and contribute to the area by suggesting reform and improvement for the relevant ethical standards for oil and gas arbitrators conducts in investor-state arbitration. It will also contribute to knowledge in this area by proposing private certification for the arbitration profession within oil and gas arbitrators in investor-state arbitration.

3.0. Aim and Objective:

This thesis aims to discuss the theoretical underpinnings of the concept of professional regulatory control mechanisms for arbitrators in investor-state arbitration, particularly certifications, and analyse the arguments for and against its use. Also, propose creating an independent private certifier body for future structuring of private certifications scheme to regulate arbitrators in investor-state arbitration and oil and gas.

The following objectives support the aim:

A. To critically review the existing regulatory framework for an arbitrator in an investor-state arbitration system and identify any weaknesses in the present system.
B. To assess the practice of arbitrators within oil and gas disputes in investor-state arbitration and map out the need for competent, qualified and quality arbitrators.
C. To suggest a regulatory control mechanism such as certifications to regulate arbitrators in investor-state arbitration and oil and gas in light of best practices derived from an overview of the regulation of the dispute resolution professions, e.g., international mediation.
D. To understand if the suggested certifications for oil and gas arbitrators will respond to the integrity problem and benefit confidence of the oil and gas industry in investor-state arbitration and legitimacy of the system.

4.0. The Questions:

This thesis will analyse the arbitrators' regulatory framework in investor-state arbitration, discussing its current state and investigating its future reform and development possibilities. More specifically, the thesis will study the proposed creation of an independent third-party certifier body. Therefore, it is important to look into all the relevant and theoretical debatable issues surrounding the means to regulate arbitrators in oil and gas within investor-state arbitration and recognise the minimum qualifications needed to become an arbitrator. The main

question that the thesis seeks to address is whether introducing a certifications scheme for arbitrators through the creation of an independent third-party certifier body in investor-state arbitration system benefits the integrity of arbitrators and, as a result, enhances the legitimacy of the system? Hence, there is a need to respond to some of the questions to fully answer this question. The first of these additional questions is whether the current system of investor-state arbitration functions adequately and effectively, or there are gaps and weaknesses in the current system and arbitrators' regulatory framework in investor-state arbitration? This brings the question of whether any suggestions for improvement would benefit the system, particularly the proposed creation of an independent third-party certifier body. Finally, certification in alternative dispute resolution already in existence will be examined to establish whether they could be effective models for investor-state arbitration. This brings the question of how the certifications scheme will establish the standards of competency and minimum quality needed to serve as arbitrators and how it will be enforced and implemented? And; Who shall be the regulatory actors for supporting and implementing the certifications for arbitrators in oil and gas within the independent certifier body? And; Whether it brings a positive or negative value for arbitrators and investor-state arbitration regimes?

5.0. The Research Significance:

The discussion of the proposal to establish an independent private body to certify arbitrators in investor-state arbitration will be of significant academic value; a study analysing this proposition exclusively and, in such depth, has yet to be undertaken. Thus, there is scope for valuable original contribution to the topic, and this thesis will undoubtedly advance the debate on this subject and further knowledge in this field.

Whilst there is much generalist writing on investor-state arbitration reforms, only a few articles discuss the establishment of control mechanisms such as certifications. This literature's total is relatively modest compared with other aspects of investor-state arbitration reforms that

have attracted a substantial amount of research and literature. However, there is no single comprehensive analysis of the current state of investor-state arbitration in oil and gas disputes and the debate surrounding the establishment of private certifications for arbitrators in oil and gas disputes in investor-state arbitration. Therefore, this study will provide a comprehensive analysis of the current state of investor-state arbitration reforms and the debate surrounding the establishment of an independent private certifier body and the further development of specialising oil and gas private certifications programs for arbitrators.

None of the literature analyses in depth whether or not the establishment of an independent private certifier body is necessary or desirable or suggest how the establishment of an independent private certifier body might be achieved. This study will detail the different approaches – the collaborative and orchestration approaches- by which a private certifications scheme might be introduced, which is missing from the current literature on the subject. The lack of literature on this subject is especially surprising, considering its potential contribution to the independence and impartiality of arbitrators and enhancing selection and appointment mechanisms of arbitrators in the investor-state arbitration and oil and gas disputes. It is intended that this thesis will fill the gap in the current literature. Therefore, this work will be of considerable value in terms of its contribution to academia and the ongoing debate concerning the investor-state arbitration reforms and the establishment of control mechanisms for arbitrators such as private certifications schemes.

Furthermore, this work may also have an important practical value by providing an analysis of arbitrators' disqualifications in oil and gas disputes. Also, highlight the need to introduce a certification mechanism in oil and gas to accommodate the concerns of states and parties about the integrity of arbitrators and the legitimacy crisis of the system. Also, enhance the process to select a qualified arbitrator. Further, this study suggests applying the certifications mechanism, such as incorporating certifications into the (ICSID) arbitrators' list mechanism and other

arbitration institutions' selection and appointment process in investor-state arbitration and oil and gas arbitrators' lists. This topic is also of great significance given that total worldwide foreign direct investment (FDI) in oil and gas accounts for trillions of dollars. Thus, any legal framework governing arbitrators involved in deciding those disputes of huge sums of money must ensure that it operates most optimally to best serve its users.

6.0. The Methodology:

This thesis adopts the doctrinal research black-letter methodology, which relies on primary and secondary resources. In doctrinal legal research, the researcher outlines an existing legal problem by collecting all relevant case law to demonstrate how a particular law is not working and assess whether the current law needs amendment, repeal, or there is a need for a new law.[92] Therefore, this thesis will critically analyse the legal text regarding the independence and impartiality, selecting and appointment of arbitrators and outline the existing legal problems with these standards on the disqualification's decisions of arbitrators in oil and gas cases. The analysis of laws and relevant cases is undertaken to demonstrate whether the investor-state arbitration needs institutional, fundamental reforms due to the claim of a systemic bias system or not. Therefore, the thesis will consider the related literature on investor-state arbitration reform and how arbitrators' integrity, selection and appointment have been treated on these reforms. First, the black-letter-law method will be used to analyse the context of the (ICSID) convention and procedural rules in investor-state arbitration. Then, it will extend to the analysis of legal rules and professional guidelines from various arbitral professional associations and institutions where oil and gas disputes have arisen under their jurisdictions to understand the legal gaps and weaknesses on the topic. This first step aims to offer an overview of the

[92] Mike McConville and Wing Hong Chui, *Research Methods for Law* (Mike McConville and Wing Hong Chui eds, Edinburgh University Press 2007).p.20

arbitrators' regulatory framework in investor-state arbitration to suggest its best improvements and reforms.

However, the non-doctrinal approach broadens legal discourse in terms of its theoretical and conceptual framework, which guides the direction of the studies.[93] Therefore, this thesis uses concepts and ideas from the regulation theory in the global governance and economics approach. Within this approach, concepts such as self-regulatory, collaborative regulatory and transnational private standards-setting will play a role in the legal reform of establishing an independent private certifier body. In doing so, thesis attempts to transform reforms from institutional and fundamental reforms to reform focusing on arbitrators' communities rather than the system itself. This thesis considers control mechanisms as certifications more efficient and rational for arbitrators' regulation. Success and failure are evaluated through the advantages and disadvantages of the control mechanism against other reforms.

Further, this thesis will be limited to study oil and gas disputes related to investor-state arbitration and exclude any oil and gas disputes related to State-State or Company-Company disputes. Also, this thesis will be limited to study arbitrators' disqualification cases in oil and gas arbitration and other cases will be excluded from the analyses of the cases.

However, the number of oil and gas cases collected for this thesis were (136) cases in investor-state arbitration. The cases were collected from the (ICSID) caseload list, the Permanent Court of Arbitration (PCA) caseload list, the United Nations Conference on Trade and Development (UNCTAD), the Investment Division (Investment Policy Hub) caseload list. The available cases collected under the (ICSID) convention and rules from the registered list of oil and gas cases were from (1977) to (2020). The cases were (103) cases in oil and gas disputes in investor-state arbitration. The available cases collected under the (UNCITRAL) rules were from (2002) to (2020). The cases were (25) in oil and gas disputes in investor-state

[93] ibid.p.5

arbitration. The available cases collected under the (SCC) rules were from (1996) to (2015). The cases were (8) in oil and gas disputes in investor-state arbitration. The thesis will also be limited to analysing the oil and gas cases that have been made accessible to the public review from several arbitral institutions. The available arbitral awards rendered in oil and gas will be regrouped into categories. First, based on successful or unsuccessful arbitrators' disqualification decision and who has requested the disqualification. Second, based on the type of institutional arbitral rules and the final decision of the cases. This regrouping will indicate how oil and gas cases and arbitrators' conduct have been treated in the investor-state arbitration system.

7.0. The Structure:

This thesis is split into eight chapters, as follows, Chapter 1 will include the introduction, which will briefly describe the research questions, aim, objectives and methodology used to analyse the problem based on doctrinal legal research. Chapter 2 will provide an overview of investor-state arbitration in the oil and gas industry. It will set out the legal nature of oil and gas industry disputes in international investment arbitration as the chapter is designed to reach the first objective of the research. Furthermore, this chapter will discuss the arbitrators' integrity problem in oil and gas disputes in investor-state arbitration to further indicate the need for regulating arbitrators.

Chapter 3 will provide an overview of the arbitrators' regulatory mechanism, such as the selection and appointment of arbitrators. Also, review the criticism of arbitrators' integrity in investor-state arbitration and its legitimacy. The chapter will also explore the legal source of arbitrators' ethical standards, qualifications and obligations in investment arbitration. Further, this chapter will review the role of professionalism in responding to the integrity problem and legitimacy crisis in investor-state arbitration. Chapter 4 will be a critical legal analysis of the

current ethical regulatory framework for arbitrators in investor-state arbitration. Further, the analysis will include rules, ethics codes, and guidelines in the investor-state arbitration system.

Chapter 5 will provide cases analysis of arbitrators' disqualifications in oil and gas disputes to support the analysing of arbitration rules in chapter 4. The cases will indicate how the procedural rules of arbitrators' regulatory framework in investor-state arbitration have been applied in oil and gas disputes where arbitrators have been challenged for their independence and impartiality. This chapter will meet the objectives that seek to map out the needs of the oil and gas industry for competent arbitrators to respond to integrity problems and enhance the confidence of the oil and gas industry in the investment arbitration system. Chapter 6 will provide an overview of professionalism in international arbitration and the theory behind the profession. This chapter will also discuss the general theories about professionals' regulations and various regulatory frameworks used by institutions or professional bodies to regulate their members such as self-regulation, which may take several forms. Further, the chapter will discuss non-state regulation and how it has affected the regulatory framework for the transnational profession. Thus, the chapter will highlight that arbitrators working in such a system should be regulated with transnational regulatory theory and regulations.

Chapter 7 discusses the arguments for and against the existing reform proposals for investor-state arbitration and suggests an alternative to these reforms proposals. First, the chapter proposes establishing an independent third-party certifier body based on transitional private regulation (TPR) to create a voluntary certification scheme to regulate arbitrators' practice in investor-state arbitration. The chapter argues that current comprehensive reforms and efforts to enhance investor-state arbitration legitimacy are unwarranted and instead recommend a corrective improvement measure for the arbitrators' community. Further, the chapter will propose a regulatory control mechanism such as certification to regulate arbitrators in the oil and gas investor-state arbitration context. Chapter 8 will sum up all the analysis that has been

done throughout the chapters included in the thesis. It will explore whether the findings can be tied together to achieve the objectives envisioned for the thesis. Therefore, by tying up all the relevant information and evidence illustrated in all the chapters of this thesis, this chapter, in general, will seek to conclude the lesson learned from the existing mechanism for the regulatory framework for arbitrators and any future regulatory ways. The findings will conclude whether the proposed regulatory framework for arbitrators in oil and gas applied under the investor-state arbitration system can enhance arbitrators' integrity and foster confidence in the oil and gas industry about the system. Finally, the chapter offers the conclusion of the thesis and will suggest improvements to the investor-state regulatory framework for oil and gas arbitrators.

Chapter 2: Historical Background of International Arbitration in Oil and Gas Industry:

1.0. Introduction:

The purpose of this chapter is to understand the history of international arbitration in the oil and gas industry and the extent to which oil and gas disputes and arbitration cases has contributed to the legitimacy of the investor-state arbitration system. In particular, the chapter focuses on the role of early oil and gas cases in establishing (ICSID). Aníbal Sabater and Mark Stadnyk have stated that investment awards in oil and gas disputes have helped create types of arbitration and substantive protections that have eventually spread across all industries.[94] Awards like *Kuwait v. Aminoil,*[95] were particularly crucial in cementing the legitimacy of international investment arbitration and thereby increasing the acceptance of international arbitration amongst states.[96] The (ICSID) built on the success of Aminoil and was able to gain traction with states precisely because of the perception of legitimacy they created. It is questionable whether (ICSID) would exist, or be as successful, if not for these 'classic' energy arbitrations.[97] The (ICSID) owes its influence on critical oil and gas disputes that legitimised the use of international arbitration to resolve investment disputes.[98]

As a foundation of this thesis, this chapter introduces an overview of investor-state arbitration in international dispute resonation. It also reviews the oil and gas industry disputes in investor-state arbitration. Finally, this chapter reviews the classification of international dispute resolution methods between private and public international dispute resolution. It will further set out the legal nature of oil and gas industry disputes in investment arbitration and review the history behind arbitration in the oil and gas industry as a resolution method.

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[94] Aníbal Sabater and Mark Stadnyk, 'International Arbitration and Energy: How Energy Disputes Shaped International Investment Dispute Resolution' in K Talus (ed), *Research Handbook on International Energy Law* (Edward Elgar Publishing Limited 2014).p.199
[95] *Kuwait v. American Independent Oil Co. (AMINOIL),* 21 I.L.M. 976, (1982)
[96] Sabater and Stadnyk (n 92).p.204
[97] ibid.p.205
[98] ibid.p.201

To this end, the chapter paid specific attention to Investor-State Arbitration that has arisen from oil and gas disputes. The oil and gas industry consists of vast activities, including Upstream, Midstream, and Downstream activities. These activities include exploration and production (E&P), oilfield services, natural gas processing, liquefied natural gas (LNG) production, oil and gas shipping and regasification, oil and gas pipeline transportation, crude oil refining, and natural gas marketing and distribution. These activities generate many international oil and gas disputes, mainly referring to arbitration.

The last section of this chapter outlines and critically discusses the existing criticisms of the investor-state arbitration legal process and whether they function adequately to ensure arbitrators' independence and impartiality, which will be discussed in-depth in the next chapter.

2.0. Introduction to International Arbitration and Alternative Dispute Resolution:

2.1. International Alternative Dispute Resolution:

The expression Alternative Dispute Resolution (ADR) has become an established term of art that designates various mechanisms whereby a third party, not directly involved in the dispute, intervenes to assist the disputants in settling their conflict. It is believed that the term (ADR) arose and gained currency in the United States in the mid-1970s when its courts and legal scholars, concerned about increasing judicial caseloads and appropriateness of the judicial process to certain types of disputes, began a search for alternative methods of dispute resolution.[99] However, the term (ADR) does not mean the same thing to all people. In Europe and much of the world, (ADR) refers to dispute resolution methods that exclude litigation and arbitration. On the other hand, in the United States, (ADR) means all kinds of dispute resolution methods other than litigation, so (ADR) would include arbitration.[100] However, some scholars

[99] Jeswald Salacuse, 'Is There a Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution' (2007) 31 Fordham International Law Journal 138.p.156

[100] Margaret L Moses, *The Principles and Practice of International Commercial Arbitration* (1st. ed, Cambridge University Press 2008).p.13

use the terms disputes and conflicts interchangeably, while others see essential differences between the two. Part of this derives based on disciplinary differences. Social scientists are more likely to study "conflicts," while those with legal training may focus on "disputes".[101] Besides, the language of resolution implies a level of finality that is only occasionally a realistic condition. Sometimes a dispute is so simple that it is possible to describe it fully and finally resolved, but in complex circumstances, "resolution" is not a single event. Years of supervised implementation remain, making the idea of resolution slippery.[102] In that context, the meaning of "alternative dispute resolution" referred to dispute resolution processes that were alternatives to the courts. [103]

Historically, the origins of alternative dispute resolution trace to traditional societies. Traditional societies had no coercive means of resolving disputes. So, consensus building was an inevitable and necessary part of the dispute resolution process. The court system only developed as an essential by-product of the modern state. Societies in Africa, Asia and the Far East were practising non-litigious means of dispute resolution long before the advent of the nation-state, for the building of long-term relationships was the bedrock on which those societies rested.[104] On the other hand, international law has long recognised mediation conciliation as an essential conflict resolution tool before establishing the Permanent Court of International Justice (PCIJ) after World War II and the Permanent Court of Arbitration, created in 1899, is earlier than the World Court. [105]

However, international dispute resolution is divided into public and private dispute resolutions. Public international dispute resolution is traditionally referring to disputes among

[101] Michael L Moffitt and Robert C Bordone, 'Perspectives on Dispute Resolution - An Introduction' in Michael L Moffitt and Robert C Bordone (eds), *The Handbook of Dispute Resolution* (1st. ed., Jossey-Bass 2005).p.2
[102] ibid.p.4
[103] Salacuse (n 97).p.156
[104] Albert Fiadjoe, *Alternative Dispute Resolution: A Developing World Perspective* (Cavendish Publishing Limited 2004).p.2
[105] ibid.p.6

countries. In contrast, private international dispute resolution applies in disputes among individuals or companies from different countries.[106] However, this simplistic division no longer fully captures the reality of current disputes. Many disputes are neither wholly public nor wholly private. As companies invest in foreign countries at an increasing rate, there are now direct disputes between these companies and the governments of the countries.[107] Traditional modes of dispute resolution have evolved to take note of these new parties involved in international disputes.[108] In this context, however, in the international investment domain, international adjudication has a minimal scope and arbitration under investment treaties has become a standard form of dispute resolution. The term "alternative dispute resolution" can refer to dispute resolution processes that stand as alternatives to international arbitration and adjudication in domestic courts.[109]

2.2. Methods of Disputes Resolution:

There are several dispute resolution methods used to settle international disputes. However, arbitration is the most widely accepted and used dispute resolution method in the international oil and gas industry. Hence, from 1972 to 2017, a total of 70 treaty-based arbitrations related to the oil and gas industry has registered under the International Centre (ICSID), which represent approximately 15% of all treaty-based arbitrations registered.[110] On the other hand, the 2018 International Arbitration Survey shows that 66% of respondents think that international arbitration to resolve investor-state disputes will increase in the future and is likely to increase in the energy sectors.[111] Further, the (ICSID) report showed that the majority of new cases registered in the fiscal year 2020 involved the oil, gas and mining sector by (30%)

[106] Andrea Kupfer Schneider, 'Public and Private International Dispute Resolution' in Michael L Moffitt and Robert C Bordone (eds), *The Handbook of Dispute Resolution* (1st. ed., Jossey-Bass 2005).p.438
[107] ibid.p.438
[108] ibid.p.439
[109] Salacuse (n 97).p.157
[110] Childs (n 53).p.5–6
[111] Queen Mary University of London and White&Case, '2018 International Arbitration Survey : The Evolution of International Arbitration' (2018).p.3

and electric power and other energy sources (20%).[112] Also, the (ICSID) report showed that the distribution of all (ICSID) cases by economic sector from (1966 to 2020) registered under the (ICSID) shows the oil, gas and mining sector (24%) and electric power and other energy sources (17%). These were followed by disputes related to construction and transportation (9%), information and communication (10%), finance (8%), agriculture, fishing and forestry (4%), and services and trade (2%).[113]

On the other hand, arbitration is a legally binding process that provides the most flexibility to parties in resolving their dispute.[114]Arbitration is a process in which a neutral third party, or an odd-numbered panel of neutral parties, renders a decision based on the case's merits.[115] Jan Paulsson stated that the idea of arbitration is that of binding resolution of disputes accepted with serenity by those who bear its consequences because of their special trust in chosen decision-makers.[116] Arbitration is a private system of adjudication. Parties who arbitrate have decided to resolve their disputes outside of any judicial system. The decision-makers (the arbitrators), usually one or three, are generally chosen by the parties. Parties also decide whether the arbitration will be administered by an international arbitral institution or *ad hoc*, which means no institution is involved.[117] Institutional arbitration is arbitration administered by an arbitral institution, while *ad hoc* arbitration is arbitration administered by the arbitral tribunal itself.[118] With institutional arbitration, the advantages are that the institution performs essential administrative functions. It makes sure the arbitrators are appointed in a timely way,

[112] ICSID, 'The ICSID Caseload - Statisitcs' (2020) <https://icsid.worldbank.org/news-and-events/news-releases/icsid-releases-fiscal-year-2020-caseload-statistics>.accessed 1 May 2021.
[113] ibid.p.12
[114] Tim Martin, 'Primer on International Dispute Resolution' (2011) <http://timmartin.ca/wp-content/uploads/2016/02/Primer-on-Int-Dispute-Resolution-Martin2012.pdf> accessed 30 April 2021.p2-3
[115] Fiadjoe (n 102).p.27
[116] Jan Paulsson, *The Idea of Arbitration* (Oxford University Press 2013).p.1
[117] Moses (n 98).p.1
[118] Mauro Rubino-Sammartano, *International Arbitration Law and Practice* (2nd ed, Kluwer Law International 2001).p.4

that the arbitration moves along reasonably, and that parties pay fees and expenses in advance.[119]

Moreover, the institution's arbitration rules are time-tested and usually reasonably sufficient to deal with most situations. With *ad hoc* arbitration, there is no administering institution. The parties also have more opportunity to craft a procedure or use the (UNCITRAL) Arbitration Rules, which are frequently used in *ad hoc* arbitrations. *Ad hoc* arbitrations are sometimes particularly useful when one of the parties is a state, and there may be a need for more flexibility in the proceedings.[120]Arbitration thus gives the parties substantial autonomy and control over the process that will be used to resolve their disputes. This is particularly important in international arbitration because parties do not want to be subject to the jurisdiction of the other party's court system.[121] The benefits of international arbitration are (1) the neutrality of the forum (that is, being able to stay out of the other party's court) and (2) the likelihood of obtaining enforcement under the New York Convention. Other advantages include keeping the procedure and the resulting award confidential.[122] It also consists of the parties' ability to choose arbitrators with particular subject matter expertise.[123]

Mediation is a non-binding process in which an impartial third party, called the mediator, facilitates the negotiation process between the disputants.[124] Mediation is still infrequently used in international oil and gas disputes. The results of mediation only become binding with a signed settlement agreement.[125] A mediator will make sure each party understands the other's point of view, meet with each party privately, listen to their respective viewpoints, stress common interests, and help them settle. Because mediators try to understand the parties'

[119] Moses (n 98).p.9
[120] ibid.p.9
[121] ibid.p.1
[122] ibid.p.3
[123] ibid.p.4
[124] Fiadjoe (n 102).p.22-23
[125] Martin (n 112).p2-3

interests, mediation is sometimes referred to as an interest-based procedure, while arbitration is referred to as a rights-based procedure.[126]

On the other hand, conciliation is another method by which a conciliator listens to the two parties, hears their different positions, and then sets forth a proposed settlement agreement, representing what she/he believes to be a fair compromise of the dispute. If the proposal does not resolve the dispute, the conciliator may offer another suggestion.[127] Further, Expert Determination has been most often used in economic valuations or technical assessments in oil and gas disputes. The decision of an expert is not enforceable as an arbitration award but only as a contract between the parties in court systems around the world. Therefore, it is only useful in highly technical matters, but it is not widely used in international disputes.[128] A final method is a Mini-Trial; usually, a panel comprises one neutral decision-maker and one executive from each company involved in the dispute. The executives should be at a high level in the company, have decision-making authority, and not be personally involved in the issues leading to the dispute. The proceedings are generally confidential and non-binding but resolve the dispute early to avoid expensive arbitration or litigation.[129]

2.3. International Arbitration:

However, as mentioned above, international dispute resolution is divided into public and private dispute resolutions. Moreover, public international arbitration traditionally refers to disputes among countries, whereas private international arbitration, in contrast, applies to disputes among individuals or companies from different countries. However, to understand the emergence of international arbitration that is neither wholly international public nor private, such as investor-state arbitration, there is a need to elaborate on its historical evolution.

[126] Moses (n 98).p.14
[127] ibid.p.14
[128] Martin (n 112).p3
[129] Moses (n 98).p.15

The history of arbitration has its roots in international private commercial dispute resolution. Merchant guilds in Europe developed arbitration as a swift and fair method for dealing with commercial disputes across borders when domestic laws were varying and unclear.[130] In the medieval period, merchants travelled to fairs to meet and conduct business with other merchants. Because these fairs occurred far from the merchants' homes, and because the merchants did not stay at any particular fair very long, it was important for the merchants to create a system to resolve the disputes that would inevitably arise from the business conducted at the fair.[131] Merchants were interested in a system that would resolve disputes (1) quickly (so they could leave the fairs) and (2) following industry standards (to facilitate relationships among the parties). Arbitration was developed to achieve these two goals. The arbitration system permitted parties to appoint a disinterested third party, an industry expert, to resolve the dispute quickly by applying understood customary norms.[132]

The popularity and ease of international commercial arbitration persist today; international arbitration can offer the advantages of speed, cost-efficiency, finality, and subject-matter expertise of the arbitrator. In addition, avoiding litigation in foreign courts remains a significant advantage and enforcing arbitration awards. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) provides the enforcement of arbitral awards.[133] However, public international arbitration between countries was rare historically. For example, the Permanent Court of Arbitration was created in 1899 to voluntarily resolve disputes between states. In the late twentieth century, more countries started to turn to arbitration for some reason. First, the International Court of Justice (ICJ), created in 1945, has

[130] Schneider (n 104).p.446
[131] Sarah Rudolph Cole and Kristen M Blankley, 'Arbitration' in Michael L Moffitt and Robert C Bordone (eds), *The Handbook of Dispute Resolution* (1st. ed., Jossey-Bass 2005).p.320
[132] ibid.p.320
[133] Schneider (n 104).p.446

succeeded in acting as a judge between countries over boundaries, territorial disputes, and fishing rights.[134]

The second reason for the expansion of arbitration between countries is creating new forums to handle conflicts. For example, the (WTO) was created in 1994 with an independent dispute settlement body to arbitrate trade cases between countries. Rotating panels hear the disputes of arbitrators with expertise in trade law. Also, the United Nations established a tribunal to hear disputes arising under the Law of the Sea Convention.[135] The third reason arbitration has expanded internationally is that countries are often involved in disputes with private parties rather than with another country. Neither the (ICJ) nor the (WTO) process is available to private parties to pursue their investment disputes with countries. Domestic courts are also not available because countries often have sovereign immunity at home and in foreign courts.[136] Therefore, the (ICSID) established under the World Bank, was created to handle disputes between countries and private parties to facilitate investment and development. Most of the United States' bilateral investment treaties worldwide and (NAFTA) refer any dispute arising under the treaty to (ICSID) or *ad hoc* arbitration rules created by the United Nations Commission on International Trade Law (UNCITRAL).[137]

3.0. The Oil and Gas Industry; Disputes and their Resolution:

3.1. The Oil and Gas Disputes:

The oil and gas industry covers diverse activities; thus, the industry is divided into upstream activities, midstream and downstream activities. Each of these activities has its types of contracts and disputes. However, the oil and gas industry's disputes are usually divided into state versus State disputes, Company versus State disputes (Investment Disputes) and Company versus Company disputes (Commercial Disputes).

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[134] ibid.p.447
[135] ibid.p.448
[136] ibid.p.448
[137] ibid.p.448

3.1.1. State versus State Disputes:

The State versus State disputes is primarily boundary disputes concerning oil and gas fields that cross international borders, mainly in maritime waters. This type involves governments since they can claim the sovereign title and resolve boundaries with neighbouring states. However, oil and gas companies are sometimes asked by developing nations to fund the dispute costs and provide data and legal expertise to resolve the boundary dispute.[138]

3.1.2. Company versus State Disputes:

The Company versus State disputes are often called investor-state or state investment disputes. They occur when governments significantly change the original deal's terms or nationalise or expropriate an investment. The investor, an oil and gas company or a consortium of oil and gas companies, can base its claim on its host government contracts, an investment treaty, or possibly both.[139]

The upstream host government contracts increase investment by host countries in their oil and gas sectors by entering into a host government contract. Typically, a host government contract is mainly a contract between the host government (H.G.) or national oil company (NOC) and the investor, an international oil and gas company (IOC), who is allocated certain rights to explore and develop hydrocarbons.[140] In addition, the host government contracts include contracts such as Concessions and Licences Agreements. The term concession is defined as an arrangement between a concession granting authority, i.e. grantor (resource owner) and grantee, allowing the international oil company (IOC) exploration, development, production and trading of hydrocarbons extracted. This is the oldest system adopted to develop petroleum resources but is now known as a licence and is in use in many countries.[141]

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[138] Tim Martin, 'Dispute Resolution in the International Energy Sector: An Overview' (2011) 4 The Journal of World Energy Law & Business 332. p334
[139] ibid. p334–335
[140] K Talus, S Looper and S Otillar, 'Lex Petrolea and the Internationalization of Petroleum Agreements: Focus on Host Government Contracts' (2012) 5 The Journal of World Energy Law & Business 181.p182
[141] Mohd Naseem and Saman Naseem, 'World Petroleum Regimes' in K Talus (ed), *Research Handbook on International Energy Law* (Edward Elgar 2014).p.151

Also, (H.G.) contracts include Service Contracts, which can be either Risk- Service Contract or Service Contract (Non- Risk). Under a Risk-Service Contract arrangement, the resource owner pays for the services of the oil company in cash or other kinds. While, under the Service Contract (Non-Risk) arrangement, the oil company is paid a flat rate for its services, usually by applying a percentage of the oil produced.[142] The other (H.G.) contracts are the Tax and Royalty Regime. In this regime, a combination of payments comprising of tax, royalty and cess is made to the Host Government (H.G.).[143]

The final (H.G.) contract is the Production Sharing Contract (PSC). The (IOC) undertakes the exploration and production operations as a Contractor for the resource owner to undertake services that require an investment of risk capital for exploration operations to find petroleum.[144] The (IOC) bears all the costs of exploration as well as exploration risk. If there is no commercial discovery of petroleum, the (IOC) carries the loss. In the event of a commercial discovery, the (IOC) is entitled to be reimbursed by a percentage of oil produced, which is achieved by applying a percentage of petroleum produced as 'cost oil' to realise the pre-development expenditure. After deducting the agreed percentage of cost oil set out in the (PSC), the remaining oil, usually called the 'profit oil' (less 'cost oil'), is shared between the (IOC) and the (H.G.) under an agreed formula based either on investment multiple or post-tax rate of return (PTRR).[145]

In addition to host government contracts, the Company versus State disputes are mostly treaty-based claims made under bilateral investment treaties (BITs) or multilateral investment treaties such as (ECT) and (FTAs), which are negotiated and ratified by two sovereign states.[146] Therefore, the oil and gas companies should structure their investments and negotiate their host

[142] ibid.p.175
[143] ibid.p.154
[144] ibid.p.159
[145] ibid.p.159
[146] Martin (n 136). p334

government contracts to take advantage of these treaties. For example, these treaties' investment protection and access the facilities of the (ICSID) centre as the forum of choice for any dispute with a sovereign state.[147] That is essentially accomplished by incorporating their investing company and managing their business out of a jurisdiction with a strong (BIT) with the host country and including an (ICSID) dispute resolution clause in their host government contract.[148]

Generally, the types of disputes under the Company versus State disputes (Investment Disputes) are related to Exploration and Production (E&P) disputes, including disputes related to Nationalisation of Upstream Assets, Changes to the Fiscal Regime and Force Majeure.[149] Under the nationalisation of upstream assets disputes, numerous countries have nationalised their petroleum industries, including Libya (the early 1970s), Kuwait (mid-1970s), Iran (1980), Venezuela (mid-2000s), and Bolivia (mid-to-late 2000s).[150] The international law recognises a state's sovereign right to nationalise an International Oil Companies' interests in an oil and gas project within the state's territory, provided that the host government contract does not limit this right and that the state pays appropriate compensation to the International Oil Companies (IOCs).[151] These nationalisations have resulted in many major international arbitrations brought by (IOCs) against host states, either under host government contracts or under investment treaties between the (IOC's) home state and the host state.[152] The principal issues in these cases have included the lawfulness of the nationalisation and the amount of compensation payable to the (IOC).[153]

[147] ibid. p335
[148] ibid. p335
[149] Childs (n 53).p.7-8
[150] ibid.p.7
[151] ibid.p.7
[152] ibid.p.7-8
[153] ibid.p.8

Under the change to the fiscal regime dispute, a state also has the sovereign right to change the fiscal regime applicable to oil and gas activities within its territory. (IOCs) are particularly vulnerable to the risk that a host state will increase the tax burden on an oil and gas project if it turns out to be highly profitable.[154] To protect (IOCs) against this risk, host government contracts often specify the income-tax rate and the royalty rate payable by the (IOC) throughout the contract's life. In addition, some host government contracts contain a fiscal stabilisation clause, which is designed to insulate the (IOC) from any changes to the fiscal regime after the contract is signed.[155] Under the force majeure disputes, many countries in which (IOCs) carry out upstream activities are politically volatile or prone to civil unrest and violence. A host state may become a global pariah in extreme cases, subject to international isolation and sanctions. Suppose the political or security situation worsens significantly after an (IOC) enters a country. In that case, the (IOC) may claim that the changed circumstances constitute a force majeure situation suspending its obligation to perform the minimum work program. The host government may disagree, claim damages, or terminate the parties' contract, possibly for opportunistic reasons.[156]

3.1.3. Company versus Company Disputes:

The third type of oil and gas dispute is the Company versus Company dispute, usually called international commercial dispute.[157] This type of dispute is resolved by international commercial arbitration and can occur in upstream and downstream activities between oil and gas companies. The upstream exploration and production (E&P) engaging private parties usually include agreements different from the host government contracts (H.G.), such as farm-out agreement, unitisation agreement, joint operation agreement, and drilling Contracts.[158] Further, the downstream activities between private parties usually include agreements, such as

[154] ibid.p.8
[155] ibid.p.8
[156] ibid.p.9-10
[157] Martin (n 136). p335
[158] Gaitis and others (n 50).p.2-5

Contract of Refineries and Petrochemical Plants construction, Transportation Contracts,[159] The Gas Sale Agreements (GSA) and Liquefied Natural Gas (LNG) Sales Agreements.[160] An example is that arbitrations involving drilling contracts have a range of outstanding disputes and are associated with the complex engineering of drilling oil and gas well operations. In addition, the rights and duties of the drilling contractor and operator and the accuracy of data on drilling can raise arbitration disputes about those rights and duties.[161] Another example is the Gas Sale Agreements (GSA) and Liquefied Natural Gas (LNG) Sales Agreements. Natural gas sales agreement "*long-term – take or pay*" is an agreement of exchange of commodities between the seller and the buyer, wherein the sellers make gas available to the buyer for delivery when required, and the buyer agrees to pay the seller in return for the availability of the gas. The agreement provides time, price, the term of delivery, and gas quality.[162] In this contract, the arbitration disputes are related to Gas Price disputes. These contracts -long term- often have fifteen to twenty years and provide that the gas price shall be determined according to a formula indexed to oil costs. Additionally, they usually contain a so-called "price review clause", providing that the parties shall review the price formula at certain intervals, e.g., every three years.[163] Today the sales are more likely to be "shorter-term" sales of processed gas made at the tailgate of a gas processing plant or the nearby intake of an interstate pipeline, where "hub" markets with multiple buyers and sellers usually are found.[164] Accordingly, most (LNG) arbitration disputes are also related to determining the price of gas.[165] In addition, investment

[159] Pipelines are the primary means of transporting large volumes of crude oil, refined products, and natural gas over land or liquidated faction of that gas to LNG by ship. see: Tom Childs, 'The Current State of International Oil and Gas Arbitration' (2018) 13 Texas Journal of Oil, Gas, And Energy Law.p.11 also; Peter Roberts, *Gas Sales and Gas Transportation Agreements : Principles and Practice* (Sweet & Maxwell 2011).p.16-17
[160] Martin (n 136). p335
[161] Gaitis and others (n 50).p5
[162] Peter Roberts, *Gas Sales and Gas Transportation Agreements : Principles and Practice* (Sweet & Maxwell 2011).p15
[163] Childs (n 53).p.12
[164] Gaitis and others (n 50).p8
[165] Lisa M Bohmer, 'Arbitrating International LNG Disputes: Lessons Learned over Two Decades' (2015) 8 Journal of World Energy Law and Business 485.p486

costs remain high in the liquid natural gas (LNG) sector. The technical knowledge required to transport via pipelines and store (LNG) and the government's necessary involvement for the construction and operation of (LNG) facilities may also give rise to (LNG) investment disputes and "Gas Non-pricing arbitration disputes".[166] ;

4.0. The Emergence of Investor-State Arbitration (ISA):

As mentioned in section (3.1.2) above, in the Company vs State disputes in the oil and gas industry, several oil and gas disputes involve the state as a party called Oil and Gas Investment Disputes. This type of dispute is conducted under the investor-state arbitration system, and this section will discuss and elaborate on this system in more detail.

4.1. Historical Development:

Historically, the desire to promote the flow of private capital resulted in four crucial multilateral attempts after the Second World War to increase such flows.[167] The first was the 1948 Havana Charter on Trade and Employment, which created the International Trade Organization (ITO). However, the governments of developing countries were hostile to specific provisions of the charter, especially those related to the protection of foreign investments.[168] The second attempt was a private initiative, the Abs-Shawcross Draft Convention on Investments Abroad 1959. However, this text also failed to gain widespread government support.[169] The third and most direct approach to investment protection was the Draft Convention on the Protection of Foreign Property, negotiated in the 1960s under the Organization for Economic Cooperation and Development (OECD). This Convention was perceived as primarily reflecting the interests of developed countries; it failed to obtain the support of the developing world.[170] Finally, at roughly the same time, the World Bank

[166] ibid.p491–492
[167] Christopher Dugan and others, *Investor-State Arbitration* (Oxford University Press 2008).p.48
[168] ibid.p.48
[169] ibid.p.48
[170] ibid.p.48-49

attempted to draft a multilateral convention on investment, observing the mistakes of others. The World Bank was indeed a more productive forum for conducting the necessary studies on the subject because, in contrast to the (OECD), it included a wide range of member states from both the developed and developing world.[171] After several years of preparatory work, the text of the Washington Convention was presented to the member governments of the World Bank for signature and ratification in March 1965. The Convention entered into force on September 14, 1966. The International Centre for the Settlement of Investment Disputes (ICSID), created according to Article 1 of the Washington Convention, has come to play a central role in the new system of investor-state arbitration.[172] The cornerstone of (ICSID's) jurisdiction is the consent of host countries to resolve investment disputes with foreign investors through international arbitration administered by (ICSID), an institution under the umbrella of the World Bank.[173]

Indeed, the (ICSID) Convention enabled the expansion of investor-state arbitration.[174] However, investor-state arbitration in the early international investment treaties as a dispute resolution mechanism was not included. For example, the first signed (BIT) ever between Germany and Pakistan (1959) incorporated a State-State dispute settlement.[175] The early treaties provide for disputes to the International Court of Justice or *ad hoc* state-to-state arbitration.[176] It was not until 1969 that the first investor-state dispute settlement modality was included in an investment treaty with the Chad-Italy (BIT).[177] However, it took until 1990 for the first arbitral tribunal, in the case of *AAPL v. Sri Lanka*,[178] to exercise jurisdiction under an

[171] ibid.p.49
[172] ibid.p.50
[173] ibid.p.50
[174] Puig (n 4).p.597
[175] Bajar Scharaw, *The Protection of Foreign Investments in Mongolia Treaties, Domestic Law, and Contracts on Investments in International Comparison and Arbitral Practice* (Marc Bungenberg and others eds, Springer International Publishing 2018).p.106
[176] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd ed, Oxford University Press 2008).p.7
[177] Scharaw (n 173).p.106
[178] *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3

investor-state dispute settlement clause in an international investment treaty. [179] From the 1990s onwards, investor-state arbitrations have been increasing steadily.[180] Indeed, by the 1990s, (ICSID) had become the main forum for settling investment disputes.[181]

Since then, investment law has had a veritable flood of cases produced and continues to build an ever-growing case law in the field. Inevitably, the large number of decisions produced by differently composed tribunals has led to concerns about consistency and coherence of decision- making process. In addition, the success of the investment arbitration system has also led to weariness and criticism about the system's pro-investor and legitimacy concerns.[182]

4.2. The Legal Framework:

4.2.1. The Legal Sources:

4.2.1.1. The (ICSID) Convention "Washington Convention":

The Convention on the Settlement of Investment Dispute between States and Nationals of Other States (ICSID) is a multilateral treaty. Through conciliation or arbitration, it provides a procedural framework for dispute settlement between host states and foreign investors.[183] In this Convention, sovereign governments that are signatories to the Convention waive their sovereign immunity from lawsuits and claims, and their courts are required to accept the awards without review.[184]

4.2.1.2. The Investments Agreements:

The first type of these agreements is the Bilateral Investment Treaties (BITs) which typically determine the scope of the application of the treaty, define which investment and investors qualify for protection, provide several substantive protections,[185] and create

[179] Scharaw (n 173).p.106
[180] ibid.p.107
[181] Dolzer and Schreuer (n 174).p.9
[182] ibid.p.11
[183] ibid.p.13
[184] Martin (n 136).p341
[185] These contain fair and equitable treatment (FET); a guarantee of full protection and security; a guarantee against arbitrary and discriminatory treatment; a guarantee of national treatment and a guarantee of most-favoured-nation treatment (MFN clause); guarantees in case of expropriation; and guarantees concerning the free transfer of payments.

procedures for the settlement of disputes. In addition, most (BITs) provide for arbitration under the (ICSID) and alternative methods, e.g. state-state arbitration.[186]

The second type is the multilateral treaties such as The Energy Charter Treaty (ECT) of 1994. Under the (ECT) Treaty, investors have the right to bring a suit before (ICSID), (UNCITRAL), before the Stockholm Chamber of Commerce (SCC), or before the courts or administrative tribunals of the respondent state.[187]

The third type is the Free Trade Agreements (FTAs), including the North American Free Trade Agreement (NAFTA), The Transatlantic Trade and Investment Partnership (TTIP) and the Central American Free Trade Agreement (CAFTA). Most of these agreements contain provisions requiring the signatory States to encourage international arbitration and arbitration provisions for states disputes and investor-state disputes.[188]

4.2.1.3. Customary International Law:

Although treaties dominate international investment law, customary international law still plays an important role. Rules on attribution and other areas of state responsibility and rules on damages illustrate the point. Other relevant areas of customary international law are the rules on expropriation, denial of justice, and the nationality of investors. The growing case law in foreign investment has led to a situation in which some general rules of international law find their significant practical expression in foreign investment law.[189] The consequence is that a full contemporary understanding of these rules requires knowledge of their interpretation and application in foreign investment law cases. A primary doctrinal issue pertains to the impact of many bilateral investment treaties on the evolution of customary law. This linkage between customary law and treaty law has been at the forefront of comments which have addressed the state of customary law regarding expropriation and compensation of foreign property.[190]

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[186] Dugan and others (n 165).p52
[187] Dolzer and Schreuer (n 174).p.15
[188] Martin (n 136).p.343
[189] Dolzer and Schreuer (n 174).p.17
[190] ibid.p.17

4.2.1.4. Case Law:

Tribunals are not bound by previous cases but frequently examine and refer to them.[191] In investment arbitration, each tribunal is constituted *ad hoc* for the particular case; therefore, it is more challenging to develop a consistent case law than in an international court such as the International Court of Justice or the European Court of Human Rights.[192] Yet, tribunals rely on previous decisions by other tribunals whenever they are able. Therefore, discussion of prior cases and their interpretations are a regular feature in almost every decision. At the same time, it is also well established that previous decisions of other tribunals do not bind tribunals in investment arbitration.[193]

4.2.2. The Legal Process:

4.2.2.1. Arbitral Rules and Organization of Process:

The arbitral process is governed by arbitration rules designated under a (BIT) and then chosen usually by the claimant when it submits the dispute. The most used rules are (ICSID) and the (UNCITRAL) Arbitration rules used in *ad hoc* arbitration. The significant difference may be that the (ICSID) Convention is a self-contained system whereby all aspects of a dispute are handled according to the (ICSID) rules, including the annulment of awards. By contrast, under the (UNCITRAL) Arbitration Rules, recourse to local courts would be necessary to set aside or annul an award under the 1958 New York Convention.[194] Unlike (ICSID), the (UNCITRAL) framework has no formal or permanent institutional support, and the contracting states to International Investment Agreement (IIA) need not be parties to the (ICSID) Convention. For countries that have not ratified the (ICSID) Convention, initiating a dispute under the (UNCITRAL) framework is usually the only option available to investors.[195]

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[191] ibid.p.19
[192] ibid.p.33-34
[193] ibid.p.33-34
[194] Sabahi, Laird and Gismondi (n 38).p.31
[195] Donde and Chaisse (n 2).p.212-213

4.2.2.2. Selection and Disqualification of Arbitrators:

As discussed in chapter 1 (1.3) that Arbitral panels generally consist of two party-appointed arbitrators and a chairperson appointed either by the parties' agreement, by the two party-appointed arbitrators or by an appointing authority.[196] Choosing the optimal candidate for party-appointed arbitrator has become increasingly complex and has attracted criticism. It is a fundamental tenet of arbitration that all arbitrators are independent and impartial, and it is presumed that all arbitrators possess these qualities.[197] Each institution has its grounds for the disqualification of arbitrators; however, all consider grounds leading to justifiable doubts about the arbitrator's impartiality and independence sufficient for disqualification.[198] Implementation of the (ICSID) Articles 14(1), Article 57 and the (UNCITRAL) Article 12 of the challenge standards such as the 'manifest lack' of an arbitrator to "to exercise independent judgment" or "justifiable doubts" as to the impartiality or independence touch on concepts of proper behaviour shared with other arbitral systems.[199] At first sight, it might appear that the lack of any of the three qualities, high moral character, expertise and independent judgment, comprising impartiality required by Article 14(1) of the (ICSID) Convention, is sufficient for a successful challenge. However, the lack of qualities must be "manifest". The word by itself is seen to set a high bar to a potential challenge.[200]

4.2.2.3. Jurisdiction Requirements:

There are three jurisdictional requirements parties – investors- must meet to bring a claim and dispute resolution by (ICSID). First, both parties must have consented to arbitrate and conciliate under (ICSID) Rules. Second, one party must be a Contracting State, and the other party must be a national of a different Contracting State. Third, the dispute must be a legal

[196] Sabahi, Laird and Gismondi (n 38).p.32
[197] ibid.p.32
[198] ibid.p.32
[199] Park (n 9). p.670
[200] Lars Markert, 'Challenging Arbitrators in Investment Arbitration: The Challenging Search for Relevant Standards and Ethical Guidelines' (2010) 3 Contemporary Asia Arbitration Journal 237.p.243

dispute arising directly from an investment.[201] A Contracting State is a party to the (ICSID) Convention does not automatically mean that it has agreed to submit disputes to (ICSID's) jurisdiction. That consent may be found in a contract with the investor that contains an arbitration clause, national legislation, or an investment treaty.[202]

4.2.2.4. Legal Disputes and Investment and Investor:

The existence of a legal dispute concerning an investment is a jurisdictional requirement in investment arbitration. If proceedings are to be conducted under the (ICSID) Convention, the test is that there is a legal dispute arising directly out of an investment (Art 25(1)) of the (ICSID) convention.[203] The definition of an investor in modern investment treaties and the (ICSID) Convention (Article 25) includes natural and legal persons, including corporations, state-owned enterprises, sovereign wealth funds, and even non-profit organisations.[204] The (ICSID) Convention does not define either legal disputes or investments, and for the most part, tribunals have interpreted both of these terms broadly. A legal dispute is generally considered to apply to a dispute over any legal right or obligation or any remedy for a breach of a legal obligation. Investment is a project or transaction having economic value.[205] Tribunals have considered many kinds of assets, projects, or transactions as investments, including capital contributions and other equity investments and nonequity investments such as construction and infrastructure projects, service contracts, and technology transfers.[206]

Nevertheless, some tribunals have assumed that an 'investment' will be defined in objective terms, which the parties' agreement cannot substitute. For Article 25, many tribunals have adopted a list of descriptors that they regard as typical investments. These include: (a

[201] Moses (n 98).p.222
[202] ibid.p.222
[203] Dolzer and Schreuer (n 174).p.245
[204] Sabahi, Laird and Gismondi (n 38).p.40
[205] Moses (n 98).p.225
[206] ibid.p.225

substantial commitment; a specific duration; an element of risk; and significance for the host state's development).[207]

4.2.2.5. Annulment and Enforcement:

Once an award is rendered, a losing party may seek to alter or overturn the award. The (ICSID) Convention and the New York Convention, applicable in non-(ICSID) cases, have limited grounds for challenging arbitral awards, focusing on whether the arbitral process was appropriately conducted rather than on the substance.[208] Therefore, the generally held view is that mechanisms for the annulment of investment treaty arbitration awards are not appeals. However, in exceptional circumstances, arbitration awards and commentators consider annulling an award for manifest errors of law, not dissimilar to an appeal.[209] Article 52 of the (ICSID) Convention, for example, lists five grounds: (a) that the tribunal was not properly constituted; (b) that the tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based.[210]

5.0. The Role of Arbitrators to Preserve the Integrity and Legitimacy of International Arbitration:

Arbitrators and judges are both subsets of the larger category of adjudicators. Therefore, defining the role of the arbitrator must begin by defining, more generally, the role of the adjudicator.[211] All adjudicators share certain universal core features, which derive from the nature of adjudication itself. Lon Fuller's classical definition of adjudication provides the core

[207] Dolzer and Schreuer (n 174).p.248
[208] Sabahi, Laird and Gismondi (n 38).p.34
[209] ibid.p.44
[210] ibid.p.44
[211] Rogers, 'Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct' (n 10).p.84

for a universal definition that adjudication is a process of decision that grants the affected party a form of participation that allows the opportunity to present proofs and reasoned arguments.[212]

Under this definition, the three constitutive elements or ordering principles of adjudication are reason, adversarial and separateness. These features have been used to distinguish adjudication from other forms of social ordering, such as contract and democratic popular decision-making. However, some additional features must be added.[213] First, adjudication is authoritative, meaning that the ultimate decision is final and binding on the parties. This feature is usually relied on to distinguish adjudication from other forms of dispute resolution.[214] Therefore, a fully operational definition of adjudication is a process to facilitate final, binding, and jurisdictionally bounded decisions that operate within a system and are based on the opportunity of participants to present proofs and reasoned arguments to third parties.[215]

However, any process that completely lacks these features cannot be considered adjudication. When decision-making is infected with bias, outcomes are not based on the reasoned application of applicable legal rules or premised on parties' proofs but on the decision maker's personal interests and inclinations.[216] The authoritative nature of adjudicatory outcomes and their existence within a larger system imposes on adjudicators an obligation to preserve the adjudicatory system's integrity and legitimacy.[217] These responsibilities to the system might translate into obligations connected with certain administrative functions' performance, avoid certain external activities that are inconsistent with their judicial function, and into obligations to avoid the appearance of impropriety.[218]

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[212] ibid.p.84-85
[213] ibid.p.85
[214] ibid.p.85
[215] ibid.p.85-87
[216] ibid.p.87
[217] ibid.p.88
[218] ibid.p.88

Thus, the arbitrator's adjudicatory role in international arbitration requires the objective application of rules to facts and the exercise of bounded discretion to ensure that the process and outcome are warranted.[219] While parties may pick arbitrators with particular cultural and legal backgrounds and specific personal experiences, arbitrators also generally must disclose those matters that would call into question their independence. Although all humans are inevitably influenced by their experiences, in international arbitration, parties ask arbitrators to put aside biases to fairly and impartially exercise their independent judgment and apply their expertise to the facts on the record to render a decision based upon the law.[220]

Consequently, there are several essential distinctions in the role of an arbitrator. First, arbitrators are generally appointed by the parties themselves or are nominated by the governing arbitral institution. In addition, arbitrators are usually only selected for the individual dispute.[221] Second, arbitration is not designed to completely separate the decision-maker from the business community, which they serve in the role of arbitrator. This connection with the industry is sometimes one of the essential qualities an arbitrator can have in the eyes of the appointing party.[222] Historically, arbitration awards were not revered for their legal analysis but more for their sense of fairness and industry knowledge. Today, businesses use international arbitration to provide a neutral, adjudicative dispute resolution process, where arbitrators independently apply the law to facts, promoting the legitimacy of international arbitration.[223] The arbitrator of yesteryear was often an expert from the same industry as the parties, who exercised a paternalistic authority. The arbitrator was expected to render a just and equitable result, even if that sometimes meant disregarding the express terms of the contract or

[219] Susan Franck, 'The Role of International Arbitrators' (2006) 12 ILSA J. Int'l & Comp. L. 499.p.505
[220] ibid.p.505-507
[221] Gabriel and Raymond (n 78).p.454
[222] ibid.p.454-455
[223] Franck, 'The Role of International Arbitrators' (n 217).p.504

the clear provisions of the chosen law.[224] These noble visions of business relations and dispute resolution inspired an elite group of continental lawyers, who are primarily responsible for founding international arbitration in its modern version.[225]

Consequently, parties have insisted on making the arbitration process more transparent and more accountable.[226] As the field continues to be dominated by an elite group of insiders. These individuals, both through informal processes and their effective control over arbitral institutions, exert significant influence over who gets appointed as an arbitrator.[227] Arbitrator selection is often in the hands of members of the same club, who either operate in the institutions or are already appointed as party-appointed arbitrators. In either situation, they are likely to favour other club members.[228] As a result, the market for international arbitrators operates as a relatively closed system that is difficult for newcomers to penetrate. In addition to the significant barriers to entry, severe information asymmetries prevent the market for arbitrator services from being fully competitive.[229]

6.0. Conclusion:

This chapter argued that today international arbitration is very distinctive from its earliest form, which had long complex history within the oil and gas disputes. Traditionally, international arbitration was only preformed between states. However, the introduction of international commercial arbitration enable arbitration between two private parties, which led to the existing of investment arbitration as a new form of international arbitration between states and private parties. This was after the end of the Second World War with efforts were made to regulate foreign investment by unsuccessful multilateral investment treaty. However,

[224] Catherine A Rogers, 'Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration' (2002) 23 Michigan Journal of International Law 341.p.351
[225] ibid.p.352
[226] ibid.p.352-353
[227] Catherine A Rogers, 'The Vocation of International Arbitrators' (2005) 20 American University International Law Review 957.p.967
[228] ibid.p.967
[229] ibid.p.968

the successful of the (BITs) in international investment law have encourage the settlement of investment disputes by directly resort to international arbitration. On the other hand, this chapter illustrated that the earliest forms of investment oil and gas arbitration cases were particularly crucial in the success of the (ICSID) Convention and in strengthening the legitimacy of investor-state arbitration in oil and gas disputes.

Therefore, this chapter critically discusses the existing criticisms of the investor-state arbitration legal process and whether they function adequately to ensure arbitrators' independence and impartiality, this will be discussed in-depth in the next chapter. Also, the chapter in section (5.0.) highlighted the important role of international arbitrators in preserve the legitimacy and confidence of the parties in the system. Thus, underlines the importance of regulating the arbitration profession in investor-state arbitration and oil and gas by improving arbitrators' professional regulatory and control mechanisms.

Chapter 3: Arbitrators' Regulatory Mechanism in Investor-State Arbitration and Its Criticisms:

1.0. Introduction:

The previous chapter has established that the oil and gas disputes have historically contributed to the development of (ICSID) and the legitimacy of investor-state arbitration as a mechanism of dispute resolution in the oil and gas industry. However, the arbitrators who have contributed to part of this confidence and legitimacy of this system in oil and gas have become the source of making the users lose confidence in this system. This situation has been led by the criticisms and concerns of the legitimacy crisis made to investment arbitration on arbitrators' integrity and lack of independence and impartiality.

However, this chapter will first provide an overview of the arbitrators' regulatory mechanism, such as their selection and appointment process, qualifications, and legal obligations. The chapter will also explore the legal source of arbitrators' ethical standards, qualifications and obligations in investment arbitration. Further, the next section will review the criticism made to the regulatory mechanism of arbitrators in investor-state arbitration about arbitrators' integrity. Further, this chapter in the final section will review the role of professionalism in responding to the integrity problem and legitimacy crisis in investor-state arbitration.

The purpose of this chapter is to argue for the need for competent, qualified and quality arbitrators in investor-state arbitration and oil and gas. Also, the extent to which the institutional rules, professional regulations and the current structure of matching the services of arbitrators to a potential party by major arbitration providers need to enhance the integrity and ensure the highest quality of appointees. Accordingly, in investor-state arbitration, it is no secret that the quality of investment awards depends upon the quality of the deciding

arbitrators.[230] Thus, this chapter outlines the need to introduce a preventative mechanism such as certifications for arbitrators that may provide an assurance of competence and excludes incompetence arbitrators. Further, certifications will provide a more precise signal of neutrality than membership on arbitrators' lists to be selected and respond to the scepticism of the integrity of the arbitration profession by preventing non-neutrality arbitrators from being certified.

2.0. The Arbitrators' Regulatory Mechanism:

2.1. The Methods of Appointment and Selection and The Parties' Role:

The arbitrator selection procedure can vary, depending upon the parties' agreement and the institutional rules. For example, suppose parties do not state how to select arbitrators in their arbitration clause but choose rules to govern the process. In that case, the selection will occur according to the institutional rules.[231] Some of the differences parties should be aware of, when they have not chosen a selection process, are whether (a) the institutional rules provide parties with the freedom to select the arbitrators, or (b) they will be limited to a list of names provided by the arbitral institution, or (c) the institution will choose the arbitrators, or (d) some variation of the above.[232]

Parties' input into selecting arbitrators has long been standard practice to promote confidence in the international arbitral process. Thus, litigants often perceive the benefit of direct selection of a tribunal rather than leaving the choice entirely to an institution.[233] By vetting a proposed arbitrator, the party may feel more comfortable deciding the case by skilled, fair, and perhaps even smart. Those unfamiliar with international arbitration sometimes express surprise at the degree of party involvement in the selection process, suggesting that it may inject a corrupting

[230] Reinisch (n 81).p.908
[231] Moses (n 98).p.120
[232] ibid.p.121
[233] Park (n 9).p.644

influence on the independence of arbitrators.[234] A mutually acceptable arbitral tribunal would usually be facilitated by allowing each side to appoint an arbitrator and having the two party-nominated arbitrators choose the third member of the tribunal. Such party participation democratises the process, fostering the trust that at least one person on the tribunal (the party's nominee) will monitor the procedural integrity of the arbitration.[235]

There are many different strategies for choosing the party-appointed arbitrators (Co-arbitrators). Still, one common way is that parties always choose people they know personally or for their reputation of being among the best international arbitrators in the world.[236] Other strategies involve weighing the merits of the prospective arbitrator against those of the other party's arbitrator.[237] The final strategy of choice of an arbitrator may involve some negotiation between client and counsel. Counsel should do extensive research, such as reading any articles written by the prospective arbitrator reading any available decisions.[238] However, in *ad hoc* arbitration, there is no institution to intervene if the parties do not choose an appointing authority or if the appointing authority selected by the parties does not fulfil its function. The (UNCITRAL) Rules provide that one of the parties may request the Secretary-General of the Permanent Court of Arbitration at the Hague to designate an appointing authority.[239]

2.1.1. The Appointment and Selection of Oil and Gas Arbitrators:

As mentioned in chapter 2 (5.0), the market for international arbitrators operates as a relatively closed system that is difficult for newcomers to penetrate.[240] Competition between arbitrators gives them different incentives than court judges, who do not need to compete to attract litigation. Arbitrators only get paid when they are chosen by the parties to serve in a particular case. Therefore, they are exposed to the same market pressures as any other

[234] ibid.p.644
[235] ibid.p.645
[236] Moses (n 98).p.122
[237] ibid.p.122
[238] ibid.p.123
[239] ibid.p.127-128
[240] Rogers, 'The Vocation of International Arbitrators' (n 225).p.968

professional who delivers a service.[241] To get selected, arbitrators need to increase their visibility in the marketplace. For instance, advertisements, announcements in legal publications, or general newspapers are not enough. As parties do not have complete information on the pool of professionals available to resolve their disputes, arbitrators engage in signalling behaviour to attract business.[242] Because arbitrators are frequently selected from an institution's list of arbitrators, inclusion in such lists works as an attraction for appointment.[243]

2.1.1.1. The ICSID list of Arbitrators:

According to the (ICSID) website, Arbitrators or *ad hoc* Committee members are selected to serve in (ICSID) proceedings through an appointment process. The parties appoint most arbitrators to the dispute according to an agreed method for constituting the Tribunal or Commission, or under a default method, Article29 (2) (b) and Article 37(2) (b) of the (ICSID) convention. For example, suppose a Tribunal or Commission is not constituted within 90 days of a notice of registration of an (ICSID). In that case, either party may request that the Chairman of the (ICSID) Administrative Council appoint the missing arbitrator under Articles 30 and 38 of the (ICSID) convention.[244] Also, the Chairman appoints all *ad hoc* Committee members in (ICSID) Convention annulment cases. The (ICSID) Convention guides as to who may be designated to the Panel of Arbitrators and serve in arbitration and proceedings (Articles 14(1), 31(2) and 40(2) of the Convention). These stipulate that all (ICSID) arbitrators, conciliators and *ad hoc* Committee members be persons: of high moral character, with recognised competence in the fields of law, commerce, industry or finance; and who may be relied upon to exercise independent judgment.[245]

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[241] Simões (n 58).p.507
[242] ibid.p.507
[243] ibid.p.507
[244] ICSID, 'How to Become an ICSID Arbitrator , Conciliator or Committee Member' (2019) <https://icsid.worldbank.org/en/Pages/arbitrators/How-to-Become-an-ICSID-Arbitrator-Conciliator-and-Committee-Member.aspx#> accessed 26 October 2019.
[245] ibid.

2.1.1.2. Membership in Arbitral Institutions' List of Arbitrators:

Because arbitrators are frequently selected from an institutions' list of arbitrators, inclusion in such lists operate as an attraction for appointment. However, arbitrators need to be more entrepreneurial and sophisticated to stand out from the crowd, showing that they are willing to receive appointments and have enough experience and expertise to be the best option available.[246] Prospective arbitrators engage in reputation-enhancing activities to create opportunities for nominations. Some try to signal their quality by publishing articles, speaking at conferences, or organising academic or industry-targeted initiatives such as seminars and workshops. Through these activities, arbitrators hope to enhance their professional prestige, generating business in fees and, hopefully, future appointments.[247]

2.1.1.3. Energy Arbitrator-Specific Lists (EAL):

Parties are generally interested in having more information about prospective arbitrators' level of experience and expertise. Accordingly, they want to set apart those arbitrators who seem more qualified, experienced and well-trained. That is why generic lists of arbitrators usually allow selection according to the candidates' specific areas of expertise. This emphasis on specialisation led to the emergence of lists mainly devoted to certain types of disputes.[248]

Professional experience within a particular subject matter is considered the most relevant selection factor. To be enlisted, professionals have to demonstrate specific credentials, for instance, is registered in the relevant professional register for a considerable period. A significant level of experience -for example, participation in a minimum number of cases- is also required of most arbitrators to ensure their professional competence within the field of the dispute.[249] Specialised lists are especially important in cases where the nature of the dispute calls for technical or other, particular competence, as is the case with energy disputes. For

[246] Simões (n 58).p.507
[247] ibid.p.507
[248] ibid.p.510
[249] ibid.p.510

instance, the need for an administering organisation familiar with the oil and gas industry to identify potential arbitrators with the required oil and gas expertise has been underlined by several authors. [250]

The Energy Arbitrators List (EAL), created in 2004, is a panel of experienced arbitrators with demonstrated expertise in deciding energy disputes. The list is currently managed by the International Centre for Dispute Resolution (ICDR), the international division of the American Arbitration Association. The idea behind its creation was to promote talent and better arbitration practices for energy disputes.[251] However, energy company lawyers and business executives were frustrated about the difficulty in getting expertise for highly technical disputes and wanted not only arbitrators' names but also information about particularised expertise.[252]

2.1.1.4. Institute for Energy Law - Energy Arbitrators List (IEL List):

Another specialised list is the Institute for Energy Law - Energy Arbitrators List. The (IEL) list is made available by the Centre for American and International Law. Interested parties can refine the list by selecting different industry sectors, specific contracts; Miscellaneous Subject Areas; Location of Disputed Project; Governing Law; Administering Institutions/Rules and Arbitration Format (domestic or international).[253] Individuals with substantial experience in the arbitration of energy disputes can list themselves in this directory as long as they meet or exceed specific criteria. The list compiles information provided by the arbitrators themselves; inclusion in the list does not imply endorsement recommendation by the Centre for American and International Law or the Institute for Energy Law, who recommend users of the list to do their due diligence on the persons listed before making an appointment.[254]

[250] ibid.p.510
[251] ibid.p.511
[252] ibid.p.511
[253] ibid.p.512
[254] ibid.p.512

2.1.1.5. Word-of-Mouth Advice:

Because most parties and their counsel are not familiar with the market for arbitrators, they tend to rely on personal enquiries and word-of-mouth advice. The problem is that opinions about arbitrators' experience and reputation are necessarily subjective, incomplete, or outdated.[255] However, such information is only available to a relatively closed circle of individuals and firms that regard it confidential or proprietary. These professionals have a monopoly on reliable information about arbitrators.[256] Even though parties frequently turn to lists of arbitrators and directories of arbitrators, lawyers' experience working with top arbitrators seems priceless. Senior arbitration experts seem to be the best source of accurate feedback but keep the information within a relatively small circle of insiders, making the cost of obtaining such information very high.[257] This results in severe information asymmetry in the market for arbitrator services. The system remains mostly closed, private and non-transparent, undermining the efficient functioning of the market.[258]

2.2. The Qualifications:

The primary provision of the (ICSID) Convention, which engaged in the qualification and appointment of arbitrators, is Article 14(1), which is also the source of the obligations of independence and impartiality. Accordingly, article 14(1) provide that persons designated to serve on the Panels shall be persons of high moral character and recognised competence in the fields of law, commerce, industry or finance, which may be relied upon to exercise independent judgment. Accordingly, competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.[259]

One of the advantages of arbitration is that parties can choose decision-makers who have the qualifications requested by parties.[260] Generally, the qualifications are the knowledge and

[255] ibid.p.508
[256] ibid.p.508
[257] ibid.p.508
[258] ibid.p.508
[259] ICSID Convention (n 3) art 14(1).
[260] Moses (n 98).p.117

experience in the dispute, law background, or specific-industry knowledge background, languages, availability, and, most importantly, arbitrator's reputation for fairness, integrity, and wisdom excellent asset to an arbitrator and also benefits the parties.[261] Both parties must have confidence in the arbitrator's integrity and abilities for the arbitration process to work well.[262]

2.2.1. The Knowledge and Skills of Oil and Gas Arbitrators:

Whether sole, party-appointed, or chair, Arbitrators are appointed case-by-case basis. As a result, specialised knowledge of factual and technical matters and industry-specific legal issues is expected. Expert arbitrators are essential in disputes involving specialised issues such as Oil and Gas disputes.[263]

In the oil and gas dispute, the first qualification needed is the competence to handle the case. Also, if there is no experience handling oil and gas matters, the appointee should decline to accept the appointment.[264] Oil and gas disputes involve a specialised body of law and, frequently, technical issues unique to the energy industry.[265] Furthermore, oil and gas law is a distinct area of the law with its legal specialisation. In addition, the sector has technical issues, business practices, jargon, form agreements, and other unique qualities.[266] Therefore, familiarity with legal issues and industry workings is essential to handle an oil and gas dispute competently. In addition to providing numerous disputes, the oil and gas industry can generate innumerable conflicts of interest.[267]

2.2.1.1. Expertise and Experience:

The choice of arbitrators is directly related to their expertise and experience in the subject matter of the dispute, such as oil and gas. Previous arbitration experience usually is essential.[268] The reputation and acceptability of international arbitration depend upon the

[261] ibid.p.120
[262] ibid.p.120
[263] Simões (n 58).p.502
[264] Michael C Sanders, 'Ethics in Oil and Gas Litigation' (2017) 58 South Texas Law Review 475.p.476
[265] ibid.p.476
[266] ibid.p.477
[267] ibid.p.477
[268] Simões (n 58).p.505

quality of the arbitrators. As parties are free to choose the adjudicators, they enjoy the possibility of appointing expert arbitrators, that is, individuals with specific knowledge in a particular field.[269] This is especially important in energy disputes based on complex contracts and regulated by highly technical legal provisions. In some cases, it may even be appropriate to appoint non-lawyers who have specific technical knowledge on the type of contract that gave rise to the controversy. However, because most arbitration proceedings are primarily legal, most arbitrators are lawyers.[270]

2.2.1.2. Skills and Qualities:

There are four necessary skills and qualities for oil and gas arbitrators. Firstly, the capacity to decide; parties do not want an arbitrator that hesitates and cannot decide. Secondly, the ability to inspire trust from the parties and their colleagues; an arbitrator must inspire trust from the parties and their colleagues. Inspiring trust requires cultural neutrality, enabling an arbitrator to better appreciate the parties' legitimate expectations.[271] Thirdly, the ability not to need the parties' approval; an arbitrator should not fear being challenged or having its decision annulled.[272] Fourthly, the ability to manage the proceedings and work well; an arbitrator must know how to organise and manage the proceedings. This is true in international arbitration enshrining many legal traditions and is especially true in large arbitrations.[273]

2.2.1.3. Arbitrator Qualifications:

Parties should look for the following qualifications in candidates for an arbitrator appointment: know the law, know the process, know the business, know the Language, be Personable, be Persuasive, be Available. It is not likely that parties will successfully find someone who fills all of the above qualifications.[274] However, they should ensure that they

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[269] ibid.p.506
[270] ibid.p.506
[271] Ana Gerdau de Borja Mercereau, 'The Professionalism of Arbitrator' (*Kluwer Arbitration Blog*, 2018) <http://arbitrationblog.kluwerarbitration.com/2018/11/30/permanent-contributor/> accessed 30 November 2018.p.2
[272] ibid.p.2
[273] ibid.p.2
[274] Martin (n 136).p.358

conduct a thorough search for candidates that fill the important criteria before making the final selection for an arbitrator.[275]

2.2.1.4. Specific Knowledge:

The possibility of appointing arbitrators with specific knowledge is especially important in oil and gas disputes. In arbitration, having a legal background is not necessarily an essential requirement for a suitable arbitrator. Still, basic legal knowledge and experience combined with expertise in a particular non-legal field are.[276] An arbitral tribunal with industry-specific expertise can be critical for resolving complex cases. In the context of oil and gas disputes, the expertise of energy arbitrators is a compelling reason to enter into an arbitration agreement. Therefore, the choice of arbitrators is of paramount importance in energy disputes.[277]

2.3. The Obligations:

The international arbitration institutions that have well-drafted arbitration rules and have the experience to properly administer arbitration are the (ICC), the (LCIA), (SCC), and the (ICSID) rules. While not all arbitral institutions have fully developed codes of ethics, they all have rules that impose certain obligations on arbitrators. Most significantly, they are impartial and/or independent and disclose certain information that may be relevant to these obligations.[278]

2.3.1. The Independence and Impartiality:

Article 14(1) of the (ICSID) convention states that the persons designated to serve on the Panels shall be persons of high moral character and may be relied upon to exercise independent judgment.[279] The requirements of independence and impartiality represent the core obligations of an arbitrator. They are widely recognised that they amount to general international principles

[275] ibid.p.358
[276] Simões (n 58).p.506
[277] ibid.p.506
[278] Catherine A Rogers, 'The Ethics of International Arbitrators' (2008) Bocconi Legal Studies Research Paper No. 2007-01, Leading Arbitrators' Guide To International Arbitration, Juris Publishing, 2008 <https://ssrn.com/abstract=1081436>.accessed 5 May 2021.p.6
[279] ICSID Convention (n 3) art 14(1)

and are incumbent on any arbitrator in all circumstances.[280] As have been defined in the chapter 1 (1.1.), independence refers to the absence of improper connections, while impartiality addresses matters related to prejudgment.[281] Thus, lack of independence derives from what might be called problematic relationships between the arbitrator and one party or its lawyer, resulting from, e.g. financial dealings such as business transactions.[282] The lack of independence usually is caused by financial, professional or personal connections between an international arbitrator and one of the parties to the dispute.[283] It looks at the proximity and duration of a relationship (past or present, direct or indirect) and the arbitrator's economic position vis-a-vis the parties (e.g., not being employed by or having investment in a party).[284]

Whereas a lack of impartiality can be characterised as a preference for or antipathy towards one of the parties,[285] or a specific legal question.[286] The lack of impartiality may derive from a prejudgment made by the international arbitrator regarding one of the parties or the questions to be answered in the international arbitral proceedings.[287]Therefore, it seems possible to identify different subgroups for the criterion "impartiality", such as deciding similar legal issues in prior cases, arbitrators' role conflict as counsel or arbitrator in multiple investment cases, repeated appointments that influence their judgment by these appointments, and arbitrators' opinion in public statements or publications. For example, prior academic writings on specific topics in investment arbitration could raise doubts about whether an arbitrator has prejudged a particular issue in dispute. The requirement of impartiality is a subjective inquiry that ensures that the arbitrator is unbiased and fair-minded based on external, objective facts and circumstances.[288]

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[280] Ng (n 20).p.24-25
[281] Park (n 9).p.635
[282] ibid.p.636
[283] Fry and Stampalija (n 12).p.193
[284] Ng (n 20).p.25
[285] Fry and Stampalija (n 12).p.193
[286] Schacherer (n 18).p.6
[287] Fry and Stampalija (n 12).p.193
[288] Ng (n 20).p.25

In this way, adjudicators have to exercise their function without any favouritism or prejudice, and they have to adopt a behaviour that minimises the situations, which could lead to challenges to their function.[289] Therefore, due to the requirements of independence and impartiality, arbitral rules impose a duty of disclosure of all facts and circumstances that may give rise to justifiable doubts as to the arbitrator's impartiality or independence. The arbitrators have an ongoing obligation to disclose throughout the arbitral process. If a party is suspicious or dissatisfied with an arbitrator's apparent lack of neutrality, the party may initiate a challenge to disqualify that arbitrator.[290] If the arbitrators ignore their duty to disclose, they violate the minimum due process rule, precisely the principle of equality and the public policy exception.[291]

2.3.2. Disclosure Obligation:

Disclosure in arbitrations under the (ICSID) rules provides that arbitrators must sign a declaration disclosing (a) past and present professional, business and other relationships (if any) with the parties and (b) any other circumstance that might cause their reliability for independent judgment to be questioned by a party.[292] In addition, other rules referred to in investor-state arbitration are (UNCITRAL) and (SCC) rules. For example, the (UNCITRAL) arbitration rule Article 11 provides that an arbitrator shall disclose any circumstances likely to give rise to justifiable doubts about his or her impartiality or independence.[293] Also, Article 11 provides that this disclosure is from arbitrators' appointments and throughout the arbitral proceedings.[294]

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[289] Schacherer (n 18).p.6
[290] Ng (n 20).p.25
[291] José Carlos Fernández Rozas, 'Clearer Ethics Guidelines and Comparative Standards for Arbitrators', *Guiding principles of arbitration ethics and comparative parameters for arbitrators* (Liber Amicorum Bernardo Cremades 2010).p.445
[292] ICSID Rules of Procedure for Arbitration Proceedings ('ICSID Arbitration Rules') (April 2006) r 6(2).
[293] UNCITRAL Rules (n 26) art 11.
[294] ibid. art 11.

Further, Article 18(2) of the arbitration rules of (SCC) 2017 provide that before an appointment, an arbitrator shall disclose any circumstances that may give rise to justifiable doubts as to the prospective arbitrator's impartiality or independence.[295] Also, Article 18(3) provides that once appointed; an arbitrator shall submit to the Secretariat a signed statement of acceptance, availability, impartiality, and independence, disclosing any circumstances that may give rise to justifiable doubts to the arbitrator's impartiality or independence.[296] Further, Article 18(4) provides that this obligation continues through the proceedings. Accordingly, an arbitrator shall immediately inform the parties and the other arbitrators in writing where any circumstances referred to in paragraph (2) arise during the arbitration.[297]

2.3.3. Disqualification Standards:

Disqualification of arbitrators in arbitrations under the (ICSID) arbitration rules (Rule 9(1)) provides a party proposing the disqualification of an arbitrator according to Article 57 of the Convention.[298] Article 57 of the convention provide that a party may propose the disqualification of any members on account of any fact indicating a manifest lack of the qualities required by Article 14(1).[299] The qualities required by article 14 (1) are high moral character and recognised competence in the fields of law, commerce, industry or finance, which may be relied upon to exercise independent judgment.[300] However, the (ICSID) Rule 9(4) provide that the decision on the disqualification, the other members shall promptly consider and vote on the proposal in the absence of the arbitrator concerned.[301] Rule 9(5) provides that the Chairman decides on a proposal to disqualify an arbitrator if those members are equally divided.[302]

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[295] The Arbitration Rules of The Arbitration Institute of The Stockholm Chamber of Commerce ('The SCC Arbitration Rules') (January 2017) art 18(2).
[296] ibid. art 18(3).
[297] ibid. art 18(4).
[298] ICSID Rules (n 292) r 9(1).
[299] ICSID Convention (n 3) art 57.
[300] ibid. art 14(1)
[301] ICSID Rules (n 292) r 9(4).
[302] ibid. r 9(5).

On the other hand, the (UNICTRAL) rules Article 12 (1) provide that any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts about the arbitrator's impartiality or independence.[303] Also, the (SCC) arbitration rules follow the disqualification standard of the (UNICTRAL) rules. In the (SCC) Article 19(1), a party may challenge an arbitrator if circumstances exist that give rise to justifiable doubts about the arbitrator's impartiality or independence or if the arbitrator does not possess the qualifications agreed by the parties.[304]

2.3.4. Other Obligations:

Arbitrators have several obligations. Some are embodied in rules and laws, while others are based on ethical concepts and the parties' expectations or the usual practices in international arbitration.[305] In this context, arbitrators' other obligations include the duty to conduct the arbitration fairly, ensure the proceedings' confidentiality, act competently, and issue the award within a reasonable timeframe.[306] Also, to render an enforceable award, act with due care, treat parties equally, and give each party a full opportunity to present its case.[307]

In addition to institutional arbitration rules, several organisations and arbitration institutions have implemented codes of ethics. These codes may become applicable to arbitrators if they belong to an organisation that has implemented the rules or if the parties contractually incorporate the rules into their arbitral agreement.[308] For example, the Chartered Institute of Arbitrators (the CIArb) and the Society of Maritime Arbitrators have codes applied to arbitrators who are members or certified by them.[309] Further, the international bar association (IBA) has also published the (IBA) Rules of Ethics for International Arbitrators (the IBA Rules

[303] UNCITRAL Rule (n 26) art 12(1).
[304] SCC Rules (295) art 19(1).
[305] Moses (n 98).p.138
[306] Jonathan Brosseau, 'Applicable Ethical Framework: How the New York and ICSID Conventions Induce Light, Darkness, and Shadow in the Arbitral Space' [2018] Social Science Research Network SSRN 1 <https://ssrn.com/abstract=3152576>.accessed 28 March 2021.p.29
[307] Moses (n 98).p.139
[308] Rogers, 'The Ethics of International Arbitrators' (n 276).p.4–5
[309] ibid.p.5

of Ethics). Also, in 2004 the (IBA) published the Guidelines on Conflicts of Interest in International Arbitration (the IBA Guidelines).[310] As a result, these rules and guidelines do not apply to arbitrators or arbitral proceedings unless incorporated into parties' arbitration agreements. However, these rules may be considered by courts, or other institutions, as some customary usages, which is true of guidelines such as those of the (CIArb).[311]

However, The International Bar Association (IBA) is not a regulatory body itself, and thus not overseeing the licence of any of the participants in international arbitration; it is, nevertheless, shaping arbitration reforms and fosters the development of ethical rules in the system. Their creation and wide-ranging use reflect a recurring desire within the international arbitration community to self-regulate and sources delineating the content of arbitrator independence.[312]

How (ICSID) decisions have referred to the (IBA) Conflicts of Interest Guidelines is of interest. It has been argued that these decisions had regularly applied the guidelines as hard standards when they supported the rejection of a challenge but have still treated them as a 'rule of thumb' when they risked impugning an arbitrator's impartiality or independence.[313] Yet, on closer reading, (ICSID) decisions have consistently found that the guidelines do not apply *per se*, as the ICSID Convention and Rules establish the standard, but they offer highly useful guidance.[314] Thus, The (ICSID) is currently working with the (UNCITRAL) Secretariat on a Code of Conduct for Arbitrators. This will ensure a consistent Code of Conduct across all the major sets of rules used for (ISDS) and can be incorporated into the (ICSID) declarations made by arbitrators at the start of a case.[315]

[310] ibid.p.5
[311] ibid.p.5
[312] Brosseau (n 304).p.23
[313] ibid.p.24
[314] ibid.p.25
[315] ICSID Secretariat, 'Proposals for Amendment of the ICSID Rules — Synopsis', vol 1 (2018).p.5

2.3.5. The Enforcement of Obligations and Arbitrators' Immunity:

The applicable ethical rules can set aspirational standards, shaping arbitrators' behaviour even without enforcement mechanisms. This has been the case of soft law instruments, which play a 'norm-setting function' in international arbitration.[316] However, coercive forums such as (ICSID) conventions give strength to ethical obligations. (ICSID) Conventions coordinate a multi-level network of forums to perform this task in such a system. However, it is uncertain which forum has jurisdiction to enforce a standard of professional conduct.[317] Even assuming that the relevant arbitral tribunal, arbitral institution, or national authority can play this role in a specific case, questions remain about these actors' awareness of the situation and their ability to intervene.[318] Second, the current forums for enforcing ethical standards are not always particularly attractive or effective. The reasons for this may vary, depending on which participant and forum are concerned. In other words, they rarely possess the knowledge of both the applicable ethical rules and the specific facts related to a participant's conduct in arbitral proceedings.[319]

On the other hand, an important issue related to the enforcement of arbitrator ethical obligation is the legal immunity of arbitrators. Civil liability and professional discipline have overlapping functions, as both can respond to affected parties' complaints regarding participants' conduct.[320] In the case of arbitrators, qualified immunity is almost universal and entirely necessary in international arbitration. Accordingly, parties cannot seek an alternative form of appeal by suing arbitrators.[321] Moreover, article 21 of the (ICSID) Convention grants arbitrators immunity from legal processes concerning their acts in exercising their functions.

[316] Brosseau (n 304).p.46
[317] ibid.p.46
[318] ibid.p.46
[319] ibid.p.47
[320] ibid.p.47
[321] ibid.p.48

This immunity is absolute and applies to all national courts. (ICSID), however, may waive this immunity. [322]

The arguments favour granting immunity to arbitrators because they perform a quasi-judicial function, and they should not be subject to suit by disgruntled parties. It is also argued that immunity helps ensure the finality of arbitral awards.[323] Moreover, the suggestion is made that if arbitrators are subject to damage awards, this may encourage a party during the arbitration to try to intimidate an arbitrator by hinting that things turn out "wrong" from the party's point of view, it will sue the arbitrator. Finally, it is argued that many well-qualified individuals will not be willing to arbitrate without immunity.[324] Arguments against granting immunity to arbitrators include the concern that relieving arbitrators of liability will encourage carelessness, fraud, and abuse of power. The finality of awards should not be more important than individual justice.[325]

2.3.6. The Disciplinary Sanctions:

International adjudicators sometimes disregard their duties and obligations. The question, therefore, arises as to what kind of action, such as breaches of duty merit, and who is responsible for dealing with such situations.[326] There has been much discussion in the international commercial arbitration world about the most appropriate body for enforcing ethical duties and imposing sanctions. The focus was not on creating a new global institution but rather on the competencies of existing arbitration institutions.[327] For this reason, initiatives such as that implemented by (CIArb), which focuses on investigating complaints of misconduct

[322] ibid.p.48
[323] Moses (n 98).p.147
[324] ibid.p.147
[325] ibid.p.147
[326] Katia Fach Gómez, *Key Duties of International Investment Arbitrators* (Springer Nature Switzerland 2019).p.14
[327] ibid.p.14

against its members, are positively valued that also calls for this type of "institutional activism" to become more widespread.[328]

Also, a series of similar problems to those already detected in the commercial context exists in the investment arbitration setting.[329] It is also pointed out that some crucial stakeholders currently consider both the normative scenario for investment arbitrators' duties and the international investment arbitrators' corresponding accountability level to be insufficient. For reasons of this kind, some actors argue that intervention at the multilateral level would constitute a decisive step forward.[330]

In terms of the enforcement of sanctions when investment arbitrators have breached their ethical duties. There are mechanisms such as arbitrators' disqualification in the (ICSID) sphere. Nevertheless, Article 21 of the (ICSID) Convention, combined with the lack of any detailed development of disciplinary powers attributable to investment arbitration tribunals, arbitration institutions and other entities, has led to a contemporary scenario that can be defined in many ways, ranging from excessively protectionist to simply considerate of investment arbitrators' idiosyncrasies.[331]

3.0. The Criticisms of Arbitrators' Integrity in Investor-state Arbitration:

3.1. The Current Legitimacy Crisis in Investor-state Arbitration:

As discussed in chapter 1 (1.3) the Investor-Sate Arbitration (ISA) system has been under severe attack from various parties regards the legitimacy crisis from legal scholars and practitioners.[332] In chapter 1 (1.3), criticisms have been explicitly recognised by the studies around the theme of oil and gas disputes in investor-state arbitration. For example, Tom Childs has argued that the backlash against the investment treaty system on several oil-producing

[328] ibid.p.15
[329] ibid.p.15
[330] ibid.p.15-16
[331] ibid.p.17
[332] Faure and Ma (n 5).p.19

states calls into question the future of the investment treaty system in the oil and gas industry.[333] Further, Andrew Chukwuemerie has highlighted the reason for the antipathy of many developing countries towards international arbitration. Because it hardly believes that they have had a fair deal in international arbitration deciding their natural resources disputes, this antipathy has been most significant to disputes arising from foreign investments in oil and gas.[334] Therefore, the need to sustain the confidence of States in the different regions of the world in (ICSID) arbitrations can therefore not be overemphasised.[335]

In the late 2000s, criticism of Investor-state dispute settlement (ISDS) began with some South American States. These states started withdrawing their membership in the (ICSID),e.g. Bolivia 2007, Ecuador 2009, and Venezuela 2012, which seemed to be a regional reaction to the fairness of what was viewed as a foreign-imposed regime.[336] Further, other states announced that they would not provide for Investor-state dispute settlement (ISDS) in future, like Australia's reaction to the Philip Morris case. Also, South Africa in 2015 stated that it would not provide for (ISDS) in future trade agreements.[337] In Europe, the European Union Parliament in 2015 adopted a series of recommendations on the Transatlantic Trade and Investment Partnership (TTIP). Such as calls to replace the Investor-state dispute settlement (ISDS) with a new system (Investment Court) which requires publicly appointed, independent professional judges in public hearings with an appellate mechanism.[338]

3.2. The Legitimacy of Investor-state Arbitration System and its' Gaps:

International courts and tribunals are in the unique situation of having to defend themselves regularly against attacks on their legitimacy as mechanisms for resolving disputes about the

[333] Childs (n 53).p.21
[334] Chukwuemerie (n 57).p.827
[335] ibid.p.866
[336] Michael Nolan, 'Challenges to the Credibility of the Investor-State Arbitration System' (2018) 5 American University Business Law Review 429.p.432-433
[337] ibid.p.434-435
[338] ibid.p.436-437

scope and the limits of state sovereignty.[339] Legitimacy means accepting a rule or rule-making institution, which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates under generally accepted principles of the right process.[340] Such legitimacy concerns affect not only dispute-settlement institutions as a whole but also inform the self-understanding and the work of those who decide disputes on the international level, international judges and arbitrators.[341] Also, legitimacy means a right to rule justified according to a set of prescribed standards. On the other hand, sociological legitimacy is the empirical study of beliefs in the rightness of rule. Legitimacy is thus not an objective quality but rests on the perceptions of relevant stakeholders.[342] In this context, legitimacy refers to the widely shared belief in the appropriateness of an international institution's purposes, procedures, and performance with delegated authority in a certain domain of international decision-making. [343]

However, the current measures to promote legitimacy are inadequate and necessary to implement preventive and corrective measures.[344] The (ISDS) mechanism is managed by arbitrators and multinational companies, who have made it central in the global political economy. Its evolution into a powerful mechanism that exerts its power on developing countries and developed countries shapes discussions about investor-state arbitration legitimacy.[345] There is a widespread absence of trust in the impartiality and fairness of the investor-state arbitration system exists.[346] However, the existence of a legitimacy gap will not

[339] Brower and Schill (n 67).p.471
[340] ibid.p.471
[341] ibid.p.471
[342] Thomas Dietz, Marius Dotzauer and Edward S Cohen, 'The Legitimacy Crisis of Investor-State Arbitration and the New EU Investment Court System' (2019) 26 Review of International Political Economy 749.p.752
[343] ibid.p.752
[344] Susan D Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatising Public International Law Through Inconsistent Decisions' (2005) 73 Fordham Law Review 1521.p.1524
[345] Dietz, Dotzauer and Cohen (n 340).p.749-750
[346] ibid.p.750

automatically lead to institutional change as institutions can function with deficits unless they are detected and brought to light by relevant actors. [347]

Legitimacy gaps occur when the features of an institution change to such a degree that makes it unable for them to meet set standards of appropriateness, which occurs as a result of institutions adopting new procedures that undermine the existing set standards.[348] Another reason is when an institution expands its authority through margins of discretion, in a way not deemed correct by the people who endowed the institution with authority resulting in the institution overstepping its authority and mandate.[349] The second scenario involves a change in standards of appropriateness required by the actors. In contrast, the institution remains unchanged, observed with changing times where new standards such as transparency and openness have become important.[350] These legitimacy gaps and criticisms will be discussed below.

3.2.1. Lack of Impartiality and Independence:

Independence and impartiality of arbitrators are key elements of any adjudicatory mechanism based on the rule of law, as it helps in safeguarding the fairness and objectivity of legal proceedings.[351] Decisions made by the arbitrators should be based only on the law and lack susceptibility to extrinsic influence such as personal, political, financial and ideological factors, as these extrinsic factors have been at the centre of critiques labelled against the (ISDS) system.[352] Private adjudicators lack impartiality and independence, jeopardised by a bias that makes them lean towards the side of the international investors without putting sufficient thought into the public interests while making the decision.[353] Their professional legal

[347] ibid.p.752-753
[348] ibid.p.752
[349] ibid.p.752
[350] ibid.p.752
[351] Chiara Giorgetti and others, 'Independence and Impartiality of Adjudicators in Investment Dispute Settlement: Assessing Challenges and Reform Options' (2020) 21 The Journal of World Investment & Trade 441.p.442
[352] ibid.p.442
[353] Dietz, Dotzauer and Cohen (n 340).p.756

background forces them to view investment cases from a private law perspective (both parties are equally entitled) as applied in economic law. It fails to consider that the state should protect public goods, which are complex and extremely controversial, instead of private enterprises that tend to be profit-oriented and commercial.[354] Specific economic incentives act as another reason for bias that private investors show. International investment protection regime ensures investors get a unilateral and direct chance to take legal action, and, thus, profits for those who take part in the arbitration proceedings mainly depend on the international investors' inclination to sue, and this system's immanent economic incentives thus affect judicial impartiality and independence. [355]

3.2.2. Lack of Transparency:

The arbitration tribunals' decisions have been conducted with little public transparency and oversight, making them free from public control. Some arbitration tribunals are held in secrecy if the interested parties want to. Arbitration tribunals offer very limited opportunities for the public to participate. When chances of amicus curiae are offered, their actual significance is quite unclear and falls to the tribunal's discretion.[356] Confidentiality of proceedings and autonomy of the conflicting parties becomes clear, showing the roots of arbitrators in dispute resolution and private law while at the same time acting as an advantage over the courts.[357] This should not apply to (ISDS) because of their work which plays a regulatory role in many important and sensitive political areas. As such, they should be subjected to strict transparency measures.[358] In recent years, some reforms addressed the transparency standards in (ISA) proceedings, such as the 2014 (UNCITRAL) Transparency

[354] ibid.p.756
[355] ibid.p.756
[356] ibid.p.757
[357] ibid.p.757
[358] ibid.p.757

Rules. For the critics of (ISDS), the lack of transparency remains a major legitimacy gap, which from a democratic perspective impedes the effective public control of arbitrators.[359]

3.2.3. Inconsistency of Awards:

Inconsistent decisions generally arise under three typical scenarios. First, different tribunals can come to different conclusions about the same standard in the same treaty. Second, different tribunals under treaties can come to different conclusions about disputes involving the same facts, related parties, and similar investment rights.[360] Finally, different tribunals under different investment treaties will consider disputes involving a similar commercial situation and similar investment rights but will come to opposite conclusions.[361] The increase in the number of investment arbitrations and the tactical structuring of investments to create claims under multiple investment treaties increases the likelihood of inconsistent decisions.[362]

The most utilised option in investment arbitration to remedy inconsistent decisions is to attack the award after it is made. Specifically, parties that have received inconsistent arbitral awards have options to either: (1) annul the award or (2) try to vacate an award at the seat of the arbitration and/or contest enforcement at the place where enforcement is sought.[363] But which option is available depends wholly upon whether an award is rendered under the (ICSID) Convention or a different system as an *ad hoc* arbitration conducted under the (UNCITRAL) Rules. [364]

Therefore, appeal bodies are important as they provide clarity and consistency of the ruling and give parties unsuccessful a chance to have their ruling reviewed, bringing an amount of legal certainty and control to the judicial decision-making system.[365] However, the lack of a

[359] ibid.p.757
[360] Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatising Public International Law Through Inconsistent Decisions' (n 342).p.1545
[361] ibid.p.1546
[362] ibid.p.1546
[363] ibid.p.1546-1547
[364] ibid.p.1547
[365] Dietz, Dotzauer and Cohen (n 340).p.757

legal body to clarify and correct erroneous decisions made by private arbitration affects the legal certainty of arbitration tribunals.[366]

3.2.4. Privileged Legal Position of International Investors:

Investor-state dispute settlement (ISDS) gives private investors the privilege to exempt them from the normal legal structure of the host states by creating a unique dispute resolution system just for private investors. (ISDS) undermines the political community's ability to solve disputes and determine the rules by which society and economy will be structured.[367] Although this system appears to be justified in cases where the foreign investors' rights are less likely to be shielded by the existing domestic law.[368] This system of treaty arbitration only works in favour of investors and fails to consider the interests and needs of the host State.[369] From this point of view, the legitimacy gap of (ISDS) derives not from its specific institutional features but rather from its fundamental nature as a structure that privileges the interests of investors over the priorities of democratic publics and the processes of democratic governance.[370]

3.3. The legitimacy of the System and Arbitrators' Integrity Criticisms:

3.3.1. Arbitrators' Bias in Favour of Investors "Pro-Investor Arbitrators":

This criticism includes the claim by states and some scholars that the investor-state arbitration system has a pro-investor bias and puts states in a disadvantaged position. Although the pro-investor bias in investor-state arbitration is difficult to prove or disprove, the perception of such a bias is pervasive. The perception seems to stem from general allegations that the outcomes of the investor-state arbitration proceedings are biased in favour of investors.[371]

An argument by Thomas Dietz, Marius Dotzauer and Edward Cohen claimed that the neutrality of private arbitrators is jeopardised by a bias leading them to systematically choose to advantage international investors without sufficiently considering the public interests in their

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[366] ibid.p.757
[367] ibid.p.758
[368] ibid.p.758
[369] Hobér Kaj, 'Investment Treaty Arbitration and Its Future- If Any.' (2015) 7 Yearbook on Arbitration and Mediation.p.4
[370] Dietz, Dotzauer and Cohen (n 340).p.758
[371] Faure and Ma (n 5).p.19-20

decisions.[372] Supporters of this critics claim that lawyers and arbitrators are often educated in private law and socialised into economic law in the context of large international law firms. This results in arbitrators looking at investment cases from a private law perspective, as a matter between two equally entitled contracting parties. Thus, arbitrator fails to understand that states must often protect extremely controversial and complex public goods, unlike purely commercial, profit-oriented private enterprises.[373] This critique, however, disregards that arbitrators are impartial and independent dispute resolvers who interpret and apply the governing law and are subject to some mechanisms – disclosure and challenge- that can prevent private interests from taking precedence over public interests.[374]

Another argument by Gus Van Harten[375] posits that systemic incentives push arbitrators to decide for investors. The idea seems to run as follows: arbitrators seek to promote the growth of investor-state proceedings to get future appointments; efforts to encourage arbitration to translate into decisions that favour claimant-investors, mainly when the appointing authority is (ICSID).[376] Thus, supporters of this argument believe that international arbitrator has become a business for lawyers, experts, engineers, accountants, and the like. The rise of a professional class of arbitrators has sparked debate over the intersection between party involvement in the appointments process and perceived commercial incentives for full-time arbitrators, raising interesting questions about the magnitude of the potential partisanship or so-called moral hazard said to attend the private judiciary.[377] However, others disagree that commercial incentives motivate arbitrators to decide one way or another. The reason is that parties make most arbitral appointments based on the arbitrators' opinions on international law, their ability

[372] Dietz, Dotzauer and Cohen (n 340).p.756
[373] ibid.p.756
[374] Brower and Schill (n 67).p.489
[375] Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press 2007).p.151
[376] Park (n 9). p.658
[377] Elsa Sardinha, 'The Impetus for the Creation of an Appellate Mechanism' (2017) 32 ICSID Review 503.p.523

to resolve the complex issues expeditiously, and their expertise in the legal areas at point rather than their business sense or any commercial incentives.[378] Judge Charles Brower advances the view that an arbitrator's reputation for apparent bias would undercut their credibility, influencing a tribunal.[379] Also, William Park states that neither evidence nor logic supports the existence of such incentives or their operation in practice as inducements to pro-investor bias remain counterintuitive.[380] Assuming rational arbitrators seek to enhance income, biased decision-making would be an odd way to do so, given that awards would be subject to review by either national courts (for lack of due process or violation of public policy) or before an *ad hoc* committee convened in connection with an (ICSID) proceeding.[381]

Further, arbitral institutions will also want to obtain a reputation for even-handedness; it would be self-destructive if any organisation gained a reputation for systematically turning out awards on behalf of either claimant or respondent. The disfavoured side would simply insist on using another forum.[382] Also, Common sense tells us that the big losers would be none other than professional arbitrators themselves if the process did not inspire general confidence.[383]

Further, Charles Brower and Stephen Schill argued that this critique disregards that investment-treaty arbitration is imbued with several formal and informal mechanisms that ensure the impartiality and independence of arbitrators.[384] First, arbitrators are under a duty to disclose relevant information such as past relations with any parties that might cast doubt on their ability to render an impartial and independent decision. Second, arbitrators are subject to challenges that either party can bring against them.[385]

[378] ibid.p.524
[379] ibid.p.524
[380] Park (n 9). p.658
[381] ibid. p.658
[382] ibid. p.658
[383] ibid. p.651
[384] Brower and Schill (n 67).p.491
[385] ibid.p.491

Another argument is that arbitrators' pro-investor bias leading to more party appointments, some scholars put forth this idea that arbitrators tend to favour investors in their awards, for the very reason that arbitrators only receive appointments when investors bring disputes, and investors will only initiate disputes if arbitrators are willing to award damages to investors.[386] David Howard stated that there is significant trouble accepting the argument that arbitrators are actually biased towards investors, and this assertion seems less persuasive when viewing counters to it.[387] Thus, David Howard disagrees with Van Harten analysis because, investors will generally only bring claims before a tribunal if there is a significant chance of prevailing, as one has to balance the cost of arbitrating this dispute versus the likely outcome.[388] In addition, investors do not usually bring a suit against a state without due consideration, as states do not easily accept the result of an arbitral tribunal when that tribunal reviews the actions of state.[389] Furthermore, a valuable professional reputation of an arbitrator is essential to the arbitrator being appointed, and a biased reputation for either party will not increase the number of appointments. Thus, most scholars disagree with the assertion that arbitrators are pro-investor, because this view disregards the procedures and mechanisms already within the arbitral system to ensure impartiality.[390] For example, arbitrators engage, like judges, in the finding of the relevant facts and apply the governing law to those facts and arbitrators are required to reach their decisions based on their impartial and independent judgments.[391] For this reason, the objective of the role of presiding arbitrator (chair arbitrator) and the party-appointment right, which is a mechanism already within arbitral system, needs to be established.[392] There are essentially two points, first the chair arbitrator will make sure that

[386] David M Howard, 'Creating Consistency Through A World Investment Court' (2017) 41 Fordham Int'l L.J.p.24
[387] ibid.p.24
[388] ibid.p.24
[389] ibid.p.24
[390] ibid.p.25
[391] Brower and Schill (n 67).p.491-492
[392] Fabien Gelinas, 'The Independence of International Arbitrators and Judges: Tampered with or Well-Tempered?' (2011) 24 New York International Law Review 1.p.26

the role of party-appointed arbitrator will ensure that all the arguments of his party get a thorough with fair hearing during the deliberations and in the judgment the views and position of the party which has appointed the arbitrator will be duly reflected.[393] The second point is that the chair arbitrators will make sure that the role of a party-appointed arbitrator will serve as an interpreter of language, legal culture, and of law for the benefit of fellow arbitrators.[394] Thus, the arbitrator appointed by a party brings something to the process through a shared or similar economic, political, social, cultural, national or legal background, even if this comes at the cost of a general sympathy or predisposition in favour of the appointing party or some aspect of its case.[395] The role of presiding arbitrator with appointed arbitrators is to reach decisions based on their impartial and independent judgments and not based in pro-selected parties.

3.3.2. Arbitrators' Bias Against the Developing States "Pro-Developed states Arbitrators":

In this criticism, developing states argue that the (ICSID) system favours investors from the developed world and disadvantages developing states, favouring the global North.[396] This originates from a Marxist analysis of international law and views international investment law and arbitration as an attempt by developed countries to impose their power on weaker, developing countries.[397] The argument is that there is some concern in developing countries over the selection of arbitrators at entities such as (ICSID), and such appointments may create a systemic bias in favour of Western legal concepts and the positions.[398] Malcolm Langford and Daniel Behn claimed a clear asymmetry in distributing the reflexive gains for states. Developed states are the beneficiaries of the large drop in claimant/investor success rates; less

[393] ibid.p.26
[394] ibid.p.26
[395] ibid.p.27
[396] Faure and Ma (n 5).p.20
[397] Brower and Schill (n 67).p.474
[398] Susan D Franck, 'Development and Outcomes of Investment Treaty Arbitration' (2009) 50 Harvard International Law Journal 435.p.450-451

developed states have only registered marginal benefits. Moreover, the investment treaty arbitration system has effectively enhanced its respect for state sovereignty (and partly regulatory autonomy), but some states are more equal than others.[399]

However, Susan Frank state that the system does not appear *per se* biased in favour of either the developed or the developing world.[400] Also, the complaints have not been theoretically grounded. Still, they suggest that arbitrators from the developed world treat the developing world unfairly and perhaps favour transnational entities, presumably Western in orientation. One reason for that is the arbitrator's over-identification with a party.[401] One might develop this argument further to suggest that an arbitrator's approach may vary according to factors such as the arbitrator's background and educational training, the nature of the parties, the framework from which the legal rights originate, and the background of the particular disputes.[402] Others reject the assertion that an arbitrator's developmental background could create bias or otherwise affect outcomes. Finally, some suggest that (ICSID) arbitrators are not irredeemably tainted by institutional bias without reference to data.[403]

Furthermore, Shalakany rejects arguments of a pro-Western arbitrator bias and states that although arbitration is a politicised dispute resolution mechanism, neither its institutional configuration nor the international law doctrines it applies are *per se* biased or predisposed to favouring the economic interests of the North.[404] However, this does not mean that Third World concerns over bias in arbitration were completely misguided. On the contrary, bias exists and will continue to appear whenever Third World countries adopt an alternative development policy authorising active state intervention in the private sphere.[405]

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[399] Langford and Behn (n 66).p.580
[400] Franck, 'Development and Outcomes of Investment Treaty Arbitration' (n 396).p.477
[401] ibid.p.450
[402] ibid.p.453
[403] ibid.p.452
[404] Amr Shalakany, 'Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism' (2000) 41 Harvard International Law Journal 419.p.424
[405] ibid.p.424

3.3.3. Arbitrators' Bias to Parties "Pro-appointer bias":

This criticism argues that party-appointed arbitrators are inherently biased.[406] Therefore, the parties' right to participate in the constitution of tribunals in investor-State arbitration has led to fears of the system's legitimacy due to potential conflicts of interest when the disputing parties are allowed to appoint their arbitrators.[407] Thus, Jan Paulsson asserts that there is no such right for a party to name an arbitrator and that, even if such a right existed, it would certainly not be fundamental.[408] However, some proponents of preserving the system of party appointments insist that the timeless right of the parties to choose the arbitrators is essential to the perceived legitimacy of (ISDS) (Brower and Rosenberg). Also, William W Park notes that party selection promotes confidence in the international arbitral process and democratises the process, fostering the trust that at least one person on the tribunal (the party's nominee) will monitor the procedural integrity of the arbitration.[409] Indeed, both investors and states' parties are interested in appointing arbitrators that they hope will support their respective positions.[410]

On the other hand, Michael Nolan claimed that the growing number of high-profile challenges to the appointment of arbitrators creates an appearance of bias.[411] Challenges rarely succeed, which casts further doubt on the effectiveness of the appointment process.[412] Also, arbitrators in the investor-state arbitration system are elitist and usually white, male, and from the developed North involved in so-called (revolving doors)[413] with a handful of leading law firms always representing the cases.[414] Thus, the (ICSID) arbitration community is dominated

[406] Sardinha (n 375).p.518
[407] ibid.p.517
[408] ibid.p.519
[409] ibid.p.519
[410] Brower and Schill (n 67).p.491
[411] Nolan (n 334).p.440
[412] ibid.p.441
[413] For example, act as an arbitrator in a case and as legal counsel in another case, then as an expert witness in another case.
[414] Faure and Ma (n 5).p.20

by a handful of highly prominent and influential individuals, and a small minority of individuals receive most of the appointments.[415]

Therefore, Anton Strezhnev suggests that the behaviour of adjudicators in investment dispute settlement requires a balance between pro-appointer bias and broader professional and social concerns because the investment law community is remarkably close-knit.[416] Furthermore, in its decision-making process, investment-treaty arbitration is an adjudicatory process based on independent fact-finding and legal analysis according to rules of law by neutral, independent, and impartial decision-makers.[417]Appointments, therefore, are essentially merit-based on arbitrators' reputation for independent and unbiased judgment that earns appointments. A reputation for independence and impartiality, in other words, is too fragile to risk by biased decision-making and therefore works as a control mechanism that ensures the arbitrators' independence and impartiality.[418] Another important informal control mechanism is public scrutiny. Most investment-treaty awards are made available to the public almost via online resources. Consequently, the professional community of arbitrators, academics, and the general public scrutinises arbitrators and their decision-making.[419] Thus, reputational damage, made quicker and easier by public scrutiny, is arguably an effective mechanism to ensure arbitrators' impartiality, independence, and objectivity in applying international law.[420]

4.0. The Role of Professionalisation in Arbitrators' Integrity:

The integrity of arbitral decision-making is primarily associated with the ethics of the individuals acting as arbitrators. Therefore, there are currently many arbitration laws, institutional rules and especially institutional codes of ethics or conducts that set out rules and

[415] Anton Strezhnev, 'Detecting Bias in International Investment Arbitration' [2016] 57th Annual Convention of the International Studies Association.p.8-9
[416] ibid.p.8-9
[417] Brower and Schill (n 67).p.492
[418] ibid.p.492
[419] ibid.p.492
[420] ibid.p.493

guidelines regulating the conduct of individual arbitrators in minute detail.[421] However, Brekoulakis believe that the increased regulation of arbitrators has failed to appease criticism against the integrity of arbitration.[422] Mainly because it has been unable to address bias associated with the system of arbitration, which led to favour specific legal interpretations or certain groups of parties. Brekoulakis further states that if an adjudicatory system is systemically biased, the substantial majority of the people selected and appointed to act as adjudicators will typically share the same values and take a similar position on fundamental legal and social economic and political matters.[423]

Further, August Reinisch states that existing mechanisms to ensure the quality of investment decisions and awards are also not too promising concerning their effectiveness. Most widely used among the preventive approaches are lists of potential arbitrators, as in (ICSID), which is not a reliable mechanism to ensure the highest quality of appointees.[424] Thus, there is a need to introduce a preventative mechanism such as certifications for arbitrators that may provide an assurance of competence and excludes incompetence arbitrators and provide a more precise signal of neutrality than membership on arbitrators' lists to be selected. Also, William Park stated that to sabotage arbitration and reduce confidence in the integrity of the arbitral process, there are two ways; one route would tolerate the appointment of pernicious arbitrators, biased and unable to judge independently. Another route would establish unrealistic ethical standards that render the arbitrator's position precarious and susceptible to destabilisation by litigants engaged in dilatory tactics or seeking to annul unfavourable awards.[425] He suggests reducing the risk of having cases decided by either pernicious or precarious arbitrators. Thus, those who establish and apply ethical guidelines walk a tightrope between (i) keeping arbitrators free from

[421] Stavros Brekoulakis, 'Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making' (2013) 4 Journal of International Dispute Settlement 553.p.558-559
[422] ibid.p.560
[423] ibid.p.560
[424] Reinisch (n 81).p.908-909
[425] Park (n 9). p.634-635

shame, prejudgment and hidden links to parties and (ii) avoiding manoeuvres that interrupt proceedings unduly by arbitrator challenges designed to disrupt the arbitral process.[426]

However, William Park states that assertions of systemic bias can detract attention from consideration of more concrete measures to promote arbitrator integrity. He claims that a thoughtful dialogue should focus on articulating and implementing ethical principles that avoid the two main paths by which arbitration may come into disrepute, as mentioned above (tolerate appointment of pernicious arbitrators, establish unrealistic ethical standards). Dialogue on arbitrator integrity becomes more plausible if linked to the way arbitrators consider facts and legal arguments.[427]

Therefore, Robert Kovacs points to various measures, such as choosing the best arbitrators for the dispute by focusing on their skills, managing the process efficiently, and the time they are willing to devote to arbitration, providing more information to parties about alternative arbitral procedures.[428] Accordingly, in investor-state arbitration, it is no secret that the quality of investment awards depends upon the quality of the deciding arbitrators. Thus, there is a need to introduce a mechanism, e.g., certifications, that ensure both the arbitrators' subject-matter knowledge and process-based expertise in investor-state arbitration. However, parties routinely engage in scrutiny of potential appointees in the process of setting up an investment tribunal. They are primarily concerned about the arbitrators' voting records and previous publications and views on specific issues that might become relevant to their case. In addition, they may want to exclude any reasons for an arbitrator's challenge. Unfortunately, these efforts sometimes seem to outweigh the parties' concern for the professionalism and quality of their candidates.[429] Thus, the thesis argues for introducing professional control mechanisms such as certification to regulate arbitrators, particularly in oil and gas disputes. Certification can offer

[426] ibid. p.634-635
[427] ibid. p.660
[428] Faure and Ma (n 5).p.22
[429] Reinisch (n 81).p.908-909

a mechanism that focuses on arbitrator quality and competence in oil and gas in investor-state arbitration. Also, certification will exclude incompetence, unqualify arbitrators and provide a more protection for the profession, also, promote the need of both subject-matter knowledge and process-based expertise on arbitral panel. The certification will deal with this by making the certification scheme programs cover legal process issues and subject matter knowledge.

Further, it would enhance selection, diversity, and arbitrators' integrity and confidence in oil and gas parties in investment arbitration. David Hoffman states that proponents of certification point, first and foremost, to the protection of the public as the rationale for certification. Also, certification standards can help ensure that (ADR) practitioners have sufficient training, explain (ADR) processes to the participants, and adhere to ethical standards.

A second advantage is that certification may increase the public's confidence.[430] For example, the public still turns to litigation more than to mediation or arbitration for resolution of their disputes in public courts and tribunals. This is because even grudging respect for judges and lawyers stems in part from the training and selection process by which they are certified for work in the public justice system. Requiring all (ADR) providers to have specified forms of training and selecting them on the basis of demonstrated ability to mediate, arbitrate, would likely increase the willingness of the public to entrust their disputes to (ADR) processes.[431] Thus, a uniform ethical and certification standards are needed to increase the confidence of all participants (the public, the courts, and the ADR providers) in the integrity and fairness of (ADR) services.[432] Further, certification is a common strategy of professions seeking recognition as they attempt to compete effectively with more established professions. It can

[430] David A Hoffman, 'Certifying ADR Providers' (*Boston Bar Journal*) 1 <https://blc.law/wp-content/uploads/2016/12/2005-07-certifying-mediators-branchmainlanguagedefault.pdf> accessed 13 September 2020.p.1-2
[431] ibid.p.2
[432] ibid.p.3

help codify a profession's common body of knowledge, build a profession's brand, increase consumer awareness, demonstrate professionalism and improve overall quality standards. All of which can increase the profession's collective share of the marketplace for professional services.[433] Also, certification is regarded as a barrier to entry and training and socialisation into a profession. Certification is expected to help more experienced professionals as a barrier to entry. Their client networks and reputation are well established and distinguish them from individuals seeking entry into the profession. Moreover, as a profession that many members enter informally, arbitrators may reject the need for more credentials if they are satisfied with the nature of their professional socialisation. Informal mechanisms such as networks may provide a sort of 'derivative' social closure that reproduce inequality independent of any type of formal legal or organisational impediments, making the erection of formal barriers a low priority. [434]

5.0. Conclusion:

Charles Browe noted that the reason to focus on professional ethics in international arbitration is that the involved communities have become global, there is less instinctive trust, either in institutions or in individual adjudicators.[435] Arbitrations typically are one-off affairs that lack communal features, such as shared knowledge and experiences. This fact, in turn, limits individuals' capacities to trust and be trusted. Further, in international arbitration, the process is not attached to an accepted unitary sovereign system, meaning that at least two parties from different nationalities are involved, allowing suspicion and mistrust to arise even more quickly than they might otherwise.[436] Thus, some crucial stakeholders currently consider the normative scenario for investment arbitrators' duties and the international investment

[433] Gough and Albert (n 89).p.852
[434] ibid.p.853
[435] Brower (n 60).p.3
[436] ibid.p.4

arbitrators' corresponding accountability level to be insufficient. For reasons of this kind, some actors, e.g., The (UNCITRAL) and the (EU), argue that intervention at the multilateral level would constitute a decisive step forward.[437] This has been the case of soft law instruments, which play a 'norm-setting function' in international arbitration. However, even assuming that the relevant arbitral tribunal, arbitral institution, or national authority can play this role in a specific case, questions remain about these actors' awareness of the situation and their ability to intervene.[438]

Thus, to reduce the risk of having cases decided by either pernicious or precarious arbitrators,[439] William Park suggests that a thoughtful dialogue should focus on articulating and implementing ethical principles that avoid the tolerate appointment of pernicious arbitrators and unrealistic ethical standards. Dialogue on arbitrator integrity becomes more plausible if linked to the way arbitrators consider facts and legal arguments.[440] Thus, this chapter outlines the need to introduce a mechanism such as certifications for arbitrators that may provide an assurance of competence and provide a more precise signal of neutrality than membership on arbitrators' lists to be selected and respond to the scepticism of the integrity of the arbitration profession. Also, discuss the current regulatory mechanism and identify the need for coordination to perform multi-level tasks to create standards of arbitrators' conduct and practice by establishing an independent third-party certifier. The certifier bodies would be appropriate for enforcing arbitrators' conduct and practice standards. However, before moving to this, the thesis will provide an analysis in the next chapter of the regulatory framework of arbitrators in investor-state arbitration and its application in arbitrators' disqualifications in oil and gas disputes.

[437] Gómez (n 324).p.15-16
[438] Brosseau (n 304).p.46
[439] Park (n 9). p.634-635
[440] ibid. p.660

Chapter 4: Analysis of Arbitrators' Independence and Impartiality in Investor-State Arbitration:

1.0. Introduction:

This chapter will provide a legal analysis of the current regulatory framework for arbitrators in investor-state arbitration. This analysis aims to identify any weaknesses in the present system and answer whether the current regulatory framework provides an effective regulatory mechanism for arbitrators in oil and gas investor-state arbitration. Thus, the chapter will compare the legal text and legal standards of independence and impartiality that regulate arbitrators in the investor-state arbitration system with different institutional arbitration rules. In the first section, this chapter's analysis will examine whether the current system contains sufficient safeguards to avoid bias issues (perceived or actual). In particular, regarding issue conflicts in disputes and whether more institutional safeguards are better to guarantee tribunal members' independence and impartiality. Further, the final section of this analysis will summarise the main finding of this legal analysis.

2.0. Analysis of Existing Regulatory Framework for Arbitrators:

2.1. Independence and Impartiality of Arbitrators in ICSID Convention and Rules:

Independence is generally defined as the absence of an actual, identifiable relationship with one of the disputing parties or with someone closely connected to a party.[441] On the other hand, impartiality concerns the absence of bias or predisposition toward one of the parties.[442] Impartiality, in other words, calls for the absence of a subjective, internal predisposition towards one of the parties and their argument.[443] Because an arbitrator's independence is assessed purely based on a connection to a party or counsel, it is said to be an objective standard

[441] Maria Nicole Cleis, *The Independence and Impartiality of ICSID Arbitrators* (Brill Nijhoff 2017).p.20-21
[442] Noah Rubins and Bernhard Lauterburg, 'Independence , Impartiality and Duty of Disclosure in Investment Arbitration' in Knahr Christina and others (eds), *Investment and Commercial Arbitration - Similarities and Divergences* (Eleven International Publishing 2010).p.154-155
[443] Cleis (n 439).p.21

that determines the question of independence. On the other hand, impartiality is an attitude or state of mind and is therefore subjective and difficult to prove.[444]

On the other hand, the (ICSID) Convention neither defines nor delimits the concepts of independence and impartiality.[445] However, they are complementary and pursue the same goal beyond linguistic and conceptual differences. The core purpose of independence and impartiality is to ensure parties' equality of arms, fair trial and procedural justice – factors that are crucial for the perceived legitimacy of the (ICSID) system.[446] As discussed in chapter 3 (3.1.), the investor-state arbitration was criticised and suffered a legitimacy crisis that indicates legitimacy gaps such as a lack of arbitrators' independence and impartiality. This section concerns a couple of safeguards that seek to ensure the personal independence of adjudicators. Such as the rules of different arbitration rules on qualifications, conflict of interest rules, and disclosure rules, as well as disqualification rules and whether it is enough safeguards to respond to the legitimacy crisis in investor-state arbitration.

2.1.1. The Ethical Standards of Arbitrators' Appointment:

In the legal analysis of the regulatory framework for arbitrators in (ICSID), the starting point is Article 14(1) of the (ICSID) Convention, which is the source of arbitrators' requirements and obligations. Article 14(1) provide that persons designated to serve on the Panels shall be persons of high moral character and recognised competence in the fields of law, commerce, industry or finance, which may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.[447] In addition, article 40(2) states that arbitrators appointed from outside the Panel of Arbitrators shall possess the qualities stated in paragraph (1) of Article 14.[448]

[444] ibid.p.21
[445] ibid.p.20
[446] ibid.p.22-23
[447] ICSID Convention (n 3) art 14(1)
[448] ibid art 40(2)

Sam Luttrell has stated that what makes the (ICSID) Convention unique amongst international arbitration instruments is the mandatory requirements of Article 14(1) of 'high moral character' and 'recognised competence in law, commerce, industry or industry finance'.[449] Thus, the requirement of competence in law will include public international law, international arbitration and international judicial procedure. Thomas Wälde indicated that it would go beyond rules and concepts that may be academically known and researchable to include the more arcane areas of the advocacy and politics of investment arbitration.[450] However, the third quality of arbitrator is provided by Article 14(1) that an arbitrator can be relied upon to exercise independent judgment. Noah Rubins and Bernhard Lauterburg have stated that neither the English nor the French versions of the (ICSID) Convention explicitly mention any impartiality duty. In contrast, the Spanish text of Article 14(1) states that an arbitrator must incorporate the equivalent of impartiality rather than independent judgment.[451] James Crawford has said that it is well established that the third of these qualities requires independence and impartiality.[452] Also, Dimitropoulos has noted that the (ICSID) traces the same set of independence and impartiality guarantees identified in other international arbitration fields.[453] Additionally, Maria Cleis has stated a consensus among (ICSID) arbitration users that both requirements are mandatory and apply to all arbitrators, whether party-appointed or chairpersons.[454] Further, Maria Cleis explained the lack of attention paid to impartiality in the drafting process because Article 14(1) of the (ICSID) Convention only indirectly applies to arbitrators unilaterally or jointly appointed by the parties outside the Panel

[449] Sam Luttrell, 'Testing the ICSID Framework for Arbitrator Challenges' (2016) 31 ICSID Review 597.p.598
[450] Thomas W Wälde, 'Equality of Arms in Investment Arbitration: Procedural Challenges' in Katia Yannaca-Small (ed), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press USA 2010).p.179
[451] Rubins and Lauterburg (n 440).p.157
[452] James Crawford, 'Challenges to Arbitrators in ICSID Arbitrations' in Abby Cohen Smutny and Epaminontas E Triantafilou David D Caron, Stephan W Schill (ed), *Practising Virtue* (Oxford University Press 2015).p.596-597
[453] Dimitropoulos (n 82).p.397
[454] Cleis (n 439).p.12-13

of Arbitrators. The delegates' discussions appear to have focused on the room for manoeuvre left to States when nominating panel members, who may subsequently be appointed to arbitral tribunals by the (ICSID) Administrative Council's Chairman.[455] However, potential conflicts of interest are much more numerous in the context of party appointments on an *ad hoc* basis, and a clear delineation of the scope of independence and impartiality is therefore crucial. The delegates who participated in the drafting process of the (ICSID) Convention failed to acknowledge this.[456]

Furthermore, (ICSID) also imposes specific requirements concerning the arbitrators' nationality as an ancillary means of ensuring independence. Article 38 of the (ICSID) Convention requires, for example, that arbitrators appointed by the Chairman of the Administrative Council shall not be nationals of the Contracting State party to the dispute or of the Contracting State whose national is a party to the dispute.[457]

2.1.2. Challenge and Disqualification of Arbitrators:

Article 57 of the (ICSID) Convention provides that a party may propose to a Commission or Tribunal the disqualification of any of its members based on any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14.[458] A related issue to Article 57 is (ICSID) Rule 9(1), which state that a party proposing the disqualification shall promptly, and in any event, before the proceeding is declared closed, file its proposal.[459] The other arbitration rules set specific limits, like the thirty-day rule under the (ICC) Rules and the (IBA) Guidelines and the fifteen-day rule under the (UNCITRAL) and (SCC) Rules.[460] Further, article 57 has generated much of the criticisms of the (ICSID) arbitration. For example, Audley Sheppard has stated that the need to show a 'manifest lack of the qualities required' is a decidedly higher

[455] ibid.p.14-15
[456] ibid.p.15
[457] Audley Sheppard, 'Arbitrator Independence in ICSID Arbitration', *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (2009).p.132
[458] ICSID Convention (n 3) art 57
[459] ICSID Rules (n 292) r 9(1).
[460] Dimitropoulos (n 82).p.398-399

threshold to satisfy when set against the standards in other arbitral rules. Several institutional rules merely require an applicant to show 'justifiable doubts' regarding the arbitrator's impartiality and independence.[461] Also, James Fry and Juan Stampalija have stated that Article 57 imposes a too high evidentiary bar for challenging an arbitrator, as they have to be 'manifestly' lacking in that particular quality. It must, therefore, be shown by facts and not a mere inference.[462] Further, Baiju Vasani and Shaun Palmer have noted that this higher standard arguably sends the unfortunate message that certain relationships between arbitrators and parties that would be unacceptable in private commercial arbitration might be permitted in (ICSID) arbitrations.[463] Also, Chiara Giorgetti stated that applying the "manifest standard" had rightly been criticised as excessively difficult to prove and too protective of the arbitrator.[464]

However, Maria Cleis has provided that the delegates never discussed the meaning of the manifest lack requirement introduced in the draft convention. Most notably, the Chairman's statement, according to which partiality and dependence constitute a lack of the qualities required under Article 14(1) of the (ICSID) Convention, fails to answer the pivotal question of when the lack of the qualities is manifest.[465] Additionally, Sam Luttrell has stated that in most bias challenges in (ICSID) cases, the central legal issue will be the meaning and effect of the Article 57 term 'manifest'. While there is some support for the proposition that the parties to an (ICSID) arbitration can modify the Article 57 test by agreement to decide the challenges by applying the (IBA) Guidelines alone, such a pact's enforceability is questionable. The norm is still very much for challenges to be made and decided based on Article 57.[466] However, James Crawford indicated that some tribunals have considered the pertinent enquiry to be whether the

[461] Sheppard (n 455).p.132
[462] Fry and Stampalija (n 12).p.208
[463] Baiju S Vasani and Shaun A Palmer, 'Challenge and Disqualification of Arbitrators at ICSID: A New Dawn?' (2015) 30 ICSID Review 194.p.197
[464] Chiara Giorgetti, 'Between Legitimacy and Control: Challenges and Recusals of Judges and Arbitrators in International Court and Tribunals' (2016) 49 The George Washington International Law Review.p.251-252
[465] Cleis (n 439).p.16-17
[466] Luttrell (n 447).p.600

evidence of unreliability is manifest, meaning that it is clear.[467] Others tribunals have considered the question to be whether the degree of the unreliability is manifest: here, 'manifest' implies seriousness.[468] Maria Cleis stated that all other provisions in which the term "manifest" used were to describe exceptional circumstances in which the disputing parties' fundamental rights are constrained. This meaning is not the case in Article 57 (ICSID) Convention: Independence and impartiality are not exceptions to the parties' right to freely appoint their decision-makers.[469] The right to an independent and impartial decision-maker is a fundamental right, enforced procedurally and safeguarded using disqualification requests and should only be limited as far as necessary to avoid its abuse and to ensure its effectiveness in arbitral proceedings. The term manifest must be understood to have a more tolerant acceptance in the context of arbitrator challenges under Article 57 (ICSID) Convention.[470]

2.1.3. Disqualification Decision-Making:

Another related issue is Article 58 of the (ICSID) Convention, which provides that the decision on any proposal to disqualify arbitrator shall be taken by the other members of the Commission or Tribunal.[471] This competence is qualified to the extent that a request relates to a sole arbitrator; however, when it is related to most of them, or where the co-arbitrators cannot agree, the Chairman of the (ICSID) Administrative Council will decide on the proposal.[472] The unchallenged co-arbitrators' competence to decide on their colleague's disqualification is unusual and subject to doctrinal criticism.[473] Maria Cleis indicated that the main argument against this system is that it might incentivise arbitrators to raise the challenge threshold.[474] Also, James Fry and Juan Stampalija have stated that this process will question whether the

[467] Crawford (n 450).p.597
[468] ibid.p.597
[469] Cleis (n 439).p.18
[470] ibid.p.18
[471] ICSID Convention (n 3) art 58
[472] Sheppard (n 455).p.132
[473] Cleis (n 439).p.19
[474] ibid.p.19

other tribunal members can make such a determination. At the same time, maintain a collegiality measure, especially if the challenge is rejected, as is often the case.[475]

Further, Chiara Giorgetti stated that this decision-making procedure on the challenge in (ICSID) raises many concerns. For example, it puts the two remaining arbitrators in an untenable position of having to decide on the disqualification of someone they unavoidably have worked with. Given the small pool of arbitrators, the challenged arbitrator would also be someone whom the remaining members may soon encounter again as either counsel or arbitrator.[476] Chiara Giorgetti further suggested that it would be more desirable if the two remaining unchallenged arbitrators declined to decide and, as a matter of course, sent the decision to the Administrative Council's Chairman.[477] However, Sam Luttrell has suggested that the Chairman has the discretion to seek an external recommendation on a bias challenge as a matter of practice. For example, from the secretary-general of the Permanent Court of Arbitration (PCA), although resorting to this third-party recommendation mechanism is rare, the final decision remains with the Chairman in any event.[478]

Further, Sam suggested that in the absence of any amendment to the (ICSID) Convention, the only way to avoid the dichotomy of Article 58 is for the parties to agree on a third-party umpire for challenges. The *Perenco v Ecuador* case was the only reported case in which such an agreement was made.[479] The parties agreed that any challenge will be decided by the Secretary-General of the Permanent Court of Arbitration and that the (IBA) Guidelines shall apply.[480] On the other hand, the (UNCITRAL) rules provide that the challenge will be heard directly by the appointing institution if there is no agreement between the parties, and the

[475] Fry and Stampalija (n 12).p.208
[476] Giorgetti, 'Between Legitimacy and Control: Challenges and Recusals of Judges and Arbitrators in International Court and Tribunals' (n 462).p.245-246
[477] ibid.p.245-246
[478] Luttrell (n 447).p.606
[479] *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6
[480] Luttrell (n 447).p.609

challenged arbitrator does not withdraw, both within fifteen days. Furthermore, (ICSID) decisions are not subject to judicial review, while under the (UNCITRAL) Rules, the appointing authority's decision will be subject to review by national courts, which tend to consider notions of independence and impartiality from their national legal systems.[481]

2.1.4. Disclosure Obligation:

Rule 6(2) of the (ICSID) Arbitration Rules (2006) provide that each arbitrator shall sign a declaration before or at the first session of the Tribunal.[482] The declaration requires an arbitrator to keep confidential, judge fairly between the parties, and not accept any instruction or compensation.[483] In addition, the declaration requires an attached statement of arbitrator (a) past and present professional, business and other relationships with the parties and (b) any other circumstance which might cause the arbitrator's reliability for independent judgment to be questioned by a party.[484] In contrast, the former (ICSID) arbitration rules (2003) requires the arbitrator in rule 6(2) only to disclose any past or present professional, business, and other relationships (if any) with the parties.[485] Amendments introduced in 2006 to the (ICSID) Arbitration Rules and Additional Facility Rules expanded and clarified the scope of pre-appointment disclosure by arbitrators to include any other circumstance that might cause the arbitrator's reliability for independent judgment be questioned by a party.[486] The new version of the (ICSID) Rules also specifies that the disclosure obligation continues, requiring the prompt disclosure of any relevant disclosures. Also, an arbitrator must disclose facts or circumstances if he or she reasonably believes that such fact would reasonably cause his or her reliability for independent judgment to be questioned by a reasonable person.[487]

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[481] Fry and Stampalija (n 12).p.209
[482] ICSID Rules (n 292) r 6(2).
[483] ibid r 6(2).
[484] ibid r 6(2).
[485] Andrew P Tuck, 'Investor-State Arbitration Revised: A Critical Analysis of the Revisions and Proposed Reforms to the ICSID and UNCITRAL Arbitration Rules' (2007) 13 Law and Business Review of the Americas 885.p.900
[486] Rubins and Lauterburg (n 440).p.158-159
[487] ibid.p.158-159

However, Audley Sheppard has stated that the (ICSID) Arbitration Rules do not contain a list nor provide any guidance on the situations or relationships that should be disclosed under Rule 6(2). Further, Sheppard stated that the phrase 'any other circumstance' is ambiguous and potentially broad.[488] Also, Katia Gómez said that the wording relating to arbitrators' a) past and present professional, business and other relationships (if any) with the parties creates an extensive duty of disclosure. All types of relationships with the parties are covered, no time limits are established, and no minimum threshold is incorporated concerning the relevance of the relationship and the risk of undermining arbitrator reliability.[489] In this context, Maria Cleis has explained why Article 6(2) of (ICSID) rules was broad and ambiguous, as it has a different regulatory purpose from Article 57 (ICSID) Convention. It aims at avoiding bias rather than eliminating biased arbitrators and is therefore designed to be more comprehensive.[490] Katia Gómez suggested modifying certain aspects of this rule would be justified, leading to misunderstandings and procedural delays.[491] Therefore, it seems that not only should a standard text referring to independence and impartiality be added to both the (ICSID) rule and the declaration statement, but the content of the declaration should also be expanded. The investment arbitration system's credibility would be enhanced if, for example, the (ICSID) Declaration also referred in detail to other crucial issues such as arbitrator availability.[492]

2.2. Independence and Impartiality of Arbitrators in Specific Institutions Rules:

2.2.1. The Appointment of Arbitrators:

The (UNCITRAL) Rules use the twin concepts of impartiality and independence instead of 'independent judgment' as found in the (ICSID) convention.[493] The (UNCITRAL) Arbitration rules (2013) in Article 6(7) mentions that the appointing authority shall appoint an independent

[488] Sheppard (n 455).p.132
[489] Gómez (n 324).p.36
[490] Cleis (n 439).p.20
[491] Gómez (n 324).p.33-34
[492] ibid.p.33-34
[493] Sheppard (n 455).p.133

and impartial arbitrator.[494] Also, the (SCC) Rules (2017) Article 18(1**)** contains that every arbitrator must be impartial and independent.[495] This clause is an explicit and unequivocal requirement of a type akin to the (UNCITRAL) formulation that every arbitrator must be impartial and independent.[496] However, Article 11(1) of the (ICC) Rules of Arbitration (2021) states that arbitrators must be and remain impartial and independent of the parties involved in the arbitration.[497] Finally, Article 14(1)(i) of the (LCIA) rules (2020) establishes that the arbitral Tribunal has general duties at all times during the arbitration to act fairly and impartially as between all parties, giving each a reasonable opportunity of putting its case and dealing with that of its opponent.[498]

However, one issue related to arbitrators' appointment is the party autonomy and party appointment of the arbitrators' case-by-case appointment. The party appointment alone raises concerns for bias in the (ISDS) system because there might impact arbitrators' independence and impartiality, meaning that an arbitrator has a particular connection to the party that appointed him. An arbitrator is not part of an institution; their task is *ad hoc* and temporary. The authority of their decision is based on the parties' consent and trust. Consent and trust thus also lay down the basis of the arbitrators' legitimacy. Therefore, arbitrators are under the permanent watch of the parties.[499]

2.2.2. The Disclosure Obligation of Arbitrators:

Under the (UNCITRAL) Rules, Article 11 establishes that an arbitrator shall disclose any circumstances likely to give rise to justifiable doubts about his or her impartiality or independence.[500] This standard is interpreted here as an objective one, as it is not limited to the

[494] UNCITRAL Rules (n 26) art 6(7).
[495] SCC Rules (n 295) art 18(1).
[496] Sheppard (n 455).p.134
[497] Arbitration Rules of The International Chamber of Commerce ('The ICC Arbitration Rules') (January 2021) art 11(1).
[498] Arbitration Rules of The London Court of International Arbitration ('The LCIA Arbitration Rules') (October 2020) art 14(1)(i).
[499] Schacherer (n 18).p.6-7
[500] UNCITRAL Rules (n 26) art 11.

parties' eyes or some other language that suggests subjectivity and the possibility of interpreting 'justifiable doubts' as requiring objectivity.[501] In the same context, Article 11 states that disclosure is required before and after the formal appointment, if appropriate. Consequently, it is more likely that under the (UNCITRAL) Rules, any concerns about the impartiality or independence of an arbitrator will become apparent earlier.[502] Furthermore, Article 18(2) of the (SCC) Rules state that before being appointed, a prospective arbitrator shall disclose any circumstances that may give rise to justifiable doubts about the prospective arbitrator's impartiality or independence.[503] Article 18(2)(3) of the (SCC) Rules prescribes a two-stage disclosure requirement similar to that seen in the (UNCITRAL) Rules. Although the two-stage disclosure requirement contrasts with the disclosure mechanic prescribed in the (ICSID) Arbitration Rules, the second stage is somewhat similar to the statement required in the signed declaration for (ICSID) arbitrations (as per Rule 6(2)).[504]

The (ICC) Rules Article11(2) states that a prospective arbitrator is required to disclose any facts or circumstances that question the arbitrator's independence in the eyes of the parties and any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality.[505] The term 'in the eyes of the parties' is intended to prevent an arbitrator from coming to a purely subjective conclusion concerning the relevance of a particular fact or circumstance when assessing his/her independence.[506] However, others have stated that this language of Article 11(2) 'in the eyes of the parties' represents a subjective test.[507] However, in 2016 the (ICC) Court adopted a Guidance Note to disclose conflicts by arbitrators. The (ICC) stated that the standard for disclosure under the (ICC) Rules of Arbitration is a subjective one, and it is for

[501] Fry and Stampalija (n 12).p.194
[502] Sheppard (n 455).p.133
[503] SCC Rules (n 295) art 18(2).
[504] Sheppard (n 455).p.134
[505] ICC Rules (n 497) art 11(1).
[506] Sheppard (n 455).p.135
[507] Fry and Stampalija (n 12).p.196

each arbitrator to assess whether to make a disclosure. The (ICC) Note appears to include a broader range of circumstances than those contemplated by the (IBA) Guidelines.[508]

2.2.3. The Disqualification of Arbitrators:

The provisions relating to arbitrators' challenges in all three versions of the (UNCITRAL) Arbitration Rules (1976, 2010, and 2013) are identical.[509] Article 12(1) provides that any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts about the arbitrator's impartiality or independence.[510] Mere doubt as to the arbitrator's independence or impartiality is not sufficient. The challenging party must demonstrate that the doubt is justifiable. The test is whether a reasonable, fair-minded, and informed person has justifiable doubts about the arbitrator's independence or impartiality, considering all relevant facts and circumstances.[511] Once again, the notion of 'justifiable doubts' has been understood as referring to an objective standard.[512] It is interesting to note how the standards for disclosure and challenge are different. Article 11 points out that circumstances' likely to give rise to justifiable doubts' must be disclosed. In contrast, Article 12 provides that an arbitrator can be challenged if circumstances exist that give rise to justifiable doubts about the arbitrator's impartiality or independence.[513] However, there seems to be (ICSID), a higher threshold for a successful challenge than under alternative regimes.[514]

Further, the (SCC) Arbitration Rules Article 19(1) provide that a party may challenge an arbitrator if circumstances exist that give rise to justifiable doubts about the arbitrator's impartiality and independence, or the arbitrator does not possess the qualifications agreed by the parties.[515] Under the 2017 (SCC) Arbitration Rules, no amendment was made to the (SCC)

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[508] Loretta Malintoppi and Alvin Yap, 'Challenges of Arbitrators in Investment Arbitration Still Work in Progress?' in Katia Yannaca-Small (ed), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press 2018).p.163-164
[509] ibid.p.159
[510] UNCITRAL Rules (n 26) art 12(1).
[511] Malintoppi and Yap (n 506).p.159
[512] Fry and Stampalija (n 12).p.195
[513] ibid.p.195
[514] Dimitropoulos (n 82).p.398
[515] SCC Rules (n 295) art 19(1).

Rules regarding challenges to arbitrators from the 2010 previous version of the rules. Under the (SCC) Rules, the decision of challenge is decided by the (SCC) board, which does not provide reasons for its decisions.[516] However, Article 14(1) of the (ICC) Arbitration Rules refers to arbitrators' challenges that can be made for an alleged lack of impartiality or independence, or otherwise.[517]

While independence and impartiality have relatively straightforward meanings, the addition of 'otherwise' expands the circumstances in which arbitrators may be challenged.[518] As indicated by the terms' or otherwise', the grounds that can be invoked based on a challenge appear to be open-ended. The word also indicates a 'broad and vague'- 'broad' because of the possibility of challenging an arbitrator for any reason considered appropriate, and 'vague' because 'lack of impartiality or independence or otherwise' is not defined.[519]

2.3. Soft Law Instruments:

2.3.1. The IBA Guidelines on Conflicts of Interest:

The IBA guidelines on conflicts of interest in international arbitration (2014) have general standards and the application list. However, while the (IBA) Guidelines are not binding and not adopted by an arbitral institution, the (IBA) Guidelines have become a vital tool. In decisions on challenges to arbitrators, they are regularly referred to as indicative for assessing whether a conflict of interest exists.[520] For example, in the oil and gas cases, the *Total v Argentina*[521] considered the (IBA) Guidelines useful, reflecting a transnational consensus on their subject matter. Also, in another oil and gas case *Perenco v Ecuador*,[522] the parties agreed

[516] Malintoppi and Yap (n 506).p.164-165
[517] ICC Rules (n 497) art 14(1).
[518] Mark Baker and Lucy Greenwood, 'Are Challenges Overused in International Arbitration?' (2013) 30 journal of international arbitration 101.p.106
[519] Malintoppi and Yap (n 506).p.161-162
[520] ibid.p.167
[521] *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1
[522] *Perenco* (n 479)

that the challenge to the arbitrator, in that case, was to be resolved by applying the 2004 (IBA) Guidelines.[523]

On the contrary, many decisions have cast doubt over the (IBA) Guidelines' applicability as the legal standard for determining arbitrators' challenges.[524] For instance, in the oil and gas cases, the majority of the *ad hoc* Committee in *Total v Argentina*[525] observed that the (IBA) Guidelines relate mainly to standards applicable to the duty to disclose and not to the standards applicable to a disqualification request. The same view was echoed by the unchallenged members of the Tribunal in the oil and gas case the *Caratube v Kazakhstan,*[526]which referred to the 2004 version of the (IBA) Guidelines.[527]

Starting with the first part of the guidelines, the general standard (1) states a general principle that every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain.[528] However, the (ICSID) Convention and Rules provide a conceivably different standard of persons of high moral character …, who may be relied upon to exercise independent judgment.[529] Further, the general standard (1) should extend the obligation to be independent and impartial to issuing the award, including during any appeal period.[530] The standard (2)(b) clarifies that an arbitrator can be disqualified if facts or circumstances, which, from the point of view of a reasonable third person knowing the relevant facts and circumstances, would give rise to justifiable doubts as to the arbitrator's impartiality or independence.[531] Standard (3)(a) stated that an arbitrator should disclose the

[523] Malintoppi and Yap (n 506).p.167
[524] ibid.p.167
[525] *Total* (n 521)
[526] *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13
[527] Malintoppi and Yap (n 506).p.168
[528] International Bar Association Guidelines on Conflicts of Interest in International Arbitration ('IBA Guidelines') (2014) Part (I) General Principle (2).
[529] Ng (n 20).p.27
[530] Ramon Mullerat OBE, 'Arbitrators' Conflicts of Interest Revisited: A Contribution to the Revision of the Excellent IBA Guidelines on Conflicts of Interest in International Arbitration' (2010) 4 Dispute Resolution International 55.p.60
[531] IBA Guidelines (n 528) Part (I) General Principle (2)(b).

information if facts or circumstances exist that may, in the parties' eyes, give rise to doubts about the arbitrator's impartiality or independence.[532] The Guidelines adopted a subjective test, requiring the arbitrators to stretch their minds and see how the parties see certain facts.[533] On the other hand, to decide on disqualification matters, the arbitrator would apply an objective test and consider how relevant facts would be perceived by a reasonable third- person.[534]

The second part of the guidelines are only examples of the Guidelines principles of the kind of situations being described, they are not exhaustive of the situations that come within each colour code. The second part is an application list that uses a colour-system mechanism to guide what situations constitute conflicts of interest and when disclosing a relationship is necessary.[535] This approach is more nuanced and instructive than an abstract standard and promises to achieve a more uniform case law on arbitrator challenges. However, whether the (IBA) Guidelines would enhance the predictability of challenge decisions in the investment arbitration context is questionable.[536] The (IBA) Guidelines provide clear and helpful guidance regarding the obligation to disclose but remain inconclusive for most challenges. Since the Red Lists are very narrowly tailored, while the Orange and Green Lists are more extensive and non-exhaustive, there is much room left for uncertainty. Indeed, the predictability of the outcome of a challenge is not the rule but the exception. The vagueness of specific provisions of the Application Lists further aggravates this insecurity.[537] Further, although the Guidelines have been designed with commercial and investment arbitration in mind, they fail to mention some frequently invoked situations as grounds for challenges in investment arbitration. For example, the arbitrator's previous employment as a public servant (and her or his ensuing familiarity with the State party

[532] IBA Guidelines (n 528) Part (I) General Principle (3)(a).
[533] Eduardo Zuleta and Paul Friedland, 'The 2014 Revisions to the IBA Guidelines on Conflicts on Interest in International Arbitration' (2015) 9 Dispute Resolution International 55.p.57
[534] ibid.p.57
[535] Mark R Joelson, 'A Critique of The 2014 International Bar Association Guidelines on Conflicts of Interest in International Arbitration' (2016) 26 American Review of International Arbitration.p.5
[536] Cleis (n 439).p.167
[537] ibid.p.167

or with the subject matter of the case), and role switching, are not covered by the Application Lists. While it is possible to resolve such challenges by subsuming the situations under the General Standards of the (IBA) Guidelines, the advantage of predictability and uniformity is thereby lost. [538] For example, Noah Rubins and Bernhard Lauterburg have argued that the (IBA) Guidelines Green list may in certain respects be inherently ill-suited to the investment arbitration context. For example, legal opinions may be of limited relevance in commercial arbitration; in contrast, arbitrators in investment arbitration frequently deal with repeating international law issues and are often asked to determine rules as a matter of the first impression.[539] Furthermore, the Application Lists' valuations are not always suitable in the investment arbitration context.[540]

2.3.2. The Codes of Conduct for Arbitrators in Free Trade Agreements:

The code of conduct for arbitrators is an instrument used for improving the integrity and certainty of international arbitration and helps the disputing parties to build confidence in tribunals.[541] Since there is great concern about arbitrator independence and impartiality in investor-state arbitration, many countries recognise the problem and have included a code of conduct in their free trade agreements (FTAs).[542] For example, the code of conduct for arbitrators in the (EU)-Canada Comprehensive Economic and Trade Agreement (CETA) is formulated following the IBA Guidelines.[543] Another example is the (NAFTA) code of

[538] ibid.p.168
[539] Rubins and Lauterburg (n 440).p.163-164
[540] Cleis (n 439).p.168
[541] Mengke Cheng, 'Establishing a Code of Conduct for a Balanced Relationship between Investment Arbitral Tribunals and National Courts' (2018) 11 Contemporary Asia Arbitration Journal 91.p.104
[542] ibid.p.104
[543] ibid.p.104

conduct, the (EU)-Singapore Code of Conduct.[544] Also, the (CPTPP) agreement Code of conduct.[545]Another example is the (JAEPA) agreement Code of Conduct of Arbitrators.[546]

However, the (CETA) Code of Conduct employs different wording and structure from the (IBA) guidelines.[547] The disclosure obligation contains a vast regulation indicating what the arbitrator candidates must reveal. The code does not repeat the (IBA) red, orange and green lists but instead shows what should be disclosed directly.[548] It should be pointed out that according to Article X.25, the Code of Conduct is not decisively binding as arbitrators will have a choice between the Code of Conduct, established following (CETA) and (IBA) Guidelines.[549] Unfortunately, the Code of Conduct in (CETA) does not stipulate what happens when an arbitrator violates the code apart from both parties' right to replace the arbitrator. It means that the Code of (CETA) does not deal with violating its provisions if the only sanction is removing the arbitrator from the proceedings.[550]

However, most codes of conduct in free trade agreements contain similar procedural issues and structures. First, most codes only catalogue duties and obligations of arbitrators generally and without a clear order. An alternative option could be to structure a code of conduct following the arbitral procedure.[551] For example, under Responsibilities to the Process, most

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[544] See the North American Free Trade Agreement (NAFTA) Code of Conduct for Dispute Settlement Procedures under Chapters 19 & 20, available at https://www.worldtradelaw.net/nafta/19-20code.pdf.download. Accessed 9 January 2021. See, also the EU-Singapore Trade and Investment Agreement, Investment Protection Agreement (Annex 7), Code of Conduct for Members of The Tribunal, The Appeal Tribunal and Mediators, available at https://eur-lex.europa.eu/resource.html?uri=cellar:55d54e18-42e0-11e8-b5fe-01aa75ed71a1.0002.02/DOC_3&format=PDF#page=20. Accessed 9 January 2021.

[545] See, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) Code of conduct for investor-State Dispute Settlement under Chapter 9 Section B, available at https://www.mfat.govt.nz/assets/Trade-agreements/CPTPP/Code-of-Conduct-for-ISDS.pdf . Accessed 9 January 2021.

[546] See, the Japan-Australia Economic Partnership Agreement (JAEPA) under Rules of Procedure of Arbitral Tribunals (Annex B) – (Attachment B) Code of Conduct of Arbitrators, available at https://www.dfat.gov.au/sites/default/files/jaepa-rules-of-procedure-of-arbitral.pdf . accessed 9 January 2021.

[547] Dominik Horodyski, 'Code of Conduct for Arbitrators in CETA – a Step Forward in Investment Arbitration?' (2015) 11 Zeszyty Naukowe Towarzystwa Doktorantów UJ 7.p.13

[548] ibid.p.13

[549] ibid.p.15

[550] ibid.p.17

[551] Chiara Giorgetti and Mohammed Abdel Wahab, 'A Code of Conduct for Arbitrators and Judges' (2019) Acad. Forum ISDS Concept Pap. 2019/12

codes of conduct in the (CETA), (EU)-Singapore agreement and the (CPTPP) contained similar provisions: 'Every candidate shall avoid impropriety, shall be independent and impartial, shall avoid direct and indirect conflicts of interests.'[552] Also, under the independence and impartiality of members, most codes of conduct in the (CETA), (CPTPP), and the (JAEPA) code of conduct contained similar provisions to article 10 in the (EU)-Singapore code. The article states that 'a Member must be independent and impartial and avoid creating an appearance of bias or impropriety and shall not be influenced by self-interest, outside pressure, political considerations, public clamour, and loyalty disputing party or a non-disputing Party or fear of criticism'.[553] In these codes, the disclosure obligation is an extended obligation to indicate what the candidates for arbitrators must reveal personal and financial interest and professional and social relationships.[554]

Second, most codes are structured not just for arbitrators but also for other arbitral tribunal members. For example, the (CETA) code of conduct and the (EU)-Singapore code of conduct are structured to include a tribunal member, appeal and mediators. Thus, another way to approach a code's format might be to focus on whom certain obligations are due. For example, sections of a prospective code could highlight the obligations due to each actor. This choice seems preferable to highlight differences among the obligations of different actors.[555]

2.3.3. The ICSID/UNCITRAL Draft Code of Conduct for Adjudicators:

In response to the call for reform, the (UN) Commission on International Trade Law (UNCITRAL) gave, in July 2017, Working Group III a mandate to identify and consider

<https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/>.accessed 5 January 2021.p.12

[552] See, Article 2 of the EU-Singapore Trade and Investment Agreement (Annex7) Code of Conduct for Member of The Tribunal, The Appeal Tribunal and Mediators (2018). Article 2 of EU-Canada Comprehensive Economic and Trade Agreement (CETA) (Annex 29-B) Code of Conduct for Arbitrators and Mediators (2016). Article 2 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) Code of conduct for Investor-State Dispute Settlement under Chapter 9 Section B (2019).

[553] See, Article 11 of the (CETA) Code of Conduct for Arbitrators and Mediators. Article 6(a)(b) of the (CPTPP) Code of conduct. Article (VI)(1) of the (JAEPA) Code of Conduct of Arbitrators.

[554] See, Article 3 of the EU-Singapore (Annex 7) Code of Conduct. Article (4) of the (CETA) (Annex 29-B) Code of Conduct. Article 4(a)(d) of the (CPTPP) Chapter 9 Section B Code of Conduct.

[555] Giorgetti and Wahab (n 549).p.12-13

concerns regarding (ISDS). In 2018, the Working Group reached a consensus on the desirability for ISDS reforms. More specifically, in April 2019, member states of (UNCITRAL) Working Group III requested the (UNCITRAL) Secretariat to undertake together with the Secretariat of the (ICSID) preparatory work for an (ISDS) Code of Conduct, focusing on the implementation and enforceability of such a code.[556]

However, the code tends to consider that the code should be binding and contain concrete rules rather than guidelines.[557] The code also tends to have a broad scope as the comprehensive term "adjudicator" is used to ensure its application to all arbitrators, annulment committees, members of an appeal mechanism or judges on a bilateral or multilateral standing mechanism (permanent court).[558] Another issue is the extensive disclosure requirement that the code ensures from adjudicators. The draft code imposes the disclosure of 'any professional, business and other significant relationships within past five years with the disputing parties, with their counsel, or with any present or past adjudicators or experts in the proceeding'.[559] It also urges disclosure of 'all (ISDS) and other international arbitration cases in which adjudicator involved as counsel, arbitrator, annulment committee member, expert, conciliator and mediator; and a list of all publications'[560] This is still a draft text. Some disclosure obligations are yet to be agreed on: the number of past years these disclosure obligations cover, whether to disclose a third-party funder and whether the candidate should publish relevant past public speeches. The extent to which the candidate is involved in other non-(ISDS) international arbitration cases is

[556] Chiara Giorgetti, 'A Common Code of Conduct for Investment Arbitrators?' (2019) 113 Proceedings of the ASIL Annual Meeting 217 <https://www.cambridge.org/core/journals/proceedings-of-the-asil-annual-meeting/article/abs/common-code-of-conduct-for-investment-arbitrators/63227B84FA55286D5853FFEA7A7CD409>.accessed 5 January 2021.p.217
[557] The ICSID and UNCITRAL First Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement (2020) Available at https://icsid.worldbank.org/resources/code-of-conduct accessed 9 January 2021. para 5. p.3
[558] ibid. para 6. p.3
[559] ibid. art 5(2)(a). p.11
[560] ibid. art5(2)(c)(d). p.11

also not settled.[561] However, it is interesting that the proposal does not address repeat appointments[562], one of the most often-heard criticisms. It is not difficult to conceive a system in which an adjudicator is limited to a certain number of repeat appointments by the same party.[563] As will be mentioned in chapter 7 (2.3.) that it has been recommended that arbitral institutions appoint all members of an arbitral tribunal for more transparency in the appointing process and better control the appointed arbitrators' quality.[564] However, this proposal's adoption would mean losing the power to appoint an arbitrator; the actors may, moreover, stop resorting to arbitration overall.[565]

Further, the code requires every adjudicator at all times to be independent and impartial.[566] Also, the draft code has shared a similar provision with (FTAs) codes of conduct in independent and impartiality that 'Adjudicators shall not be influenced by self-interest, outside pressure, political considerations, public clamour, loyalty to a party to the proceedings, or fear of criticism'.[567]

Further, the code has addressed the double hatting issue that 'Adjudicators shall [refrain from acting]/[disclose that they act] as counsel, expert witness, judge, agent or in any other relevant role'.[568] However, the commentary comment in the code stated that it is important to determine whether a code should create an outright ban on double-hatting or create an obligation to disclose the overlapping roles and allow the parties to challenge the adjudicator if they find the overlapping roles objectionable.[569] Interestingly, the current draft proposal

[561] Nikos Lavranos, 'Towards a Binding Global Code of Conduct for Arbitrators in ISDS Disputes' (*borderlex*, 2020) <https://borderlex.eu/2020/05/06/towards-a-binding-global-code-of-conduct-for-arbitrators-in-isds-disputes/> accessed 2 November 2020.
[562] See, the comment of Article 5 para 52 state that the article 5 focuses on avoiding conflicts of interest. The issue of repeat appointment is not its primary focus. Although, repeat appointment has been identified as a concern by many observers of ISDS and considered by UNCITRAL Working Group III.
[563] Lavranos (n 559).
[564] Dimitropoulos (n 82).p.422
[565] ibid.p.422
[566] ICSID and UNCITRAL draft Code of Conduct (n 557). art 4(1). p.9
[567] ibid (n 557). art 4(2)(a). p.9
[568] ibid (n 557). art 6. p.16
[569] ibid (n 557). para 67. p.17

avoids making any specific recommendation on this issue other than including the provision as a placeholder.[570] The commentary explains that limiting or even completely banning "double hatting" would exclude most counsels, particularly younger ones, who simply cannot afford to leave their practice to act exclusively as adjudicators. In short, if there is a full ban on the practice, the pool of available adjudicators would be drastically reduced.[571]

On the other hand, Article 12 addresses the enforcement of the code's obligations that every adjudicator has an obligation to comply with the applicable provisions.[572] The comments of this article stated that a primary method of implementing the code is through voluntary compliance.[573] The comment stated that several options might be considered to implement the code. The most likely options would be: (i) to incorporate the code into investment treaties and other instruments of consent; (ii) to have disputing parties agree to its application at the inception of each case; (iii) to append it to the disclosure declaration that adjudicators must file upon acceptance of nomination; or (iv) to incorporate the code into applicable procedural rules. If such an instrument were developed, the code could also be made part of a multilateral instrument on (ISDS) reform. In this instance, the applicability of the code would be determined by such an instrument.[574]

Interestingly, Article 12 only states that every (prospective) adjudicator "has an obligation to comply" with the code, without explicitly stating any sanctions in case of failure to observe it.[575] The commentary of this code discusses imposing monetary sanctions - meaning pay back part of the fees- and reputational sanctions by publicly listing adjudicators who violated the code of conduct. In the end, the commentary rejects both ideas by referring to the practical

[570] Lavranos (n 559).
[571] ibid.
[572] ICSID and UNCITRAL draft Code of Conduct (n 557). art 12(1). p.23
[573] ibid. para 89. p.23
[574] ibid. para 97. p.24
[575] Lavranos (n 559).

difficulties in implementing them. Nonetheless, it can be expected that the Working Group members will push for some robust enforcement tools. [576]

3.0. Summary Analysis:

In the summary of the legal analysis in this section, there is a consensus in all arbitration rules that arbitrators must fulfil certain minimum requirements of independence and impartiality. Although Article 14(1) of the (ICSID) convention used different terminology 'independent judgment' than the (UNCITRAL) Rules Article 6(7) and the (SCC) Rules Article 18(1), which use the twin concepts of 'impartiality and independent', there is a consensus among (ICSID) arbitration users that both requirements are mandatory and applies to all arbitrators in (ICSID).[577] However, potential conflicts of interest are much more numerous in the context of (ICSID) party appointments on an *ad hoc* basis, and a clear delineation of the scope of independence and impartiality is therefore crucial. The delegates who participated in the drafting process of the (ICSID) Convention failed to acknowledge this.[578] Further, all arbitration rules comparable with the (ICSID) - (Article 57 the 'manifest lack') - are relatively uniform in requiring the disqualification threshold of 'justifiable doubts' regarding the arbitrator's independence and impartiality for a challenge succeed. The (IBA) Guidelines also provide the same standard 'justifiable doubts' threshold for a disqualification. However, the need to show a 'manifest lack of the qualities required' is a decidedly higher threshold to satisfy when set against the standards in other arbitral rules.[579]

Further, Chiara Giorgetti stated that applying the "manifest standard" had been rightly criticised as excessively difficult to prove and too protective of the arbitrator.[580] Additionally, Sam Luttrell has stated that in most bias challenges in (ICSID) cases, the central legal issue

[576] ibid.
[577] Cleis (n 439).p.12-13
[578] ibid.p.15
[579] Sheppard (n 455).p.132
[580] Giorgetti, 'Between Legitimacy and Control: Challenges and Recusals of Judges and Arbitrators in International Court and Tribunals' (n 462).p.251-252

will be the meaning and effect of the Article 57 term 'manifest'.[581] However, James Crawford indicated that tribunals have considered two meanings: manifest means clear, and the 'manifest' means serious.[582] Finally, Maria Cleis stated that the term manifest must be understood to have a more tolerant acceptance in the context of arbitrator challenges under Article 57 (ICSID) Convention.[583] This raises the question of whether challenges subject to a justifiable doubts standard have noticeably different outcomes than (ICSID) manifest lack challenges. The answer to this question will be answered in the next chapter (5).

However, there seems to be an intention to use professional self-regulatory regulation such as the code of conduct as an alternative or enhancement to the standard of independence and impartiality that regulate the arbitrator's conduct in a potential conflict of interest. However, the structure and suitability of these professional regulations remain a question in the context of investment arbitration. This intention is to respond to criticisms of legitimacy and gaps in regulatory frameworks for arbitrators' conflict of interest. For example, the (ICSID) Arbitration Rules 6(2) do not contain a list, nor do they provide any guidance on the situations or relationships that ought to be disclosed and is notably ambiguous and potentially very broad.[584] In this context, the (IBA) Guidelines have become a very important tool. In decisions on challenges to arbitrators, they are regularly referred to as indicative – not binding- for assessing whether a conflict of interest exists.[585]

On the contrary, several decisions have cast doubt over the (IBA) Guidelines' applicability as the legal standard for determining arbitrators' challenges. The (IBA) Guidelines relate mainly to standards applicable to the duty to disclose and not to the standards applicable to a disqualification request.[586] It appears that the particularities of investment arbitration were, to

[581] Luttrell (n 447).p.600
[582] Crawford (n 450).p.597
[583] Cleis (n 439).p.18
[584] Sheppard (n 455).p.132
[585] Malintoppi and Yap (n 506).p.167
[586] ibid.p.167-168

a certain extent side-lined when the (IBA) Guidelines were drawn up; they fail to mention some situations which are frequently invoked as grounds for challenges in investment arbitration. For example, the arbitrator's previous employment as a public servant, and role switching, are not covered by the Application Lists.[587] Also, the (IBA) Guidelines' Red Lists' narrow construction and the relatively high threshold imposed by the Orange List could be interpreted to express an underlying presumption against disqualification.[588]

On the other hand, self-regulatory codes of conduct for arbitrators mainly differ from the arbitration rules; they are specifically enacted to govern arbitrators' conduct. They do not regulate arbitral proceedings as a whole but only contain specific standards of adjudicators' ethics.[589] Furthermore, they are generally not binding but only serve as guidelines. In practice, however, some self-regulatory codes of conduct have a rather far-reaching field of application due to the lack of clarity and uniformity of existing (binding) arbitration rules. They often come into play when a conflict of interest is alleged and, as such, are an important source of standards of arbitrators' independence and impartiality.[590] Users of arbitration sometimes criticise self-regulatory codes of conduct for limiting what they perceive as their right to appoint a decision-maker freely. Proponents of the codes counter that the standards enounced in such instruments enhance parties' certainty that their appointee will remain on the arbitral Tribunal. They make the criteria for assessing disclosure obligations, objections by the counterparty and challenges more transparent and predictable and render it more difficult for arbitrators or institutions dealing with such issues to pursue their agenda.[591] The legal certainty created by such instruments is argued in the interest of all international arbitration participants and justifies the arbitration community's self-regulation.[592]

[587] Cleis (n 439).p.168
[588] ibid.p.169
[589] ibid.p.157
[590] ibid.p.157
[591] ibid.p.157
[592] ibid.p.157-158

4.0. Conclusion:

In conclusion, to defend and strengthen investor-state arbitration legitimacy about arbitrators' independence and impartiality. A new code of conduct for arbitrators will be entered into force and tested when challenges are raised. Meanwhile, it remains to be seen whether the code of conduct will be recognised and, if so, the effects of this step and its impact on future challenges in disputes can only be measured in time. Further, investment arbitration improvement and reform, whether by code of conduct or rules reform, needs to focus on specific issues (discussed in chapter 7). For example, some improvements could include more onerous disclosure requirements and limits on contacts between parties, especially party-appointed arbitrators. Also, limits on the number of multiple appointments, clearer standards for challenging arbitrators, separation of individuals serving as (ICSID) arbitrators from those on annulment committees.[593] Further, the suggestion provided that the (ICSID) should ask a neutral tribunal to decide on challenges based on a different threshold. This change can only be made through an amendment of the (ICSID) Convention.[594] On the other hand, the next chapter will analyse the application of these rules and regulations in disqualification decisions of arbitrators in oil and gas disputes.

[593] Giorgetti and others (n 349).p.466
[594] Giorgetti, 'Who Decides Who Decides in International Investment Arbitration' (n 71).p.479-480

Chapter 5: Analysis of Disqualification Decisions in Oil and Gas Disputes in Investor-State Arbitration:

1.0. Introduction:

This chapter will provide a legal analysis of arbitrators' disqualification decisions in oil and gas disputes in investor-state arbitration. The chapter aims to identify any weaknesses in the present system and answer whether the current regulatory framework provides an effective mechanism for arbitrators' conduct and practice in oil and gas disputes in investor-state arbitration. This chapter's analysis is divided into two main sections; the first is an analysis of the arbitrators' disqualification decisions in oil and gas disputes. This provides how arbitration rules are applied to assess arbitrators' ethical practice in oil and gas cases in investor-state arbitration. Further, the analysis focuses on the threshold for arbitrator challenges and applying the abstract requirement of independence and impartiality to specific conflict categories. This analysis of the relevant rules and the oil and gas case law will allow for making an informed and detailed comparison of challenge outcomes in oil and gas disputes in the second section of the chapter.

2.0. The Analysis of Oil and Gas Arbitrators' Disqualifications Decisions:

The concept of independence and impartiality of arbitrators has been defined in chapter 1 (1.1). However, this section will elaborate on how international arbitrators' ethical practices and conduct within oil and gas disputes in investor-state arbitration have applied the independent and impartiality standards.

2.1. The Similarities and Differences of Disqualification Decisions:

It is possible to make several generalisations about the decisions related to arbitrators' disqualification in Oil and Gas investor-state arbitration. These decisions have some similarities and differences, for example, the differences in the number of oil and gas submitted under each arbitral institution in investor-state arbitration. These decisions also share some

similarities, under different arbitration rules, such as the disqualification requests mainly were initiated by Respondent State. Further, in the end, the section will consider the differences in the outcomes or results of the disqualifications decisions in oil and gas cases in investor-state arbitration.

2.1.1. The Applicable Legal Standard:

A review of all of the publicly available decisions on challenges in investment oil and gas disputes show that only a small percentage of international arbitrators end up being disqualified. The challenges brought under the (ICSID) Convention have been far less likely to succeed than those under the (UNCITRAL) Arbitration Rules. This trend can be explained by the fact that the disqualification standard under the (ICSID) Convention (the 'manifest lack' test), which can be found in Articles 14 and 57, is much more stringent than the one under the (UNCITRAL) Arbitration Rules (the 'justifiable doubts' test).[595] Under the (ICSID), the need for the existence of "facts," in contrast to "appearances" or "circumstances," indicates a manifest lack, in contrast to reasonable lack, of the qualities of an arbitrator. A major difference, at least textually, can be seen between the (ICSID) and the other arbitration rules. There seems to be, in (ICSID), a higher threshold for a successful challenge than under alternative regimes.[596] However, the meaning of 'manifest' has been the subject of interpretation through (ICSID) jurisprudence. Most recent decisions preferred a more focused and specific interpretation of 'manifest' as evident or obvious.[597] For example, in *Blue Bank v Venezuela*,[598] the World Bank chairman applied a lower threshold than previous cases. He noted in his decision that 'Articles 57 and 14(1) of the (ICSID) Convention do not require proof of actual dependence or bias; rather, it is sufficient to establish the "appearance of dependence

[595] Fry and Stampalija (n 12).p.263
[596] Dimitropoulos (n 82).p.398
[597] Chloe J Carswell and Lucy Winnington-Ingram, 'Challenges To Arbitrators Under The ICSID Convention and Rules' in Barton Legum (ed), *The Investment Treaty Arbitration Review* (Fourth Edi, Law Business Research Ltd 2019).p.141
[598] *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20

or bias". The World Bank chairman noted that it means evident or obvious regarding the word' manifest'. In that light, 'manifest' is merely a rule of evidence, not a qualitative modifier to the standard for disqualification.[599]

Furthermore, some disqualification decisions in oil and gas cases within the (ICSID) context followed the approach adopted in the Blue Bank ruling that the appearance of dependence or bias is sufficient to result in disqualification.[600] For example, disqualification decisions in *Burlington Resources v. Ecuador*,[601] *Caratube International Oil Company LLP & Mr Devincci Salah Hourani v. Kazakhstan,*[602] and *ConocoPhillips Petrozuata B.V. and Others v. Venezuela*.[603] However, there have also been challenging decisions in oil and gas cases within the (ICSID) context that did not adopt this standard.[604] For example, *Total v Argentina*,[605] Argentina argued that the standard of disqualification under the (ICSID) Convention is the appearance of dependence or predisposition or bias. The *ad hoc* Committee's remaining members who decided the challenge did not expressly endorse or reject the 'appearance of dependence or bias' test. However, they appear to have accepted that the challenging party must demonstrate that it is 'manifest, obvious, that the person challenged cannot exercise independent judgment.[606]

However, it may be that the only way to resolve the issue of the standard for disqualification definitively is to amend Article 57 of the (ICSID) Convention. However, amending the Convention is a highly ambitious, if not an altogether unrealistic, undertaking since any amendment requires the approval of the majority of two-thirds of the (ICSID) Administrative

[599] Malintoppi and Yap (n 506).p.156
[600] ibid.p.156
[601] *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5
[602] *Caratube* (n 526)
[603] *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/07/30
[604] Malintoppi and Yap (n 506).p.156
[605] *Total* (n 521)
[606] Malintoppi and Yap (n 506).p.157

Council members and all member states of the Convention.[607] Furthermore, James Fry and Juan Stampalija have argued that amending Article 57 seems indispensable to aligning the (ICSID) Convention with current trends in the field. Other alternatives, such as the states parties to the (ICSID) Convention issuing an interpretation, or states modifying their own existing and future international investment agreements, all require significant compromises to succeed.[608] In the meantime, the (IBA) Guidelines could become a helpful tool for dealing with international arbitrators' conflicts of interest in investment disputes.[609]

On the other hand, Peng Wang argued that the disqualification standard of (ICSID) imposes a heavy burden of proof for reasons. Investment arbitrations under (ICSID) will not be workable if the arbitrators can be easily challenged and disqualified. It makes sense that the disqualification standard in investment arbitration is higher than in commercial arbitration. The international investment arbitration framework would cease to be viable if an arbitrator was disqualified simply for having faced similar factual or legal issues in other arbitrations. The heavy burden of proof can be treated as the protection of the arbitrators, and in a more profound sense, the heavy burden is to protect the unique arbitration framework of the private v state, which should be considered the most valuable.[610] Indeed, the (ICSID) Convention were never intended to create an impossibly high standard for disqualification, particularly given that such an interpretation of 'manifest' is squarely at odds with the commonly perceived purpose of (ICSID)—to provide host States and investors with an international device to settle their disputes in an arena which offers the highest possible guarantees of legality, fairness and impartiality.[611]

[607] ibid.p.157
[608] Fry and Stampalija (n 12).p.263
[609] ibid.p.263
[610] Peng Wang, 'Challenge and Disqualification of Arbitrators Under ICSID: A Case Analysis' [2012] Social Science Research Network SSRN <https://ssrn.com/abstract=2112004>. accessed 5 January 2021.p.15
[611] Vasani and Palmer (n 461).p.197

2.1.2. The Caseload of Oil and Gas Disputes by Arbitral Institutions:

The oil and gas cases in investor-state arbitration provided on the websites of the (UNCTAD),[612] the (ECT),[613] the (PCA),[614] and the (ICSID)[615]showed the total number of (136) oil and gas cases collectively that have been filed in investor-state arbitration, after excluding duplicated cases. Further, the cases have been explained by tables below, it should be acknowledged that the limited number of the (SCC) cases and the unpublished decisions may have effect the conclusion drawn from these tables. This is regarding the (SCC) in the number of disqualification requests by parties in (table 2) and the decision result in (table 3).

a. The Number of Cases by Arbitral Institutions:

There were (103) cases under the ICSID rules from (1977 to 2020), this is equivalent to a ratio of (75.73%) of the (136) cases; by comparison to the cases under (UNCTRAL) rules, there were (25) cases from (2002 to 2020) this is equivalent to a ratio of (18.38%) of the (136) cases. Under the (SCC) Rules, the total number was (8) cases from (1996 to 2015) this is equivalent to a ratio of (5.88%) of the (136) cases.

These numbers above explain that the (ICSID) is the preferred rule for parties in oil and gas investor-state arbitration due to the (75.73%) of cases that have been filed under the (ICSID) rules. Also, the (25) cases under the (UNCTRAL) rules that equivalent to (18.38%) explain that the (UNCTRAL) is the second preferred rule for the parties in oil and gas investor-state arbitration. One of the apparent reasons for this preferability of (ICSID) is the enforceability system of the (ICSID) awards compared to (UNCITRAL) enforceability that sometimes involves national court interventions.

b. The Number of Disqualifications Cases by Arbitral Institutions:

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[612] The United Nation Conference on Trade and Development (UNCTAD) https://investmentpolicy.unctad.org/
[613] The Energy Charter Treaty (ECT) https://www.energychartertreaty.org/cases/list-of-cases/
[614] The Permanent Court of Arbitration (PCA) https://pca-cpa.org/en/cases/
[615] International Centre for Settlement of Investment Disputes (ICSID) https://icsid.worldbank.org/cases/case-database

As shown in (Table1), from the total number of (136) oil and gas cases, there have been (28) cases where parties request the disqualification of arbitrators; this is equivalent to a ratio of (20.58%) of the (136) cases, whereas (108) cases have no disqualifications requests which are equivalent of (79.41%) of the cases. Interestingly, the majority of disqualification cases (28) have been rising under the (ICSID) rules by (18) disqualification cases equivalent to (13.23%) of the (136) cases. However, by comparison to the number of disqualification cases under the (UNCTRAL) that have (9) cases equivalent to (6.61%), and (SCC) that have (1) case equivalent to (0.73%); the total of both rules were only (10) cases which are equivalent to (7.35%) of the disqualification cases. This explains that even though the (ICSID) is the preferable rule in the oil and gas investor-state arbitration, the (ICSID) rule has a higher number of arbitrators' disqualification cases by (18) cases equivalent to (13.23%). What is more interesting is that (ICSID) has also, highest number of non-disqualification cases by (85) cases equivalent of (62.5%) of the cases.

Table 1: Oil and Gas Investor-State Arbitration by Number of Cases

Oil and Gas Cases	**Number of Cases Under**			**Total**
	UNCITRAL	**SCC**	**ICSID**	
Non-Disqualification Cases	16 (11.76%)	7 (5.14%)	85 (62.5%)	108 (79.41%)
Disqualification Cases	9 (6.61%)	1 (0.73%)	18 (13.23%)	28 (20.58%)
Total	25 (18.38%)	8 (5.88%)	103 (75.73%)	136

2.1.3. Disqualification Decisions by Number of Disqualification Requests:

a. The Number of Disqualification Requests Submitted:

From the (28) disqualification cases there have been (34) disqualification requests to disqualify arbitrators that is equivalent to (25%) of the (136) cases; see (Table 2). This explains that the disqualification requests against arbitrators have been submitted more than once under same oil and gas cases. For example, *ConocoPhillips v. Venezuela case* the Respondent

submitted six disqualifications requests in this case.[616] The (Table 2) shows that the majority of disqualification requests have been submitted under the (ICSID) by (24) requests of disqualifications which are equivalent of (70.58%) of the (34) requests. However, by comparison to (UNCITRAL), there was only (9) requests for disqualifications that is equivalent to (26.47%) of the (34) requests.

b. The Number of Disqualification Requests Submitted by Parties:

Interestingly, the respondents' states have filed most of disqualification requests in oil and gas investor-state arbitration by (25) requests that is equivalent to (73.52%) of the requests either under the (ICSID) or (UNCTRAL) rules. This explains why some states have inserted provisions related to arbitrator ethical conduct into their investment agreements. Some agreements have included a new code of conduct for arbitrators to regulate arbitrators' conduct.

Table 2: The Number of Arbitrators' Disqualification Request by Parties

Requests by	**Number of Requests Under**			**Total**
	UNCITRAL	**SCC**	**ICSID**	
Respondent	7 (20.58%)	1 (2.94%)	17 (50%)	25 (73.52%)
Claimant	2 (5.88%)	0 (0%)	7 (20.58%)	9 (26.47%)
Total	9 (26.47%)	1 (2.94%)	24 (70.58%)	34 (25% of 136)

c. The Disqualification Requests Based on Reasons of Requests:

There would appear to be diversity and repetition based on the disqualifications brought in oil and gas investor-state arbitration. For example, the most repetitive examples are the arbitrators' repeated appointment, conflict role 'double hat', arbitrator relationship with law firms, and arbitrator failure to disclose information. Besides, example of diversities is arbitrator nationality, arbitrator lack of experience, and arbitrator membership in a task force. However, more interesting is that there would appear to be inconsistency, as will be discussed next

[616] *ConocoPhillips Petrozuata B.V. and Others* (n 603)

section, in how similar based grounds of challenges have been handled. Such variety certainly would be expected, as the challenges and the success of those challenges should depend on the substance of the arbitrator's acts in question and the implications involved concerning their independence and impartiality.

2.1.4. Disqualification Decisions by Outcomes:

Regarding outcomes, the apparent difficulty of challenges succeeding, at least under the (ICSID) rules, is far more troubling, as shown in the table below (Table 3).

Table 3: Disqualification Proposals by Result of Decisions

Result of Decisions	Number of Decisions Under			Total
	UNCITRAL	SCC	ICSID	
Upheld /Sustain	4 (11.76%)	0 (0%)	4 (11.76%)	8 (23.52%)
Rejected /Dismiss/Declined	3 (8.82%)	1 (2.94%)	19 (55.88%)	23 (67.64%)
Arbitrator Resigned	2 (5.88%)	0 (0%)	1 (2.94%)	3 (8.82%)
Total	9 (26.47%)	1 (2.94%)	24 (70.58%)	34

In particular, only (8) requests have been upheld or sustained from the total of (34) disqualification requests submitted in oil and gas investor-state arbitration that is equivalent to (23.52%) of the disqualifications. Moreover, from the (8) successful requests of arbitrators, only (4) successful requests have been under the (ICSID) cases that is equivalent to (11.76%) of the disqualifications. Among those four, one of them was an arbitration was determined by reliance on the (IBA) Guidelines (*Perenco v. Ecuador*).[617] Whereas (19) requests of disqualification have been rejected under the (ICSID) cases that is equivalent to (55.88%) of the disqualifications, and only one arbitrator resigned. Therefore, the chances for success in disqualifying arbitrators seem considerably higher under the (UNCITRAL) rules than under the (ICSID) rules, especially when the number of arbitrators' resignations is taken into account.

[617] *Perenco* (n 479)

This is explained that there are inequities in the investor-state arbitration system concerning the standard and test of arbitration rules applied to determine the disqualification of arbitrators.

2.2. The Application of the Disqualification Standards to Specific Conflicts:

2.2.1. The Standard of Independence:

As discussed in chapter 1 (1.1.), the standard of "independence" covers the relationships between the arbitrators and the parties and their counsel, such as professional, business or social relationships. The test is used to avoid a potential bias of an arbitrator favouring one party to the arbitration.[618] Independence means that the international arbitrator has no inappropriate relationship with one of the parties. The lack of independence usually is caused by financial, professional or personal connections between an international arbitrator and one of the parties to the dispute.[619] Further, analysis of these judgments' outcomes based on successful or unsuccessful disqualification decisions has been issued by different arbitration rules. To understand whether these disqualification decisions under the standard of independence has been consistent or not. These decisions have been compared based on the (ICSID) test of independent judgment, the justifiable doubt test of (UNCITRAL) rules and (IBA) Guidelines on Conflict of Interest. Also, the decisions have been organised based on grounds of disqualifications under different arbitration rules.

2.2.1.1. Professional Relationship:

Meg Kinnear and Frauke Nitschke stated that the mere existence of a professional relationship between an arbitrator and a party or counsel is not an automatic basis for disqualification, and tribunals have considered a case-specific factor that indicates whether the arbitrator can make an impartial decision in these circumstances. These factors include the nature, extent, and duration of the relationship and whether the arbitrator is financially

[618] Markert (n 198).p.254
[619] Fry and Stampalija (n 12).p.193

dependent on the other party or counsel.[620] Accordingly, in oil and gas cases in investor-state arbitration, there were no successful disqualifications based on the professional relationship of arbitrators. However, when the disqualification has been brought under the (UNCITRAL) arbitration rules, it has led to the arbitrator's resignation, indicating that under (UNCITRAL) rules, the disqualification could have been successful.

Under the (UNCITRAL) rules, there was the case of *Murphy v. Ecuador*.[621] In this case, the Respondent's challenge Mr Tawil based on Mr Tawil's close relationship with the Claimant's counsel (King & Spalding's) gives rise to the appearance of a lack of impartiality and independence. In this case, Mr Tawil served with Claimant's counsel as co-counsel to the Claimant in two concluded (ICSID) arbitrations and as arbitrator in the *Universal Compression v. Venezuela* case. Also, one of King & Spalding's associates, Ms Silvia Marchili, worked as a junior associate in the legal team at (M. & M. Bomchil) headed by Mr Tawil. The Respondent claimed that these disclosures demonstrate a deep cooperation and reciprocal trust between Mr Tawil and the firm King & Spalding for many years. These facts would give rise to reasonable and justifiable doubts as to Mr Tawil's impartiality and independence.[622] Following the challenge, in his letter, Mr Tawil informed the parties that he would not continue to sit as an arbitrator in this case. However, the same arbitrators have been challenged in *Universal Compression v. Venezuela* under the (ICSID) arbitration rules.[623] In this case, Venezuela's proposal to disqualify Prof. Tawil has been rejected, even though it was on similar grounds to

[620] Meg Kinnear and Frauke Nitschke, 'Disqualification of Arbitrators under the ICSID Convention and Rules' in Chiara Giorgetti (ed), *Callenges and Recusals of Judges and Arbitrators in International Courts and Tribunals* (Brill 2015).p.53

[621]*Murphy Exploration & Production Company – International v. The Republic of Ecuador (II*), PCA Case No. 2012-16 (formerly AA 434).

[622]*Murphy Exploration & Production Company – International v. The Republic of Ecuador (II*), PCA Case No. 2012-16 (formerly AA 434), Request for Determination of Challenge of Mr. Guido Santiago Tawil as Arbitrator in Connection with the Notice of Arbitration under the UNCITRAL Arbitration Rules Company International of Murphy Exploration & Production (21 December 2011).p5-6

[623]*Universal Compression International Holdings, S.L.U. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/10/9.

his challenge in (*Murphy v. Ecuador)* [624] under the (UNCITRAL) rules.[625] In the Universal case, the (ICSID) Administrative Council Chairman considered that Tawil and King & Spalding LLP's connection did not give rise to a manifest lack of independence or impartiality. The Chairman reasoned that they had not acted as co-counsel since 2009 and that such a situation is included in section 4.4.2 of the (IBA) Guidelines' Green List. Therefore, the challenge could not succeed. Regarding the relationship between Tawil and his former associate, the Chairman pointed out that the former associate had resigned from that job five years earlier and that she was one of several lawyers on Tawil's team. The Chairman considered it difficult to see that the international arbitrator's independence or impartiality could be affected by such a previous relationship.[626] However, considering these reasons and facts provided by the Chairman of the (ICSID). If these facts and reasons have already existed during the Murphy case, it will remain questions why the arbitrator has resigned. This can only be understood as the arbitrator believes that it would lead to his disqualification under the independent standard test of the (UNCITRAL) rules.

Further, under the (ICSID) arbitration rules is the case of *Total SA v. Argentine*.[627] In this case, the Respondent filed a request for Disqualification of Ms Teresa Cheng as a member of the Annulment Committees. Argentina bases its request for disqualification on three main grounds: (i) the alleged contractual relationship between Freshfields, the Claimant's law firm in this annulment proceeding, and a member of the *ad-hoc* Committee; (ii) Ms Teresa Cheng's relationship with Claimants' counsels, breaches her duty of disclosure and her lack of transparency; and (iii) failure to disclose other relationships with Claimant's law firm.[628]

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[624] *Murphy* (n 621)
[625]*Universal Compression International Holdings, S.L.U. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/10/9, Decision on the Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Santiago Tawil, Arbitrators (20 May 2011).
[626] Fry and Stampalija (n 12).p.233-234
[627] *Total* (n 521)
[628]*Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Argentine Republic's proposal to disqualify Ms. Teresa Cheng (August 26, 2015) para 32.

However, the majority of the Committee rejected the disqualification of Ms Cheng considering that the contractual relationship between Ms Cheng and Freshfields refers to two specific legal services of short duration, provided by Ms Cheng to different companies, which unrelated to this arbitration, with a lapse of seven years between the two. Also, in both cases, the request for the service to the client was made by Freshfields through lawyers that have no involvement in this arbitration. [629] Also, the non-disclosure or later disclosure by Ms Cheng, in an honest exercise of discretion, does not, by itself, involve a lack of independence or impartiality under Article 14(1) of the (ICSID) Convention.[630] This indicates that the mere existence of a professional relationship will not be the ground for successful disqualification.

A final example is the case of *Stati and Others v. Kazakhstan* under the (SCC) Arbitration Rules.[631] In this case, the Respondent challenged the appointment of Prof. Sergei Lebedev by the Arbitration Institute of the (SCC) and argued that a member of the (SCC) Board, whose involvement in the appointment, was a Consultant in the King & Spalding firm, which is representing Claimants in this case.[632] However, the challenge was dismissed, having found no grounds for disqualification, as a (SCC) board member did not participate in the (SCC) Board's decisions on this case.[633]

2.2.1.2. Business Relationship and Contacts:

Lars Markert stated that the business contacts between an arbitrator and a party or its counsel are more likely to constitute a successful basis for an arbitrator challenge.[634] The most critical grounds for challenges related to an arbitrator's independence is an existing direct or indirect business relationship between the arbitrator and a party or its counsel. For example, an apparent

[629]ibid. para 122.
[630]ibid. para 141.
[631]*Ascom Group S.A., Anatolie Stati, Gabriel Stati and Terra Raf Trans Traiding Ltd. v. Republic of Kazakhstan*, SCC Arbitration V 116/2010.
[632]*Ascom Group S.A., Anatolie Stati, Gabriel Stati and Terra Raf Trans Traiding Ltd. v. Republic of Kazakhstan*, SCC Arbitration V 116/2010, Award (19 December 2013) para 12.
[633] ibid. para 16
[634] Markert (n 198).p.254

ground for a challenge would be if an arbitrator held a position or deliberately took on a position with one of the parties in the proceedings.[635] Also, if the arbitrator's law firm is representing one of the parties in unrelated investment arbitration, or if not the arbitrator him- or herself but only a partner has the business relationship or if the arbitrator is not even aware of his or her business relationship with a party.[636] Accordingly, in oil and gas cases in investors-state arbitration, the only successful disqualification was under (UNCITRAL) rules by two successful disqualifications based on arbitrators' business relationship. However, when the disqualifications have been brought under the (UNCITRAL) arbitration rules, all the disqualifications have been successful either for a direct or indirect business relationship. While under the (ICSID) rules, it has led to non-successful disqualification.

An example of successful disqualification based on a direct business relationship is the recent case of *Nord Stream 2AG v. The European Union (EU)* under the (UNCITRAL) rules.[637] In this case, the challenge brought by the Respondent against Mr Peter Rees Qc based on Mr Rees' financial interest in Royal Dutch Shell Plc (Shell), a financing partner of the Claimant on the project, a Pipeline Project, that forms part of the subject matter of this arbitration. Further, the Respondent cited Mr Rees' former employment as Shell's Legal Director and its Executive Committee member.[638] The decision stated that it is clear from the parties' materials that shell has a significant financial interest in the Claimant the Nord Stream 2 Project. In this light, a relationship with Shell on the part of an arbitrator could give rise to justifiable doubts about his or her impartiality or independence in a dispute involving the Nord Stream 2 project in the eyes of an objective, reasonable, and informed the third party.[639]

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[635] ibid.p.256
[636] ibid.p.257
[637] *Nord Stream 2 AG v. European Union*, PCA Case No. 2020-07
[638] *Nord Stream 2 AG v. European Union*, PCA Case No. AA761, Decision on Challenge to Peter Rees Qc (9 December 2019) para 2
[639] ibid. para 31

Further, about Mr Rees' connections with Shell as Legal Director of Shell and member of its Executive Committee, it would be reasonable to consider that the Nord Stream 2 project was a matter discussed at Shell by its Executive Committee.[640] Thus, the decision considered that, from the perspective of an objective, reasonable, and informed the third party, Mr Rees' previous and present connections with Shell, taken together, give rise to justifiable doubts about his impartiality and independence. Therefore, the Respondent's challenge was upheld.[641] The second successful example of oil and gas cases related to arbitrators' business relationship is *Yukos, Hulley and Veteran VPL v. Russia* under the (UNCITRAL) arbitration rules.[642] In this case, the three arbitration cases were heard in parallel with the Parties' full participation at all relevant stages of the proceedings. Mindful of the fact that each of the three Claimants maintains separate claims in separate arbitrations.[643] Claimants appointed Prof. Gabrielle Kaufmann-Kohler as an arbitrator; she disclosed certain circumstances connecting her then law firm to Claimants and Claimants' counsel, which, in her view, did not affect her independence and impartiality. Based on that relationship, Russia challenged the Claimants' appointment of Prof. Kaufmann-Kohler.[644] The Secretary-General of the (PCA) sustained the challenge of Prof. Kaufmann-Kohler as arbitrator.[645] The disclosure made by the arbitrator regarding her law firm, which might consider her indirect involvement, was enough ground for the (PCA) to sustain the challenge, regardless of disclosure made.

[640]ibid. para 32
[641]ibid. para 34
[642]*Hulley Enterprises Ltd. v. The Russian Federation*, PCA Case No. 2005-03/AA226, and *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. 2005-04/AA227, and *Veteran Petroleum Limited v. The Russian Federation*, PCA Case No. 2005-05/AA228. In this case, the three controlling shareholders of OAO Yukos Oil Company, collectively Claimants, initiated arbitrations against the Russian Federation.
[643]*Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. AA227, Final Award (18 July 2014) para 2
[644]*Hulley Enterprises Ltd.* (Cyprus) *v. The Russian Federation*, PCA Case No. AA226, Interim Award on Jurisdiction and Admissibility (30 November 2009) para 15
[645]ibid. para 15

However, in a similar but not identical situation is *Mobile v. Argentina's case* under the (ICSID) arbitration rules.[646] In this case, Argentine proposed the disqualification of the three members of the Tribunal. The challenge is based on the Tribunal's ruling refusing Argentina's request to remove the Tribunal's Independent Financial Expert, who failed to disclose the existence of a marketing agreement between (his employer) and the consulting firm of the Claimants' experts on damages.[647] In this case, the Chairman stated that the mere existence of an adverse ruling, such as the Tribunal's decision not to remove the Tribunal's Independent Financial Expert, is insufficient to prove a manifest lack of impartiality or independence. Thus, the disqualification was rejected.[648] Although the business relationship has existed with no disclosure, the decision was rejected in this case. However, when considering the successful case of *Yukos, Hulley and Veteran VPL v. Russia*,[649] it can be concluded that the mere existence of a business relationship is a ground of disqualifying in (UNCITRAL) whereases under (ICSID) is not a ground for disqualifying. This conclusion can explain the rejections made to all the disqualification requests made in the latter case, *ConocoPhillips v. Venezuela*, under the (ICSID) arbitration rules.[650] In this case, there have been six proposals for disqualifying arbitrators. In the first proposal, claimant-appointed arbitrator L. Yves Fortier disclosed the merger of the firm he was a partner, Norton Rose OR LLP, with Macleod Dixon LLP.[651] In his disclosure, Mr Fortier stated that Macleod Dixon LLP's Caracas office had provided legal services to ConocoPhillips Company; and is acting adversely to Venezuela's interests in certain matters, including one (ICSID) case Universal Compression International against Venezuela.

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[646]*Mobil Exploration and Development Argentina Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic,* ICSID Case No. ARB/04/16

[647]*Mobil Exploration and Development Argentina Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic,* ICSID Case No. ARB/04/16, Decision on The Proposal to Disqualify All Members of The Arbitral Tribunal (4 June 2015) para 11 and para 24

[648]ibid. para 40

[649] *Yukos, Hulley and Veteran VPL* (n 642)

[650] *ConocoPhillips Petrozuata B.V. and Others* (n 603)

[651]*ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on The Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator (27 February 2012) para 1

[652] After this disclosure was made, Venezuela filed a proposal to disqualify him. In this respect, the unchallenged arbitrators rejected the challenge. The decision was mainly based on the terms of Fortier's disclosure, which stated that he was not involved in the merger negotiation, nor did he work on or become exposed to any questions concerning Macleod Dixon's arbitrations involving Venezuela.[653] As a result of this decision, Venezuela challenged again Mr Fortier on the third challenge, which was rejected as Venezuela claimed that Mr Fortier should be disqualified based on his ongoing relationship with Norton Rose in the Yukos arbitrations.[654] The decision stated that the disqualification was rejected as it is irrelevant to a determination of Mr Fortier's independence or impartiality in this case. The Yukos arbitrations involved different parties, facts, and treaties than the present case.[655] The fourth proposal to disqualify Mr Fortier was also based on his ongoing relationship with Norton Rose in Yukos arbitration, which was dismissed as it must be capable of being related to the present case.[656] However, the fifth and sixth challenges were also rejected. It did not provide any support or new facts that Mr Fortier's ongoing relationship with Norton Rose manifestly lacks the ability to act impartially between the parties in the present arbitration.[657] Also, these relationships were an indirect and purely administrative tie with Norton Rose.[658]

[652]ibid. para 2
[653] Fry and Stampalija (n 12).p.239
[654]*ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on The Proposal to Disqualify a Majority of The Tribunal (1 July 2015) para 92
[655]ibid. para 95
[656]*ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on The Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator (15 December 2015) para 40
[657]*ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on The Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator (15 March 2016) para 35
[658]*ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on The Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator (26 July 2016) para 16

2.2.1.3. Personal Relationship and Social Contacts:

Personal relationships have also been the basis for challenges, and this fact alone has been held not to prove bias. The nature and extent of the acquaintance are relevant to (ICSID) convention articles 14 and 57. Thus, an arbitrator who formerly was co-counsel did not violate article 14, especially where there was no evidence that similar legal issues would be considered and the relationship has not placed the appointing counsel in a privileged position to anticipate the arbitrator's views.[659] However, the mere social contacts between an arbitrator and a party or its counsel are unlikely to be a successful basis for an arbitrator challenge. At least as long as the contacts were occasional and purely social, and no additional facts can be established, tribunals are not likely to find a manifest lack of independence.[660]

An example of successful disqualification under the (ICSID) rules is *Big Sky Energy Corporation v. Kazakhstan*.[661] Unfortunately, the (ICSID) website did not publish any documents on this case. Still, the (ICSID) website provides that the Claimant filed a proposal for disqualifying arbitrator Rolf Knieper, which the co-arbitrators upheld. However, Chloe J Carswell and Lucy Winnington-Ingram stated that the challenge centred on Prof. Knieper's previous work as a German employed consultant on various legal reforms across central Asia. In particular, it was alleged that Prof. Knieper's work had brought him into close contact with members of the Kazakh judiciary, whose actions the Claimant criticises.[662]

2.2.1.4. Nationality:

An example of removing an arbitrator based on his nationality is *RSM Production Corporation v. the Central African Republic* under the (ICSID) arbitration rules.[663] During this case's annulment procedures, RSM submitted a disqualification request of Ms Nayla Comair-Obeid, appointed by the Central African Republic (CAR). Finally, Ms Comair-Obeid presented

[659] Kinnear and Nitschke (n 618).p.54-55
[660] Markert (n 198).p.254
[661] *Big Sky Energy Corporation v. Republic of Kazakhstan*, ICSID Case No. ARB/17/22
[662] Carswell and Winnington-Ingram (n 595).p.148
[663] *RSM Production Corporation v. Central African Republic*, ICSID Case No. ARB/07/2

her resignation by letter, based on Article 52.3 of the (ICSID) Convention. In this case, the Court, whose Award is the subject of the request for annulment, was notably composed of two arbitrators of French nationality. Mrs Comair- Obeid being the holder of the Lebanese and French dual nationality, could not sit on the *ad hoc* Committee.[664] This is due to Article 52(3) forbids *ad hoc* Committee members who share the same nationality as members of the original Tribunal. Finally, an *ad hoc* Committee was constituted by Bernardo Cremades, Fernando Mantilla Serrano and Abdulqawi Ahmed Yusuf.[665]

2.2.2. The Standard of Impartiality:

As discussed in chapter 1 (1.1.), impartiality refers to the absence of bias towards one of the parties; in other words, a lack of impartiality can be characterised as a preference for or antipathy towards one of the parties.[666] The lack of impartiality may derive from a prejudgment made by the international arbitrator regarding one of the parties or the questions to be answered in the international arbitral proceedings.[667] In investment arbitration, the question of impartiality or issue conflicts plays a significant role. The reason for that is; first, investment arbitration awards and decisions are usually publicised. This makes it easier to discern how an arbitrator or an arbitral tribunal have ruled on a particular issue.[668] Second, nowadays, investment arbitrations based on (BITs) have become the norm. Although (BIT) provisions might be differently worded, they often cover the same aspects of investor protection. This also means that arbitrators will often have to decide on very similar aspects of the case.[669] Therefore, it seems possible to identify different subgroups for the criterion "impartiality", such as deciding similar legal issues in prior cases, arbitrators' role conflict, repeated appointments and arbitrators' opinion in public statements or publications. This section will understand whether

[664]*RSM Production Corporation v. Central African Republic,* ICSID Case No. ARB/07/2, Decision on Annulment (20 February 2013) para 18
[665]ibid. para 19
[666] Fry and Stampalija (n 12).p.193
[667] ibid.p.193
[668] Markert (n 198).p.261
[669] ibid.p.261

the disqualification decisions based on these subgroups under the standard of impartiality has been consistent or not under different arbitration rules.

2.2.2.1. Deciding on Similar Legal Issues in Prior Cases:

Whether an arbitrator having once decided an issue of law in a prior case can nevertheless be impartial when the same issue is raised in a later case. Rubins and Lauterburg stated that this particular problem is unique to investment arbitration, given the recurring nature of investment protection law questions and treaty interpretation questions.[670] However, Kinnear and Nitschke stated that the fact that an arbitrator rendered a decision against the Respondent in a prior case, where there were no common facts, is insufficient to establish a lack of impartiality.[671] Also, a difference of opinion among tribunal members on an interpretation of a factual or legal matter, or the fact that an arbitrators' decision in a prior case is subject to an annulment application, do not establish an absence of impartiality. Nor does an arbitrator make a procedural ruling adverse to a disputing party or refuse an application for reconsideration by a disputing party. Generally, the Tribunal has held that deciding similar legal issues in concurrent or consecutive arbitrations does not establish bias.[672]

Accordingly, in oil and gas cases in investors-state arbitration, there was only one successful disqualification of an arbitrator under (ICSID) rules based on deciding a similar legal issue in a prior case. In contrast, three other disqualifications had been rejected. The successful example was in *Caratube & Mr Devincci Salah Hourani v. Kazakhstan* under the (ICSID) arbitration rules.[673] The Claimants proposed Mr Bruno Boesch's disqualification that Mr Boesch manifestly cannot be independent and impartial in this arbitration. He served as the arbitrator appointed by Kazakhstan in the case of (*Ruby Roz v. Kazakhstan)*[674]. The Claimants

[670] Rubins and Lauterburg (n 440).p.177
[671] Kinnear and Nitschke (n 618).p.55
[672] ibid.p.55-56
[673] *Caratube* (n 526)
[674] *Ruby Roz Agricol LLP v. Kazakhstan*, UNCITRAL, Award on Jurisdiction, (2013)

claim obvious similarities between the Ruby Roz case and the present arbitration.[675] Therefore, the unchallenged arbitrators upheld the disqualification request based on the significant overlap and relevance in the underlying facts and legal issues between the Ruby Roz case and the present arbitration. A reasonable and informed third party would find it highly likely that Mr Boesch would prejudge legal issues in the present arbitration based on the facts underlying the Ruby Roz case.[676]

On the other hand, all the disqualifications declined when there is no similarity in the fact and legal issue decided in a prior case. The first example is the case of *Repsol v. Argentina* under the (ICSID) arbitration rules.[677] Argentina proposed the recusal of Prof. Vicuña and Dr. von Wobeser.[678] Starting with Prof. Vicuña, the challenge was based on an alleged bias against Argentina due to his role as President in three arbitral tribunals in (*CMS, Enron* and *Sempra)*[679] cases in which Argentina was involved. These cases' decisions were then annulled by *ad hoc* committees with serious criticism of the annulled decisions.[680] On the other hand, the challenge for von Wobeser's based on the basis that a claimant appointed him in the (CIT) case against Argentina in 2004.[681] The challenges were rejected by the Chairman of (ICSID's) Administrative Council. The decision was based on Prof. Vicuna's challenge, the (CMS, Enron and Sempra) cases based on different facts and rules than those discussed in the Repsol case.[682] Also, concerning the challenge of von Wobeser, the Chairman explained that the 2004 arbitration dealt with different facts and different treaties than the one involved in the present

[675]*Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on The Proposal for Disqualification of Mr. Bruno Boesch (20 March 2014) para 24
[676]ibid. para 90
[677]*Repsol, S.A. and Repsol Butano, S.A. v. Argentine Republic*, ICSID Case No. ARB/12/38
[678]*Repsol, S.A. and Repsol Butano, S.A. v. Argentine Republic*, ICSID Case No. ARB/12/38, Decision on The Proposal to Disqualify the Majority of The Tribunal (13 December 2013) para 18
[679] *CMS Gas Transmission Co. v. Th e Argentine Republic*, ICSID Case No. ARB/01/8, *Enron Corporation Ponderosa Assets, L.P. v. Th e Argentine Republic*, ICSID Case No. ARB/01/3, *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16
[680] Fry and Stampalija (n 12).p.244
[681] ibid.p.244
[682]*Repsol* (n 678). para 77

case and that the case was settled in 2009.[683] Interestingly, this challenge is the transparency in including the arbitrator's declarations and comments under (ICSID) arbitration rule 6(2).[684]

Further, a rejected disqualification was based on not filing the disqualification request promptly in *Interocean v. Nigeria* under the (ICSID) arbitration rules.[685] Nigeria proposed the disqualification of Prof. Park based on his failure to disclose that he was acting as arbitrator in an arbitration between (*TOTAL et al. v. NNPC* Arbitration),[686] which was decided on a similar issue and overlapped with the issues in this case.[687] However, the Chairman notes that the proposal was not filed promptly for Arbitration Rule 9(1).[688] A final example is *Aktau Petrol Ticaret A.Ş. v. Kazakhstan* under the (ICSID) arbitration rules.[689] The (ICSID) website did not publish any documents on this case, but the (ICSID) website shows that the Respondent filed a proposal for disqualification of arbitrator Bernard Hanotiau. However, based on his involvement in the Rumeli case, the challenge was that Kazakhstan's claim involved similar issues of facts of law to this case. The unchallenged arbitrators decided that the challenge was declined because the issue was not "similar fact evidence" as the factual situations it raised were quite different.[690]

2.2.2.2. Repeat Appointments:

Federica Cristani stated that participation in previous proceedings had not formed the basis of disqualification of arbitrators in (ICSID) cases.[691] Further, Kinnear and Nitschke claimed

[683]ibid. para 83
[684] Fry and Stampalija (n 12).p.246
[685]*Interocean Oil Development Company and Interocean Oil Exploration Company v. Federal Republic of Nigeria*, ICSID Case No. ARB/13/20
[686] *TOTAL Exploration & Production Nigeria Ltd., Chevron Petroleum Nigeria Ltd., Nexen Petroleum Nigeria Ltd., and Esso Exploration and Production Nigeria (Offshore East) Ltd.v.* ***v****. Nigerian National Petroleum Corporation (NNPC), Ad Hoc* tribunal 2013
[687]*Interocean Oil Development Company and Interocean Oil Exploration Company v. Federal Republic of Nigeria*, ICSID Case No. ARB/13/20, Decision on The Proposal to Disqualify All Members of The Arbitral Tribunal (3 October 2017) para 34,35
[688]ibid para 76
[689]*Aktau Petrol Ticaret A.Ş. v. Republic of Kazakhstan*, ICSID Case No. ARB/15/8
[690] 'Hamid Gharavi and Melanie Van Leeuwen Secure a Third Consecutive Victory against Kazakhstan for a US$ 30 Million Award' (*Derains & Gharavi International*, 2017) <http://www.derainsgharavi.com/2017/11/hamid-gharavi-and-melanie-van-leeuwen-secure-a-third-consecutive-victory-against-kazakhstan-for-a-us-30-million-award/> accessed 13 October 2020.
[691] Cristani (n 73).p.171

that several challenges have argued that the repeat appointment of an arbitrator by the same party or counsel can sustain a challenge. However, the simple fact of repeat appointment by the same party, without more, did not manifest a lack of independence.[692] Therefore, there are types of additional circumstances that might influence the arbitrator's judgments, such as a regular appointment with financial benefits or a material risk that factors outside the record may influence the arbitrator in their knowledge derived from other cases.[693] Accordingly, as stated above, the simple fact of repeat appointments cannot make successful disqualification. This was the case in oil and gas cases; there was only one disqualification of the arbitrator in Murphy's case under (UNCITRAL) rules, which led to the arbitrator's resignation based on multiple appointments; there were five other disqualifications that had been rejected. None of the disqualifications' requests based on repeat appointments in oil and gas cases has confirmed that arbitrators create a financial dependence or influence their judgment by these appointments.

The first example of oil and gas cases related to repeat appointments of arbitrators is *BG Group Plc v. Argentina* under the (UNCITRAL) arbitration rules.[694] Argentina challenged Professor Albert Jan van den Berg according to Article 11 of the (UNCITRAL) Rules. Argentina agreed to submit the challenge to the (ICC) Court as appointing authority.[695]Argentina's challenge was based on Prof. Berg's appointment as arbitrator by claimants in four arbitrations (LG&E, BG, Enron) and in a case brought by Italian nationals.[696] Due to his arbitrary and abrupt change of mind regarding the State of Necessity between the (LG&E and Enron) decisions, which Berg never even tried to explain through a separate

[692] Kinnear and Nitschke (n 618).p.57
[693] ibid.p.57-58
[694]*BG Group Plc. v. The Republic of Argentina, Ad Hoc* UNCITRAL Arbitration 2003
[695]*BG Group Plc. v. The Republic of Argentina, Ad Hoc* UNCITRAL Arbitration 2003, Final Award (24 December 2007) para 8,11
[696]*The Republic of Argentina v. BG Group Plc.* Case no 08-0485 (RBW), Petition To Vacate or Modify Arbitration Award, (US District Court for The District of Columbia 2008) para 71

opinion, Argentina challenged Berg in this proceeding. However, the (ICC) Court rejected the challenge without providing any reasons.[697] However, a separate statement by Judge Reggie Walton explains that there may be a material factual distinction between this case and the (LG&E) case. It may be that (LG&E) failed to articulate a persuasive argument. At the same time, BG Group and the other litigants have since raised convincing challenges. Thus, there is no basis for concluding that Jan van den Berg was biased.[698]

However, another example of oil and gas cases under the (UNCITRAL) arbitration rules is *Murphy v. Ecuador's case*.[699] In this case, Murphy challenged Ecuador's appointment of Prof. Brigitte Stern in the second challenge. The challenge was based on Prof. Stern's consistent record of appointments by the Respondent States that justifiably gives rise to doubts regarding her impartiality and independence.[700] In her letter, Prof. Stern informed the parties that she would not continue to sit as an arbitrator in this case. On the other hand, Prof. Stern was challenged in the other three (ICSID) cases that share similar challenges in the previous (UNCIRTAL) case. However, the challenge of Prof. Stern in these three cases have been all rejected. The three cases are *Universal Compression v. Venezuela*,[701] *Tidewater v. Venezuela*[702]and *Petroceltic Holdings and Petroceltic Resources v. Egypt* under the (ICSID) arbitration rules.[703] In the Universal case, the decision rejected the disqualification. It stated that no objective fact had been presented that would suggest that the multiple appointments would manifestly impact Prof. Stern's independence or impartiality by Respondent.[704]

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[697]ibid. para 75
[698]*The Republic of Argentina v. BG Group Plc.* Case no 08-485 (RBW), Memorandum Opinion, (US District Court for The District of Columbia 2008) p.21
[699]*Murphy* (n 621)
[700]*Murphy Exploration & Production Company – International v. The Republic of Ecuador (II*), PCA Case No. 2012-16 (formerly AA 434), Notice of Challenge to Prof. Brigitte Stern (28 November 2011).p 2
[701]*Universal* (n 623)
[702]*Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/10/5
[703]*Petroceltic Holdings Limited and Petroceltic Resources Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/19/7
[704]*Universal* (n 625) para 77

Further, Prof. Stern's non-disclosure of publicly available information about her previous appointments by Venezuela does not evidence a manifest lack on her part of independence or impartiality.[705] Also, Tidewater argues that the objective doubts about Prof. Stern's independence and impartiality have been compounded by her failure to disclose the multiple appointments.[706] However, the decision state that non-disclosure would itself indicate a manifest lack of impartiality only if the facts or circumstances surrounding such non-disclosure are of such gravity as to call into question the arbitrator's ability to exercise independent and impartial judgment.[707] The Two Members consider that Prof. Stern's failure to disclose was an honest exercise of judgment on her part in the belief that publicly available information did not require specific disclosure.[708] On the other hand, in the Petroceltic case, the Claimants' disqualification of Prof. Stern was based on her failure to meet her disclosure obligations, her repeated appointments by States, and her repeated appointments by Egypt six times.[709] However, the (ICSID) website provided that the co-arbitrators declined the proposal for disqualification of Prof. Brigitte Stern without publishing any document for this decision.

On the other hand, it should be noted that an interesting issue of the four cases, of which Prof. Stern had been challenged, is that they all almost shared the same grounds of challenges, the same challenged arbitrator, and a different legal standard adapted to decide the challenges. Indeed, when the challenge was submitted under the (UNCITRAL) rules, which adapt the justifiable doubt test of independence and impartiality of arbitrators, Prof. Stern has resigned from her position as arbitrator in the case of Murphy. Differently, the other three challenges of which submitted under the (ICSID) rules of which adapt the standard of independent judgment,

[705]*Universal* (n 625) para 95
[706]*Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/10/5, Decision on Claimants' Proposal to Disqualify Professor Brigitte Stern, Arbitrator (23 December 2010) para 16
[707]ibid. para 40
[708]ibid. para 55
[709]*Petroceltic Holdings Limited and Petroceltic Resources Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/19/7, Claimants' Letter Request to Disqualify Professor Brigitte Stern (10 December 2019) p. 1

all three challenges were rejected. In these three decisions, it had been stated that the mere fact of holding multi appointments without influence or dependence does not manifestly lack the independence and impartiality of the arbitrator. Thus, it remains questioned, if these three challenges have been submitted under the (UNCITRAL) rules, would Prof. Stern have resigned from her positions or remain confident that she will survive those challenges.

Furthermore, *OPIC Karimum Corporation v. Venezuela* under the (ICSID) arbitration rules is a final example of repeated appointment disqualification.[710] OPIC Karimum Corporation requested the disqualification of Prof. Sands, based on his multi appointments by Respondent's counsel; and his multi appointments by Respondent, Venezuela.[711] However, the challenge was rejected by the unchallenged members of the Tribunal. In their decision, the Tribunal stated that it does not agree with the Tidewater case that multiple appointments as arbitrators by the same party in unrelated cases are a neutral factor in considerations relevant to a challenge. [712] Thus, the decision stated that multiple appointments by the same party or counsel could not be considered neutral as far as the independence and impartiality of the arbitrator is concerned. The Tribunal then referred to Sands' multiple appointments by the Respondent's counsel Curtis Mallet. The Tribunal determined that they were only two unrelated cases, which did not seem enough to prove Sands' manifest lack of independence.[713]

2.2.2.3. The Comments and Academic Publications:

An example of an arbitrator's statement or comments in a case or publication is that prior academic writings on specific topics in investment arbitration could raise doubts about whether an arbitrator has prejudged a particular issue in dispute. However, Lars Markert stated that prior academic writings automatically raised doubts about an arbitrator's impartiality. It would lead to the result that experts' specialised knowledge would not be published anymore and

[710]*OPIC Karimum Corporation v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/10/14
[711]*OPIC Karimum Corporation v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/10/14, Decision on The Proposal to Disqualify Professor Philippe Sands, Arbitrator (5 May 2011) para 7
[712]ibid. para 47
[713] Fry and Stampalija (n 12). p.232

could not be used in arbitration proceedings.[714] Therefore, the better view seems that prior academic writings in the absence of other clear signs of an arbitrator's bias should not form grounds for a successful challenge.[715] On the other hand, concerning public statements and comments by arbitrators, Lars Markert stated that public statements and comments connected with the arbitral proceedings are more likely to constitute grounds for a successful challenge.

In contrast, general comments do not seem to be suspicious.[716] Accordingly, the successful disqualifications in oil and gas cases were based on a published comment in an interview and a comment made by an arbitrator in his explanation letter; both comments were connected with the pending arbitral proceedings. This confirms what Lars Market have highlighted about arbitrators' comments above. However, the disqualification request was dismissed when the arbitrator's comments were made general and to clarify and emphasise the arbitrator's point. Further, no disqualification was based on prior academic publications in oil and gas cases.

For example, the two successful disqualifications based on comments made by arbitrators, the first was *Burlington Resources, INC v. Ecuador* under the (ICSID) arbitration rules.[717] Ecuador proposed the disqualification of Prof. Vicuña based on his comments in his explanation and his questions in a telephone conference to undermine Ecuador's position.[718] However, the Chairman stated that Prof. Vicuña's written explanations include an allegation about the ethics of counsel for the Republic of Ecuador. Such comments do not serve any purpose in addressing the arbitrator manifestly lacking independence or impartiality. In the Chairman's view, such comments manifestly evidence an appearance of lack of impartiality

[714] Markert (n 198).p.263
[715] ibid.p.263
[716] ibid.p.264-265
[717] *Burlington* (n 601)
[718] *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on The Proposal for Disqualification of Professor Francisco Orrego Vicuna (13 December 2013) para 30, 36

concerning the Republic of Ecuador and its counsel. Accordingly, the Chairman decides that the proposal to disqualify Prof. Vicuña is upheld.[719]

Further, the second example is the case of *Perenco Ecuador Limited v. Ecuador* under the (ICSID) arbitration rules.[720] However, the parties had agreed that any arbitrator challenges would be resolved by the Secretary-General of the Permanent Court of Arbitration (PCA), applying the (IBA) Guidelines on Conflicts of Interest.[721] Ecuador became aware of a published interview given by the Hon. Charles N. Brower, in which he made comments about Ecuador and the pending (ICSID) proceedings. Those comments gave rise to the Respondents' request that Judge Brower be disqualified.[722] Ecuador argues that Judge Brower's interview gave rise to a strong appearance of bias. The combination of the words chosen by Judge Brower, such as recalcitrant host countries and the context in which he used them, had the overall effect of painting an unfavourable view of Ecuador in such a way as to give a reasonable and informed third party justifiable doubts as to Judge Brower's impartiality.[723] However, the Secretary-General of (PCA) has sustained the challenge against the Hon. Charles N. Brower as an arbitrator for the reason that, from the point of view of a reasonable third person, the comments made by Judge Brower in an interview published constitute circumstances that give rise to justifiable doubts as to Judge Brower's impartiality or independence.[724] One must note that the (ICSID) Convention threshold, the term "manifest" under article 57 of the (ICSID) Convention, is significantly higher than the threshold provided by the (IBA) Guidelines. In this respect, one may argue that Judge Brower's challenge may not have succeeded under the regular (ICSID) procedure.[725]

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[719]ibid. para 79, 80
[720]*Perenco* (n 479)
[721]*Perenco Ecuador Limited v. Republic of Ecuador*, PCA Case No. IR-2009/1, Decision on Challenge to Arbitrator (8 December 2009) para 2
[722]ibid. para 3
[723]ibid. para 48,49
[724]ibid. para.11
[725] Cristani (n 73).p.169-170

On the other hand, the unsuccessful disqualification, which was rejected, is *RSM Production Corporation v. Saint Lucia* under the (ICSID) arbitration rules.[726] The Claimant (RSM) proposed the disqualification based upon Dr Griffith's assenting reasons to the decision on St. Lucia's request for security for costs.[727] The Claimant's opinion that Dr Griffith's comments reveal bias against third-party funders and funded claimants. The description of third-party funders as "mercantile adventurers" and the association with "gambling" are, in Claimant's view, radical in tone and negative and prejudge the question of whether a funded claimant will comply with a costs award.[728]Additionally, the Claimant derives from Dr Griffith's determinations that his alleged bias against the funders extends to the Claimant and the funded party.[729] However, the decision stated that the standard required that Dr Griffith's statements in his Assenting Reasons manifestly, i.e. obviously, reveal bias regarding the conduct of the proceeding from an objective point of view. [730] The decision stated that these expressions primarily clarify and emphasise Dr Griffith's point. Thus, the Claimant's proposal for the disqualification of Dr Griffith was dismissed.[731]

2.2.2.4. Role Conflict "Double Hat":

The issue of arbitrators' role conflict considers whether an arbitrator who acts in different capacities, as counsel or arbitrator, in multiple investment cases should be disqualified, which is still an unresolved problem in investment arbitration. Kinnear and Nitschke have stated two arguments; the first argument is that there should be a strict division between these roles and that individuals should not play these roles simultaneously.[732] The second argument is that the mere fact of playing a different role in different cases is inconclusive as to whether there is a

[726]*RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10
[727]*RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Claimant's Proposal for The Disqualification of Dr. Gavan Griffith QC (23 October 2014) para 39
[728]ibid. para 41, 42
[729]ibid. para 42
[730]ibid. para 76
[731]ibid. para 84
[732] Kinnear and Nitschke (n 618).p.59-60

conflict of interest, and in a field with relatively few experts and few cases, that ability to play different roles is essential to developing arbitrators with experience, knowledge and a realistic perspective.[733] However, Lars Markert has stated that the persistent plea for a specific argument in the role of a counsel in one case might at least influence the same person's perception of the identical issue when sitting as an arbitrator. Therefore, as long as the (UNCITRAL) Arbitration Rules and the (IBA) Guidelines form the applicable standards, it seems unlikely that an arbitrator acting simultaneously as counsel for or against one of the parties in another related matter will survive a challenge.[734] Indeed, when the disqualifications have been submitted under the (UNCITRAL) Rules, the arbitrator has resigned from his position in oil and gas cases. While the same arbitrator has been challenged on similar grounds on a different case under the (ICSID) rules, the disqualification has been rejected.

However, there were three disqualifications in oil and gas investor-state arbitration, which have been based on arbitrators' role conflict grounds. The first example, in which the arbitrator has resigned, is *Murphy v. Ecuador* under the (UNCITRAL) Arbitration Rules.[735] The case has been mentioned earlier under the ground of arbitrators' professional relationships; however, one of the grounds of this challenge was role conflict. In this case, Ecuador challenged Mr Tawil based on a close relationship with the Claimant's counsel (King & Spalding's) that Mr Tawil served together with Claimant's counsel in this case as co-counsel to the Claimant in two concluded (ICSID) arbitrations. After this challenge, the arbitrators informed the parties of his resignation from his position.[736] The second disqualification was rejected in *Universal Compression v. Venezuela* under the (ICSID) arbitration rules.[737] The case has been mentioned earlier under the ground of professional relationships. However, one of the grounds of the

[733] ibid.p.60
[734] Markert (n 198).p.266
[735] *Murphy* (n 621)
[736] *Murphy* (n 622). p. 5
[737] *Universal* (n 623)

disqualification proposed by Venezuela is that Prof. Tawil served as co-counsel with King & Spalding LLP to claimants in specified (ICSID) cases that purportedly had recently concluded or were pending.[738] The Chairman of the (ICSID) rejected the disqualification considering that the connection between Tawil and King & Spalding LLP did not give rise to a manifest lack of independence or impartiality. The Chairman reasoned that they had not acted as co-counsel since 2009 and that such a situation is included in section 4.4.2 of the (IBA) Guidelines' Green List. Therefore, the challenge could not succeed.[739]

The third example is the case of *Repsol v. Argentina* under the (ICSID) arbitration rules.[740] However, in the second disqualification in this arbitration, Argentina proposed the recusal of Dr. von Wobeser, following Article 57 of the (ICSID) Convention.[741] Dr. von Wobeser's challenge was based on the fact that he was co-counsel with Freshfields, the Repsol Counsel, in an (ICC) arbitration that finished in 2004. That relationship was only disclosed after Argentina expressly asked about this.[742] However, the challenge was rejected because the 2004 arbitration referred to different facts and another (BIT) than the one involved in the present case.[743]

2.2.2.5. Delay or Failure to Act on Parties' Motions:

Chevron and TexPet v. Ecuador's case under the (UNCITRAL) arbitration rules is an example of this issue.[744] Ecuador requested all three members of the Tribunal to recuse themselves.[745] The challenge was rejected regarding all three Tribunal members by the Secretary-General of the Permanent Court of Arbitration in his capacity as appointing authority.[746] Ecuador's challenge resulted from a series of events that gave Ecuador reasonable

[738] *Universal* (n 625) para 11
[739] Fry and Stampalija (n 12).p.233
[740] *Repsol* (n 677)
[741] *Repsol* (n 678) para 18
[742] Fry and Stampalija (n 12).p.245
[743] ibid.p.245
[744] *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, PCA Case No. 2009-23
[745] *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, PCA Case No. 2009-23, Decision on Track 1B (12 March 2015) para 34
[746] ibid. para 35

doubt, both regarding the Tribunal's impartiality and its capacity to dedicate the necessary time to the arbitration. The challenge was based on the Arbitral Tribunal's refusal to rule on the Ecuadorian State's urgent motions.[747] From Ecuador's point of view, was the Tribunal's reluctance to call and schedule an in-situ visit to the Ecuadorian Amazon Region, where oil production activities had polluted the environment, the record shows that the Tribunal lacked time to rule on these urgent motions of the State, or, in other words, its dedication of resources to considering and resolving the petitions of the Claimants promptly, without showing the same respect for Ecuador's motions, gives the appearance of bias.[748] Any reasonable observer would conclude that the Tribunal's conduct could be characterised as a "failure to act" for purposes of the (UNCITRAL) Rules and the Dutch Rules of Arbitration (the *lex arbitri* of the proceedings). The Tribunal took nearly three years to decide whether it was convenient to make an in-situ visit, which was later cancelled due to the "ongoing discrepancies" between the parties and the lack of availability of members of the Tribunal.[749] For Ecuador, it was also clear from the facts and circumstances of the arbitration proceedings that a reasonable observer would have justifiable doubts regarding the Tribunal's impartiality.[750] Although the decision was not published, it has been stated that the Permanent Court of Arbitration (PCA) approach in *Chevron v Ecuador* is instructive. It noted that the standard governing challenge is objective, and the question should be viewed from the perspective of a reasonable and informed third party. The (PCA) Secretary-General made it clear that it was not his role to substitute his views on the underlying matters for those of the Tribunal. Instead, his responsibility was to scrutinise the integrity of the Tribunal's proceedings and decisions: not to assess the wisdom and

[747] Diego García Carrión (ed), *Chevron Case: Ecuador's Defense on the Claimants Abuse of Process in International Investment Arbitration* (Procuraduría General del Estado Ecuador 2015).p.157
[748] ibid.p.157
[749] ibid.p.158
[750] ibid.p.158

correctness of the actions of the arbitrators, but instead to decide whether there were procedural failings that are "so manifestly unreasonable that bias is the most likely explanation for them.[751]

2.2.2.6. Deny Parties' Submission of Documents:

An example of this issue is the case of *Sempra v. Argentine* under the (ICSID) arbitration rules.[752] Argentine submitted copies of a decision on liability issued in another pending (ICSID) case to the Secretariat of tribunal. Under Rule 34 of the (ICSID) Arbitration Rules, the Tribunal informed the parties not to admit Argentina's submission of a decision on liability.[753] Following this decision, the Argentine Republic proposed the disqualification of the President of the Tribunal. In its letter, Argentina also requested the President of the Tribunal to indicate which of his co-arbitrators have joined him in this decision.[754] The President of the Tribunal declined Argentina's request, referring to (ICSID) Arbitration Rule 15(1). Therefore, the Argentine Republic proposed the disqualification of all Tribunal members under Article 57 of the (ICSID) Convention.[755] Furthermore, the Secretary-General of (ICSID) wrote to the Members of the Tribunal requesting them to confirm her understanding that the Tribunal, like other (ICSID) tribunals, gives due consideration to published decisions, particularly the Decision of Liability issued in (*LG&E v. the Argentine Republic*)[756] (ICSID) Case.[757] The President of the Tribunal confirmed that the Tribunal, in its deliberations, had considered the Decision on Liability. Following this, the Secretary-General of (ICSID) informed the parties that the Chairman of (ICSID) Administrative Council had rejected the Respondent's proposal to disqualify the Tribunal members.[758]

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[751] Jeffrey Rosenthal and others, 'International Arbitration' (2015) 49 The Year In Review An Annual Publication of The ABA/Section of International Law 111.p.120
[752] *Sempra* (n 679)
[753] *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award (28 September 2007) para 53
[754] ibid. para 54
[755] ibid. para 56, 57
[756] *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1
[757] *Sempra* (n 753) para 63
[758] *Sempra* (n 753) para 64, 66

2.3. The Unpublished Disqualifications Decisions in Oil and Gas Disputes:

There were three cases in which not published oil and gas disqualification decisions and precise grounds. The first is the case of *OAO Tatneft v. Ukraine* under the (UNCITRAL) arbitration rules.[759] In this case, Ukraine challenged Professor Dolzer. The Secretary-General of the Permanent Court of Arbitration (PCA), who the Parties had designated as the appointing authority, decided to sustain the challenge.[760] The second case is the case of *Venezuela US, SRL v. Venezuela* under the (UNCITRAL) arbitration rules.[761] In this case, the Respondent submitted Mr Fortier's challenge to Mr Jernej Sekolec as appointing authority by the Secretary-General of the (PCA). Therefore, Mr Sekolec issued a decision in his capacity as appointing authority rejecting the challenge to Mr Fortier. [762]

Further, another challenge brought in this case by the Claimant raised particular concerns regarding the disclosures made by Mr Bottini. As a result, Mr Sekolec issued a decision in his capacity as appointing authority sustaining the challenge against Mr Bottini.[763] The precise grounds of the challenge decision have not been disclosed. The third case is the case of *Saipem S.p.A. v. Bangladesh* under the (ICSID) arbitration rules.[764] In this case, Bangladesh's proposed the disqualification of Prof. Christoph Schreuer. The two arbitrators decided to dismiss the challenge proposal concluding that Prof. Schreuer met the requirement of independence and impartiality in Article 14(1) of the (ICSID) Convention, that he could "exercise independent judgement".[765] However, in this case, the decision of the disqualification was not published, but the (ICSID) website stated that the challenge was dismissed.

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[759]*OAO Tatneft v. Ukraine*, PCA Case No. 2008-8
[760]*OAO Tatneft v. Ukraine*, PCA Case No. 2008-8, Award on The Merits (29 July 2014) para 9
[761]*Venezuela US, S.R.L. (Barbados) v. Bolivarian Republic of Venezuela*, PCA Case No. 2013-34
[762]*Venezuela US, S.R.L. (Barbados) v. Bolivarian Republic of Venezuela*, PCA Case No. 2013-34, Interim Award on Jurisdiction (26 July 2016) para 36
[763]ibid. para 41, 43
[764]*Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/7
[765]*Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures (21 March 2007) para 47

3.0. Summary Analysis:

In the conclusion of the analysis of disqualification decisions in oil and gas disputes in investor-state arbitration laid out in this section, there are main similarities, differences and gaps. First, arbitrators in oil and gas disputes were frequently faced with disqualifications; however, only a small percentage of arbitrators ended up being disqualified. This is because the (ICSID) disqualification standard is more stringent than under the (SCC) or the (UNCITRAL) rules. The oil and gas disqualifications brought under the disqualification standard in Articles 14 and 57 of the (ICSID) (manifest lack) have been less likely to succeed than those under the (UNCITRAL) or the (SCC) disqualification standard (justifiable doubts). Thus, there were disqualifications decisions based on similar grounds of disqualification in oil and gas disputes but have led to varying decisions between the two standards. For example, disqualifications based on arbitrator business relationship, arbitrator repeat appointment and arbitrator role conflict 'double hat'. In an arbitrator business relationship, the only successful disqualifications were under (UNCITRAL) rules by two successful disqualifications, while under the (ICSID), two disqualifications were unsuccessful. In the arbitrator role conflict, the disqualifications under the (UNCITRAL) Rules, the arbitrator has resigned from his position. While the same arbitrator has been challenged on similar grounds on a different case under the (ICSID) rules, the disqualification has been rejected. In arbitrator repeat appointments, only one disqualification under (UNCITRAL) rules led to the arbitrator's resignation, while under the (ICSID), five disqualifications had been rejected.

Further, one disqualification decided by the (ICC) Court was also rejected. It should be noted that when the challenge was submitted under the (UNCITRAL) rules of which adapt the justifiable doubt test, Prof. Stern has resigned from her position as arbitrator in the case of Murphy. Differently, Prof. Stern, on the other three challenges of which submitted under the (ICSID) rules of which adapt the standard of manifest lack, all three challenges were rejected. Thus, it remains questioned, if these three challenges have been submitted under the

(UNCITRAL) rules, would Prof. Stern have resigned from her positions or remain confident that she will survive those challenges.

Therefore, there is an argument that the investment arbitration framework would cease to be viable if an arbitrator simply disqualified. The heavy burden of proof of (ICSID) can be treated as the protection of the arbitrators, and in a more profound sense, the heavy burden is to protect the unique arbitration framework of private v state, which should be considered the most valuable.[766] On the contrary, there is an argument that the standard for disqualification in (ICSID) (Article 57) should be amended.[767] However, amending the Convention is highly ambitious unrealistic since any amendment requires the approval of the majority of two-thirds of the members of the (ICSID) Administrative Council and all member states of the Convention.[768]

Second, arbitrators in oil and gas disputes were generally faced disqualification requests in investor-state arbitration system based on their professional relationship with the party in the proceeding, their business relationship, repeat appointments, deciding on the similar legal issue in prior cases and finally, arbitrators' role conflict 'double hat'. However, the disqualification requests based on deciding a similar legal matter and arbitrator's opinion on comments or written statement, personal relationship and nationality were only invoked under the (ICSID) proceeding and led to successful disqualification. One successful (ICSID) disqualification based on arbitrators' comments and opinions was decided under the (IBA) guidelines.

Third, arbitrators' disqualifications were dismissed/rejected in oil and gas disputes based on an arbitrators' professional relationships, repeat appointment and arbitrators' role conflict 'double hat'. In particular, in oil and gas disputes, there were (19) requests of disqualification that have been rejected under the (ICSID) cases, and only one arbitrator resigned.

[766] Wang (n 608).p.15
[767] Malintoppi and Yap (n 506).p.157
[768] ibid.p.157

Four, there are gaps in arbitrators' disqualification decisions in oil and gas disputes worth mentioning as there were no sufficient examples for these decisions to be analysed against them. For example, there are some grounds for disqualifications requests that have been only invoked in the (ICSID), such as arbitrator denying party submission of a document as a ground of disqualification request. Similarly, under the (UNCITRAL) rules, there has been a basis for disqualifications only invoked under (UNCITRAL), such as arbitrator delay or failure to act on parties' motions. Disqualification based on these bases raises interesting questions, such as whether these bases would expand again in other rules in the investor-state arbitration system or whether it led to a widely new disqualification basis in future oil and gas disputes. Further, only one disqualification request is based on the arbitrator's nationality and only one disqualification based on the arbitrator's personal relationship in the (ICSID) system in oil and gas disputes.

Further, few disqualifications based on arbitrator role conflict 'double hat' and arbitrator published comments or written opinion have only been invoked in the (ICSID) system in oil and gas disputes. However, the highest number of disqualifications have been filed under arbitrator repeat appointments in oil and gas disputes. Also, an increased number of disqualifications have been filed concerning arbitrator professional relationships and arbitrator deciding similar legal issues in prior cases in oil and gas disputes. Based on deciding a similar legal issue in previous cases, disqualification has been only filed in the (ICSID) system. On the other hand, there is a further gap concerning unpublished decisions of disqualifications in oil and gas disputes in investor-state arbitration. There are four cases where disqualification decisions have been unpublished in oil and gas disputes in investor-state arbitration, which raise some issues to regard transparency in the proceeding as one of the concern issues in investor-state arbitration.

4.0. Conclusion:

In conclusion, there is a need to improve and strengthen the arbitrators' selection and appointment and enlarge the arbitrators' pool in oil and gas disputes in investor-state arbitration. As stated above, the highest number of disqualifications were based on repeated appointments under both the (ICSID) and (UNCITRAL) arbitration in oil and gas disputes. Also, an increased number of disqualifications were related to arbitrator professional relationships and arbitrator deciding similar legal issues in prior cases in oil and gas disputes. These issues collectively indicate some of the criticisms mentioned in chapter 3 regarding arbitrator independence and imperiality and the small elite number of arbitrators being selected often. This justified creating professional certification that will enlarge the pool of arbitrators and resort to confidence in the system.

The following chapter will provide a theoretical framework for the improvement suggestions of professional certifications for arbitrators. Further, the next chapter will argue that the common expectation of regulatory control exercised by these regulatory rules may need to be enhanced by a professional certification mechanism adapted to the criticism that arbitrators received about their integrity. Thus, using transnational private regulation (TPR) in private regulatory regimes such as international investment arbitration overcomes the traditional limitations in the relationship between regulators and regulated, thereby departing from conventional self-regulatory regimes.

Chapter 6: Theoretical Aspects of Professionals and Transnational Regulations

1.0. Introduction:

The purpose of this chapter is to address the philosophy behind existing ethical regulatory frameworks for arbitrators' profession in the investor-state arbitration as a professional self-regulatory regime. Chapter (4) and (5) have identified the limited role of the current regulatory framework of arbitrators in enhancing the arbitrators' integrity and ensuring the highest quality of appointees. Therefore, in this chapter, the thesis will address the theoretical perspectives of professionals and the extent to which the practice of international arbitration has become professional, as discussed in chapter (3) (4.0). The international arbitrators inevitably seek to express what has developed as a shared identity and obtain certain benefits associated with professionalisation, such as added prestige, exclusivity, and regulatory autonomy.[769] Also, professionalisation implies control entry to the profession formally or informally to ensure the highest quality of professionals and protect the public from unqualified professionals.[770] Thus, professions tend to enact regulations and develop credentials, such as voluntary certifications, as they grow and build institutions to address concerns about service quality that inevitably emerge in the absence of clear standards for professional practice.[771]

Thus, the chapter will study the theories of regulation, e.g. self-regulation theory, to address how transnational professional roles such as international arbitrators can be regulated. In this regard, the self-regulatory debate led to the emergence of two competing views on making self-regulation a compelling and legitimate mechanism. First, enforced self-regulation theory and second, global governance theory; hence, this chapter analyses the theoretical aspect of both theories. In doing so, the transnational enforced self-regulation theory provides two particularly

[769] Rogers, 'The Vocation of International Arbitrators' (n 225).p.961
[770] ibid.p.977
[771] Gough and Albert (n 89).p.851

promising regulatory strategies. The first is the regulatory collaboration strategy, and the second appropriate regulatory is orchestration strategy.

The last section of this chapter outlines and explores the investor-state arbitration as a global-transnational- regulatory system and the regulatory role of (ICSID) in establishing the professional certification for arbitrators under governance mechanisms, which will be proposed next chapter.

2.0. Professionals:

2.1. Definitions and Characteristics:

It is essential to define what is meant by the term profession and specify the critical elements of the profession. The profession has been described as a vocation whose practice is founded upon an understanding of the theoretical structure of some department of learning or science and the abilities accompanying such understanding.[772] Further, the profession has been defined more broadly as groups that apply special knowledge in a client's service.[773] Other observations were made on professions as a distinctive group in the division of labour.[774] However, Catherine Rogers state that there is no universally accepted sociological definition of a profession but is instead a subterfuge for advancing the economic ambitions of those invoking it. Nevertheless, she acknowledged that the term undeniably has some universally recognised core markers that those pursuing such prestige invoke to distinguish themselves from other occupations. She further suggests that international arbitrators demonstrate some of the characteristics of professionalisation.[775]

On the other hand, professions have certain elements and characteristics as the exclusivity of their membership and their application of abstract knowledge. Further, professions have

[772] Nicola Higgs-kleyn and Dimitri Kapelianis, 'The Role of Professional Codes in Regulating Ethical Conduct' (1999) 19 Journal of Business Ethics 363.p.363
[773] ibid.p.363
[774] Mike Saks, 'Defining a Profession: The Role of Knowledge and Expertise' (2012) 2 Professions and Professionalism 1.p.1-2
[775] Rogers, 'The Vocation of International Arbitrators' (n 225).p.976-977

added altruism, regulatory autonomy and service to these critical features.[776] Therefore, there is an agreed fundamental characteristic of professionals. First, professionals are interest groups engaged in competition with each other and other groups in society, including the state. Second, the number of professionals expanded massively in the 20th Century, and professions have grown in importance, albeit relatively. Third, professionals are concerned with providing services to people rather than producing inanimate goods.[777] Fourth, the social status of professionals tends to increase as a function of the length of training required to practice. Fifth, professionals claim specialist knowledge about the service they provide and expect to define and control that knowledge. Sixth, Professions may pursue economic interests but often have other motives for their collective action as a strategy of social closure.[778]

Further characteristic of a profession is its self-regulation by a code of ethics and its role as a moral community.[779] Accordingly, international arbitrators demonstrate some of these fundamental characteristics of professionals, such as providing services, special knowledge, economic interest and self-regulation. As Catherine Rogers suggests , this professional impulse for international arbitration spotlights international arbitrators' conduct, implying self-regulation. [780]

Over the last thirty years or so, the practise of international arbitration has become relentlessly professional.[781] This can be seen at the major universities, where international arbitration is now taught at the post-graduate level as a subject matter for study on its own. It can be seen at law firms worldwide, where partners and associates are now part of an international arbitration group ready to represent their clients in international disputes before a

[776] ibid.p.961
[777] Nigel Malin, 'Theoretical Frameworks Used in Studying Professions' (2017) 19 Social Work & Social Sciences Review 7.p.8
[778] ibid.p.8
[779] Higgs-kleyn and Kapelianis (n 770).p.363
[780] Rogers, 'The Vocation of International Arbitrators' (n 225).p.977
[781] Alan Redfern, 'The Changing World of International Arbitration' in David D Caron and others (eds), *Practising Virtue: Inside International Arbitration* (Oxford University Press 2015).p.45

neutral tribunal of arbitrators. It can be seen in the practice of the leading arbitral institutions, modernising their rules of arbitration to deal with new problems. It can be seen in the work of professional associations such as the International Bar Association (IBA), with its worldwide conferences and seminars and its guidelines on subjects as diverse as conflicts of interest in international arbitration.[782] With the increased professionalism in the process, international arbitration itself changed. It became more institutionalized, also became more judicialised. In the present context, the characterisation of today's arbitrator as a professional dispute manager is of particular significance—the increased professionalism, not only of arbitrators but of all the players in the international arbitral process.[783]

2.2. Theoretical Aspects of Professionals:

The following theoretical perspectives are used to understand how professionals develop their identities.[784] These theories are the taxonomic theory, with its two approaches (the trait and functionalism), and the conflict theory to the modern approach from conflict theory insight the neo-Weberian approach.

The first central approach to professions was the taxonomic perspective.[785] Taxonomic contributors' emphasis on knowledge and expertise was understandable, as recognised professions typically had a more robust formal knowledge and higher educational base than other occupations. Identifying such characteristics was, perhaps, one of the strengths of the taxonomic approach. However, there were two broad variants of the first taxonomic approach: the trait view and the second, structural-functionalist analysis of professions.[786] The Trait view has generated many differing *ad hoc* lists of attributes of professions. Most lists included high-level knowledge and expertise or related items as special features – alongside other

[782] ibid.p.45
[783] ibid.p.46
[784] Malin (n 775).p.8
[785] Mike Saks, 'A Review of Theories of Professions,Organizations and Society: The Case for Neo-Weberianism, Neoinstitutionalism and Eclecticism' (2016) 3 Journal of Professions and Organization 170.p.172
[786] Saks (n 772).p.2

characteristics such as codes of ethics, altruism, rationality and educational credentials.[787] However, the lack of consensus among trait contributors over the core characteristics of professional groups highlighted the weakness of this approach.[788] Also, a list of traits alone is insufficient for a theory, which requires proposals about causality to be made. Whether there was an agreed list of traits in early works is highly doubtful.[789]

On the other hand, functionalism proposes that groups and institutions exist because they are functional for society.[790] In this functionalist approach, a primary concern was to describe how social groups and institutions operate to maintain each other and the totality of the social system in which they are located. The integral part of this process was to describe those institutions, including the professions, in terms of their defining characteristics or traits. Theoretically speaking, this narrow functional approach has fallen into academic disinterest since the late 1960s. Nevertheless, of all the major strands of sociological theorising, it remains the only one to stress the importance of ethics to the professional project.[791]

Another theoretical perspective used to understand how professionals develop their identity is conflict theory. Marx and Weber saw the conflict as essential to understanding social change.[792] However, later researchers developed a distinctive profession approach from their initial insights.[793] The conflict approach to professions, then, focuses on professions designed to restrict the supply of services. In this approach, educational requirements, registration and licensing are now recast as devices to limit the supply of skilled labour and enhance status and earnings.[794] Using these ideas, the critical feature of established professions suggested a high level of control over membership and used this to sustain the quality of services and enhance

[787] ibid.p.2
[788] Saks (n 783).p.172
[789] Stephen Ackroyd, 'Sociological and Organisational Theories of Professions and Professionalism' in Mike Dent and others (eds), *The Routledge Companion to the Professions and Professionalism* (Routledge 2016).p.16
[790] ibid.p.16
[791] Donald Nicolson and Julian Webb, *Professional Legal Ethics* (Oxford University Press 1999).p.52
[792] Ackroyd (n 787).p.18
[793] ibid.p.18
[794] ibid.p.18

the social standing and earnings of existing members. These professions are called collegiate professions because the college of the qualified membership controls them. Control was secured by a strong professional association empowered to license competent practice, membership of which was obligatory.[795]

However, later researchers developed a distinctive approach to professions from Marx and Weber's insights based on conflict theory.[796] In this regard, the neo-Weberian approach to professions is centred on social closure, based on the creation of state-sanctioned occupational monopolies, through interest group politics. It initially attracted attention in the early 1970s and is now one of the most prominent theoretical perspectives in the social scientific study of professions.[797] The Neo-Weberian framework emphasises social closure and professional dominance. It introduces the notion of professionals seeking to exercise power over others and showing a simultaneous desire to corner the market for that service.[798]

In summary, all these theories provide is that the taxonomic approach has explained the importance of high knowledge and expertise of the profession. In contrast, the functionalist approach stresses the importance of ethics to the professional project. Further, in the conflict approach, educational requirements, registration and licensing are devices to restrict the profession's supply and enhance status and earnings. Finally, the Neo-Weberian approach emphasises social closure and seeks to exercise power over others and the market for that service.

However, the new transnational sociology of the professions is premised on the notion that powerful actors are institutionalising professional privileges and practices via professional regulations, norms and cultures outside the confines of Westphalian state regimes through forms of transnational professional projects imperatives neoliberal capitalism. The idea that

[795] ibid.p.18
[796] ibid.p.18
[797] Saks (n 783).p.175
[798] Malin (n 775).p.23

transnational professionals are increasingly prominent, on those who can demonstrate that their professional skills and professionalisation are transnational rather than remaining within a national system.[799] Global professional service firms also transform professionalism from a national occupational concern to a transnational organisational and managerial concern.[800] This transnational sociology of profession best suits the professional regulation of international arbitrators in investor-state arbitration.

2.3. Professional Self-Regulation:

One of the characteristics of a profession discussed above is its self-regulation by a code of ethics and other regulatory mechanisms such as certification. Self-regulation involves regulating the conduct of individual organisations or groups of organisations by themselves.[801] The term self-regulation can imply no relationship with the state or describe a particular corporatist arrangement. Instead, self-regulation describes the situation of a group of persons or bodies acting together, performing a regulatory function in respect of themselves and others who accept their authority.[802] Also, self-regulation has been defined as the industry's practice to formulate and enforce rules and codes of conduct with no government involvement or minimal participation, such as an observer or advisor.[803] Finally, self-regulation is also defined as the process by which an organised group regulates the behaviour of its members.[804]

2.3.1. Public Interest and Control of Entry:

According to most sociological profiles, one of the hallmark features of a profession, as part of its efforts to self-regulate, is attempting to control entry to the profession, either formally or informally. These efforts are often undertaken for the stated purpose of protecting the public

[799] L Seabrooke, 'Epistemic Arbitrage: Transnational Professional Knowledge in Action' (2014) 1 Journal of Professions and Organization 49.p.49
[800] ibid.p.50
[801] Ian Bartle and Peter Vass, 'Self-Regulation within the Regulatory State: Towards a New Regulatory Paradigm?' (2007) 85 Public Administration 885.p.888
[802] Julia Black, 'Constitutionalising Self-Regulation' (1996) 59 The Modern Law Review 24.p.27
[803] Julia Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory" World' (2001) 54 Current Legal Problems 103.p.116
[804] ibid.p.116

from incompetent practitioners. International arbitrators have been a relatively closed community, with entry controlled, not by formal licensing, but through screening and promotion in an informal, tight-knit community such as institutes with members.[805] These resources imply exclusivity and a substantive process of selecting. In other words, they suggest a form of control over who becomes a part of the community of international arbitrators as part of a more considerable effort to protect the public.[806]

On the other hand, there have been critical of many aspects of professional regulation and self-regulation. Self-regulation is characterised as, potentially, having the effect of a cartel. By controlling entry to the market and setting an agreed price above the competitive price, members of the profession earn economic rents.[807] There is an argument that control entry undoubtedly leads to supply shortages and substantial economic rents by profession members. Further, control entry requires a monopoly right for the profession over a particular service and numerical restrictions on entry to the profession. Thus, an excess demand for the services of the profession is maintained.[808] However, another argument is that established members of the profession may be interested in encouraging an expansion of new entry to the lower reaches of the profession as this might reduce the salaries paid to new entrants due to excess supply.[809]

Further, it has been argued that restricting fee competition, particularly by publishing mandatory or recommended fee scales, reduces competition and innovation and is against the public interest.[810] From this perspective, the regulation of markets for professional services is

[805] Rogers, 'The Vocation of International Arbitrators' (n 225).p.977
[806] ibid.p.978
[807] Frank H Stephan and James H Love, 'Regulation of The Legal Profession' in Gerrit Bouckaert, Boudewijn and De Geest (ed), *Encyclopedia of Law and Economics III* (Edward Elgar 1999) 987 <https://reference.findlaw.com/lawandeconomics/5860-regulation-of-the-legal-profession.pdf>. accessed 11 May 2021 p.988
[808] ibid.p.993
[809] ibid.p.994
[810] ibid.p.988

seen to arise or is sustained because it is in the interests of the profession's members. Thus, it legitimises or enforces their cartel-like behaviour.[811]

On the other hand, self-governing organisations have two essential aspects: the authority to license and the ability to discipline licensees. The self-governing profession is charged with deciding who is qualified to practise and in what areas. The profession also sets the standards of technical competence and ethical and professional conduct to be followed by members.[812] They are taking the public's interest to heart and considering that the paramount duty of a self-governing profession is to protect the public interest. Therefore, it is essential to ensure that strict standards guard admittance into a profession and that members, once admitted, are governed by high standards of competence and conduct.[813] A profession should set these standards at a level sufficiently high to ensure good service to the public and a broad range of technical and professional qualifications. These standards also should be periodically reviewed to ensure the public interest is adequately served with current skills, knowledge, and conduct.[814]

2.3.2. Professional Self-Regulation Mechanisms:

The specific mandate of a self-governing profession can include one or all of the following roles. The first role is determining entrance requirements. Secondly, providing a system of registration to determine the required applicant qualifications. The third role is licensing professional practitioners. The fourth is to establish and maintain levels of competency. The fifth is setting a code of conduct, and the final role is to administer a disciplinary process to sanction member who fails to maintain established standards and practices.[815]

However, in terms of professional mechanisms, professional regulation uses the common terms registration, accreditation, certification, and licensure. Registration refers to issuing a

[811] ibid.p.988-989
[812] Robert Schultze, 'What Does It Mean To Be a Self-Governing Regulated Profession?' (2007) 4 Journal of Property Tax Assessment & Administration 41.p.45
[813] ibid.p.45
[814] ibid.p.45
[815] ibid.p.45-46

certificate of registration by a public or private governing body.[816] Its purpose is simply to provide a list of people meeting a specified set of objective criteria or qualifications and to identify for the public those who are qualified. Registration can be as simple as ensuring that members' names are recorded on a list.[817] Another term is accreditation which is the process of determining and certifying the achievement and maintenance of reasonable and appropriate education standards for professionals. Accreditation establishes the educational standard that the academic program must meet.[818]

On the other hand, the term Certification refers to issuing a certificate by a public or private governing body attesting to a person's attainment of specific knowledge and skill.[819] Its purpose is to provide a finite judgement of individual competency, which protects the profession, and establishes public respect. Certification focuses on an individual's credentials and eligibility to practice a profession.[820] Licensure refers to the issuance of a licence by a publicly mandated governing body granting the right to engage in the activities of a given occupation.[821]

[816] ibid.p.46
[817] ibid.p.46
[818] ibid.p.47
[819] ibid.p.47
[820] ibid.p.47
[821] ibid.p.47

Table: 4 Status Entry Requirements*

Status	What is it?	Purpose	Focus	Key Words
Registered	Issuance of certificate of registration by a public body or private governing body	List of people meeting a specified set of objective criteria or qualifications. Identification of members for public	Identification of those who are qualified	Identification
Accredited	Certification of educational programs	The appropriate standard of education for professionals. Establishment of educational standard	Educational standards for members	Educational standard
Certified	Issuance of certificate by a public body or private governing body	Individual's attainment of knowledge and skill. Protection of profession and establishment of public respect for it	Credentials of members	Credentials and eligibility to practice
Licensed	Issuance of a licence by a publicly mandated governing body granting the right to engage in activities of a given occupation. Attests to a person's attainment of a degree of competency are required to protect the public's health, welfare, or safety.	Individual competency and accountability. Protection of the public through regulation. System available and transparent to the public	Protection of public interest	Accountability

*(Source of Table: See; Robert Schultze, What Does It Mean To Be a Self-Governing Regulated Profession.p.46)

2.3.2.1. Code of Ethics/Conducts:

One of the factors to measure a profession is that they create their ethical standards, often compiled in a code to articulate and govern the conduct of their members. These codes then provide a basis for self-regulation, which is considered one of the independent features of any profession and one of the goals of professionalisation projects. Thus, Rogers has suggested that self-regulation through a code of ethics is the definitive characteristic of a profession, and for international arbitrators, it is one of the most visible. [822] Also, a draft code of conduct has been recently proposed jointly by (ICSID) and (UNCTRAL) to regulate arbitrators in investor-state arbitration. Thus, it is vital to highlight the differences between the code of ethics and conduct.

[822] Rogers, 'The Vocation of International Arbitrators' (n 225).p.980

The use of a code of conduct assists the profession in its ongoing relationship with society and its desire for self-regulation, resolving the tension between its pursuit of autonomy and the public's demand for accountability and enunciating its professional norms visibly.[823] The code is a vehicle that assures the public, clients and colleagues that members are competent, have integrity, and that the professional intends to maintain and enforce high standards. Apart from convincing external parties of the profession's integrity, codes play an important role in forcing profession members to question their values.[824]

Professional associations or regulatory bodies generally develop the codes of ethics as part of the professionalisation of an occupational group. Sometimes they are created in response to a lack of public confidence in a particular occupational group.[825] Codes may be interpreted as how the professions themselves define their ideal of professional conduct. It is not that codes equate to professional ethics, but rather that they help explain the joint agreement amongst members of professions as to their collective standards of appropriate behaviour. [826]

2.3.2.2. Professional Certification:

Professional certifications are typically competency-based credentials obtained based on passing an examination or other requirements such as having a certain number of years of work experience or agreeing to adhere to an ethical code. They are a voluntary form of professional regulation so far, and certification may be expected as a *de facto* job requirement by an employer or by discerning clients.[827] However, a significant reason for the push for certification in occupations characterised by a high risk of error or malpractice is to pre-emptively defend against allegations of incompetence.[828] For this reason, self-regulation through certification

[823] Higgs-kleyn and Kapelianis (n 770).p.364
[824] ibid.p.364
[825] Sarah Banks, 'Codes of Ethics and Ethical Conduct: A View from the Caring Professions' (1998) 18 Public Money and Management 27.p.27
[826] Hugh Gunz, Sally Gunz and Ronit Dinovitzer, 'Professional Ethics: Origins, Applications, and Developments' in Laura Empson and others (eds), *The Oxford Handbook of Professional Service Firms* (Oxford University Press 2015).p.119
[827] Gough and Albert (n 89).p.853
[828] ibid.p.854

sometimes emerges in areas of the labour market that are already regulated by the state. Certification can also benefit individuals by allowing certified workers to demonstrate that they are more competent than other service providers and, in so doing, command higher wages.[829] Certification is even thought to be desired by professionals because it is part of a collective process of professionalisation that enables individuals to recognise themselves as part of a profession with shared interests and moral responsibility. [830]

On the other hand, certification standards are divided into three areas; first, private organisations establish standards for their members or panellists. Second, court programs that set standards for (ADR) providers handling court-referred cases. Third, state-wide licensure, applicable to all (ADR) practitioners, regardless of whether they practice in the courts, private marketplace or community programs.[831]

Concerning international arbitration, the formal certification could be a means for providing training and quality control for new arbitrators, particularly from jurisdictions that do not have established traditions of arbitration from outside mega-multinational law firm practice.[832] While certification of international arbitrators may seem like a remote possibility today, certification is a reality for international mediators. The International Mediation Institute (IMI) has a well-regarded and effective mediator certification programme.[833] The (IMI's) model includes submission requirements the members have minimal training through qualified programmes, abide by its code of ethics, and provide feedback from parties.[834] For arbitrators specifically, the chartered institute of arbitrators (CIArb) has a well-established certification programme. The (CIArb) refers to itself as a professional organisation for arbitration, mediators, and adjudicators It lists having a prestigious secondary professional qualification as

[829] ibid.p.854
[830] ibid.p.854
[831] Hoffman (n 428).p.3
[832] Catherine A Rogers, *Ethic in International Arbitration* (Oxford University Press 2014).p.255
[833] ibid.p.255
[834] ibid.p.255

among membership benefits.[835] The (CIArb) has stringent, published entry requirements, including extensive training, passing an examination, and completing an interview. It also has a relatively detailed code of ethics and related practice guidelines that pertain to arbitrator members. Most impressive, the (CIArb) has a grievance procedure for complaints against arbitrator members.[836] Ultimately, ethical self-regulation is a challenge for the international arbitration community to think beyond its present situation to future generations and future developments in an ever-more globalised legal world.[837]

3.0. Professional Self-Regulation and International Arbitrators:

3.1. Professional Regulation for International Arbitrator:

Arbitrators operate in a primarily private and under-regulated market for services, access to which is essentially controlled by the most elite arbitrators. This market has come under increased pressure in recent years because the number of arbitrators and arbitration proceedings has increased sharply, and their work product has come under greater scrutiny. In response to these pressures, arbitrators have begun to present themselves as professionals.[838] Thus, the need for regulation is more significant in the international context because international arbitrators operate as custodians of a system, exceed the easy reach of traditional state regulatory mechanisms and must be kept out of their grasp to maintain its neutrality.[839] There is no regulatory competition; regulation is absent. International arbitration occurs in an a-national space internationally disassociated with any sovereign; consequently, there is no host state regulation.[840]

[835] ibid.p.255
[836] ibid.p.255-256
[837] ibid.p56
[838] Rogers, 'The Vocation of International Arbitrators' (n 225).p.960
[839] ibid.p.963
[840] Catherine A Rogers, 'Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration' (2002) 23 Michigan Journal of International Law 341.p 356

Therefore, the primary problem for ethical regulation in international arbitration is not a competition among regulators but an absence of regulation.[841] In addition, those who aim to establish some standards of international ethical practice argue that the legitimacy of international arbitration is at stake.[842] Others view that international arbitrators are over-regulated; they can be quickly disqualified for a simple relation to the counsel of one of the parties.[843] Proponents of the opinion that arbitrators are over-regulated point to the increase in sources and an apparent rise in the number of challenges to arbitrators in recent years.[844] In addition, those who oppose the development of increased ethical regulation are concerned that complaints, grievances, and unethical behaviour claims will complicate and hinder the promise of expeditious and efficient case processing, which arbitration claims to deliver. [845]

On the other hand, those concerned about the under-regulation of international arbitrators focus on the apparent absence of traditional forms of professional regulation.[846] There is very little regulation of arbitrators, except for the oversight of a particular institution. Moreover, arbitrators are not licensed, nor is there an oversight board, except within individual arbitration institutions.[847] Consequently, arbitrators are mainly unregulated and unmonitored.[848] Also, arbitrators are not required to have any special training certification. As a result, they are not subject to direct oversight, discipline, or sanctions that traditionally regulate other organised professions.[849] Also, unlike other legal professionals, international arbitrators generally enjoy almost complete immunity from professional malpractice liability, even for allegedly egregious errors.[850] In addition to an absence of formal sanctions, international arbitrators are insulated

[841] ibid.p 357
[842] Carrie Menkel-Meadow, 'Ethical Ordering in Transnational Legal Practice: A Review of Catherine A. Rogers's Ethics in International Arbitration' (2016) 29 The Georgetown Journal of Legal Ethics 207.p.215
[843] Rogers, *Ethic in International Arbitration* (n 830).p57
[844] ibid.p59
[845] Menkel-Meadow (n 840).p.215
[846] Rogers, *Ethic in International Arbitration* (n 830).p57
[847] Gabriel and Raymond (n 78).p.455
[848] ibid.p.456
[849] Rogers, *Ethic in International Arbitration* (n 830).p57-58
[850] ibid.p.58

mainly from market-based regulation. As a result, international arbitrators' conduct is mostly protected from public scrutiny and broad-based reputational sanctions. Meanwhile, significant barriers to entry into the market for arbitrators' services ensure that international arbitrators cannot be easily replaced or the pool of arbitrators easily expanded. The absence of an effective market has led some to refer to arbitrators as a cartel or mafia.[851]

On the other hand, it would be a mistake to conclude that arbitrators are not regulated at all. Various sources aim to regulate the conduct of international arbitrators. For example, some international bodies have promulgated new ethical rules, guidelines, procedural rules, and other criteria to manage and evaluate the conduct of international arbitrators. These sources supplement the arbitral rules that already govern arbitrators' selection, appointment, and challenge.[852]

3.2. Arbitral Institutions as Regulatory Actors of Professional Self-Regulation:

Formalising ethical rules and self-regulation usually begin when informally enforced shared social norms break down. In the community of international arbitrators, it was precisely when the community expanded, and shared understandings declined.[853] Professional self-regulation in international arbitration is already a reality in various forms; fundamentally, international arbitration is an example of a self-regulating dispute resolution regime.[854]Arbitral institutions and organisations operate as primary regulators. These entities have established their regulatory role through demonstrated expertise and proximity and constructive self-interest in safeguarding the effectiveness of arbitral processes.[855]

Arbitrators' obligations of independence and impartiality and various constituent substantive parts of those obligations, such as a duty to investigate, a duty to disclose, and

[851] ibid.p58
[852] ibid.p58
[853] Rogers, 'The Vocation of International Arbitrators' (n 225).p.980-981
[854] Rogers, *Ethic in International Arbitration* (n 830).p.234
[855] ibid.p.240

standards for disqualification, were primarily developed and refined by private international institutions and organisations, not national or governmental regulators and the enforcement of these obligations primarily within international arbitration processes and institutions.[856]

However, while arbitral institutions have been at the forefront of arbitrator disclosure obligations, they contain mostly vague and qualitative standards, such as independence impartiality. As such, they effectively leave arbitrators with tremendous discretion about what to disclose and provide little guidance for how to interpret and apply the standard in specific situations.[857] In addition, institutions play a role in future appointments by using lists of potential arbitrators that parties are either encouraged to use or rarely required to use. These lists function as a form of self-regulation. According to most sociological profiles, formal or informal controls on entry are a typical way of self-regulation among professions.[858] The list also creates the possibility of removing from such a list as a potential sanction for professional misconduct. Institutions that do not establish formal lists or panels of arbitrators nevertheless have an informal means of cataloguing individuals from whom they appoint arbitrators when charged with that task.[859]

However, in the absence of formal licensure, certification and other mechanisms, arbitral institutions and appointing authorities are today the most visible and effective regulators of arbitrators. They have a permanence and tangibility that makes them naturally well suited to serve as regulators. They also have unique expertise based on their intimate knowledge of and direct involvement in arbitration practices and procedures and unique ability to operate in a multinational, multicultural environment.[860] This issue will be explained in the coming section.

[856] ibid.p.240
[857] ibid.p.243
[858] ibid.p.253
[859] ibid.p.254
[860] ibid.p.254

4.0. Regulations:

4.1. The Definitions and Types of Regulation:

Regulation is often spoken of as an identifiable and discrete mode of governmental activity, yet the term regulation has been defined differently. Baldwin argues three main conceptions: Firstly, as a sustained and focused control exercised by a public agency over activities valued by a community.[861] Secondly, regulation refers to the promulgation of an authoritative set of rules, accompanied by some mechanism, typically a public agency, for monitoring and promoting compliance with these rules.[862] Thirdly, a broader conception of regulation, as all mechanisms of social control – including unintentional and non-state processes- to be forms of regulation.[863] The variation is attributed to differences in disciplinary concerns, with lawyers, political scientists, and economists building mainly on the first two conceptions, while socio-legal scholars emphasise the third.[864]

Further, this thesis adopts a more detailed definition of regulation as the sustained and focused attempt to alter the behaviour of others according to defined standards and purposes to produce a broadly identified outcome or outcomes, which may involve mechanisms of standard-setting and information-gathering and behaviour modification.[865] This definition refocuses the regulation on the objectives (controlling behaviour) and the functions required to accomplish that (setting substantive standards and enforcement).[866] The redefinition of regulation has ushered in a range of theories and proposals about how and when regulation is most effective and which mechanisms are optimal to accomplish the desired end.[867]

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[861] Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy, and Practice* (University Press Scholarship Online 2011).p.3-4
[862] Robert Baldwin, Collin Scott and Christopher Hood, 'Introduction', *A Reader on Regulation* (Oxford University Press 1998).p.3
[863] ibid.p.4
[864] Christel Koop and Martin Lodge, 'What Is Regulation? An Interdisciplinary Concept Analysis' (2017) 11 Regulation and Governance 95.p.95
[865] ibid.p.96
[866] Rogers, *Ethic in International Arbitration* (n 830).p.225
[867] ibid.p.226

Regulation may be carried out not merely by state institutions but by a host of other bodies, including corporations, self-regulators, professional or trade bodies, and voluntary organisations.[868] It is also done by non-government actors such as organisations, associations, firms, individuals, and other specialist bodies, e.g. auditors and technical committees.[869] Self-regulation involves regulating the conduct of individual organisations or groups of organisations by themselves.[870] Regulatory rules are self-specified, conduct is self-monitored, and the rules are self-enforced; there is little or no role for the state. It can be contrasted with strong statutory or command and control regulation in which the state, by various means, specifies the regulations and monitors and enforces the conduct of the regulated organisations.[871] Further, self-regulation is defined as delegating public policy tasks to private actors in an institutional form. One of the main objectives is the regulation of markets (industry) by the participants (players).[872] Therefore, the definition of self-regulation is concerned that the industry or sector is charged with the three components (1) legislation – where rules are defined, (2) enforcement – where appropriate actions are initiated against the rule violators, and (3) adjudication – where consideration is made if the rules had indeed been breached, and where the appropriate sanctions for such breach are determined.[873] However, there is no all-encompassing definition of self-regulation as its meaning differs from person to person, from industry to industry, and from sector to sector.[874]

However, there are several categories of self-regulation; the first categories of self-regulation were viewed from the regulator's point, i.e., whether the regulator is cooperative, facilitating, or implicit in their roles.[875] The second category of self-regulation was viewed based on the

[868] Baldwin, Cave and Lodge (n 859).p.4
[869] Black (n 801).p.137
[870] Bartle and Vass (n 799).p.888
[871] ibid.p.888
[872] Rebecca Ong Yoke Chan, 'Self Regulation', *Mobile Communication and the Protection of Children* (Leiden University Press 2010).p.241
[873] ibid.p.240
[874] ibid.p.240
[875] ibid.p.242

degree of state intervention, i.e., the first is 'Consensual self-regulation' stresses achieving consensus by open participation.[876] Second, 'Enforced self-regulation' involves negotiations between the state and the individual firms to produce regulations particular to each firm to avoid standards imposed by the government.[877] The third is 'Co-regulation' is refers to the situation where the regulator and industry stakeholders work together, with the regulator setting the framework to work within. The industry stakeholders may be left to draft detailed rules within this framework and take responsibility for implementation and enforcement.[878] The fourth is 'Mandated self-regulation', which is seen most clearly in circumstances where self-regulation results from government threats or supporting policymaking and enforcement. The collective group or industry must formulate and enforce norms within a framework defined and provided by the state and coerced self-regulation.[879] The fifth type is 'Sanctioned self-regulation', a lesser form of state intervention in voluntary self-regulation. In the sanctioned self-regulation, the regulations are formulated by the collective group or industry. The regulations are then subjected to the government's approval. The latter voluntary self-regulation (as its name implies) is where no active state intervention, whether direct or indirect, is involved.[880]

4.2. The Motives and Criticisms of Self-regulation:

The motives underlying regulation, first by considering the technical justifications for regulating that may be given by a government that is assumed to be acting in pursuit of the public interest and as instances of market failure.[881] Regulation in such cases is argued to be justified because the uncontrolled marketplace will, for some reason, fail to produce behaviour or results following the public interest.[882] Market failure accrues for many reasons: monopoly,

[876] ibid.p.242-243
[877] ibid.p.243
[878] ibid.p.244
[879] ibid.p.244
[880] ibid.p.245
[881] Baldwin, Cave and Lodge (n 859).p.16
[882] ibid.p.16

information inadequacies, anti-competitive behaviour, etc. Where a monopoly occurs, the market fails because the competition is deficient. From the public interest perspective, the problem with a firm occupying a monopolistic position is that maximising profits will restrict its output and set the price above marginal cost.[883] Information inadequacies, competitive markets can only function appropriately if consumers are sufficiently well informed to evaluate competing products. However, the market may fail to produce adequate information and may fail for several reasons: information may cost money to produce.[884] Regulation by making information more extensively accessible, accurate, and affordable may protect consumers against information inadequacies and the consequences thereof and encourage the operation of healthy, competitive markets.[885]

Furthermore, self-regulation offers some benefits; one reduces costs in implementing and compliance with state regulation.[886] Further, since the industries and collective bodies design the rules, the rules would be more comprehensive in their coverage. The industries and collective bodies would also be more committed to the rules and avoid state intervention.[887]

On the other hand, criticisms of adopting a self-regulatory approach range from first, that industries and groups may come together to develop standards and principles with their interest in mind rather than the general public. For example, the principles and standards developed may act as entry barriers to the market and industry.[888] A second criticism is the enforcement of such standards and principles against violators; unless the state backs up the self-regulatory body, it is difficult to see how and to what extent a regulatory body can ensure compliance.[889] The third critique is related to the criticism that the enforcement mechanism can substantially

[883] ibid.p.17
[884] ibid.p.19
[885] ibid.p.20
[886] Chan (n 870).p.247
[887] ibid.p.248
[888] ibid.p.251
[889] ibid.p.252

weaken if it emerges that the self-regulatory scheme fails to attract the support of all industry members in terms of participation and adherence to the agreed rules.[890] The final critique arises if the self-regulatory scheme does not encompass vigorous accountability mechanisms. For example, the decisions taken by self-regulatory bodies are not transparent and reviewable.[891]

On the other hand, regarding the private self-regulatory regime in global contexts. The reasons for this privatisation and internationalisation of governance are that governments lack the requisite technical expertise, financial resources, or flexibility to deal expeditiously with ever more complex and urgent regulatory tasks.[892] The observed measurable result is that, in global contexts, regulatory solutions to global governance problems tend to involve more market-oriented, participatory, decentralised and self-regulatory strategies. These strategies complement and sometimes even displace traditional state-based regulation. By internalising monitoring and enforcement and delegating it to insiders within the regulated institutions, self-regulation can rely on specialised knowledge, the technical capacity that government regulatory lack. [893]

Governance scholars such as John Braithwaite and Julia Black have developed proposed theories and strategies to make professional self-regulation effective and legitimate. First, John Braithwaite's concept of enforced self-regulation, in his model actors are primary regulators, but government entities monitor various stages of self-regulation to ensure compliance and provide legal enforcement. Second, Julia Black's prescriptions for ensuring the legitimacy of private regulators.[894] Her model is that private entities can control the conduct only if their exercise of power is regarded as legitimate, meaning that they are perceived as acceptable and credible by those they seek to govern.[895] However, international arbitration's existing legal

[890] ibid.p.252-253
[891] ibid.p.253
[892] Rogers, *Ethic in International Arbitration* (n 830).p227
[893] ibid.p227
[894] ibid.p228
[895] ibid.p228-229

framework already largely tracks the essential features of Braithwaite's and Black's prescription. International arbitration is, as Braithwaite propose, a largely private regime backed up by government enforcement but triggered only when self-regulation breaks down. Thus, international arbitration should express self-regulation of its participants' professional conduct.[896] The call to self-regulation is for international arbitration to acknowledge and leverage existing self-regulatory structures, extending these structures and institutions to the professional regulation of various participants. This process of express self-regulation is already well developed concerning arbitrators.[897]

5.0. Theories of Regulations:

5.1. Theories of Regulation with State Intervention:

The economic theory of regulation began with an article by George Stigler in 1971.[898] The theory of economic regulation would ideally draw together the diverse techniques that constrain or direct economic activity; it would guide our decisions about which economic activities need regulation. In addition, it would specify the appropriate combination of regulatory mechanisms that would best resolve particular problems.[899] Richard Posner provided that there are two main theories for regulation that have been proposed under the economic theory of regulation. One is the public interest theory; this theory holds that regulation is supplied in response to the public's demand to correct inefficient or inequitable market practices. The second theory is the capture theory; this theory holds that regulation is supplied in response to the demands of interest groups struggling to maximise their members' incomes.[900]

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[896] ibid.p229
[897] ibid.p229-230
[898] S Peltzman, 'The Economic Theory of Regulation after a Decade of Deregulation' in Robert Baldwin, Collin Scott and Christopher Hood (eds), *A Reader on Regulation* (Oxford University Press 1998).p93
[899] Thomas D Barton, 'Prospects for a General Theory of Economic Regulation' (1989) 46 Washington and Lee Law Review 41.p.41
[900] Richard A Posner, 'Theories of Economic Regulation' (1974) 5 Bell Journal of Economics and management Science 335.p.335-336

The first, the public interest theory, centres on the idea that those seeking to institute or develop regulation do so in pursuit of public interest-related objectives (rather than group, sector, or individual self-interests).[901] Proponents of regulation are thus seen as acting as agents for the public interest. Regulation's purpose is to achieve specific publicly desired results in circumstances where, for instance, the market would fail to yield these. Consistent with such a vision emphasises the trustworthiness and disinterestedness of expert regulators, whose public-spiritedness and efficiency the public can have confidence. In addition, it assumes some form of objective knowledge that can establish market failures and respond with the appropriate instruments.[902] The public interest theory of regulation is based on two assumptions. First, uncontrolled markets often fail because of the problems of monopoly or externalities. Second, governments are benign and capable of correcting these market failures through regulation.[903]

However, a severe problem with the public interest theory is that the theory contains no linkage or mechanism by which perception of the public interest is translated into legislative action.[904] Further, an agreed conception of the public interest may be hard to identify. The further problem stems from doubts concerning the disinterestedness, expertise, and efficiency that the public interest approach attributes to regulators. Opportunities for personal profit may corrupt regulators, so regulation is biased by pursuing private interests.[905]

The second theory is the capture theory. This approach to regulation stresses the extent to which regulatory developments are driven, not by the pursuit of public interest but by the particularistic concerns of interest groups.[906] This approach is often also linked to labels such as private interest; the idea of capture is that, as a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit. Accordingly, regulation is inherently

[901] Baldwin, Cave and Lodge (n 859).p.41-42
[902] ibid.p.42
[903] Andrei Shleifer, 'Understanding Regulation' (2005) 11 European Financial Management 439.p.440
[904] Posner (n 898).p.340
[905] Baldwin, Cave and Lodge (n 859).p.43
[906] ibid.p.44

about degrees of capture.[907] The theory is that economic regulation is a process by which interest groups seek to promote their private interests.[908]

According to the economic theory of regulation, where there is a failure of competition or monopoly, there will be monopoly profit, and the legislature will give the regulator the power to dispose of these economic monopoly rents. Thus, the regulated industry will have an incentive to influence the regulator to benefit from a 'regulatory rent' and a regulation market. This means that the industry will capture the regulator since the industry will have more to lose or gain than the regulator.[909] However, the capture theory is unsatisfactory in several respects; first, there is an insufficient distinction from the public interest theory because the capture theory also assumes that the public interest underlies the start of regulation.[910] Second, regulation often serves the interests of groups of consumers rather than the interests of the branch. Finally, the capture theory is more of a hypothesis than a theory; it does not explain why a branch can take over a regulatory agency and why.[911]

5.2. Theories of Self-regulations with Non-State Intervention:

5.2.1. The Theory of Enforced Self-regulation:

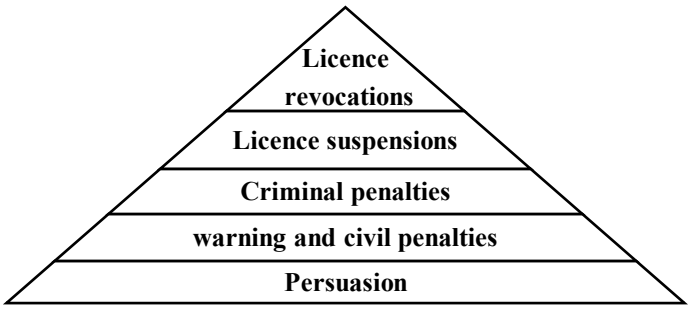
The enforced self-regulation model is about negotiation between the state and individual firms to establish particular regulations for each firm. Each firm in an industry must propose its regulatory standards to avoid harsher (and less tailored) standards imposed by the state.[912] As opposed to industry association, self-regulation, this individual firm is enforced in two senses. First, the firm is required by the state to make self-regulation. Second, privately written rules can be publicly enforced.[913] Enforced self-regulation represents an extension and individualisation of co-regulation. As distinct from enforced self-regulation, co-regulation is

[907] ibid.p.44-45
[908] Posner (n 898).p.341
[909] Baldwin, Cave and Lodge (n 859).p.45
[910] Johannes Aleidus den Hertog, 'Public and Private Interests in Regulation' (Universiteit Utrecht 2003).p.24
[911] ibid.p.25
[912] Ian Ayres and John Braithwaite, *Responsive Regulation Transcending the Deregulation Debate* (Oxford University Press 1992).p.101
[913] ibid.p.101

usually taken to mean industry-association self-regulation with some oversight or ratification by the government.[914]

On the other hand, Ian Ayres and John Braithwaite moved regulatory enforcement debates toward responsive regulation.[915] Responsive regulation (RR) suggests that governance should be responsive to the regulatory environment and to the conduct of the regulated in deciding whether a more or less interventionist response is needed. There are some types of responsiveness, such as pyramidal responsiveness, micro- responsiveness, networked, and meta-regulatory and socialist responsiveness.[916] Thus, the model of 'responsive regulation' was introduced, together with the concept of enforcement pyramids. A central tenet of 'responsive regulation' as expounded by Ayres and Braithwaite was that compliance is more likely when a regulatory agency operates an explicit enforcement pyramid—a range of enforcement sanctions extending from persuasion, at its base, through the warning and civil penalties up to criminal penalties, licence suspensions, and then licence revocations (Figure: 1).[917]

Figure (1) The Enforcement Pyramid*



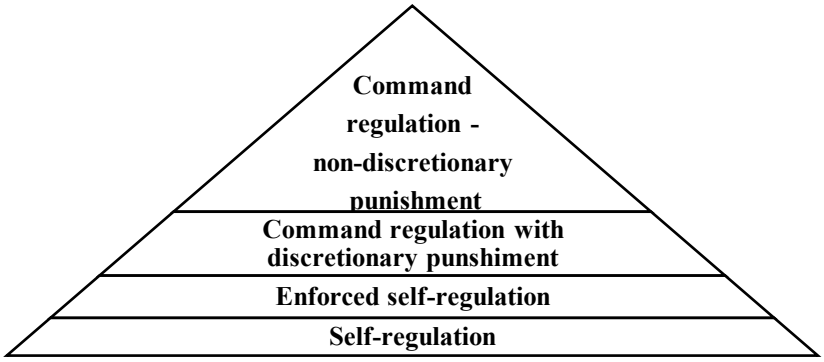
* (Source: See, Robert Baldwin, Martin Cave, and Martin Lodge, Understanding Regulation: Theory, Strategy, and Practice. p.261)

There would be a presumption that regulation should always start at the pyramid's base. Regulatory interventions would thus commence with non-penal actions and escalate with more

[914] ibid.p.102
[915] Baldwin, Cave and Lodge (n 859).p.260
[916] John Braithwaite, 'Types of Responsiveness' in Peter Drahos (ed), *Regulatory Theory: Foundation and Applications* (Australian National University Press 2017).p.117
[917] Baldwin, Cave and Lodge (n 859).p.260-261

punitive responses where prior control efforts had failed to secure compliance.[918] Further, the pyramid of sanctions is aimed at a single regulated firm, but Ayres and Braithwaite also apply a parallel approach to entire industries. Thus, they propose a 'pyramid of regulatory strategies' for industrial application (Figure: 2).[919]

Figure (2) The Enforcement Strategies Pyramid*



*(Source: See, Robert Baldwin, Martin Cave, and Martin Lodge, Understanding Regulation: Theory, Strategy, and Practice. p.262)

The idea is that governments should seek and offer self-regulatory solutions to industries in the first instance. If appropriate goals are not met, the state should escalate its approach and move on through enforced self-regulation to command regulation with discretionary punishment and finally command regulation with non-discretionary punishment.[920]

However, the pyramidic regulatory strategy of enforcement has been the subject of some criticisms or reservations. The first criticism of the pyramidic approach is that, in some circumstances, step-by-step escalation up the pyramid may not be appropriate.[921] For example, where potentially catastrophic risks are being controlled, it may not be acceptable to enforce by escalating up the layers of the pyramid. In non-compliance regarding high-risk activities, the appropriate reaction may be an immediate resort to the higher levels of the pyramid. Second, in some contexts, post-escalation may be necessary to move the regulatory response

[918] ibid.p.260
[919] ibid.p.260
[920] ibid.p.260-261
[921] ibid.p.261

down the pyramid and decrease the punitiveness of the approach—as where the regulator has become more inclined to offer greater levels of compliance than formerly.[922] However, moving down the pyramid may not always be easy, as Ayres and Braithwaite recognise, because using more punitive sanctions may prejudice the relationships between regulators and regulated that are the foundations for the less punitive strategies. Third, it may be wasteful to operate an escalating tit-for-tat strategy across the board. Responsive regulation presupposes that regulators respond to the pressures imposed by regulators through the sanctioning pyramid.[923]

On the other hand, a new development for enforced self-regulation has emerged, called smart regulation, which builds on 'responsive regulation' but considers a broader range of regulatory actors. The proponents of smart regulation, Neil Gunningham, Peter Grabosky, and Darren Sinclair, argue that the Ayres and Braithwaite pyramid is concerned only with the interaction between two parties: state and business.[924] Smart regulation, however, holds that regulation can be carried out not merely by the state but by businesses themselves and by quasi-regulators such as public interest groups, professional bodies, and industry associations.[925] The term refers to a form of regulatory pluralism that embraces flexible, imaginative and innovative forms of social control. In doing so, it harnesses governments and businesses and third parties. For example, it encompasses self-regulation and co-regulation, using commercial interests and non-governmental organisations (NGOs) (such as peak bodies) as regulatory surrogates, together with improving the effectiveness and efficiency of more conventional forms of direct government regulation.[926]

Accordingly, the pyramid of smart regulation is three-sided and considers the possibility of regulation using different instruments implemented by some parties. It conceives escalation to

[922] ibid.p.262
[923] ibid.p.262
[924] ibid.p.266
[925] ibid.p.267
[926] Neil Gunningham and Darren Sinclair, 'Smart Regulation' in Peter Drahos (ed), *Regulatory Theory: Foundation and Applications* (Australian National University Press 2017).p.133

higher levels of coerciveness within a single instrument and several instruments. Seeing regulation in these three dimensions allows the adoption of creative mixes, networks, regulatory enforcement instruments, and influencing actors or institutions. It also encompasses the use of control instruments that, in specific contexts, may be easier to apply, less costly, and more influential than state controls.[927]

Figure (3) The Three Aspects of Smart Regulation*

Government as regulator	**Business as self-regulator**	**Third parties (Public Interest Groups PIGs, etc.)**
Disqualifications	Disqualifications	Dismissal
Penal sanctions	sanctions	Discipline
Notices	Warnings	Promotions
Warnings	Guidance	Reviews
Persuasion	Education	Incentives
Education	Advice	Training supervision
Advice		Advice

*(Source: See, Robert Baldwin, Martin Cave, and Martin Lodge, Understanding Regulation: Theory, Strategy, and Practice. p.267)

5.2.2. Theory of Transnational Enforced Self-Regulation:

Responsive Regulation (RR) opened up significant new ways of thinking about regulation. Since Ayres and Braithwaite Responsive Regulation (RR) 1992, however, the locus of many regulatory problems has shifted to the transnational arena, characterised by multiple public and private regulators with limited capacities, authority and information and modest sanctioning ability.[928] This type of regulation encompasses various regulatory arrangements carried out by corporate actors, non-governmental organisations (NGOs), civil society groups working alone, or collaboration.[929] It can be broadly understood as non-state actors making, implementing or enforcing rules and standards across national borders. Transnational non-state regulation connects with theories of globalisation—most obviously regulatory globalisation.[930]

[927] Baldwin, Cave and Lodge (n 859).p.267
[928] Kenneth W Abbott and Duncan Snidal, 'Taking Responsive Regulation Transnational: Strategies for International Organizations' (2013) 7 Regulation and Governance 95.p.95
[929] Natasha Tusikov, 'Transnational Non-State Regulatory Regimes' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (Australian National University Press 2017).p.339
[930] ibid.p.339

As regulatory issues have become increasingly transnational, no national authority directly access all relevant regulatory targets in terms of either jurisdiction or capacity. In short, hierarchical regulation is unavailable or inadequate for most transnational problems. While the (RR) model clearly cannot be taken transnational without significant modification, the ideas behind (RR) are potentially even more valuable for transnational regulators than for domestic agencies, if only because of the shortage of viable alternatives.[931]

Some crucial components of transnational responsive regulation are already developing on a decentralised, bottom-up basis; these activities can be referred to as transnational regulatory standard-setting (TRSS).[932] (TRSS) includes burgeoning transnational self-regulation by individual firms and industry associations, new regulatory relationships between (IGOs) and business, including (IGOs') codes of conduct for firms and public-private partnerships that adopt regulatory standards. Also, active involvement by international public interest groups (iPIGs) as participants in (TRSS) arrangements, including many that also involve business and some that are fully tripartite, in the spirit of responsive regulation (RR).[933]

In addition, because (TRSS) arrangements are mainly private, they lack essential regulatory authority and capacities. To be fully effective, transnational regulatory standard-setting (TRSS) schemes need additional support from national and international agencies, even if a full symbiosis with public authority is infeasible.[934] It must adapt the insights of (RR) to focus on strengthening, extending and working with the developing (TRSS) system. Thus, it needs transnational responsive regulators, Inter-Governmental Organisations (IGOs) are the institutions best positioned to act as transnational regulators in the style of (RR). (IGOs) have global scale, global mandates, and the neutrality and legitimacy that result from multilateral

[931] Abbott and Snidal (n 926).p.96
[932] ibid.p.97
[933] ibid.p.97
[934] ibid.p.97

state membership.[935] (IGOs) must take somewhat different approaches to (RR): their (RR) strategies must be compatible with their limited authority and sufficiently unobtrusive that states will accept them.[936]

A few (IGOs) have begun to develop techniques that meet these needs, working with and through (TRSS) rather than employing the more intrusive forms of contingent regulation contemplated by Ayres and Braithwaite. By combining evidence on these early developments with the insights of (RR), it can identify feasible (RR)-like approaches to transnational regulation.[937] Two general strategies are particularly promising. First is regulatory collaboration; an (IGO) engages directly with target firms and industry groups, promoting and supporting self-regulation in a particular issue area and steering self-regulation toward more effective and legitimate forms through ideational influences and material inducements. (IGOs) can also include (iPIGs) in supportive roles.[938] While regulatory collaboration resembles the interactions near the bottom of the (RR) pyramid, there is a significant difference: (IGOs) cannot easily escalate to more stringent forms of regulation if their efforts at persuasion fail. Reputational and market sanctions (positive and negative) are among the essential tools available for escalation, but their use must be enhanced if this form of transnational (RR) is effective.[939] (IGOs) must tread carefully, however, because their member states remain jealous of their authority and wary of aggressive regulatory intervention into national jurisdictions. Thus, the regulatory collaboration will necessarily be a weaker and more limited (RR) version.[940]

Second is Orchestration – which moves well beyond the original formulation of (RR) – (IGOs) use their limited capacities to support and empower independent intermediaries to

[935] ibid.p.97
[936] ibid.p.97
[937] ibid.p.97
[938] ibid.p.97
[939] ibid.p.97
[940] ibid.p.97

engage with target firms and industries. Intermediaries use their material and conceptual capabilities to promote and enforce effective self-regulation, multi-stakeholder regulation and other forms of (TRSS).[941] Its key properties are that orchestration is: (i) indirect because the orchestrator works through intermediaries to influence targets, and (ii) soft because the orchestrator lacks authoritative control over intermediaries and targets. Indirect governance is especially important transnationally, as (IGOs) often lack direct access to targets.[942] Intermediaries may include international (NGOs) or other (iPIGs), private or public-private (TRSS) schemes, and other actors independent of the targets. Orchestration provides (IGOs) with an important avenue of escalation: they can amplify reputational and market sanctions against defecting firms and industries by activating and supporting intermediaries. In addition, by bringing (iPIGs) and other civil society actors more deeply into the regulatory system, orchestration provides many of the benefits of tripartism identified by Ayres and Braithwaite, including offsetting business influence monitoring (IGOs).[943]

Some arrangements may comprise a single company or industry, while others cut across industry sectors or involve multiple business and civil society stakeholders representing a range of interests. Actors may employ formal legal mechanisms, such as national or international laws, as well as informal processes such as non–legally binding certification programs or codes of conduct.[944] As a result, however, the range of expertise found within any one scheme depends on the actors it engages. The emerging Transnational New Governance system relies heavily on voluntary principles, codes, procedures, and (to the extent states and IGOs are involved).[945]

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[941] ibid.p.97-98
[942] ibid.p.98
[943] ibid.p.98
[944] Tusikov (n 927).p.340
[945] Kenneth W Abbott and Duncan Snidal, 'Strengthening International Regulation Through Transnational New Governance ' (2009) 42 Vanderbilt Journal of Transnational Law 501.p.543

6.0. Investor-State Arbitration as Transnational Private Self-Regulatory Regime:

International arbitration is already engaged in the self-regulation of international arbitrators. Specifically, the ethical standards for arbitrators developed by the international arbitral community members are more precise, effective, and professionally relevant than those created by national legislatures and courts. Arbitral institutions directly oversee the selection, appointment, and challenge processes under their rules. In performing these functions, arbitral institutions act as primary regulators, developing applicable standards and enforcing them.[946] However, the basic framework for arbitrator regulation has proven to be more effective and reliable than might otherwise be imagined or implemented through any national regulatory process.[947]

International arbitration can ensure and perhaps even strengthen its vitality in cross-border contexts. Just as Braithwaite proposes in his model of enforced self-regulation, international arbitration's success is partially attributable to the fact that states provide an essential, though limited, control function. Arbitration's self-regulatory function, in other words, operate in the shadow of national courts' control function.[948] The result of these arrangements is a transnational, hybrid institutional constellation in which states cooperate to put the authority of their domestic courts behind private dispute resolution bodies.[949]

An example of these arrangements in investor-state arbitration is the (ICSID) centre which states and investors put the authority of their courts behind it as a dispute resolution body.

Therefore, the international arbitration regime is an example of global governance model. Thus, the professional regulation of participants in international arbitration has been and should be intentionally modelled to fit the self-regulatory structure of this regime.[950] Thus, the self-

[946] Rogers, *Ethic in International Arbitration* (n 830).p.223
[947] ibid.p.224
[948] ibid.p.238
[949] ibid.p.239
[950] ibid.p.239

regulatory structure in investor-state arbitration can fit the transnational private regulation (TPR), which is often associated with the shortcomings of the regulatory state as a global regulator. These weaknesses have fostered the emergence of international institutions, followed by the development of transnational private regulators.[951] Therefore, (TPR) is centred around private actors, interplaying with international organisations (IO) and intergovernmental organisations (IGO).[952] The regulatory actor in private regulation is driven by multiple actors: firms, (NGOs), independent experts, or epistemic communities.[953]

On the other hand, transnational private regulation in professional services examines the emerging body of rules created by private actors in a manner that leapfrogs national borders. Driven by the forces of globalisation of business, these actors aim to offer handy solutions to global professionals through rulemaking activities in the shadow of traditional forms of state regulatory making.[954] Thus, the (TRSS) schemes suggest that to make transnational professional private regulation effective, it need support from national or international agencies.

For example, public regulators decide to informally engage in a regulatory partnership with private parties for specific regulatory functions, including standard- or rule-setting or focus only on implementation, monitoring or enforcement. They can use agreements like (MOUs) or other organisational forms to engage in partnerships or promote the formation of private schemes by private organisations without direct participation. This is sometimes called a co-regulatory scheme.[955]

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[951] Fabrizio Cafaggi, 'New Foundations of Transnational Private Regulation' (2011) 38 Journal of Law and Society 20.p.23
[952] ibid.p.21
[953] Fabrizio Cafaggi and Andrea Renda, 'Measuring the Effectiveness of Transnational Private Regulation' [2014] Social Science Research Network SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2508684>.p.14
[954] Panagiotis Delimatsis, 'Transnational Private Regulation in Professional Services' [2012] Social Science Research Network SSRN 1 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2140927>. accessed 28 March 2021.p.1
[955] Cafaggi and Renda (n 951).p.47-48

7.0. Conclusion:

This chapter has found that one of the features of a profession, as part of its efforts to self-regulate, is to control entry to the profession, either formally or informally, to protect the public from incompetent practitioners. However, as explained in chapter 3 (2.1), international arbitrators have been a relatively closed community, with entry controlled informally through screening and promotion in an informal, tight-knit community such as – arbitrators' list-institutes with members.[956] In terms of professional regulation, the chapter has also discussed the use of the certification, which refers to the issuance of a certificate by a public or private governing body attesting to a person's attainment of specific knowledge and skill.[957] Certification focuses on an individual's credentials and eligibility to practice a profession. [958] On the other hand, certification standards are divided into three areas; first, private organisations establish standards for their members or panellists. Second, court programs that set standards for (ADR) providers handling court-referred cases. Third, state-wide licensure, applicable to all (ADR) practitioners, regardless of whether they practice in the courts, private marketplace or community programs.[959] However, the first type of certification standards is what the thesis will propose for arbitrators in the next chapter. Thus, to enable private organisations such as arbitration institutions to work and engage with other regulatory actors in establishing private certification standards in investor-state arbitration beyond states' intervention in the regulatory process, the theory of transnational self-regulation and transnational private standard-setting is important. Arbitral institutions and organisations operate as primary regulators. These entities have established their regulatory role through demonstrated expertise and proximity and constructive self-interest in safeguarding the effectiveness of arbitral processes.[960] They also have unique expertise based on their intimate

[956] Rogers, 'The Vocation of International Arbitrators' (n 225).p.977
[957] Schultze (n 810).p.47
[958] ibid.p.47
[959] Hoffman (n 428).p.3
[960] Rogers, *Ethic in International Arbitration* (n 830).p.240

knowledge of and direct involvement in arbitration practices and procedures and unique ability to operate in a multinational, multicultural environment.[961] As a result, they can work through the transnational regulatory standard-setting (TRSS) to propose a system of private certifications scheme for arbitrators to enhance independence and impartiality and the process of selecting arbitrators in investor-state arbitration.

Therefore, the next chapter of this thesis will discuss and analyse the reform proposals suggested in investor-state arbitration and the alternative solution the thesis will propose. The reform proposals in investor-state arbitration range from institutional reform to fundamental reform of investor-state arbitration system. However, the next chapter will argue that investor-state arbitration is a valuable dispute mechanism, and there is no alternative. Thus, reform should improve and enhance the system rather than replace it with a court or other reform. In addition, investor-state arbitration regulatory rules may need to be enhanced by a professional certification mechanism adapted to the criticism that arbitrators received about their integrity.

[961] ibid.p.254

Chapter 7: Existing Reforms of Investor-State Arbitration and The Alternative Solution:

1.0. Introduction:

This chapter discusses the arguments for and against the existing reform proposals for investor-state arbitration and suggests an alternative to these reforms proposals. The chapter proposes establishing an independent third-party certifier body based on transitional private regulation (TPR) to create a voluntary certification scheme to regulate arbitrators' practice in investor-state arbitration. The chapter argues that current comprehensive reforms and efforts to enhance investor-state arbitration legitimacy are unwarranted and instead recommend a corrective improvement measure for the arbitrators' community. The reason to focus on the arbitrators' community is that the investor-state arbitration system legitimacy is undermined by the concern or discomfort regarding arbitrators' independence and impartiality and the increasing number of arbitrator disqualifications in Investor-State arbitration. Maria Cleis stated that only a few scholars specify that the inadequacy of the standard of independence and impartiality or the rise in dilatory challenges could be the source of the surge in arbitrator challenges.[962] Maria also indicated that scholars have only exceptionally broached the issue based on the belief that (ICSID) arbitration suffers from an acute and prevalent systemic lack of independence and impartiality.[963] Therefore, several scholars have concluded that specific arbitration characteristics in general, particularly investment arbitration, are opposed to independence and impartiality. Thus, the (ICSID) arbitration system requires comprehensive reform instead of a partial approach.[964] These reform proposals will be discussed in the first section of this chapter.

[962] Cleis (n 439).p.188
[963] ibid.p.188
[964] ibid.p.188

However, as indicated in chapter 5 (2.1.4), there is an inadequacy of the standard of independence and impartiality in arbitrators' challenges in oil and gas disputes. The (ICSID) disqualification standard is more stringent than under the (SCC) or the (UNCITRAL) rules. However, only a small percentage of arbitrators in oil and gas disputes end up being disqualified. This indicates that the rise of challenges in oil and gas disputes have been used as dilatory challenges for the arbitration process. Based on these findings that there is an inadequacy of the challenge threshold rather than a systemic lack of independence and impartiality, this chapter concludes that comprehensive reforms would be unwarranted and unsuitable for resolving the system's existing deficiencies. For example, Maria Cleis suggests that existing concerns would effectively be reduced by clarifying the challenge threshold and bringing it into line with the threshold applied in the vast majority of the dispute settlement mechanisms.[965]

Instead of (ICSID) treaty modification for challenge threshold, this chapter's second section suggests a collaborative regulatory for professional certifications scheme to regulate arbitrators in investor-state arbitration. This suggestion aims to improve and enhance arbitrators' practice and integrity and focus on arbitrators' quality and arbitrator community rather than institutional or procedural reform proposals in the investment arbitration system. Further, the suggested professional certifications scheme will enhance the arbitrators' integrity and benefit confidence of the oil and gas industry in investor-state arbitration and provide the possibility of developing a certification program for oil and gas arbitrators within the certification scheme. At the same time, the certification will aid the gap in the existing provisions regarding appointment, training, and regulating arbitrators' markets in the oil and gas context. First, the second section will explain the procedure features of introducing professional certification and second, the structure of the regulatory certification scheme in the investor-state arbitration system. Third,

[965] ibid.p.189

the second section will explain the role of the (ICSID) and other regulatory actors in the professional certification regulation based on the transnational private regulatory mechanisms such as collaborative approach and orchestration approach. Further, the second section will argue for the certifications' effect in enhancing arbitrators' independence and impartiality and enhancing arbitrators' appointment and selection process in investor-state arbitration.

The third section of this chapter will support the argument for introducing an independent third-party certifier body based on transitional private regulation (TPR) to create a voluntary certification scheme in investor-state arbitration. Also, it discusses its advantages compared to other existing reform proposals. Further, the third section will provide examples of other certifications schemes that have been used in Alternative Dispute Resolutions (ADR), such as certification in international mediation and Maritime Arbitrators.

2.0. The Analysis of Existing Reform Proposals in Investor-State Arbitration:

2.1. Introduction:

Mark McLaughlin stated that there is no global consensus about reforming investor-State arbitration to address its deficiencies, therefore reform proposals are based on three types; incremental reform, institutional reform, and fundamental reform.[966] However, Susan Frank divided the reform proposals into four categories: Legislators' approach, Barrier Builders approach, Arbitration Rejecters approach, and Safeguard Builders approach.[967]

Legislators' approaches recommend changes to the text of investment treaties. Barrier Builders wish to impose pre-conditions to arbitration and minimise investors' access.[968] On the other hand, incremental reformists view the criticisms of the current system as overblown and argue that investor-state arbitration remains the best option available. Hence, they favour

[966] Mark McLaughlin, 'Global Reform of Investor–State Arbitration: A Tentative Roadmap of China's Emergent Equilibrium' (2018) 6 The Chinese Journal of Comparative Law 73.p.76
[967] Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatising Public International Law Through Inconsistent Decisions' (n 342).p.1587-1588
[968] ibid.p.1587

retaining the existing dispute resolution system but instituting modest reforms to redress specific concerns.[969] Institutional or Systemic reformists see merit in maintaining investors' ability to file claims directly on the international level but view investor-state arbitration as a seriously flawed system for dealing with such claims. They champion more significant, systemic reforms, such as replacing investor-state arbitration with a multilateral investment court and an appellate body.[970] Similarly, Safeguard Builders suggest structural modifications to the arbitration mechanism to promote legitimacy.[971] On the other hand, fundamental reformists -paradigm shifters- dismiss the existing system as irrevocably flawed and in need of replacement. They reject the utility of investors' making international claims against states, whether before arbitral tribunals or international courts. Instead, they embrace a variety of alternatives, such as domestic courts, ombudsmen, and state-to-state arbitration.[972] Similarly, Arbitration Rejecters believe that arbitration is simply the incorrect forum for resolving investment treaty disputes and advocating alternative public institutions' use to resolve investment disputes.[973]

As discussed in chapter 3 (3.2), there was dissatisfaction among some participants and observers with the investor-State arbitration system's overall structure and results.[974] Investor-state arbitration is in a state of flux, with doubts about its utility, coherence, adequacy and consistency becoming apparent.[975] As a correction to these deficiencies, institutional, incremental, and fundamental reform have been advanced as solutions.[976] These reforms introduce several proposals such as the abolishment of party-appointed arbitrators, the

[969] Anthea Roberts, 'Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration' (2018) 112 The American Journal of International Law 410.p.410
[970] ibid.p.410
[971] Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatising Public International Law Through Inconsistent Decisions' (n 342).p.1588
[972] Roberts (n 967).p.410
[973] Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatising Public International Law Through Inconsistent Decisions' (n 342).p.1588
[974] Dimitropoulos (n 82).p.418
[975] McLaughlin (n 964).p.74
[976] ibid.p.74

introduction of an appeal mechanism; the establishment of an international investment court; and the introduction of binding codes of conduct. However, except for the fourth proposal, the proposed reforms go toward a further judicialisation of investment arbitration or returning to the old status quo.[977] On the other hand, Ina C Popova and Jessica L Polebaum suggest that the voices for institutional reform may eventually converge on a consensual approach. In the meantime, the existing general standards of independence and impartiality are expansive enough to cover alleged prejudgment of legal or factual issues.[978] On this, the arbitration community as a whole will no doubt ultimately generate best practices through healthy debate, rigorous analysis, and seasoned practice.[979]

2.2. Incremental Reform- Legislators Approach:

The proponents of this reform acknowledge the deficiencies that plague the investor-state arbitration system but insist that the benefits outweigh the costs; the major proponents of incremental reform are Japan and the (USA).[980] Objections raised by Japan include that investor-state arbitration should only be available to developing states to ensure Japanese companies are protected and that it should be excluded from the USA as it is a highly litigious society.[981] The (USA) Primary objections centre on the disparity of access to justice with (US) nationals, lowering labour standards, and public policy is subject to arbitrators' judgment at the behest of foreign corporations.[982] Therefore, these objections have been met with incremental reform in international investment agreements. Most notable in this regard is the issuance of a Chapter 11 interpretation of the North America Free Trade Agreement (NAFTA) that all arbitral documents would promptly make available to the public.[983]

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[977] Dimitropoulos (n 82).p.418-419
[978] Ina C Popova and Jessica L Polebaum, 'Emerging Expectations for Arbitrators: Issue Conflict in Investor-State Arbitration and Beyond' (2018) 41 Fordham International Law Journal 937.p.952
[979] ibid.p.952
[980] McLaughlin (n 964).p.76
[981] ibid.p.77
[982] ibid.p.77
[983] ibid.p.77

On the other hand, it is possible to carve out some distinctive features of incremental reform. First, it keeps faith with investor-State arbitration in principle, accepting that its deficiencies can be addressed within current structures.[984] Second, these reforms aim to limit arbitrators' discretionary powers to ensure public interests are balanced against private rights.[985] This is achieved by clarifying the treaty language and restricting judicial arbitrariness. Traditional (IIAs) are added to ensure regulatory measures are protected to ensure legal safeguarding of democratic policymaking over international investor rights.[986] Third, these reforms call for increased transparency are required by the publication of awards. Increased flexibility allows agreements to be amended and states to react to the tribunals' ruling, conferring a higher control level.[987] In this reform approach, the 2014 (UNCITRAL) Rules on Transparency in Treaty-based Investor-State Arbitration is adapted. The public informed comprehensively about the investor-state proceeding while it is still early (Art. 3) of these rules requires publishing all procedural documents.[988]

2.3. Institutional Reform- Safeguard Builders Approach:

These reforms include developing an appellate mechanism and developing an investment court based on the belief that incremental reforms will not sufficiently address the existing problems.[989] Canada and the European Union (EU) advocate such an approach and introduce a code of conduct. In addition, the Comprehensive Economic and Trade Agreement between Canada and the (EU), (CETA) provides the road- map for future institutional reform likely to be pursued by both influential parties.[990]

Another institutional reform suggested by scholars like Jan Paulsson and Jan van den Berg is abolishing the system of party-appointment in international investment arbitration. Instead,

[984] ibid.p.79
[985] ibid.p.79
[986] Dietz, Dotzauer and Cohen (n 340).p.765
[987] McLaughlin (n 964).p.79
[988] Dietz, Dotzauer and Cohen (n 340).p.764
[989] McLaughlin (n 964).p.79
[990] ibid.p.79

it has been recommended that arbitral institutions appoint all members of an arbitral tribunal for more transparency in the appointing process and better control the appointed arbitrators' quality.[991] However, this proposal's adoption would mean losing the power to appoint an arbitrator; the actors may, moreover, stop resorting to arbitration overall.[992]

This institutional reform will address appellate review, lack of transparency and arbitrator independence. Coherence is introduced by the appellate mechanism, while transparency is increased by adherence to the 2014 (UNCITRAL) transparency rules and introducing a code of conduct for arbitrators.[993] The most radical reform is a two-tiered investment court, a tribunal of First Instance, and an Appeal Tribunal proposed by (CETA) and (EU)-Vietnam (FTA). Cases will be awarded randomly.[994] However, the challenge lies in the fact that courts will introduce substantial costs and long delays and the absence of international consensus to substantive protections. Institutional and incremental reforms are closer to each other in that they acknowledge that investor disputes should be settled by an international body, as opposed to domestic courts.[995]

2.3.1. Codes of Conduct:

The European Commission has put this proposal forward due to the collapse of the control systems for international arbitration. These changes will be aimed to deal with the issues of consistency of the awards and conflict of interests.[996] The development of a code of conduct by the (EU) includes questions about arbitrators' behaviour and ethics and conflicts of interests. This code of conduct is expected to list individuals who may act as arbitrators in specific disputes. The individuals will have to comply with the code of conduct. This system is viable with co-regulation and will be accepted by the arbitration community.[997]

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[991] Dimitropoulos (n 82).p.422
[992] ibid.p.422
[993] McLaughlin (n 964).p.80
[994] ibid.p.80
[995] ibid.p.81
[996] Dimitropoulos (n 82).p.424
[997] ibid.p.425

On the other hand, the former deputy and acting Secretary-General of (ICSID) Nassib Ziad have recommended that (ICSID) needs its code of conduct and guidelines for arbitrators and counsel.[998] In April 2019, member states of (UNCITRAL) Working Group III requested the (UNCITRAL) Secretariat to undertake together with the Secretariat of the (ICSID) preparatory work for an (ISDS) Code of Conduct, focusing on the implementation and enforceability of such a code.[999] Recently, the (ICSID) with (UNCITRAL) announced a joint draft code of conduct for adjudicators in investor-state arbitration. A code of conduct for arbitrators was one of the main topics of the suggested reform of (ICSID). However, there is no comprehensive code of conduct governing (ICSID) arbitrators or the treatment of potential issue conflicts.[1000] Further, there are some issues when developing a code; for example, the (ICSID) and (UNCITRAL) should prepare binding or non-binding codes (soft or hard law).[1001] There are strong arguments in favour of regulating ethics through non-mandatory guidelines. Guidelines could be more flexible, which may be more suitable in investment arbitration that is resolved in various arbitral institutions and applying different rules.[1002] On the other hand, arguments favouring a mandatory code claim that several previous attempts by well-respected institutions to develop non-binding guidelines have had only limited success. Although the (IBA) Guidelines have been invoked more frequently than other soft law instruments, they are rarely applied. They only cover the specific issue of conflicts of interest.[1003] Also, disputing parties have not shown a strong interest in incorporating ethics rules to resolve their dispute, only when the need arises.[1004] Another issue is concerning the scope of the applicability of an ethics code. Specifically, whether a series of specialised codes, each then applied and remodelled

[998] Nolan (n 334).p.439
[999] Giorgetti, 'A Common Code of Conduct for Investment Arbitrators?' (n 554).p.217
[1000] Popova and Polebaum (n 976).p.947
[1001] Giorgetti, 'A Common Code of Conduct for Investment Arbitrators?' (n 554).p.218
[1002] ibid.p.218
[1003] ibid.p.218
[1004] ibid.p.218

within a particular forum, is preferable to a general code that can be used by a diversity of institutions that administer investor-state arbitration cases.[1005] However, critics point out that repeat appointments, possible conflicts, and dual hatting can only be addressed if a code can be applied in multiple institutions and includes general complete disclosure requirements. Moreover, a general code could also regulate comprehensively the number of cases in which a person may simultaneously participate, for example, by limiting cases or types of cases in which a person could participate within a specified timeframe. This would address and provide respite to the concerns of conflicts of interest, repeat appointments, and dual hatting.[1006]

2.3.2. International Investment Court:

Professor Gus Van Harten put this proposal forward. He proposed replacing investment arbitration with a permanent court with tenured judges and is subject to supervision by national courts or an appellant body.[1007] This is believed to increase impartiality and independence as tenured judges do not have prospective future appointments in their minds compared to arbitrators. This will be a complete exit from the existing system and encourage people interested in accountability and independence.[1008] However, this is not a viable solution based on the global trend where people prefer alternative dispute resolution instead of the strenuous court process. Investors and states will have withdrawal options resorting to traditional international law dispute mechanisms, removing their cases and arbitration courts, ending up as the International Court of Justice.[1009]

Furthermore, the European Commission (EC) has reacted to criticisms of investor-state arbitration's legitimacy by replacing the investor-state dispute settlement system with a standing investment court (The EU Model of Investment Court). The (EC) has implemented these goals in the European Union's trade agreement with Canada (CETA) and Vietnam and

[1005] ibid.p.218
[1006] ibid.p.218
[1007] Dimitropoulos (n 82).p.423
[1008] ibid.p.424
[1009] ibid.p.424

the (EC's) proposal for a Transatlantic Trade and Investment Partnership.[1010] In November 2017, the (EC) announced that it would pursue the establishment of a permanent multilateral investment court system. This institutionalisation project aims to address, in part, concerns about the pernicious effects of party appointment of the decision-maker, but with the attendant consequences for the principle of party autonomy.[1011] This new model provided for permanent judges appointed by state parties and are required to adhere to the set code of conduct for judges and expertise in international law to deal with a lack of impartiality and independence.[1012] The judges have a fixed term of four- or six years depending on the treaty and can be appointed for a further term in office. This substantial change in appointment strengthens the state's position by having the exclusive right to nominate judges to the court in the dispute resolution system while at the same time weakening the influence of private investors who can no longer appoint a judge.[1013] This tackles the bias favouring investors in the arbitration system due to the lack of dependence on jobs handed out to them by private companies. The fixed terms in office should guarantee a high degree of neutrality and strengthen the judges' independence.[1014] The fixed judge's salary reduces the incentive to use the (ISDS) as a business for accumulating wealth that private arbitrators use. The two contracting parties pay the judges' salary on a parity basis supplemented by daily allowances that depend on the work done based on hourly rates.[1015] They receive an additional salary when they solve cases, and only a small amount upon original appointment means that his change is somewhat symbolic compared to the older system as it fails to eliminate the judges' incentive to work more cases and show bias to certain investors so enabling them to continue leveraging the new system for their benefit, increasing

[1010] Popova and Polebaum (n 976).p.948-949
[1011] ibid.p.950
[1012] Dietz, Dotzauer and Cohen (n 340).p.762
[1013] ibid.p.763
[1014] ibid.p.763
[1015] ibid.p.763

earning potential of the new judges.[1016] This new approach has more restrictive rules for working and selecting members based on specific qualification requirements and implementing a code of conduct that will focus on expertise law, with knowledge of investment law being of limited desirability.[1017]

Further, to address the lack of transparency, the new (EU) model will incorporate (UNCITRAL) transparency rules, which is a somewhat symbolic change because the previous model had the possibility of confidential hearings. However, the standards of transparency were lower.[1018] However, the old model showed many inconsistencies, as there was no possibility of appeal. In contrast, this new (EU) model brings a rather symbolic change in the global investment regime and is substantial in terms of the respective treaty. It will have an appellate body with jurisdiction over the respective investment treaty but not outside the bilateral contractual relationship.[1019]

On the other hand, courts can work with states as they are predictable and consistent in terms of courts' advantages.[1020] The ability of courts to secure compliance and build their social legitimacy. Potential of courts to push forward regional consolidation by making decisions important for long term interests of the regional blocs that they serve.[1021] However, the courts' disadvantages are that although a court is supposed to be an independent entity, states hold influence over judicial selection and can manipulate the budget to have the court make biased decisions, fail to comply with its judgments, or exit its jurisdiction.[1022] States that have a more

[1016] ibid.p.763
[1017] ibid.p.763
[1018] ibid.p.764
[1019] ibid.p.765
[1020] Shai Dothan and Joanna Lam, 'A Paradigm Shift? Arbitration and Court-Like Mechanisms in Investors' Disputes', *Permanent Investment Courts,European Yearbook of International Economic Law* (Springer Nature Switzerland 2020).p.20
[1021] ibid.p.18
[1022] ibid.p.17

substantial power on this new international investment court will have biased results in their favour. States will have the ability to choose the forum resulting in an advantage over others.[1023]

2.3.3. Appeal Mechanism:

The introduction of an appellate body provides the advantage of an additional layer for review to improve consistency while at the same time leaving the system's basic structure untouched.[1024] This mechanism helps transparently develop investment arbitration, with annulment playing the role of appeal.[1025] Creating an appellate body addresses some criticisms by ensuring results and doctrine predictability. It streamlines the industry by scrutinising how issue conflicts and double hatting between arbitrators and parties are dealt with and annul rulings if inappropriate behaviour is detected.[1026] It also ensures adherence to a set of codes of conduct.[1027] However, the appellate body must maintain impartiality and independence, which will be achieved by paying attention to how members of the appeal body are selected and deciding who can be nominated.[1028] Susan Franck suggests that establishing an independent permanent appellate is the best remedy for impartiality and inconsistency.[1029]

However, the appeal mechanism poses a severe threat of discouraging new arbitrators from entering the system, and the market also increases the time and costs involved for investment disputes resolution.[1030] Developing an appellate mechanism goes against the increased freedom and autonomy of commercial arbitration from judicial intervention.[1031] A permanent standing appellate body gains in treaty interpretation consistency do not guarantee corresponding profits in accuracy of treaty interpretation. Secondly, change to an institutionalised international

[1023] ibid.p.18
[1024] Dimitropoulos (n 82).p.423
[1025] ibid.p.423
[1026] Giorgetti and others (n 349).p.467
[1027] ibid.p.467
[1028] ibid.p.468
[1029] Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatising Public International Law Through Inconsistent Decisions' (n 342).p.1524
[1030] Dimitropoulos (n 82).p.423
[1031] Dothan and Lam (n 1018).p.15-16

investment dispute from an *ad hoc* tribunal would impact the balance of power between adjudicators and the state.[1032]

2.3.4. Abolishment of Party-Appointment System:

One of the alternatives to party appointments proposed by Jan Paulsson is to interpose an institution into the appointment process so that arbitrators would no longer be directly connected to the parties.[1033] In this context, the (ICSID) Secretariat can play a role (the ICSID Secretary-General) because it is already in charge of appointing arbitrators who have not been appointed by the parties and members of *ad hoc* Committees in annulment proceedings, in particular the (ICSID) Secretary-General.[1034] However, several objections were made to having the Secretary-General appoint all three arbitrators. First, it will create the Secretary-General's monopoly power, which is already criticised for all *ad hoc* committees' appointments by only one person concentrating too much power on the one hand.[1035] As a result, it is unlikely that the appointment of arbitrators by the Secretary-General would elicit more confidence in the dispute resolution process from the parties.[1036] Also, it would not solve existing independence and impartiality issues but would transform them into doubts regarding the arbitrators' political neutrality and institutional independence.[1037] In summary, the Secretary-General's appointment of arbitrators or the (ICSID) Chairman would neither increase arbitrators' independence and impartiality nor the parties' confidence in the process. Moreover, the appointed decision-maker's appropriate specialisation could not be guaranteed due to the lack of knowledge of the disputing parties' particular needs concerning the arbitrator's expertise.[1038]

[1032] Mark Feldman, 'Investment Arbitration Appellate Mechanism Options: Consistency, Accuracy, and Balance of Power' (2017) 32 ICSID Review 529.p.544
[1033] Cleis (n 439).p.194
[1034] ibid.p.194
[1035] ibid.p.194
[1036] ibid.p.195
[1037] ibid.p.195
[1038] ibid.p.197

The second alternative to party appointments would be to limit appointments by the parties to a complete roster of qualified arbitrators or standing panel roster. As the debate continues to rage between creating an international governance court and retaining the old arbitration system model, a third possible solution lies in forming standing panels that are halfway between the two.[1039] A standing panel is an institutional structure with a roster of arbitrators. It comprises a spectrum of institutional arrangements, and authorities exercise control by determining arbitrators that will preside over a dispute.[1040] To date, attempts to create such rosters have been unsuccessful in several dispute resolution mechanisms: In the (ICSID) system, many States fail to nominate arbitrators to the Panel of Arbitrators provided in Article 12 (ICSID) Convention. The roster of the (PCA's) arbitrators was initially intended to be closed but is mostly insignificant today, and parties can freely appoint anyone as an arbitrator.[1041] The standing panels in the investment arbitration system would enhance the panel's credibility and legitimacy by eliminating conflicts of interest and bias associated with normal tribunals, where arbitrators are biased towards the parties that selected them.[1042]

However, creating a roster of arbitrators would be problematic. There appears to be no appropriate roster size that would reduce the risk of dependence and partiality without unnecessarily curtailing the decision-making body's diversity and expertise.[1043] An extensive roster would be ineffective, and its members would not be assured of receiving appointments and would therefore continue to compete for nominations.[1044] Further, a small roster would virtually have to guarantee an arbitrator to get appointed to tribunals. Such a short roster would

[1039] Leom E Trakman and David Musayelyan, 'Arguments For and Against Standing Panels of Arbitrators in Investor-State Arbitration: Evidence and Reality' Melbourne Journal of International Law <https://law.unimelb.edu.au/__data/assets/pdf_file/0004/1954156/Trakman,-ARGUMENTS-FOR-AND-AGAINST-STANDING-PANELS-OF-ARBITRATORS-IN-INVESTOR-STATE-ARBITRATION-EVIDENCE-AND-REALITY.pdf>.accessed 28 March 2021.p.3
[1040] ibid.p.12
[1041] Cleis (n 439).p.198-199
[1042] Leon Trakman, 'Enhancing Standing Panels in Investor-State Arbitration: The Way Forward?' (2017) 48 Georgetown Journal of International Law 1145.p.1171
[1043] Cleis (n 439).p.199
[1044] ibid.p.199

eliminate the parties' freedom of choice; it would also increase the chances of repeat appointments which is frequently invoked bases for arbitrator challenges. Simultaneously, diversity and expertise on such a small roster would be significantly curtailed.[1045]

On the other hand, States are hesitant to adopt this model as they will be required to surrender their privilege and right to appoint arbitrators.[1046] Further, different standing panels have different models, which undermine the point of it being standardised.[1047] The panel models are determined by the treaties they are meant to regulate, with treaties in which Canada are a party having established and detailed rules that include selection criteria and relevant qualifications required for panel appointments.[1048] On the other hand, other treaties defer to institutional authorities to handle appointment and detailed selection. These differences divergence across treaties are the most significant drawback, with (UNCTAD) arguing for arbitrators' random appointment from rosters.[1049]

2.4. Fundamental Reform- Arbitration Rejecters Approach:

Proponents of fundamental reform to investor-State arbitration are Brazil, India, and South Africa. Several countries have withdrawn from (ICSID) altogether: Ecuador, Bolivia, and Venezuela.[1050] These proponents reject the basic belief that an international system should recourse to investor-state problems. This is driven by a state's practical experience with investor-state arbitration, where the awards were negative based on their view.[1051] Fundamental reforms propose alternative forms of dispute settlement, focusing on mandates to prevent disputes given to an Ombudsman.[1052] If a dispute arises, a joint committee of both parties' representatives will form a state-state arbitration tribunal. Guidelines are put in place to

[1045] ibid.p.199-200
[1046] Trakman and Musayelyan (n 1037).p.4
[1047] Trakman (n 1040).p.1153
[1048] ibid.p.1153
[1049] ibid.p.1153
[1050] McLaughlin (n 964).p.81
[1051] ibid.p.81
[1052] ibid.p.82

regulate corruption, multinational enterprises and protect all life. This is done to replace an adversarial approach with a cooperative one.[1053]

Further, there are proposals to resort to diplomacy to solve international disputes. In every international dispute involving foreign nationals, the traditional way of resolving investor-State disputes has been diplomacy and diplomatic protection in international investment law. As seen in the (UNCTAD) toolkit for the resolution that involves conciliation, negotiation and mediation, the evolution of diplomacy makes the system more effective.[1054] The measures, however, may end up being ineffective due to delays associated with bureaucracy as opposed to offering solutions. Therefore, these measures are ideal for dispute prevention rather than dispute resolution.[1055]

A further proposal, partly in response to Australia's withdrawal from international investment arbitration, has been recently again put on the table to go back to domestic courts' system deciding on investor-State issues.[1056] However, domestic courts' use to solve international investment issues will dilute the law as they will have challenges acting impartially due to their country's interests.[1057] Eventually, the success of a broad re-introduction of domestic courts in resolving international investment disputes will depend on domestic courts' quality.[1058]

3.0. The Alternative Solution of Collaborative Regulatory of Certifications Scheme:

3.1. Introduction:

In chapter 6 (5.2), the thesis discussed the theoretical basis of transnational private regulation (TPR) and Investor-state Arbitration as a transnational private self-regulatory

[1053] ibid.p.82
[1054] Dimitropoulos (n 82).p.425
[1055] ibid.p.425
[1056] ibid.p.426
[1057] ibid.p.426
[1058] ibid.p.426

regime. In (TPR), private actors play a significant role in the regulatory process. Many political scientists prefer the term "private governance", whereas some institutional economists refer to "private ordering". Experts in regulatory governance often refer to "self-regulation" or, depending on government involvement, "co-regulation". International organisations have referred to private regulatory schemes as "alternative modes of regulation".[1059] Cafaggi and Renda stated that the term private regulation encompasses all these phenomena, and thus in the broadest possible sense.[1060] Accordingly, private regulation is the performance of one or more vital regulatory functions (e.g., rule-making, implementation, monitoring, enforcement) by one group of private parties linked by a contractual or organisational arrangement.[1061] Therefore, arbitral institutions act as primary regulators, developing applicable standards and enforcing them when they perform functions such as overseeing the selection, appointment, and challenge processes under their rules.[1062] Thus, as proposed by the transnational enforced self-regulation and global governance theories, participants' professional regulation in international arbitration should intentionally be modelled to fit this regime's self-regulatory structure.[1063] Further, as explained in chapter 1 (2.2.2), Catherin Rogers suggested that perhaps the time has come for licensing or certification procedures to regulate arbitrator conduct.[1064] Also, Mark Gough and Kyle Albert stated that the arbitrator rosters maintained by major arbitration providers maintain some level of quality control through the minimum standards such as require extensive work experience in arbitration and formal training; however, certification programme may assure competence and provide a clearer signal of neutrality than membership on a roster.[1065]

[1059] Cafaggi and Renda (n 951).p.16
[1060] ibid.p.17
[1061] ibid.p.17
[1062] Rogers, *Ethic in International Arbitration* (n 830).p.223
[1063] ibid.p.239
[1064] Rogers, 'Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct' (n 10).p.121
[1065] Gough and Albert (n 89).p.854-855

Accordingly, the existing reform proposals in investor-state arbitration require fitting the structure of investor-state arbitration as a transnational self-regulatory regime. This section suggests a transnational private regulation of voluntary professional certifications scheme by creating an independent third-party certifier to regulate arbitrators in investor-state arbitration instead of comprehensive reform. This suggestion aims to improve arbitrators' selection and appointment and enhance arbitrators' practice and integrity by focusing on arbitrators' quality and arbitrator community rather than institutional reform proposals such as roster or standing tribunal and investment court. Further, the suggested certifications scheme will provide the appropriate venue for developing a certification program for investor-state arbitration for oil and gas arbitrators. Also, encourage the involvement of private actors in the oil and gas industry such as energy arbitration institutions, (NGOs), professional associations and industry groups in the oil and gas industry. This section will explain the certifications scheme procedures, regulatory actors' roles, and the certification scheme's structure for arbitrators in investment arbitration.

3.2. The Procedural Features of Transnational Private Regulation (TPR):

3.2.1. The Standard-Setting, Enforcement Procedures and Regulatory Instruments:

The (TPRs) act as private legislatures, including three distinct features; standard-setting, implementing enforcement procedures, and regulatory instruments.[1066] Regarding the standard-setting procedure, the private standards are voluntarily applied by regulated entities, individually or collectively, to benefit third parties.[1067] The standards may be included or codified in regulatory contracts using codes of conduct, guidelines, regulations, memoranda of understanding, or framework agreements signed by the regulated entities.[1068] However, the

[1066] Fabrizio Cafaggi, 'The Many Features of Transnational Private Rule-Making: Unexplored Relationships Between Custom, Jura Mercatorum and Global Private Regulation' (2015) 36 University of Pennsylvania Journal of International Law 875.p.899

[1067] ibid.p.909

[1068] Fabrizio Cafaggi, 'A Comparative Analysis of Transnational Private Regulation: Legitimacy, Quality, Effectiveness and Enforcement' [2014] EUI Department of Law Research Paper No. 2014/145 <https://ssrn.com/abstract=2530516>.accessed 28 March 2021.p.16

paradigmatic example is certification, where different schemes have emerged, driven by industry, and more recently, by multiple stakeholders, including national governments.[1069] Finally, the standards-setter may either proscribe the standards and let regulated entities choose the implementation instruments (output standards) or suggest or impose not only the tool (the standard contract form) firms have to deploy but also the governance requirements necessary for good implementation (input standards). In this matter, there is a wide variety of standards ranging from general principles to highly detailed and specific rules.[1070]

In terms of the enforcement procedure, the (TPRs) enforcement mechanisms ensure compliance with the standards and solve disputes between the regulator and regulated, between regulated, and between regulated and third parties.[1071] The private enforcer might be a unit of the regulatory body (simpler version) or have an independent legal personality- third-party enforcer-but its activity should not be subject to the standard setter's control.[1072] However, transnational private governance has separated regulatory functions: standard-setting, monitoring, and enforcement.[1073] Further, private regulators' enforcement procedure includes defining a sanctioning system stemming from contract law, those based on organisational law, and those grounded on reputation.[1074]

(TPRs) are represented by the specificity of regulatory instruments primarily drawn from private law, particularly ownership and agreements, property rights and contracts.[1075] Their structure is determined by the necessity to standardise the obligations and rights of regulated entities and the interests of third parties non-members of the regulatory entity. They do not operate as stand-alone instruments but the interplay with other private tools and underlying

[1069] Cafaggi, 'The Many Features of Transnational Private Rule-Making: Unexplored Relationships Between Custom, Jura Mercatorum and Global Private Regulation' (n 1064).p.900
[1070] ibid.p.909
[1071] ibid.p.903
[1072] ibid.p.904
[1073] ibid.p.908
[1074] ibid.p.905
[1075] Cafaggi and Renda (n 951).p.54

public regulation.[1076] Regulatory Contracts as instruments are by far the most diffused instrument to define the standards and the modes of compliance in (TPR) but not the only one.[1077] However, the regulatory function of contracts has, in turn, impacted the sanctioning system. A double sanctions system ensures compliance with private standards incorporated in the commercial contract.[1078] Certification is another regulatory instrument that plays an increasing role in certification schemes where regulated entities join the regime by signing bilateral contracts with certifiers that share common rules imposed by the accredited body in compliance with the scheme's regulations owner.[1079] Certification is the process through which a party – the certifier – assesses a product's conformity, process or persons managed by another party –the certified– with specific quality standards.[1080] The certification aims to ensure compliance with obligations by parties who voluntarily joined the scheme. Certification can be found in food safety, human rights, and environmental and social standards. Also, certification is primarily managed via contracts.[1081] Certification may be mandated by legislation, public policy or based on contractual arrangements. It typically implies a continued relationship of compliance: the certifier assesses the compliance levels intermittently during the period in which the certificate is valid.[1082] A key rationale of certification is reducing information asymmetries between suppliers and their customers, be it business, consumers or governments. The certification programs' principal function may thus be the signalling of compliance with certain norms to other market participants, thus enabling them to deploy market sanctions,

[1076] Cafaggi, 'A Comparative Analysis of Transnational Private Regulation: Legitimacy, Quality, Effectiveness and Enforcement' (n 1066).p.15
[1077] ibid.p.16
[1078] Cafaggi, 'The Many Features of Transnational Private Rule-Making: Unexplored Relationships Between Custom, Jura Mercatorum and Global Private Regulation' (n 1064).p.911
[1079] Cafaggi, 'A Comparative Analysis of Transnational Private Regulation: Legitimacy, Quality, Effectiveness and Enforcement' (n 1066).p.16
[1080] Paul Verbruggen and Rebecca Schmidt, 'The Role of Certification in the Enforcement of Transnational Private Regulation' [2013] Social Science Research Network SSRN 1 <http://ssrn.com/abstract=2255918>. accessed 28 March 2021.p.3
[1081] Cafaggi, 'A Comparative Analysis of Transnational Private Regulation: Legitimacy, Quality, Effectiveness and Enforcement' (n 1066).p.16
[1082] Verbruggen and Schmidt (n 1078).p.3

social sanctions, or legal sanctions depending on the legal relationship with the certified firm.[1083]

3.3. The Structure of Private Certifications Scheme for Investor-State Arbitration:

3.3.1. The Role of ICSID in Regulatory Standard-Setter of Certifications Scheme:

Chapter 6 (5.2.2) explores the theory of transnational responsive regulation, and the theory of transnational enforced self-regulation suggests that intergovernmental organisations (IGOs) can work as responsive regulators. The (IGOs) can work with transnational regulatory standard-setting (TRSS) schemes – coordinating, supporting, and steering them – to construct a mixed transnational institutional order capable of engaging in Responsive Regulation (RR). (IGOs) are the best available transnational responsive regulators: they have the global scope, legitimacy, and focality to play this central role; (IGOs) also possess some necessary capacities.[1084] Therefore, two strategies introduced regulatory collaboration and orchestration, which will be explained in the next section. The former resembles Responsive Regulation (RR) but requires adaptation; the latter is more innovative and matches (IGOs') limited capacities.[1085]

This section argues that investor-state arbitral institutions, considered intergovernmental organisations (IGOs), can implement the orchestration strategy to develop transnational private standards for certification schemes and support creating the separate third-party certifier body. However, Dimitropoulos suggests that through co-/self-regulatory approach, (ICSID) should have a central role in the shaping of the certification system, and the (ICSID) Secretariat could be responsible for the development of the standards in the form of a code of conduct and for "accredit" the certifiers or the states could be responsible for the accreditation of the certifiers.[1086] On the other hand, as will be suggested next in section (3.3.3.), the (ICSID)

[1083] ibid.p.3-4
[1084] Abbott and Snidal (n 926).p.103
[1085] ibid.p.103
[1086] Dimitropoulos (n 82).p.430-431

Secretariat's role as an accreditor of the Certifier might pose a problem where could be the (ICSID) representative on a wide accreditation body. However, to mitigate such a problem in the suggested certification scheme in investor-state arbitration, the contractual relation between the (ICSID) as standards owner and the accreditation body is only an optional contractual relation. This optional contractual relation with accreditation body enables the (ICISD) to require certifiers to comply with (ISO/IE 17065; the Conformity assessment Requirements for third-party certifying products, processes, and services), which replace the（ISO/IEC) Guide 65 standard.[1087] The accreditation body assure the (ICSID) Secretariat of the compliance with the (ISO/IEC) 17065.[1088]

In investor-state arbitration, the (ICSID), the (UNCITRAL) and the (PCA) are intergovernmental organisations (IGOs) with member states. The governing bodies are composed of the institutions' respective contracting state parties or member states.[1089]The (ICSID) Administrative Council is in charge of proposing and approving amendments to the (ICSID) Convention and adopting the (ICSID) Arbitration Rules and changes.[1090] Further, the Permanent Court of Arbitration (PCA) governing body is represented in the Administrative Council that oversees its policies budgets and adopts the Amendments to the (PCA) Rules.[1091] Furthermore, the governing body of (UNCITRAL) is the Commission which consists of the representatives of member states elected for three or six years by the (UN) General Assembly. Amendments to the (UNCITRAL) Rules are initiated, drafted and adopted by the Commission

[1087] ISO the International Organization for Standardization; see: https://www.iso.org/home.html accessed 13 March 2024. and IEC the International Electrotechnical Commission for worldwide standardization; see: https://www.iec.ch/homepage accessed 13 March 2024. The ISO/IEC Guide 65 is the withdraw standard for General requirements for third-party operating a product certification system; see: https://www.iso.org/standard/26796.html accessed 13 March 2024.
[1088] The ISO/IEC 17065 is the new Conformity assessment Requirements for bodies (third-party) certifying products, processes, and services; see: https://www.iso.org/standard/46568.html accessed 13 March 2024.
[1089] Nathalie Bernasconi-Osterwalder and Diana Rosert, 'Investment Treaty Arbitration: Opportunities to Reform Arbitral Rules and Processes' (2014).p.7
[1090] ibid.p.7
[1091] ibid.p.7

with observer states, international organisations and (NGOs).[1092] Accordingly, these arbitral institutions governing bodies can be engaged in a contractual relationship as (IGOs') responsive regulators in the process of transnational regulatory standard-setting (TRSS) for professional certifications scheme for arbitrators through orchestration strategy by creating an independent third-party certifier body. As mentioned above that, (IGOs) have two strategies working through transnational regulatory standard-setting (TRSS) such as regulatory collaboration and regulatory orchestration.[1093] In the next section, the thesis will explain the (ICSID) roles using the two strategies and suggest standards-setting for certification schemes using orchestration strategy.

3.3.1.1. Regulatory Collaboration Strategy:

In the Responsive Regulation (RR) model, the agency "delegates" regulatory functions to business targets – firms, industry groups, professional associations, technical standards bodies, and other groups– by (contingently) authorising self-regulation.[1094] In regulatory collaboration, (IGOs) interact directly with regulatory targets, relying on relatively soft inducements to gain voluntary cooperation, promote self-regulation, and steer it in desired directions. (IGO) inducements often resemble "persuasion" in (RR) theory, the lowest level of the regulatory pyramid; with few potential escalation avenues, these have limited impact.[1095] However, when (IGOs) can provide sufficient incentives, collaboration can have more significant effects.[1096] (IGOs) have two principal avenues of escalation in case of defection. The first is to withdraw any benefits they have conveyed. The second is the reputational sanction; this approach is less demanding, as it does not require the provision of benefits, yet it remains underdeveloped.[1097]

[1092] ibid.p.7
[1093] Abbott and Snidal (n 926).p.97
[1094] ibid.p.103
[1095] ibid.p.103-104
[1096] ibid.p.104
[1097] ibid.p.104

Enhancing reputational sanctions involves (iPIGs) – and national or local (PIGs) – in regulatory collaboration, as Responsive Regulation.[1098]

As suggested in (3.3.1.) by Dimitropoulos, in regulatory collaboration strategy, (ICSID) will be responsible for creating a market for certified arbitrators, and the (ICSID) Secretariat could "accredit" the certifiers. "Accreditation" should be used to license training and certification centres by (ICSID).[1099] This is because the regulatory collaboration suggests that (IGOs) engage directly with target firms and industry groups, promoting and supporting self-regulation and steering self-regulation toward more effective and legitimate forms through ideational influences and material inducements. (IGOs) can also include international public interest groups (iPIGs) in supportive roles.[1100]

3.3.1.2. Regulatory Orchestration Strategy:

Orchestration enables (IGOs) to enlist an existing intermediary organisation or create a new intermediary body. An (IGO) enlists intermediary organisations that share its regulatory goals in orchestration and supports them in regulating firms or other targets through transnational regulatory standard-setting (TRSS). Intermediaries may include (iPIGs), civil society based (TRSS) schemes, and collaborative schemes that include business or public actors.[1101] Orchestration involves (iPIGs) centrally in the regulatory process, including promulgating standards and crucial later stages, such as monitoring and enforcement.[1102] An (IGO) can catalyse intermediary organisations as an orchestrator, encouraging them to focus on particular issues or targets or adopt desired strategies. In some cases, an orchestrator might even help create suitable intermediaries where they do not exist.[1103] Once intermediaries are engaged, an

[1098] ibid.p.105
[1099] Dimitropoulos (n 82).p.430
[1100] Abbott and Snidal (n 926).p.97
[1101] ibid.p.105
[1102] ibid.p.105
[1103] ibid.p.105

(IGO) can provide ideational and material support and deploy its support conditionally to steer intermediary activities.[1104]

Orchestration is a crucial addition to (RR) theory. It is a precious strategy for (IGOs), as it helps them overcome their structural defects as responsive regulators. Intermediaries provide regulatory capabilities that (IGOs) lack. Private intermediaries have direct access to private targets and more extensive information about them. Intermediaries also contribute specialised expertise and operational capacities such as monitoring.[1105] By orchestrating private organisations operating within an issue area, (IGOs) can enhance their facility. By cooperating with well-regarded intermediaries, (IGOs) can strengthen their legitimacy and authority. Also, states that might oppose direct (IGO) regulatory efforts are less sensitive to (IGOs') indirect role as orchestrators. Indeed, the involvement of private intermediaries may provide domestic support for (IGO) action, increasing state support.[1106] Intermediaries take on the state's traditional role in sanctioning violations in other settings lacking strong state structures. Some intermediaries also have additional enforcement capacities, most dramatically mobilising consumer boycotts or other economic pressures.[1107] Orchestration involves civil society intermediaries in regulatory interactions with targets; involving multiple intermediaries increases protection against capture while also enhancing sanctioning power.[1108]

(ICSID) uses their limited capacities to support and empower intermediaries to engage with target firms and industries in regulatory orchestration strategy. Intermediaries use their material and ideational capabilities to promote and "enforce" self-regulation, multi-stakeholder regulation, and other forms of (TRSS). Intermediaries may include international public interest

[1104] ibid.p.105
[1105] ibid.p.106
[1106] ibid.p.106
[1107] ibid.p.106
[1108] ibid.p.106

groups (iPIGs), private or public-private (TRSS) schemes, and other actors independent of the targets.[1109]

Finally, although regulatory collaboration and orchestration can improve international regulation, these techniques still fall short of the (RR) ideal compared to domestic agencies; (IGOs) have limited regulatory capacities, lack big guns, and are granted only limited access to private targets.[1110] Regulatory collaboration, especially with (iPIGs) involvement, allows (IGOs) to gain the voluntary participation of targets whose interests are not too sharply opposed to the regulatory objective. Orchestration, by contrast, engages intermediaries that possess monitoring capacities and even small guns of their own to encourage a broader range of targets to participate.[1111] Therefore, as discussed above by Abbott and Snidal, the thesis suggested that the certification scheme in investor-state arbitration will use the orchestration strategy which possess monitoring capacities and have small guns to encourage broader targets to participate in the voluntary certification scheme. Further, Private intermediaries have direct access to private targets and more extensive information about them.[1112] Thus, orchestration regulatory strategy will enable the (ICSID) to prevent an accreditation system from being ignored by the parties, who may continue with their arbitrator appointment system. The (ICSID) as an (IGO) can escalation in case of defection to withdraw any benefits to parties ignoring the certification scheme or issue reputational sanction which remains underdeveloped.[1113] Crucially, orchestration implicitly assumes that a single (IGO), in our example is the (ICSID), will emerge in each issue area as a clearly identified orchestrator of (TRSS) schemes, much as (RR) assumes a focal state agency.[1114] Further, one of the objectives of certification scheme in investor-state arbitration as an opt-in voluntary system is to open access to a larger pool of

[1109] ibid.p.97-98
[1110] ibid.p.108
[1111] ibid.p.108-109
[1112] ibid.p.106
[1113] ibid.p.104
[1114] ibid.p.109

arbitrators to create a counter network of arbitrators who have other credentials than the current ones, and would compete network-to-network with the existent network. [1115]

However, Key problems include conflicting goals and, therefore, inconsistent regulatory efforts by orchestrators and forum-shopping by targets seeking to take advantage of disorder. Nevertheless, this problem needs to be viewed in the context of the lack of hierarchical regulatory alternatives and the even greater multiplicity of (TRSS) schemes. Coordinating (IGO) activities is crucial and difficult, but it remains a second-order problem compared to strengthening transnational regulation.[1116]

3.3.2. The Role of States in Certification Scheme:

The States can influence non-state programs in the regulatory process, beginning with agenda-setting and negotiation; governments can participate in these processes by providing expertise and technical advice, as well as administrative or financial support.[1117] Concerning implementation, while states' importance is relatively high at the agenda-setting/negotiation stage, it is relatively low at the implementation stage. Even strong states lack the authority and expertise to implement standards within firms.[1118] Finally, states may play a vital role in the monitoring and enforcement of standards when states are not directly involved in the monitoring and enforcement of standards. These programs rely on regular third-party audits by independent certification bodies (certifiers) for enforcement.[1119] All the same, they require effective regulation and enforcement of contract law, property rights, planning rules, and the like to function, and governments can have a significant impact on the work of third-party auditors.[1120]

[1115] Dimitropoulos (n 82).p.430
[1116] Abbott and Snidal (n 926).p.109
[1117] Lars H Gulbrandsen, 'Dynamic Governance Interactions: Evolutionary Effects of State Responses to Non-State Certification Programs' (2014) 8 Regulation and Governance 74.p.76
[1118] ibid.p.76
[1119] ibid.p.76
[1120] ibid.p.77

3.3.3. The Creation of Third-Party Certifier Body:

As discussed above, the thesis supports an orchestration strategy to enable (IGOs) in investor-state arbitration to enlist an existing intermediary organisation or create a new intermediary body. However, in this section, the thesis argues for creating a separate certifier body based on a third-party certifications scheme. The certifications scheme is based on four types of certifications; one approach to distinguish between the four types of certifications is by referencing the relationship between the body that has adopted the quality standards against which certification is gained – the standard-setter, and the entity applying for certification.[1121]

The first type is based on a collaborative regulatory strategy called the 'first-party' certification, where the certifier coincides with the standard-setter: the company or organisation that has adopted the standard carries out the compliance check itself.[1122] However, in the orchestration strategy, the certification has two types; the second-party and third-party certification scheme. The 'Second-party' certification suggests that the standard-setter has outsourced the certification function to a separate legal entity. However, the certifier and the certified entertain close relations and cannot be considered independent since they have similar business interests.[1123] For example, the certifier may be a representative organisation of which the firm is applying for certification is a member, a firm's subsidiary, or a firm operating in the same industry.[1124] On the other hand, the 'third-party certification' suggest that the standard-setter has allocated the certification function to a separate legal entity directly or indirectly related to the product, process or persons certified.[1125] The standard-setter typically imposes conditions on the certifier that it must meet to be allowed to monitor compliance with the quality standards. An accreditation body's attestation concerning the certification's

[1121] Verbruggen and Schmidt (n 1078).p.4
[1122] ibid.p.4
[1123] ibid.p.4-5
[1124] ibid.p.5
[1125] ibid.p.5

competency and independence is typically required.[1126] Accreditation constitutes the process through which an authoritative organisation offers formal recognition that an individual certifier is competent to perform audits and certify that certain products, processes or (legal) persons meet a particular set of norms.[1127] Under third-party certification schemes, the costs of the certification audits carried out by the certifier are typically borne by the entity seeking certification. The third-party certifier has no commercial relationship with the certified party; this type of scheme has been called fourth-party certification. Examples of such not-for-profit certifiers are government authorities or (NGOs).[1128]

On the other hand, the factors that influence the standard-setter choice to opt for a particular certification scheme are the balance between costs and risks.[1129]

3.3.3.1. The Advantages and Interests' Heterogeneity:

It is held that third-party certification offers many important advantages over first- and second-party certification schemes. A third-party certification scheme is said to facilitate trust in and the legitimacy of the private regulatory regimes. It is also more independent, transparent and credible than first- and second-party certification, given that it is accredited certification bodies that assess and ensure compliance with the private norms.[1130] However, the independence of third-party certification is somewhat undermined because the certification services are paid by the entity seeking certification.[1131] In other words, there is a commercial relationship between the certifier and the certified. However, the risk that certificates are awarded falsely can be minimised by ensuring effective competition, tight oversight by accreditation bodies or body authorities, and adequate sanctioning in case of fraudulent practices.[1132]

[1126] ibid.p.5
[1127] ibid.p.6
[1128] ibid.p.5
[1129] ibid.p.5
[1130] ibid.p.6
[1131] ibid.p.6
[1132] ibid.p.6

On the other hand, there might be interests' heterogeneity about objectives and instruments among the diversity of regulatory actors in a private certification scheme. This conflict is reflected in the nature of transnational communities that have emerged and are involved in regulatory processes.[1133] However, the first response to conflicts is provided by governance models, which includes both a simple and a complex version.[1134] In the simple version, the organisation opens the membership to different constituencies. The regulatory model prioritises constituencies by using different membership statuses in some cases. The primary constituency is granted full membership, while other constituencies are given the status of associate members—or that of observers.[1135] The complex model comprises different chambers or pillars within the general assembly. Each constituency is represented in a chamber, and the chambers appoint members of the board.[1136] The second institutional response to the heterogeneity of interests is related to the regulatory process changes concerning participation and consultation. Many transnational private regulators have codified their standard-setting procedures, which require consultations at different stages of the drafting process.[1137] In addition, many transnational private regulators create technical committees whose components are appointed based on expertise and representation of interests. In technical committees, the consensus is the general rule; therefore, participation influences the decision-making process.[1138] The alternative or complementary method to ensure inclusiveness is granting consultations at every relevant drafting stage. Consultations' outcomes have to be considered, and reasons have to be given when recommendations are rejected.[1139]

[1133] Cafaggi, 'The Many Features of Transnational Private Rule-Making: Unexplored Relationships Between Custom, Jura Mercatorum and Global Private Regulation' (n 1064).p.893
[1134] ibid.p.896-897
[1135] ibid.p.897
[1136] ibid.p.897
[1137] ibid.p.898
[1138] ibid.p.899
[1139] ibid.p.899

3.3.3.2. The Contractual Relationships:

Before providing certification services, the certifier must have concluded a licensing contract with the standard owner.[1140] This contract specifies what requirements the certifier must meet to become and remain approved as a licensed certifier under the particular regime.[1141] It typically includes detailed procedures of monitoring, complaint handling and sanctioning. Accreditation against the (ISO/IEC) Guide 65 [1142] is usually required as well. Compliance with this standard, which has emerged as "the golden standard" for conformity assessment bodies, is monitored by accreditation bodies, which operate based on a service contract concluded with the certifier concerned.[1143] For this purpose, the standard-owner may even have adopted a memorandum of understanding with accreditation bodies (or their representative organisations at the international level).[1144]

Another contractual relationship exists between the entities that seek certification against a standard and the licensed and accredited certifier.[1145] For example, firms that want to gain certification need to register with the certifier and sign a service contract, which typically specifies the procedures and conditions for certification and regulates the use of trademarks and logos with the certificate supplier.[1146] Finally, a contractual arrangement between the seller (in our case is, the ICSID) and the buyer (arbitrators or professionals) may require the former to be certified against a particular private standard, which may have been developed by or with the participation of the buyer itself. [1147]

[1140] Verbruggen and Schmidt (n 1078).p.7
[1141] ibid.p.7
[1142] See (n 1086); the (ISO/IEC) Guide 65 is the withdraw standard for General requirements for third-party operating a product certification system; the (ISO/IEC) 17065 replace the (ISO/IEC) Guide 65.
[1143] Verbruggen and Schmidt (n 1078).p.7
[1144] ibid.p.7
[1145] ibid.p.7
[1146] ibid.p.7-8
[1147] ibid.p.8

Figure (4) below illustrates contractual relationships of third-party certification in investor-state arbitration based on the figure provided by Rebecca Schmidt and Paul Verbruggen's article.[1148]

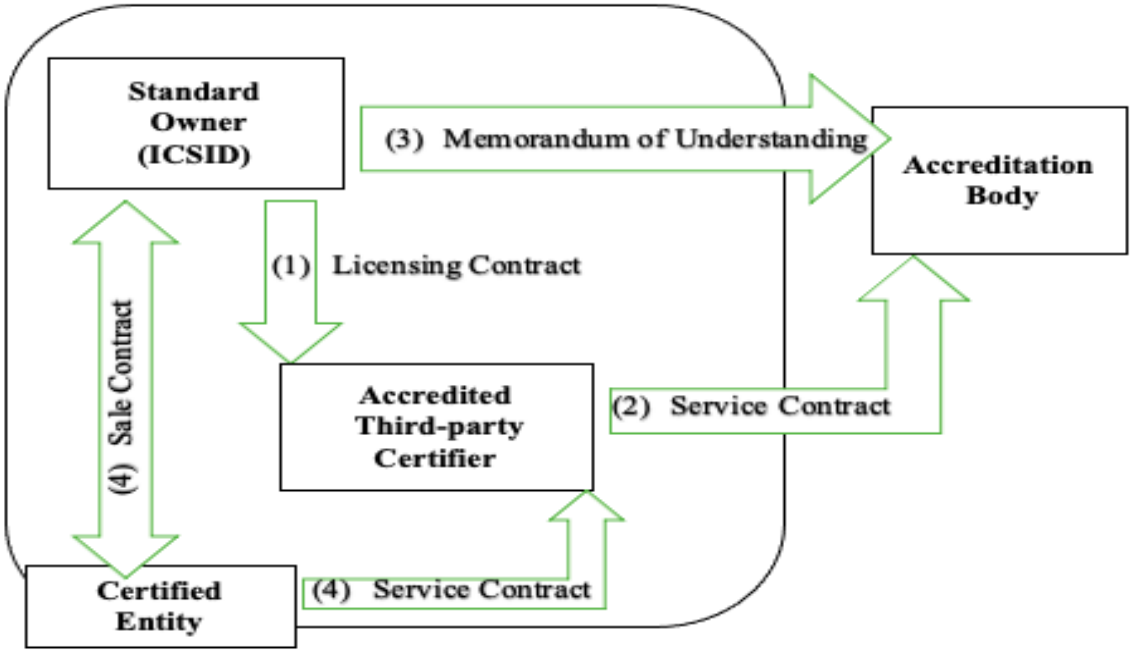

Figure (4) Based on Source: Rebecca Schmidt and Paul Verbruggen's article (The Role of Certification in the Enforcement of Transnational Private Regulation, 2013.p.7).

The suggested example of a contractual relationship for the certification scheme in investor-state arbitration is that first a licensing contract will be between (ICSID) (the standard owner) and the independent certifier body, which have requirements the certifier must meet to become and remain approved as a licensed certifier includes detailed procedures of monitoring, complaint handling and sanctioning.[1149] The second is a service contract between certifier and accreditation body to enable the accreditation body to monitor compliance with (ISO/IEC) 17065 standard. This is the rationale behind having both an accreditation body and a third-party certifier is for the purpose of (ISO/IEC) 17065 standard and to monitor its compliance. Thus, the third is an optional memorandum of understanding between the (ICSID) and an

[1148] ibid.p.7
[1149] ibid.p.7

accreditation body to report the certifier compliance with (ISO/IEC) 17065 standard.[1150] The fourth, is a service contract between certified entities that request certification and the third-party certifier. Finally, the fifth is contractual sale arrangement between the seller and the buyer that may require from the former to be certified against a particular private standard, which may have been developed by or with the participation of the buyer itself.[1151]

Once the licensing contract approve the creation of private certifier; the independent certifier body will be structured to have an Independent Advisory Committee or Council; its role is to help ensure independence and develop high standards, including a small group representing different geographies, ages, genders, and investor-state arbitration backgrounds. Further, the structure of the independent certifier body will include an internal operational team guided by a Board of Directors to sets the overall direction of the independent certifier body public service activities and ensure efficient operation and appropriate financial control. Also, the independent certifier will include the input of independent bodies of arbitration and (ADR) experts with supporting organisations and implementing organisations. The supporting organisation can include many private arbitration institutions involved in investor-state arbitration (e.g., ICSID-ICC-SCC). They can work together with the independent certifier body to advance and require their arbitration panellists to be certified to the level of certification in the independent body certifier. Further, the implementing organisations can include professional arbitrators' associations and alternative dispute resolution training centres, such as (IBA), (CIArb) and arbitration associations. The independent certifier body does not certify or accredit arbitrators directly and is not a service provider. Accreditation and certification are conducted by Certified arbitrator Training Programs and Qualifying Assessment Programs,

[1150] ibid.p.7
[1151] ibid.p.8

respectively, vetted against independent standards by the independent Appraisal Committee. Applications are open to any organisation worldwide that meets the standards.

3.4. The Role of Private Regulatory Actors in The Certifications Scheme:

The previous section discusses the structure of the certification scheme and the role of the (ICSID) in creating standards-setting for the certification scheme. Further, the arbitral institutions can engage in the certification scheme as a member of the third-party certifier body and voluntary implement the (ICSID) standards for the certification scheme. This can include the (ICC), (SCC) and other arbitral institutions such as The Cairo Regional Centre for International Commercial Arbitration (CRCICA), The Singapore International Arbitration Centre (SIAC) and The Asian International Arbitration Centre (AIAC), etc. Therefore, the effectiveness of transnational private regulation, (TPR), often depends on good collaborative platforms; thus, active cooperation with transnational regulatory networks or international organisations is needed.[1152] Further, transnational private regulatory regimes are created by private actors in collaboration rather than in competition with public entities.[1153]

3.4.1. The Role of Supporting Organisations:

In contrast to (ICSID), (PCA) and (UNCITRAL) discussed above, the (ICC) International Court of Arbitration, the (SCC) Arbitration Institute and other arbitral bodies, such as the (LCIA), have a non-governmental structure. However, the non-governmental arbitral institutions' role in collaborative regulatory professional certification for arbitrators should be taken toward appointment and arbitrators' control. The arbitral institutions' Executive Boards can work together with the independent certifier body to advance and require their arbitration panellists to be certified to the level of certification in the independent body certifier. For example, the (ICC) Executive Board comprises 20 persons, representatives of private sector businesses and chambers of commerce with some decision-making powers. While the (ICC)

[1152] Cafaggi, 'The Many Features of Transnational Private Rule-Making: Unexplored Relationships Between Custom, Jura Mercatorum and Global Private Regulation' (n 1064).p.882
[1153] ibid.p.889

Court proposes amendments to the rules, it is up to the (ICC) Executive Board to approve them.[1154] Further, the (SCC) Arbitration Institute has an (SCC) Board that functions as the governing body and consists of 15 to 16 law experts.[1155] All (SCC) Board members are distinguished and highly qualified experts in international commercial dispute resolution affiliated with law firms, other arbitration institutions and universities. Further, the Board of the (SCC) Arbitration Institute takes decisions appointment of arbitrators, challenge to arbitrators. However, amendments to the (SCC) Rules are adopted under this governing structure is not fully transparent.[1156]

The arbitration institutions' executive board can get involved with an independent certifier body in membership of the certification scheme. The collaboration can be concerning adjusting internal rules which refer to by the Executive Board when considering including an arbitrator in their institution's list for appointing certified arbitrators in investor-state arbitration. As a result, the engagement of arbitral institutions in collaborative regulatory of professional certification would be seen by the parties and arbitration community as a significant move toward accountability and integrity of the arbitral proceedings in these institutions.

3.4.2. The Role of Implementing Organisations:

Since international investment dispute settlement is traditionally open only to states and corporations or individual investors, only state and investor interests are represented at such proceedings, thus excluding broader public or transnational interests. The (NGOs) participation are often perceived as a method to remedy these problems.[1157] However, some of the Non-state actors are considered global networks involved in investment arbitration either in rules-making or regulatory of arbitrator profession. For example, the International Bar Association (IBA),

[1154] Bernasconi-Osterwalder and Rosert (n 1087).p.8
[1155] ibid.p.8
[1156] ibid.p.8
[1157] Eric De Brabandere, 'NGOs and the "Public Interest": The Legality and Rationale of Amicus Curiae Interventions in International Economic and Investment Disputes' (2011) 12 Chicago Journal of International Law 85.p.103

Charted Institute of Arbitrators (CIArb), the International Council for Commercial Arbitration (ICCA) and the Association for International Arbitration (AIA) are Non-State actors. Therefore, when considering what role (NGOs) can play in collaborative regulatory of a professional certification scheme for arbitrators. These institutions and centres can work with the independent certifier body to implement the certification scheme by developing certified training and qualifying program for arbitrators under the approval and certification of the independent certifier body. Accreditation and certification are conducted by Certified Training Programs and Qualifying Assessment Programs against independent certifier body's standards.

Therefore, the (NGOs) can engage in the certification scheme for investor-state arbitration through membership in the independent certifier body. The (NGOs) can provide the skills, knowledge, expertise to the certification scheme concerning their expertise area. On the other hand, transnational private regulation (TPR) is characterised by a wider variety of private actors participating in the rule-making process with different objectives.[1158] The importance of (NGOs) constitutes a distinctive feature of private regulation reflecting the transformations within the private sphere. They have shifted from rule-takers and final beneficiaries of regulatory processes to rule-makers.[1159] (NGOs) are involved in regulation that concerns their area of expertise or interest representation. They have incentives to maximise their influence on regulatory processes on behalf of their constituencies. They can achieve these objectives from within or outside the organisation using legal and non-legal instruments.[1160]

3.4.3. The Role of Supporting and Implementing Organisations in Oil and Gas Arbitration:

As the thesis is concerned with oil and gas in investor-state arbitration, private actors and (NGOs) in the oil and gas industry can be engaged in the certification scheme and ensure that their voice and objectives are raised and considered regarding investor-state arbitration and

[1158] Cafaggi, 'The Many Features of Transnational Private Rule-Making: Unexplored Relationships Between Custom, Jura Mercatorum and Global Private Regulation' (n 1064).p.923
[1159] Cafaggi and Renda (n 951).p.14
[1160] ibid.p.15

arbitrators professionals from the oil and gas industry. Several organisations can be considered taking implementing roles for oil and gas certified training and qualifying programs for arbitrators under the certification scheme within the independent certifier body. For example, the International Centre for Dispute Resolution (ICDR) has Energy Dispute Resolution Services, the Institute for Energy Law (IEL), the International Centre for Energy Arbitration (ICEA) and The Centre for Energy, Petroleum and Mineral Law & Policy (CEPMLP). Further, global independent bodies such as The World Petroleum Council (WPC) and The Society of Petroleum Engineers (SPE). These institutions, centres, and associations can engage under a Task Force Group within the independent certifier body's board to develop standards for the oil and gas arbitrators' certification program and be approved by the independent certifier body's committees. The Task Force aims to develop standards and criteria for specialised oil and gas training and qualifying certification programs to be implemented by organisations conducting training programs for oil and gas investor-state arbitration. Also, the oil and gas certification program needs to be supported by oil and gas arbitration organisations by enhancing their arbitrators' lists and requiring their arbitrators' panellists to be certified. Further, the program needs to be implemented by organisations in oil and gas, such as oil and gas professional associations and oil and gas industry organisations engaged with the certifications scheme in investor-state arbitration to provide training and qualifying programs for oil and gas arbitrators.

Organisations such as the International Centre for Dispute Resolution (ICDR) has Energy Dispute Resolution Services at an international level. The (ICDR) Energy services mirror the energy industry segments, including oil and gas, electricity, and alternative energy projects. In addition, the (ICDR) collaborates with industry groups to build educational conferences in key energy markets around the world. The highly selective process of choosing (ICDR) panel members is based on relevant industry background and a broad diversity of nationality,

practice, age, and gender. The (ICDR) tirelessly seeks leading industry experts to serve as arbitrators and mediators uniquely qualified to deal with complex, high-value energy-related disputes.[1161] The (ICDR) International Energy Secretariat and Director power and supported by the Energy Arbitrator List (EAL), a panel of experienced arbitrators with demonstrated expertise in deciding international energy disputes. The (EAL) was born out of discussions among energy experts and corporate and outside counsel to help identify capable and experienced energy arbitrators. An independent Review Committee of industry leaders and legal experts worldwide facilitated the identification and vetting of arbitrators for the (EAL).[1162]

Further, the Institute for Energy Law (IEL) provide educational and professional opportunities for lawyers and other professionals in the energy industry through academic courses, conferences, scholarly publications and membership activities. The (IEL) is a membership organisation and counts many leading energy companies and attorneys among its international membership.[1163] The (IEL) has an Executive Committee chaired by the Advisory Board Chair (IEL).[1164] The Institute for Energy Law (IEL) has also invited individuals with substantial experience in the arbitration of energy disputes to list themselves in (IEL Energy Arbitrators List). This list is compiled from arbitrators' information and does not imply endorsement by the Institute for Energy Law (IEL).[1165] Another centre is the International Centre for Energy Arbitration (ICEA); the centre consulted the energy sector and worked with relevant representative bodies to establish reports on current trends and desired requirements

[1161] The International Centre for Dispute Resolution (ICDR), Energy Dispute Resolution Services https://www.icdr.org/energydrservices accessed 28 March 2021.
[1162] ibid.
[1163] The Centre for American and International Law (CAIL), The Institute for Energy Law (IEL) https://www.cailaw.org/institute-for-energy-law/index.html accessed 28 March 2021.
[1164] Institute for Energy Law (IEL), Leadership https://www.cailaw.org/institute-for-energy-law/Leadership/index.html accessed 28 March 2021.
[1165] Institute for Energy Law (IEL), IEL Energy Arbitrators List https://www.cailaw.org/institute-for-energy-law/arbitrator-search.html accessed 28 March 2021.

regarding dispute resolution within the industry.[1166] Further, Academic centres such as The Centre for Energy, Petroleum and Mineral Law & Policy (CEPMLP) at Dundee University.[1167] The King Abdullah Petroleum Studies and Research Centre (KAPSARC) collaborates with leading international research centres, public policy organisations, and industrial and government institutions to share knowledge insights.[1168]

On the other hand, the Oil and Gas industry has several international civil society organisations and public interest groups. For example, the World Petroleum Council (WPC) works to manage further the industry and its social, economic, and environmental impact.[1169] Also, The Society of Petroleum Engineers (SPE) is a not-for-profit professional association whose more than 140,600 members in 144 countries are engaged in oil and gas exploration and production. (SPE) is a key resource for technical knowledge, providing opportunities to exchange information at in-person and online events and training courses publications, and maintains offices in Dallas, London, Dubai, Kuala Lumpur, Calgary, Moscow and Houston.[1170]

4.0. The Suggested Improvements to Investor-state Arbitration Based on Certifications Scheme:

4.1. The Certifications in Other Alternative Disputes Resolutions:

The certification mechanism has been successfully implemented in international mediation by an independent body such as the International Mediation Institution (IMI).[1171] Also, in other (ADRs), such as Maritime Arbitrator and Mediator certification by the Maritime Arbitration

[1166] The International Centre for Energy Arbitration (ICEA) http://energyarbitration.org/#!/up accessed 28 March 2021.
[1167] The Centre for Energy, Petroleum and Mineral Law & Policy (CEPMLP) https://www.dundee.ac.uk/cepmlp accessed 28 March 2021.
[1168] King Abdullah Petroleum Studies and Research Centre (KAPSARC) https://www.kapsarc.org/about/ accessed 28 March 2021.
[1169] See; Extractives Hub, Centre for Energy, Petroleum and Mineral Law & Policy (CEPMLP), International Organisations, Non-governmental and civil society organisations https://www.extractiveshub.org/topic/view/id/46/chapterId/472 accessed 28 March 2021.
[1170] The Society of Petroleum Engineers (SPE) https://www.spe.org/en/about/ accessed 28 March 2021.
[1171] International Mediation Institution (IMI) https://imimediation.org/en/ accessed 28 March 2021.

Association (MAA).[1172] Further, the (IMI's) Investor-State Mediation Taskforce has assisted the development of Investor-State mediation competency standards; (IMI) has teamed with other Investor-State organisations to launch a series of Investor-State mediators skills training programmes.[1173]

Firstly, the certification scheme structure in international mediation is similar to the intended design proposed in this thesis for a private certification scheme for arbitrators in investor-state arbitration. The (IMI) is a non-profit public-interest foundation established in The Hague and is a joint initiative of Associations and mediation centres.[1174] The (IMI) is the independent, impartial, and international standard-setting body for mediation. Criteria are developed through a rigorous process under the oversight of dedicated Committees and Taskforces, with panels of experts' input.[1175] The (IMI) Independent Standards Commission (ISC) establishes the (IMI) practice and ethical standards and reviews and approves the assessment programmes that institutions qualify mediators for (IMI) certification.[1176] The (IMI) sets high standards for mediators but does not conduct assessments itself. Instead, institutions that conduct an assessment of mediators, such as providers and trainers, are invited to adjust their programmes or develop new programmes, to meet the specific criteria determined by the (ISC), and to apply to the (ISC) for approval to qualify mediators passing those programmes and meeting the criteria for (IMI) certification. Those mediators will become (IMI) certified, and their profiles will be included on the (IMI) portal.[1177] Secondly,

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[1172] Maritime Arbitration Association (MAA) http://www.maritimearbitration.com/What-We-Do/Education-and-Training accessed 28 March 2021.
[1173] The (IMI) Investor-State Mediation Task Force https://imimediation.org/en/about/who-are-imi/ism-tf/ accessed 28 March 2021
[1174] Dimitropoulos (n 82).p.429-430
[1175] International Mediation Institution (IMI) Certify https://imimediation.org/en/practitioners/certify/ accessed 28 March 2021.
[1176] The IMI Independent Standards Commission https://imimediation.org/en/about/who-are-imi/imi-isc/ accessed 28 March 2021.
[1177] Patrick Deane and others, 'Making Mediation Mainstream: A User/Customer Perspective' [2010] International Mediation Institute <https://www.imimediation.org/wp-content/uploads/2017/09/making-mediation-mainstream-1-article.pdf>. accessed 28 March 2021.p.7

the (IMI) aims to provide a common global platform for all stakeholders and promote transparency and high competency standards in mediation practice.[1178]This is achieved through a transparent international mediator competency certification scheme based on visible high standards and creating a diverse cadre of (IMI) Certified Mediators. Mediation users are assisted by an open, easily accessible search engine to surface concise and comparable information relating to suitable competent mediators. Because (IMI) is not a service provider, it earns no income from providing any mediation, training or other services.[1179] Thirdly, the certification type and pathway to be (IMI) Certified Mediator. The candidate must first be qualified for (IMI) Qualified Mediator. This program is a Certified Mediator Training Program (CMTP) provided by a third-party organisation.[1180] Second, the candidate must be qualified for (IMI) Certified Mediator. This program certifies mediators to be highly experienced professionals who meet the international gold standard for mediation worldwide.[1181] Further, the final pathway is (IMI) Certified Mediation Advocate. This program is a Mediation Advocacy Qualifying Assessment Program (MA-QAP) provided by a third-party organisation. This program certifies mediators as highly experienced mediation advocates certified against international standards.[1182] Further, there are other two specialisation certifications programs, the (IMI) Intercultural Mediator and (IMI) Online Mediator; both programs are Qualifying Assessment Program (QAP).[1183]

4.2. The Certifications Scheme Against Other Reforms:

Gough and Albert have argued that arbitration appears to be typical of the professions in which new certification programmes are emerging rapidly.[1184] Also, Dimitropoulos has stated that the Certification scheme should lead to an overall standardisation of international

[1178] ibid.p.6-7
[1179] ibid.p.7
[1180] International Mediation Institution (IMI) Certify (n 1175).
[1181] ibid.
[1182] ibid.
[1183] ibid.
[1184] Gough and Albert (n 89).p.853

investment arbitration. At the same time, it should also lead to a further "professionalisation" of international investment arbitrators.[1185] Further, it will reduce the dangers of moral hazard created by the community's closed nature and the absence of professional discipline mechanisms.[1186] Dimitropoulos indicated that the certification scheme could help enhance market information for arbitrator selection and reappointment to arbitration tribunals and impact their behaviour. Certification would partially replace the reputation and word of mouth recommendation of arbitrators. It is thus expected that the introduction of certification will boost the dissemination of information across the system.[1187] Additionally, it would open the door to new arbitrators without closing it to the current ones. While the number of arbitrators has increased in the past, the market is still relatively closed, and there are only very few arbitrators from developing countries and women arbitrators.[1188] If appointments were not only based on reputation but on a formal assurance of competence, and if the information was better disseminated on the arbitration market, newcomers from the developing and developed world would have more chances to enter the market.[1189] Standardisation, professionalisation, and transparency could lead to an overall better legitimisation of the investment arbitration system. More legitimacy of the system would eventually lead to withholding the "backlash" against investor-State arbitration and finally attracting more and more states to the system.[1190]

On the other hand, the institutional reform types in which adjudicators could be selected and appointed. These options are distributed from rosters for party appointment to a standing tribunal and appellate body or investment court and arbitrators' institutional appointment.[1191] However, Giorgetti stated that better international investment arbitration suggestions should

[1185] Dimitropoulos (n 82).p.431
[1186] ibid.p.432
[1187] ibid.p.432
[1188] ibid.p.432
[1189] ibid.p.432-433
[1190] ibid.p.433
[1191] Langford, Behn and Malaguti (n 42).p.3

be carefully considered.[1192] Giorgetti also noted that none of the recent proposals that call for a change in the party-selection system provides a feasible alternative.[1193]

First, proposals that increase the number of adjudicators may increase diversity but might complicate attempts to achieve case-based consistency, which is important for procedural fairness.[1194] However, diversity can bring more points of view in deliberation so that a more comprehensive understanding of the parties' position is granted. Thus, diversity brings better judgments. Importantly, as international investment cases increasingly touch on public policy matters, it becomes essential to include multiple and diverse views within the persons who decide disputes.[1195] Second, the appointment for fixed single terms in the (EU) investment court may significantly increase independence but make the system potentially less accountable – possibly lessening the pressure for 'correct' decisions.[1196] Third, creating a standing body with permanent adjudicators will reduce costs for litigating parties (no tribunal fees) and shorten proceedings (there is no need to constitute a tribunal and no space for arbitrator challenges).[1197] Also, it will decrease the likelihood of double hatting and increase transparency in appointment processes.[1198] However, states could reduce overall costs and length of proceedings with policy interventions.[1199] Thus, any move to stronger judicialisation could or should be accompanied by greater attention to the types of influences states may have in the selection and appointment process.[1200] Also, judges' selection and appointment to a standing tribunal or court require consideration, including criteria, selection, size, and terms.[1201] Fourth, an appellate body does not offer an obvious solution to the independence and

[1192] Giorgetti, 'Who Decides Who Decides in International Investment Arbitration' (n 71).p.461
[1193] ibid.p.462
[1194] Langford, Behn and Malaguti (n 42).p.3
[1195] Giorgetti, 'Who Decides Who Decides in International Investment Arbitration' (n 71).p.482
[1196] Langford, Behn and Malaguti (n 42).p.3
[1197] ibid.p.3
[1198] ibid.p.32
[1199] ibid.p.3
[1200] ibid.p.33
[1201] ibid.p.12

impartiality problems as the backgrounds of the appellate body members will influence perceptions of independence and impartiality.[1202] Also, it will increase the time and costs involved in investment disputes resolution.[1203] Further, the appellate mechanism goes against the increased freedom and autonomy of commercial arbitration from judicial intervention.[1204] Fifth, the roster systems (or standing panels) will potentially have the least effect, as it only limits the pool of arbitrators, and arbitrators will know which party appointed them.[1205] Also, a roster will require that a choice be made about what types of rosters will be used, the conditions for nomination to a particular list, what institution will host the list, and how the parties will select from these lists.[1206] Furthermore, they sometimes detail qualifications that panellists should have but do not outline precisely how the rosters will be constituted.[1207] There are no directives as to how qualifications should be vetted, thus leaving it to parties to determine whether a particular individual is qualified or not.[1208] Sixth, the reform proposal of having a neutral authority select all the arbitrators would completely change the balance of interests negotiated by the parties while not ensuring that the neutral authority does not consider the diverse interests represented by each party.[1209] Further, it would not only require a renegotiation of the (ICSID) Convention and (UNCITRAL) Model Law, but it would also require the renegotiation and redrafting of the innumerable (BITs) and investment protection treaties that include a dispute resolution clause that provides for the selection by the parties and by a neutral appointing authority.[1210] Seventh, as discussed above in (2.2.1), the code of

[1202] Giorgetti and others (n 349).p.467-468
[1203] Dimitropoulos (n 82).p.423
[1204] Dothan and Lam (n 1018).p.15-16
[1205] Langford, Behn and Malaguti (n 42).p.32
[1206] ibid.p.7
[1207] Andrea Bjorklund and others, 'Selection and Appointment of International Adjudicators : Structural Options for ISDS Reform' (2019) Academic Forum on ISDS Concept Paper 2019/11 <https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/>. accessed 28 March 2021p.14
[1208] ibid.p.17
[1209] Giorgetti, 'Who Decides Who Decides in International Investment Arbitration' (n 71).p.462
[1210] ibid.p.463

conduct is one of the reform options to respond to criticisms in the investment disputes settlement system to improve the integrity and help dispute parties build confidence in tribunals.[1211] Further, the code of conduct can be a useful instrument to aid the certification system. Certified arbitrators can be obligated to adhere to the (ICSID/UNCITRAL) code of conduct by the certification scheme standards. However, there are some drawbacks regarding the code of conduct for arbitrators in investor-state arbitration compared to the certification scheme. First, the code of conduct supporters are divided into binding codes or non-binding guidelines.[1212] The second drawback about the code of conduct is the scope and applicability of whether a series of specialised codes within a particular forum is preferable to a general code used by a diversity of institutions that administer investor-state arbitration cases.[1213] Repeat appointments, possible conflicts, and dual hatting can only be addressed if a code can be applied in multiple institutions.[1214] Third, supporters of the code of conduct are divided regarding an important issue: what process should be adopted to ensure the code's implementation and success. In this situation, arbitral institutions could include and adopt the code in their rules to apply to all future proceedings administered by that institution.[1215]

However, Codes fail most often because they raise unrealistic expectations.[1216] If failures outnumber successes, there tends to be a spiralling effect where more and more violations seem to occur. In some instances, codes will also fail because they try to control too much.[1217] It should be obvious that effective ethics codes must have institutional support systems. It is less obvious that too many support systems can make ethics codes unworkable because it is not

[1211] Cheng (n 539).p.104
[1212] Giorgetti, 'A Common Code of Conduct for Investment Arbitrators?' (n 554).p.218
[1213] ibid.p.218
[1214] ibid.p.218
[1215] ibid.p.219
[1216] Stuart C Gilman, *Ethics Codes and Codes of Conduct as Tools for Promoting an Ethical and Professional Public Service: Comparative Successes and Lessons* (The PREM,The World Bank 2005) <https://www.oecd.org/mena/governance/35521418.pdf>. accessed 28 March 2021.p.63
[1217] ibid.p.64

uncommon to have multiple entities with competing authorities and responsibilities.[1218] Further, Codes also fail because they exclude the business community from development and implementation.[1219]

4.3. The Improvement to Arbitrators' Independent and Impartiality:

The investor-state arbitration system has been criticised for indirect influence through party appointment, direct influence through interference by parties, or the combined effect produced when arbitrators also act as legal counsel in other cases, through the practice of 'double hatting' and internal influences that threaten the impartiality of adjudicators.[1220] Further, Giorgetti indicated that a chief complaint of party-selected arbitrators is their limited number and demographic characteristics, and the system is not diverse; the same few people tend to be reappointed again.[1221] Also, Giorgetti indicated that few repeat players seem to dominate the field and that almost 20% of all arbitrators selected in the cases decided on the merits by (ICSID) in the 1994-2009 period were appointed at least four times.[1222] These data support the concern expressed in the recent discussion about whether the existing selection procedures result in selecting the best decision-makers.[1223] Further, criticisms were related to the increased possibility of arbitrators' personal relationships, professional relationships, issue conflicts and the concern of double hatting.[1224] Furthermore, Michael Nolan stated that public concerns about the lack of independent arbitrators in the investment arbitration system find support in practical challenges that cast doubt on arbitrators' neutrality.[1225] Further, Michael Nolan indicated that the criticism of the investor-state arbitration system from arbitration professional insiders questions opaque arbitrator appointment processes, the revolving door between

[1218] ibid.p.64
[1219] ibid.p.67
[1220] Langford, Behn and Malaguti (n 42).p.31
[1221] Giorgetti, 'Who Decides Who Decides in International Investment Arbitration' (n 71).p.458
[1222] ibid.p.460
[1223] ibid.p.460
[1224] Giorgetti, 'A Common Code of Conduct for Investment Arbitrators?' (n 554).p.217
[1225] Nolan (n 334).p.440

advocates and neutrals, and time constraints faced by arbitrators.[1226] On the other hand, Maria Cleis stated that only a few scholars specify that the inadequacy of the relevant standard of independence and impartiality or a rise in uncalled-for dilatory challenges could be the source of the surge in arbitrator challenges.[1227] She also indicated that scholars have only exceptionally broached the issue based on the belief that (ICSID) arbitration suffers from an acute and prevalent systemic lack of independence and impartiality.[1228] Therefore, several scholars have concluded that certain arbitration characteristics in general, particularly investment arbitration, are opposed to independence and impartiality.[1229] However, Fry and Stampalija argued that the problem comes from inadequacies in the (ICSID) Convention itself, namely the particularly stringent standards of the (ICSID) Convention vis-a-vis the other standards in existence, not necessarily the lack of a unified system.[1230] This is because the lack of a unified standard leads to different and sometimes even conflicting standards applied in similar arbitrations, undermining the system's coherence and perceived legitimacy.[1231] Therefore, this thesis follows and support Maria Cleis' conclusion that there is no irreconcilable contradiction and that the suggested comprehensive reforms would be unwarranted and unsuitable for resolving the system's existing deficiencies.[1232]Maria Cleis suggests that existing concerns would effectively be reduced by clarifying the challenge threshold and bringing it into line with the threshold applied in the vast majority of the dispute settlement mechanisms.[1233] However, Fry and Stampalija argued that it would be politically impossible to amend Articles 14 and 57 of the (ICSID) Convention would necessarily require acceptance of the possibility that the whole treaty would be opened up to serious debate and modification.[1234]

[1226] ibid.p.438
[1227] Cleis (n 439).p.188
[1228] ibid.p.188
[1229] ibid.p.188
[1230] Fry and Stampalija (n 12).p.256
[1231] ibid.p.256
[1232] Cleis (n 439).p.189
[1233] ibid.p.189
[1234] Fry and Stampalija (n 12).p.258

Therefore, this thesis proposes a possible reform to the (ICSID) system by introducing a private certifications scheme for arbitrators. The certification system provides a quality assurance mechanism of a person's competence.[1235] Also, the certifications can respond to practical conflict issues that result in arbitrators' disqualification in investor-state arbitration. For example, the double hat issue or repeated appointments and deciding on a similar legal issue. Furthermore, the certifications can confirm the eligible role to whom the certificate is awarded, e.g., arbitrator, thus, separating the role of arbitrators from other roles as expert or counsel, which are not covered by the certification scheme. As a result, it would also positively reduce challenges related to the arbitrator's professional relationship where arbitrators are disqualified for having a professional relationship as counsel to one of the parties. Further, regarding arbitrators' repeated appointments, certification can open the door for newcomers' arbitrators and enlarge the pool of arbitrators who are qualified to compete in the market of investment arbitration community. This would allow parties to avoid relying on repeated appointments to extend their selection options of arbitrators. Also, certification would provide parties with the ability to identify arbitrators who come from certain countries, legal systems and cultural backgrounds that parties seek to have in their arbitrators, rather than relying on similar arbitrators repeatedly. Thus, certification can also ensure diversity in the investment arbitration system. Also, it would positively reduce the issue of challenge to arbitrators based on the personal relationship as certification can enlarge the community of investment arbitrators. Furthermore, certification helps other qualified arbitrators with less experience that have not yet had the chance to be trusted to be appointed in deciding new cases, thus, reducing the challenge based on arbitrators having decided a similar legal issue in prior cases.

As a result, the voices and criticisms claiming that there is a systemic lack of independence and impartiality in the investment arbitration system or that investment arbitration is opposed

[1235] Dimitropoulos (n 82).p.429

to independence and impartiality would be convinced that resolving these concerns need more focusing on arbitration communities and correcting the market of an arbitrator rather than attacking the system of investment arbitration. Ina Popova and Jessica Polebaum stated that the existing general standards of independence and impartiality are expansive enough to cover alleged prejudgment of legal or factual issues. On this, as on other matters, the arbitration community as a whole will no doubt ultimately generate best practices through healthy debate, rigorous analysis, and seasoned practice.[1236]

4.4. The Improvement to Arbitrators' Selection and Appointment:

The professional certification scheme for arbitrators in investor-state arbitration would enhance investor-state arbitration's arbitrators' selection process. The certification scheme would replace selection based on arbitrators' lists or institutional rosters of arbitrators, which are not transparent in their process and create asymmetric information in the market of an international arbitrator. Further, the certifications scheme will enlarge the arbitrators' pool in (ICSID) and investor-state arbitration and ensure the diversity of the arbitrators' practitioners in the (ICSID) system.

Chiara Giorgetti argues that to preserve the arbitral process's integrity and increase investment arbitrators' diversity, the appointing authorities, secretariats, and disputants should all contribute.[1237] First, Giorgetti suggested that appointing authorities should choose diverse candidates when selecting presiding or co-arbitrators or members of *ad hoc* annulment committees. Second, the Chairman of the (ICSID) Administrative Council has the chance to directly contribute to the diversity of investment arbitrators since he or she is entitled to select ten of the Panel of Arbitrators. Third, (ICSID's) Secretary-General should urge the (ICSID) Contracting States to consider diversity when nominating members to the Arbitrators Panel. Fourth, the Secretariats of (ICSID) and the Permanent Court of Arbitration may, via developing

[1236] Popova and Polebaum (n 976).p.952
[1237] Faure and Ma (n 5).p.24

a best-practice policy, encourage disputing parties to consider the promotion of diversity when they appoint their arbitrators.[1238] However, if the four suggestions provided by Chiara Giorgetti is to be considered, it lacks the tools and needs the mechanisms to enable its implementation. Therefore, a professional certification scheme can be a good tool and instrument to implement Giorgetti's suggestions in (ICSID) arbitration to preserve the integrity diversity of arbitrators and enhance arbitrators' selection and appointment. First, the certification scheme can allow the (ICSID) when its appointing authority needs to appoint presiding or co-arbitrators or *ad hoc* annulment committees to choose arbitrators who are certified. Thus, certification enables (ICSID) to enhance diversity by choosing certified arbitrators from developing countries, young professionals, and female arbitrators. Also, certification can signal that those arbitrators are qualified to be appointed and selected. Second, the Chairman of the (ICSID) Administrative Council, who is entitled to select ten of the Panel of Arbitrators, can choose at least one or two arbitrators who are certified. This will make the selection process by the Chairman of the (ICSID) administrative council more transparent and improve the parties' confidence in the Chairman selecting process, reflecting positively on the system's legitimacy. Similarly, previous suggestions can also be applied to the third and fourth points by encouraging state and parties to nominate and select some members to the certified Panel of Arbitrators.

Further, the certification system could be implemented by (BITs) parties such guidelines into their investment treaties or (BITs) whenever they are renewed. This would allow for comprehensive regulation of the matter, and the relatively easy amendment of such guidelines, without a need for the renegotiation of the entire investment agreement (IIAs).

Further, regarding first point above which argue for allowing (ICSID) to appoint presiding or co-arbitrator. It is worth to consider the practice that exists in appointing judges that could encourage (ICSID) appointing certified arbitrators. In this context, the common law judiciaries

[1238] ibid.p.24

and civil law (or career) judiciaries that makes two major points. It shows that in all jurisdictions there is a tight relationship between the judicial appointment methods and the characteristics of the initial judicial training offered. This is because the selection conditions correspond to implicit assumptions about the level of practical experience of the appointee, and the learning needs that the appointee has to fulfil his judicial role.[1239] First, in the common law model, the majority of new appointees already have significant practical experience in advocacy. For that reason, there is no lengthy and comprehensive "initial" training. But often there is a much shorter, hands-on "induction" training, meant to focus on the practical aspects of being a judge as opposed to being an advocate. New appointees in this model often have full adjudicative powers from the moment they are appointed, and they begin their judicial activity almost immediately.[1240] Second, in contrast, in the civil law or "career judiciary" model, the majority of new appointees have no legal practice experience upon appointment, and the initial training is designed to address this. The initial training is designed to also be part of the evaluation of the candidate, where successful entry into the judiciary is dependent not just upon the entry exam, but also on the successful completion of the initial training programme.[1241]

This suggestion of selecting certified arbitrators in (ICSID) would be in line with the recent trend towards selecting trained judges in Europe and other jurisdictions, which can inform the approach to appointing new or experienced arbitrators based on certification scheme. Fundamentally, judicial education and training is an essential element of judicial independence, as it helps to ensure the competency of the judiciary as well as greater public confidence in the judiciary.[1242] In the (EU) countries, the establishment of the European Judicial Training Network (EJTN) -(non-profit organization)- has been to reflect on training standards and

[1239] Diana Richards, 'Current Models of Judicial Training: An Updated Review of Initial and Continuous Training Models across Western Democratic Jurisdictions' [2016] Journal of the International Organization for Judicial Tranining 41.p.41-42.
[1240] ibid.p.41-42.
[1241] ibid.p.41-42.
[1242] Cheryl Thomas, 'Review of Judicial Training and Education in Other Jurisdictions' (2006).p.13

curricula for members of the judiciaries of (EU) countries, to coordinate judicial training exchanges and joint programmes, and to foster cooperation between (EJTN) member states' national training institutions.[1243]

On the other hand, as this thesis is concerned with oil and gas in investor-state arbitration, a certifications scheme will enhance selecting arbitrators in oil and gas disputes. As mentioned earlier in (3.4.3), energy arbitration organisations and (NGOs) in the oil and gas industry can be engaged in the certifications scheme to develop the oil and gas certifications program. This would either replace or enhance the list mechanism of selected oil and gas arbitrators and improve the competence. Therefore, arbitrators from the oil and gas industry can show their competence and qualification among other arbitrators in lists or institutional roosters that they are oil and gas professionals and certified in investment disputes. This would increase the arbitrators' pool in oil and gas and ensure the industry principles and objectives are represented. However, the current lists for oil and gas arbitrators contain only a registry form of names and are not effective in ensuring the quality of arbitrators or providing the parties with information to ensure quality and protection.

On the other hand, as supporting organisations in certification schemes, arbitration institutions can implement or incorporate certification standards as guidelines to be voluntarily applied to their internal policy or rules of selecting and appointing arbitrators in certain situations. For example, where parties fail to appoint an arbitrator or the rules require that the arbitral institution appoint a sole arbitrator or a presiding arbitrator. The institutions can voluntarily encourage parties and the Chairman to select a certified arbitrator in those situations. In the meantime, parties will continue to have a say in the constitution of the arbitral tribunal.[1244] Indeed, Stephan Wilske has suggested that an arbitral tribunal should show no

[1243] Ann Voskamp, 'The Role and Competencies of The Trainer in The Judiciary', *EJTN Handbook on Judicial Training Methodology in Europe* (The European Union EJTN 2016).p.6

[1244] Stephan Wilske, 'The Duty of Arbitral Institutions to Preserve the Integrity of Arbitral Proceedings' (2017) 10 Contemporary Asia Arbitration Journal 201.p.211

cronyism in the appointment process, where parties fail to appoint an arbitrator or where the rules require that the arbitral institution appoints a sole arbitrator or a presiding arbitrator, such arbitral institution should be cautious to prevent cronyism, i.e., awarding lucrative arbitrator mandates to friends or trusted colleagues.[1245]

The arbitral institutions are in good positions to implement the certification scheme successfully. As Stephan Wilske has indicated concerning rule-making and adjusting arbitral rules to install some ethical minimum, institutions are in a good position when incorporating ethical standards within the rules of arbitration.[1246] Often one or two leading arbitral institutions establish specific ideas then follow them.[1247] Accordingly, arbitral institutions have their most outcome-determinative role in the appointment process and control of arbitrators.[1248] Therefore, the certification scheme's role for arbitrators is to support the arbitral institutions with a mechanism that enhances the selection and appointment process and arbitrators' quality.

Further, the certifications scheme can provide arbitral institutions with the ability to control and sanction misbehaved arbitrators. While the rule-making function of arbitral institutions is important, it is even more important for them to control compliance with such rules and, if need be, particularly sanction intentional breaches of its rules.[1249]Arbitral institutions must maintain arbitrators' compliance with professional certification standards, whether by adherence to a specific code of conduct or monitoring and reporting mechanisms. For example, in orchestration, arbitral institutions can share information with independent body intermediaries, who certified arbitrators, about arbitrators' violation of the rules and misconducts. The independent body intermediaries can sanction the arbitrators by, e.g., revoke or suspending

[1245] ibid.p.212
[1246] ibid.p.206
[1247] ibid.p.207
[1248] ibid.p.211
[1249] ibid.p.213

certification for a particular time, compensating arbitrator, blacklist arbitrator for a specific time, or shaming sanction by public announcements.[1250]

4.5. The Improvement to Arbitrators' Continuing Professional Development:

The professional certification scheme for arbitrators would provide enhancement to the competency of arbitrators in investor-state arbitration. This would be through commands arbitrators to update their arbitration professional knowledge constantly; this is known as continuous professional development (CPD). In certain work environments, (CPD) system is non-negotiable and is often monitored by a professional body. Professionals are required to meet a minimum number of (CPD) points over a certain period of time.[1251] Therefore, the certification scheme would establish the process of maintain levels of competency for certified arbitrators by requiring a minimum requirement of (CPD) over a certain time of practice. The (CPD) serves as a platform to gain knowledge and experience which not only benefits the workplace, but the individual as well. The (CPD) has five stages, namely: self-appraisal, personal plan, action or implementation, documentation, and evaluation. Furthermore, (CPD) plays a significant role in the workplace as it ensures that they remain competent throughout their careers, especially with advances in the various fields and technology.[1252] Thus, in a filed such as oil and gas disputes advancing knowledge and related industry developments is important to arbitrators. Also, (CPD) courses are already used for judges to develop their judicial skills and (CPD) is considered when applying for judicial appointments. Almost all civil law countries tend to adopt a judicial training model by an independent state judicial school, while in common law countries the typical practice is a coordination between several country-wide organisations and universities in delivering training.[1253] Interestingly, there has

[1250] ibid.p.214-215
[1251] Z Suliman, W (Winnie) Kruger and JA Pienaar, 'Continuing Professional Development (CPD): A Necessary Component in the Workplace or Not?' (2020) 2 The Journal of Medical Laboratory Science and Technology of South Africa 41.p.41
[1252] ibid.p.41
[1253] Richards (n 1237).p.41-42.

been recently in most countries a shift from continuous training as an optional entitlement to a mandatory requirement for all judges. This suggests that the important of (CPD)and the acceptance amongst judges and amongst judicial policymakers.[1254] Further, many international arbitration institutions are already requiring their members to consider (CPD) requirements. In any profession, it is important to be aware of any developments, techniques, advancements and knowledge related to that specific field. It is key to maintaining the professional competencies of the employees together with their skills, knowledge and experience.[1255] Accordingly, all authorised supporting and implementing organisation within the certification scheme would be required to comply with the (CPD) standards that developed by the third-party certifier body for (CPD) programme for arbitrators. There could be various approach to (CPD) for certified arbitrators within the scheme; for example, initial phase of (CPD) training for new young less experienced arbitrators to mid-career phase of (CDP) training for fully experienced arbitrators and from mandatory (CPD) to optional recommended training.

The training programme that would design by supporting and implementing organizations within the certification scheme will ensure level of knowledge, skills and experience of arbitrators and provided them with recent update on laws and arbitration process as well as industrial knowledge related to disputing issues which would be expected by the parties from arbitrators. The (CPD) requirements would be range from academic education leading to practice of law to life experience and pragmatic orientation. Also, from conferences and seminars, both nationally and internationally, to requirement of remote learning resources and self-study. The (CPD) requirements for fully experience arbitrators would be range from offering basic courses or training of new arbitrators' orientation courses to mentor-coaching on personal and arbitration professional development.

[1254] ibid.p.41-42
[1255] Suliman, Kruger and Pienaar (n 1249).p.41

5.0. Conclusion

The current arbitration system has come under much criticism due to the numerous legitimacy gaps in this system. This has caused many proposals to be developed, such as incremental, institutional, and fundamental reforms. Different countries are pushing for various reforms driven by their experiences with the existing system. All the reforms proposed have their merits and demerits, which will have a global impact when implemented. The quest for change should be employed carefully and with input from all actors to avoid a similar situation that has been witnessed with the current system. Legitimacy should be at the core of any appropriate solution, as it provides the foundation on which trust in the system is built by the different countries. The best solution is to employ incremental reforms, as the current arbitral system has all the hallmarks of being a reliable system when the legitimacy gaps are addressed. Proponents of incremental reforms believe that the system has many advantages, despite its numerous flaws, and the focus should be on correcting the deficiencies and not changing the whole system. The introduction of professional certifications mechanisms for arbitrators in investor-state arbitration may be considered incremental reforms. This alternative solution improves the system's standards and efficiency and raises public confidence about handling the cases. The certification scheme proposal has many goals to secure the legitimacy of the investor-state arbitration system. First, they enhance the process of selection and appointing arbitrators in the investment arbitral tribunals. Second, ensuring the arbitrators' quality and professional competence. Third, enlarging the pool of competent arbitrators and ensuring the diversity in investor-state arbitration. Fourth, creating a credible mechanism of information about arbitrators to avoid conflict of interest and arbitrators' disqualification. Fifth, the certification scheme allows for the development of specialised programs for the need of arbitrators in difficult types of disputes such as oil and gas. Investing in the arbitrators and demanding quality from them improved the system as a whole. It thus should be improved to eliminate the legitimacy gaps instead of replacing them with new systems.

Chapter 8: Conclusion

1.0. Answering the Central Research Questions:

1.1. Summary of Findings:

Chapter 1 of this thesis defined the central question which the research sought to address; is whether the introduction of certifications scheme for arbitrators through the creation of an independent third-party certifier body in investor-state arbitration system benefit the integrity of arbitrators and, as a result, enhance the legitimacy of the system? This primary question inherently raised other vital issues, such as whether the current system of investor-state arbitration functions adequately and effectively or there are gaps and weaknesses in the current system and arbitrators' regulatory framework in investor-state arbitration? And whether any alternative suggestions for improving the system would be beneficial to the system, particularly the proposed creation of an independent third-party certifier body and might address some of the deficiencies within the current system.

As discussed in chapter 1 and chapter 3, even though the investor-state arbitrations have been critical in addressing the investor-state disputes in the oil and gas sector, it has also come under serious criticism. Among the complaints that have been fronted against the investor-state arbitrations is the arbitrators' integrity.[1256] Accordingly, arbitrators must be independent and impartial when dealing with conflicts and some arbitrators have been accused of coming up with bias decisions. For instance, some of the arbitrators have been biased against the host states while favouring investors. Chapter 5 observed that respondent states in oil and gas disputes frequently challenged arbitrators, and a review of disqualification cases have indicated a small number of disqualifications succussed. The lack of integrity in investor-state arbitration cases has made some countries worldwide reconsider their membership in (ICSID) and contribution to the arbitration treaties and conventions. In chapter 1 studies by Tom Childs,

[1256] Mosk (n 13).p.35

Andrew Chukwuemerie, Sylvia Noury, Leilah Bruton and Annie Pan, Elisabeth Eljuri and Clovis Trevino, Alexia Brunet and Juan Agustin Lentini, Kenneth Stein, indicated that the confidence of some oil and gas states is shrinking on (ICSID) Convention and arbitration. Also, in chapter 3, scholars such as Gus Van Harte, Jan Paulsson, Richard Mosk and William Park, Malcolm Langford, Daniel Behn and Maria Chiara Malaguti have identified the lack of arbitrators' integrity in investor-state arbitration and the arbitrators' selection system.

To remedy the problem of arbitrators' integrity, chapter 7 explore some suggestions that have been put forward, such as an (ICSID) code of conduct for arbitrators, introducing an appeal mechanism in (ICSID) or an international investment court. However, this thesis suggests in chapter 7 the establishment of an independent third-party certifier body to regulate arbitrators in investor-state arbitration and oil and gas disputes. The investor-state arbitration reform approaches and suggestions have been and continue to be hotly debated; experts have disagreed on fundamental issues such as the need for and desirability of such mechanisms. Thus, this thesis proposes introducing private certifications to regulate arbitrators to respond to the problem of arbitrators' bias and their selection and appointments process. The reform to enhance arbitrators' integrity issues should be directed toward their communities and quality. One of the significances of this study was to explore the different approaches by which the private certification can be introduced by the collaborative and orchestration approaches. This is a major component as it has not been covered in any literature, providing a gap that must be looked into to bring regulatory to investor-state arbitration in oil and gas disputes.

1.2. Conclusion:

The findings of the research, which have been discussed in previous chapters, support several specific conclusions:

1) The call to introduce a certifications scheme for arbitrators has been established and it will benefit the arbitration system and would enhance the integrity of arbitrators and the legitimacy of the (ISA) system.

It is accepted that the basis of the call for an independent third-party certifier body in investor-state arbitration is attributed to the alleged lack of arbitrators' independence and impartiality and legitimacy crisis in investor-state arbitration. In chapter 1 (1.3), criticisms have been explicitly recognised by the studies of oil and gas disputes in investor-state arbitration. For example, Tom Childs has argued that the backlash against the investment treaty system on several oil-producing states calls into question the future of the investment treaty system in the oil and gas industry.[1257] Thus, Chapter 3 has concluded that the allegations of lack of arbitrators' integrity and independence and impartiality are occurring in investor-state arbitration, meaning that the need to create an independent third-party certifier body in investor-state arbitration has been established. For instance, chapter 3 indicate several scholars, e.g., Thomas Dietz, Marius Dotzauer and Edward Cohen. They have argued that arbitrators' bias favouring investors puts states in a disadvantaged position.[1258] Gus Van Harten[1259] argued that systemic incentives push arbitrators to decide for investors.[1260] Another argument is the claim that arbitrators' bias against the developing states, particularly in the (ICSID) system.[1261] Susan Frank explained that there is some concern in developing countries over selecting arbitrators at entities such as (ICSID), and such appointments may create a systemic bias favouring Western legal concepts and the positions.[1262] Also, arbitrators in the investor-state arbitration system are elitist and usually white, male, and from the developed North involved in so-called (revolving doors)[1263] with a handful of leading law firms always representing the cases.[1264] Therefore, some criticism argues that party-appointed arbitrators are inherently

[1257] Childs (n 53).p.21
[1258] Faure and Ma (n 5).p.19-20
[1259] Van Harten (n 373).p.151
[1260] Park (n 9). p.658
[1261] Faure and Ma (n 5).p.20
[1262] Franck, 'Development and Outcomes of Investment Treaty Arbitration' (n 396).p.450-451
[1263] For example, act as an arbitrator in a case and as legal counsel in another case, then as an expert witness in another case.
[1264] Faure and Ma (n 5).p.20

biased.[1265] Jan Paulsson asserts no such right for a party to name an arbitrator.[1266] Further, Michael Nolan claimed that the growing number of high-profile challenges to the appointment of arbitrators creates an appearance of bias.[1267] Challenges rarely succeed, which casts further doubt on the effectiveness of the appointment process.[1268]

Also, in Chapter 7, Giorgetti indicated that a chief complaint of party-selected arbitrators is their limited number and demographic characteristics, and the system is not diverse; the same few people tend to be reappointed again.[1269] Also, Giorgetti indicated that few repeat players seem to dominate the field; almost 20% of all arbitrators selected in the cases decided on the merits by (ICSID) in the 1994-2009 period were appointed at least four times.[1270] These data support the concern expressed in the recent discussion about whether the existing selection procedures result in selecting the best decision-makers.[1271]

Contrary to other opinions, some scholars, such as Judge Charles Brower, supposed that these criticisms disregard that arbitrators are impartial and independent dispute resolvers who interpret and apply the governing law and are subject to disclosure and disqualification mechanisms that prevent private interests.[1272] Further, Prof. Shalakany[1273] and Susan Frank state that the system does not appear per se biased in favour of either the developed or the developing world and the complaints have not been theoretically grounded.[1274] Further, William Park notes that party selection promotes confidence in the international arbitral process and democratises it, fostering the parties' trust that they select at least one person on the tribunal.[1275]

[1265] Sardinha (n 375).p.518
[1266] ibid.p.519
[1267] Nolan (n 334).p.440
[1268] ibid.p.441
[1269] Giorgetti, 'Who Decides Who Decides in International Investment Arbitration' (n 71).p.458
[1270] ibid.p.460
[1271] ibid.p.460
[1272] Brower and Schill (n 67).p.489
[1273] Shalakany (n 402).p.424
[1274] Franck, 'Development and Outcomes of Investment Treaty Arbitration' (n 396).p.477
[1275] Sardinha (n 375).p.519

Therefore, chapter 3 (4.0) established the vital role of professionalisation to address arbitrators' integrity in investor-state arbitration and argued that establishing arbitrators' certification scheme would undoubtedly promote the arbitrators' competence, quality, and arbitrators qualified. Also, it would enhance the current structure of matching the services of arbitrators to a potential party by major arbitration providers and ensure the highest quality of appointees. It would also provide a more precise signal of neutrality than membership on arbitrators' lists to be selected and respond to the scepticism of the integrity of the arbitration profession. However, August Reinisch states that existing mechanisms to ensure the quality of investment decisions and awards are also not too promising concerning their effectiveness. Most widely used among the preventive approaches are lists of potential arbitrators, as in (ICSID), which is not a reliable mechanism to ensure the highest quality of appointees.[1276] Therefore, chapter 3 (2.2.1) addresses the knowledge and skills required for oil and gas arbitrators, such as expertise and experience in the area of oil and gas disputes.

The thesis has argued that introducing professional control mechanisms such as certification to regulate arbitrators, particularly in oil and gas disputes, can offer a mechanism that focuses on arbitrator quality and competence in oil and gas in investor-state arbitration. Further, it would enhance selection, diversity, and arbitrators' integrity and confidence in oil and gas parties in investment arbitration. David Hoffman states that proponents of certification point to the protection of the public as the rationale for certification.[1277] Also, certification standards can help ensure that (ADR) practitioners have sufficient training, explain (ADR) processes to the participants, and adhere to ethical standards. A second advantage is that certification may increase the public's confidence.[1278] Further, certification can help codify a profession's common body of knowledge, build a profession's brand, increase consumer awareness,

[1276] Reinisch (n 81).p.908-909
[1277] Hoffman (n 428).p.1-2
[1278] ibid.p.1-2

demonstrate professionalism and improve overall quality standards. All of which can increase the profession's collective share of the marketplace for professional services.[1279]

2) The best way to establish a certification scheme for arbitrators in investor-state arbitration appears to be through the creation of an independent third-party certifier body based on transitional private regulation (TPR).

Accordingly, the thesis has specified several findings regarding this issue:

1. Chapter 6 (5.0) considered some theories that have been put forward on regulating professionals. The chapter has found that one of the features of a profession is to control entry to the profession, either formally or informally, to protect the public from incompetent practitioners.[1280] According to the public interest theory, those who develop regulations protect the public interest. On the other hand, the capture theory emphasises the ideas of specific interest groups instead of the public interest. This makes it more specific, and the regulations aim to protect the interests of the given particular groups.[1281]

   In chapter 6 (5.2.2), the thesis explores the theory of transnational responsive regulation, and the theory of transnational enforced self-regulation suggested that intergovernmental organisations (IGOs) can work as responsive regulators based on two strategies regulatory collaboration and orchestration.[1282] Thus, chapter 7 (3.3.1) argued that investor-state arbitral institutions such as (the ICSID, the UNCITRAL and the PCA) can implement the orchestration strategy to develop transnational private standards for certification schemes and support the creation of the separate third-party certifier body. Accordingly, these arbitral institutions' governing bodies can engage in a contractual relationship as (IGOs') responsive regulators in the process of

[1279] Gough and Albert (n 89).p.852
[1280] Rogers, 'The Vocation of International Arbitrators' (n 225).p.977
[1281] Posner (n 898).p.335-336
[1282] Abbott and Snidal (n 926).p.103

transnational regulatory standard-setting (TRSS) for professional certifications scheme for arbitrators through orchestration strategy by creating an independent third-party certifier body.

Orchestration enables (IGOs) to enlist an existing intermediary organisation or create a new intermediary body.[1283] (ICSID) can use their limited capacities to support and empower intermediaries to engage with target firms and industries in regulatory orchestration strategy. Intermediaries use their material and conceptual capabilities to promote and "enforce" self-regulation, multi-stakeholder regulation, and other forms of (TRSS). Intermediaries may include international public interest groups (iPIGs), private or public-private (TRSS) schemes, and other actors independent of the targets.[1284]

2. One of the findings of chapter 7 (3.3.3) is that the certification scheme under the orchestration strategy should be established as a third-party certification scheme. The chapter explore certification types, e.g., the first-party certification and second party certification. On the other hand, the third-party certification is a situation where the certifier allocates the certification function to another entity directly or indirectly related to the product or the person to be certified.[1285] Another distinguishing factor between the certifications types is that the certifier has no commercial connection with the certified person or entity for the third-party certification.[1286] The standard-setter typically imposes conditions on the certifier that it must meet to be allowed to monitor compliance with the quality standards. An accreditation body's attestation concerning the certification's competency and independence is typically required.[1287] Therefore,

[1283] ibid.p.105
[1284] ibid.p.97-98
[1285] Verbruggen and Schmidt (n 1078).p.5
[1286] ibid.p.5
[1287] ibid.p.5

chapter 7 (3.3.3.2) suggested an example of the contractual relationship for the third-party certification scheme in investor-state arbitration. The licensing contract will be between (ICSID) (the standard owner) and the independent certifier body and an optional Memorandum of Understanding Agreement between the (ICSID) and an accreditation body. The independent certifier body structure will have an Independent Advisory Committee or Council, including a small group representing different geographies, ages, genders, and investor-state arbitration backgrounds. The role of the Independent Advisory Committee is to help ensure independence and develop high standards. The structure of the independent certifier body will include an internal operational team guided by a Board of Directors to sets the overall direction of the independent certifier body public service activities and ensure efficient operation and appropriate financial control. Also, the independent certifier will include the input of independent bodies of arbitration and (ADR) experts with supporting organisations and implementing organisations. The supporting organisations can consist of many private arbitration institutions involved in investor-state arbitration (e.g., ICSID-ICC-SCC). They can work together with the independent certifier body to advance and require their arbitration panellists to be certified to the level of certification in the independent body certifier. Further, the implementing organisations can include professional arbitrators' associations and alternative dispute resolution training centres, such as (IBA), (CIArb) and arbitration associations. The independent certifier body does not certify or accredit arbitrators directly and is not a service provider. Accreditation and certification are conducted by certified arbitrator Training Programs and Qualifying Assessment Programs, respectively vetted against independent standards by the independent Appraisal Committee. Applications are open to any organisation worldwide that meets the standards.

3. Chapter 7 (3.4.3) find that private actors and (NGOs) in the oil and gas industry can be engaged in the certification scheme as supporting organisations and implementing organisations for oil and gas certified training and qualifying programs for arbitrators under the certification scheme within the independent certifier body. For example, the International Centre for Dispute Resolution (ICDR), the Institute for Energy Law (IEL), the International Centre for Energy Arbitration (ICEA) and The Centre for Energy, Petroleum and Mineral Law & Policy (CEPMLP). Further, global independent bodies such as The World Petroleum Council (WPC) and The Society of Petroleum Engineers (SPE). These institutions, centres, and associations can engage under a Task Force Group within the independent certifier body's board to develop standards for the oil and gas arbitrators' certification program and be approved by the independent certifier body's committees. The Task Force aims to develop standards and criteria for specialised oil and gas training and qualifying certification programs to be implemented by organisations conducting training programs for oil and gas investor-state arbitration.

3) The certification scheme for arbitrators in investor-state arbitration will probably work if it is established as part of an incremental and legislator's reform approach.

Mark McLaughlin stated no consensus about reforming the investor-state arbitration to address its deficiencies.[1288] However, proponents of the incremental or legislator's reform approach argue that the benefits outweigh the shortcomings even though the investor-state arbitration has imperfections.[1289] Incremental reformists view the criticisms of the current system as overblown and argue that investor-state arbitration remains the best option available. Hence, they favour retaining the existing dispute resolution system but instituting modest reforms to redress specific concerns.[1290] Incremental reform has some distinctive features; it

[1288] McLaughlin (n 964).p.76
[1289] ibid.p.76
[1290] Roberts (n 967).p.410

keeps faith with investor-State arbitration in principle, accepting that its deficiencies can be addressed within current structures.[1291] Also, these reforms aim to limit arbitrators' discretionary powers to ensure public interests are balanced against private rights.[1292] Thus, chapter 7 (4.3) and (4.4) recommend a corrective improvement measure for the arbitrators' independence, impartiality, and selection and appointment.

The best solution is to employ incremental reforms, as the current arbitral system has all the hallmarks of being a reliable system when the legitimacy gaps are addressed. The focus should be on correcting the deficiencies and not changing the whole system. Introducing a certifications scheme for arbitrators in investor-state arbitration may be considered one of the incremental reforms. This alternative solution improves the system's standards and efficiency and raises public confidence about handling the cases. The certification scheme proposal has many goals to secure the legitimacy of the investor-state arbitration system. First, they enhance the process of selection and appointing arbitrators in the arbitral tribunals in investor-state arbitration. Second, ensuring the arbitrators' quality and competence and enhancing the arbitrators' professionalism in investor-state arbitration. Third, enlarging the pool of competent arbitrators and ensuring the diversity of arbitrators in different countries' systems. Fourth, creating a credible mechanism of information about arbitrators to avoid conflict of interest and reducing the number of arbitrators' disqualification in investor-state arbitration. Fifth, the certification scheme allows for the development of specialised programs for the need of arbitrators in complex types of disputes such as oil and gas, which will enhance the quality and selection process of arbitrators. Investing in the arbitrators and demanding quality improved the system as a whole. Further, arbitration is an important system that has observed investment

[1291] McLaughlin (n 964).p.79
[1292] ibid.p.79

law and ensured investment disputes are solved. It should thus be improved to eliminate the legitimacy gaps instead of replacing them with new systems.

The findings of chapter 7 (4.2) have supported the incremental reform of the certification scheme and indicated some disadvantages of the institutional and fundamental reforms in investor-state arbitration:

- The proposal for the appointment of arbitrators for fixed single terms in investment court may significantly increase independence but make the system potentially less accountable – possibly lessening the pressure for 'correct' decisions.[1293]
- The introduction of an appellate body in investor-state arbitration does not offer an obvious solution to the independence and impartiality problems as the backgrounds of the appellate body members will influence perceptions of independence and impartiality.[1294] Also, it will increase the time and costs involved in investment disputes resolution.[1295]Further, the appellate mechanism goes against the increased freedom and autonomy of commercial arbitration from judicial intervention.[1296]
- The roster systems (or standing panels) will only limit the pool of arbitrators, and arbitrators will know which party appointed them.[1297] Also, a roster system will require a choice about what types of rosters will be used, the conditions for nomination to a particular list, what institution will host the list, and how the parties will select from these lists.[1298] Furthermore, they sometimes detail qualifications that panellists should have but do not outline precisely how the

[1293] Langford, Behn and Malaguti (n 42).p.3
[1294] Giorgetti and others (n 349).p.467-468
[1295] Dimitropoulos (n 82).p.423
[1296] Dothan and Lam (n 1018).p.15-16
[1297] Langford, Behn and Malaguti (n 42).p.32
[1298] ibid.p.7

rosters will be constituted.[1299] Finally, there are no directives as to how qualifications should be vetted, thus leaving it to parties to determine whether a particular individual is qualified or not.[1300]

- The proposal of having a neutral authority select all the arbitrators would completely change the balance of interests negotiated by the parties while not ensuring that the neutral authority does not consider the diverse interests represented by each party.[1301] Further, it would require a renegotiation of the (ICSID) Convention, (UNCITRAL) Model Law and redrafting of the innumerable BITs and investment protection treaties that include a dispute resolution clause that provides the parties selection and a neutral appointing authority.[1302]
- The code of conduct can be a valuable instrument to aid the certification system. Still, supporters of the code of conduct are divided into binding or non-binding codes and about the scope and applicability of whether a series of specialised codes within a particular forum is preferable to a general code that diversity of institutions can use to administer investor-state arbitration cases.[1303]

4) Establishing a certification scheme for arbitrators will address the concerns of states and investors about arbitrators' integrity and their regulatory legal framework in investor-state arbitration, particularly developing states' concerns in oil and gas disputes.

Chapter 1 (1.3) and Chapter 3 (3.3) have expressed the dissatisfaction of states and parties in oil and gas disputes about arbitrators' integrity, which resulted in many arbitrators' disqualifications in oil and gas disputes. For instance, in chapter 1, Tom Childs have argued

[1299] Bjorklund and others (n 1205).p.14
[1300] ibid.p.17
[1301] Giorgetti, 'Who Decides Who Decides in International Investment Arbitration' (n 71).p.462
[1302] ibid.p.463
[1303] Giorgetti, 'A Common Code of Conduct for Investment Arbitrators?' (n 554).p.218

that the surge in the number of investment treaty arbitrations brought by international oil companies (IOCs) has provoked a backlash against the investment treaty system on the part of several oil-producing states such as Venezuela in 2012 withdrew from the (ICSID) Convention.[1304] Elisabeth Eljuri and Clovis Trevino stated that some Latin American States, e.g. Bolivia, have taken steps to insulate themselves from the system.[1305] Similarly, Sylvia Noury, Leilah Bruton and Annie Pan have stated that some African states such as Nigeria, Egypt, Uganda and South Africa have also demonstrated a less investor-friendly approach to international investment arbitration.[1306] Therefore, Andrew Chukwuemerie has stated that the reason for the antipathy of many developing countries towards international arbitration is because it hardly believes that they have had a fair deal in international arbitration deciding their natural resources investments disputes in oil and gas.[1307] Therefore, the need to sustain the confidence of States in the different regions of the world in (ICSID) arbitrations cannot be overemphasised.[1308]

The thesis conducts a legal analysis of arbitrators' regulatory framework in chapter 4 to address the above concerns. Chapter 4 (3.0) identifies that the current regulatory framework for arbitrators in investor-state arbitration has some weaknesses. There are inequities concerning independent and impartiality standards and tests of arbitration rules applied to determine the disqualification of arbitrators in the present legal system. For instance, the (ICSID) Convention does not distinguish between impartiality and independence as major ethical requirements in the investor-state arbitration process.[1309] Article 14(1) of the (ICSID) convention used different terminology' independent judgment' than the (UNCITRAL) Rules Article 6(7) and the (SCC) Rules Article 18(1), which use the twin concepts of 'impartiality

[1304] Childs (n 53).p.21
[1305] Eljuri and Trevino (n 55).p.345
[1306] Noury, Bruton and Pan (n 54).p.2
[1307] Chukwuemerie (n 57).p.827
[1308] ibid.p.866
[1309] Cleis (n 439).p.20

and independent'. Although, there is a consensus among (ICSID) arbitration users that both requirements are mandatory and applies to all arbitrators in (ICSID).[1310] However, potential conflicts of interest are much more numerous in the context of (ICSID) party appointments on an *ad hoc* basis, and a clear delineation of the scope of independence and impartiality is therefore crucial.[1311] Further, the disqualification standard in all arbitration rules comparable with the (ICSID) - (Article 57 the **'**manifest lack') - are relatively uniform in requiring the disqualification threshold of 'justifiable doubts' regarding the arbitrator's independence and impartiality for a challenge to succeed. The (IBA) Guidelines also provide the same standard 'justifiable doubts' threshold for a disqualification. However, the need to show a 'manifest lack of the qualities required' is a decidedly higher threshold to satisfy when set against the standards in other arbitral rules.[1312] This implies that it would be difficult for a party to prove that an arbitrator lacks the skills required under the Article. Chiara Giorgetti stated that applying the "manifest standard" had been rightly criticised as excessively difficult to prove and too protective of the arbitrator.[1313] Additionally, Sam Luttrell has stated that in most bias challenges in (ICSID) cases, the central legal issue will be the meaning and effect of the Article 57 term 'manifest'.[1314] This raises the question of whether challenges subject to a justifiable doubts standard have noticeably different outcomes than (ICSID) manifest lack challenges.

However, Peng Wang argued that the heavy burden of proof of (ICSID) could be treated as a protection of the arbitrators, and the unique arbitration framework of private v state which should be considered the most valuable.[1315] On the contrary, there is an argument that the standard for disqualification in (ICSID) Article 57 should be amended.[1316] However, amending

[1310] ibid.p.12-13
[1311] ibid.p.15
[1312] Sheppard (n 455).p.132
[1313] Giorgetti, 'Between Legitimacy and Control: Challenges and Recusals of Judges and Arbitrators in International Court and Tribunals' (n 462).p.251-252
[1314] Luttrell (n 447).p.600
[1315] Wang (n 608).p.15
[1316] Malintoppi and Yap (n 506).p.157

the Convention is highly ambitious unrealistic since any amendment requires the approval of the majority of two-thirds of the members of the (ICSID) Administrative Council and all member states of the Convention.[1317] Therefore, Chapter 5 (2.0) analysis arbitrators' disqualification decisions in oil and gas disputes to address inequities in the investor-state arbitration legal system and whether challenges subject to a justifiable doubts' standard have different outcomes than (ICSID) manifest lack challenges. Based on the observation, the analysis of disqualification decisions in oil and gas disputes in investor-state arbitration concludes several observations:

A) The study observes that arbitrators in oil and gas disputes were frequently challenged, but only a smaller fraction of the applications are accepted. This means that challenges are difficult to succeed, at least under the (ICSID) rules, as shown below (Table 3). From the (8) successful arbitrators' disqualification, only (4) successful disqualifications under the (ICSID) cases which is (11.76%) of disqualifications, one of them determined by reliance on the (IBA) Guidelines (*Perenco v. Ecuador*)[1318] and (19) disqualifications rejected.

Table 3: Disqualification Proposals by Result of Decisions

Result of Decisions	**Number of Decisions Under**			**Total**
	UNCITRAL	**SCC**	**ICSID**	
Upheld /Sustain	4 (11.76%)	0 (0%)	4 (11.76%)	8 (23.52%)
Rejected /Dismiss/Declined	3 (8.82%)	1 (2.94%)	19 (55.88%)	23 (67.64%)
Arbitrator Resigned	2 (5.88%)	0 (0%)	1 (2.94%)	3 (8.82%)
Total	9 (26.47%)	1 (2.94%)	24 (70.58%)	34

[1317] ibid.p.157
[1318] *Perenco* (n 479)

B) Although the (ICSID) is the preferable rule in the oil and gas investor-state arbitration, it still faces have the highest number of disqualifications by (18) cases which is (13.23%) of the total disqualification cases (20.58%) (see table 1) under the (ICSID).

Table 1: Oil and Gas Investor-State Arbitration by Number of Cases

Oil and Gas Cases	Number of Cases Under			Total
	UNCITRAL	SCC	ICSID	
Non-Disqualification Cases	16 (11.76%)	7 (5.14%)	85 (62.5%)	108 (79.41%)
Disqualification Cases	9 (6.61%)	1 (0.73%)	18 (13.23%)	28 (20.58%)
Total	25 (18.38%)	8 (5.88%)	103 (75.73%)	136

More interesting about these requests of arbitrators' disqualifications in oil and gas is that most disqualification requests have been filed by respondents' states in oil and gas investor-state arbitration by (73.52%) of the total disqualification requests (see table 2). Again, this confirms the dissatisfaction of states about the investor-state arbitration system.

Table 2: The Number of Arbitrators' Disqualification Request by Parties

Requests by	Number of Requests Under			Total
	UNCITRAL	SCC	ICSID	
Respondent	7 (20.58%)	1 (2.94%)	17 (50%)	25 (73.52%)
Claimant	2 (5.88%)	0 (0%)	7 (20.58%)	9 (26.47%)
Total	9 (26.47%)	1 (2.94%)	24 (70.58%)	34 (25% of 136)

C) Another observation is that different results of disqualifications decisions have been made in cases where disqualifications have been based on similar grounds. For example, in an arbitrator business relationship, the only successful disqualifications were under (UNCITRAL) rules by two successful disqualifications, while under the (ICSID), two disqualifications were rejected. In the arbitrator role conflict, the disqualifications under the (UNCITRAL) Rules, the arbitrator has resigned from his position. The same arbitrator has been challenged on similar grounds on a different

case under the (ICSID) rules, the disqualification has been rejected. Finally, in arbitrator repeat appointments, only one disqualification under (UNCITRAL) rules led to the arbitrator's resignation, while under the (ICSID), five disqualifications had been rejected.

5) Establishing a certification scheme for arbitrators will strengthen the arbitrators' regulatory legal framework and improve investor-state arbitration in many aspects.

A) The Certifications scheme should lead to a further "professionalisation" of international investment arbitrators.[1319] Also, the certification scheme will reduce the dangers of moral hazards created by the community's closed nature and the absence of professional discipline mechanisms.[1320]

B) The certification scheme will improve the arbitrators' independence and impartiality in investor-state arbitration in many aspects:

- The certification system provides a quality assurance mechanism of a person's competence.[1321]
- Regarding arbitrators' repeated appointments, certification can open the door for newcomers' arbitrators and would allow parties to avoid relying on repeated appointments to extend far their selection options of arbitrators.
- Regarding arbitrators' impartiality, certification would provide parties with the ability to identify arbitrators who come from certain countries, legal systems and cultural backgrounds that parties seek to have in their arbitrators, rather than relying on similar arbitrators repeatedly. Thus, certification can also ensure diversity in the investment arbitration system.

[1319] Dimitropoulos (n 82).p.431
[1320] ibid.p.432
[1321] ibid.p.429

- Certification would positively reduce the challenge to arbitrators based on the personal relationship as certification can enlarge the community of investment arbitrators.
- Certification helps other qualified arbitrators with less experience that have not yet had the chance to be trusted to be appointed in deciding new cases, thus, reducing challenges based on arbitrators having decided a similar legal issue in prior cases.

C) The certification scheme will improve the arbitrators' selection and appointment in investor-state arbitration in many aspects:

- Certification can help enhance market information for arbitrator selection and appointment and would partially replace reputation and word of mouth recommendation of arbitrators. It is thus expected that the introduction of certification will boost the dissemination of information across the system.[1322]
- Certification will open the door to new arbitrators and enlarge the arbitrators' pool in (ICSID) without closing it to the current ones as the market is still relatively closed. There are only very few arbitrators from developing countries and women arbitrators.[1323]
- The certification scheme would replace selection based on arbitrators' lists or institutional rosters of arbitrators, which are not transparent in their process and create asymmetric information in the market of the international arbitrator.
- The certification scheme can allow the (ICSID) when its appointing authority needs to appoint presiding or co-arbitrators or *ad hoc* annulment committees to choose arbitrators who are certified. Thus, certification enables (ICSID) to enhance diversity by choosing certified arbitrators from developing countries, young

[1322] ibid.p.432
[1323] ibid.p.432

professionals, and female arbitrators. Also, certification can signal that those arbitrators are qualified to be appointed and selected.

- The chairman of the (ICSID) Administrative Council, who is entitled to select ten of the Panel of Arbitrators, can choose at least one or two arbitrators who are certified. This will make the selection process by the chairman of the (ICSID) administrative council more transparent and improve the parties' confidence in the chairman selecting process, which will reflect positively on the system's legitimacy.
- The certification can allow states and parties to nominate and select some members to the Panel of Arbitrators who are certified.
- The certifications scheme will enhance selecting arbitrators in oil and gas disputes by either replacing or enhancing the list mechanism of selected oil and gas arbitrators and improve the competence of oil and gas arbitrators. Therefore, arbitrators from the oil and gas industry can show their competence and qualification among other arbitrators in lists or institutional roosters that they are oil and gas professionals and certified in investment disputes. This would increase the arbitrators' pool in oil and gas and ensure the industry principles and objectives are represented.
- As supporting organisations in certification schemes, arbitration institutions can implement or incorporate certification standards as guidelines to be voluntarily applied to their internal policy or rules of selecting and appointing arbitrators in certain situations. For example, where parties fail to appoint an arbitrator or when the rules require that the arbitral institution appoints a sole arbitrator or a presiding arbitrator.
- The certifications scheme can provide arbitral institutions with the ability to control and sanction misbehaved arbitrators. In orchestration, arbitral institutions can share

> information with an independent certifier body about arbitrators' violations of the rules and misconducts. The independent body intermediaries can sanction the arbitrators by, e.g., revoking or suspending certification for a particular time, compensating arbitrator, blacklist arbitrator for a specific time, or shaming sanction by public announcements.[1324]

2.0. Future Studies:

This work has focused on the debate surrounding whether introducing a certifications scheme for arbitrators through the creation of an independent third-party certifier body in an investor-state arbitration system benefits the integrity of arbitrators and, as a result, enhances the legitimacy of the system. Indeed, the research findings suggest that such a need is present and creating an independent third-party certifier body would be a positive move for the system of investor-state arbitration. However, the work did move on to explore how an independent third-party certifier might best be introduced. Specifically, chapters six and seven investigated a number of the most prominent theories and reform proposals that have been put forward in the past for investor-state arbitration. Accordingly, Chapter six examined the theoretical framework of regulation and whether any existing theories could serve as a model or inspiration for creating an independent third-party certifier body in investor-state arbitration. Chapter seven investigated the advantages and disadvantages of reform proposals such as introducing an investment court or an appeal mechanism and explored how an independent third-party certifier might best be introduced.

A preliminary analysis of the proposal of creating an independent third-party certifier body suggested that it might provide the best means of benefiting the integrity of arbitrators and, as a result, enhance the legitimacy of the investor-state arbitration system. However, even if the analysis supports creating an independent third-party certifier body based on transitional

[1324] Wilske (n 1242).p.214-215

private regulation (TPR), much more research will need to be undertaken to make an informed decision, and many more questions will need to be answered. Intensive research will need to be carried out into how the certifier body should function and its processes. There is still a significant amount of work that will need to be completed before an independent third-party certifier body can come to fruition. The present research suggested that the current framework of investor-state arbitration might be particularly well suited to creating an independent third-party certifier body based on transitional private regulation (TPR). Perhaps more incremental reform to the system will need to be affected before a certifier body can be introduced. The research suggested that investor-state arbitral institutions (the ICSID), the (UNCITRAL) and the (PCA) can implement the (TPR) orchestration strategy to develop transnational private standards for certification schemes and support creating the independent third-party certifier body. Accordingly, these arbitral institutions governing bodies can be engaged in a contractual relationship as (IGOs') responsive regulators in the process of transnational regulatory standard-setting (TRSS) for professional certifications scheme for arbitrators through orchestration strategy by creating an independent third-party certifier body. Creating an independent third-party certifier body could take years to negotiate and establish. Thus, it would appear that there may be a lot of work to do in the field of investor-state arbitration before the creation of an independent third-party certifier body.

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