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## Rawlsian Fairness and International Arbitration

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## RAWLSIAN FAIRNESS AND INTERNATIONAL ARBITRATION

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## ABSTRACT

*Critics of international arbitration predominantly invoke the concept of “fairness” in four ways. First, fairness is associated with procedural due process concerns, involving the expected trade-off between party demands for efficiency and confidentiality in dispute resolution and in court litigation where there are expectations of full presentation and disclosure of evidence and transparency in the conduct of arbitration proceedings. Second, fairness is also used as a criterion for assessing dispute resolution outcomes, in regard to how arbitral tribunals choose their interpretive methodologies or retain subjective discretion when applying substantive law or rules to the given facts of a dispute. Third, critics assert unfairness in pointing out the absence of full judicial review of arbitral awards with merely a limited recourse to appeal as the control mechanism in international arbitration. Fourth, recent empirical attempts by scholars argue fairness synonymously with the legitimacy of community decision-making and participation rights, where questions have arisen in regard to perceived inequalities in the appointment of arbitrators, the composition of arbitral tribunals, and the ability of arbitrators to resolve public interest dimensions attaching to international arbitration disputes. These critiques stand alongside mandates of fairness already embedded in the operative rules of international arbitration, such as, for example, Article 18 of the UNCITRAL Model Law on Arbitration (“all parties shall be treated with equality,”)<sup>1</sup> Article 9(2)(g) of the IBA Rules on the Taking of Evidence in International Arbitration (“considerations of procedural economy, proportionality, fairness or equality of the Parties”),<sup>2</sup> and Article 1.7 of the UNIDROIT Principles of International Commercial contracts (“good faith and fair dealing in international arbitration”).<sup>3</sup>*

*Responding to varying usages of “fairness” and in order to elicit testable criteria for future verification, this paper draws from Harvard philosopher John Rawls’ theory of justice as fairness in his opus “A Theory of Justice.” Rawlsian theory can substantiate the ongoing assessment of fairness in international arbitration through the theory’s approach to evaluating inequalities arising from political ordering and/or economic arrangements. In the original position where individuals contract or reach*

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<sup>1</sup> UNCITRAL, Model Law on International Commercial Arbitration, U.N. Doc. A/40/17, art. 18 (Jul. 7 2006).

<sup>2</sup> IBA Rules on the Taking of Evidence in International Arbitration, Art. 9(2)(g).

<sup>3</sup> UNIDROIT Principles of International Commercial Contracts, Art. 1.7.

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*mutual agreement under a veil of ignorance as to each other's relative endowments, information asymmetries, and welfare expectations, Rawls argues for reasonable conditions within which each contracting party can agree to principles best representing their interests.<sup>4</sup> Under the first Rawlsian principle (the "liberty principle"), each contracting party should have the same indefeasible claim to a fully adequate scheme of equal basic liberties compatible with liberties for all parties contracting under the same arrangements. Under the second Rawlsian principle, any social and economic inequalities arising from the agreement reached should attach under conditions of fair equality of opportunity to all parties, and such inequalities should be distributed in a manner that they are to be of the greatest benefit to the least-advantaged members of the bargaining community (the "difference principle"). This paper applies Rawlsian fairness analysis to each of the four "fairness"-based critiques of international arbitration, finding ultimately that each asserted critique requires more careful differentiation as to perceived inequalities in arbitration procedures, communities, and outcomes.*

*" . . . fairness is relative and subjective . . . a human, subjective, contingent quality which merely captures in one word a process of discourse, reasoning, and negotiation leading, if successful, to an agreed formula located at a conceptual intersection between various plausible formulas for allocation . . . . The fairness of international law, as of any other legal system, will be judged, first by the degree to which rules satisfy the participants' expectations of justifiable distribution of costs and benefits, and secondly by the extent to which the rules are made and applied in accordance with what the participants perceive as right process.<sup>5</sup>*

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<sup>4</sup> JOHN RAWLS, A THEORY OF JUSTICE (Revised Edition by Belknap Press of the original edition published by Harvard University Press, 1971), at 11-13.

<sup>5</sup> THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 7, 22-24 (Oxford Univ. Press, 1995).

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## 1. INTERNATIONAL ARBITRATION, JUSTICE, AND FAIRNESS

For some years now, international arbitration (especially investor-State arbitration) has been peculiarly “under siege.”<sup>6</sup> Despite the inimitable diversity of mechanisms for the settlement of international disputes and the respective functional limits of these mechanisms,<sup>7</sup> it is with some irony that the oldest and most heavily-used form of dispute settlement<sup>8</sup> today attracts the most commentaries and questions as to its capacity to observe and to result in fairness.<sup>9</sup> Despite canonical observations that

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<sup>6</sup> See, e.g., Leon E. Trakman, *The ICSID Under Siege*, 45 Cornell Int'l L.J. 603 (2012) (discussing the effect of power on ICSID arbitration and its challenges); Pia Eberhardt & Cecilia Olivet., *Profiting from Injustice: How Law Firms, Arbitrators and Financiers are Fuelling an Investment Arbitration Boom* (Corporate Europe Observatory and Transnational Institute 2012) (arguing that international arbitration has created an international investment climate that is flawed); Steven Seidenberg, *International Arbitration Loses its Grip: Are U.S. lawyers to blame?*, A.B.A. J. (2010) (asserting that U.S. lawyers may be the cause of the ineffectiveness of international arbitration); Lucy Reed, *More on Corporate Criticism of International Arbitration*, KLUWER ARBITRATION BLOG, (July 16, 2010), available at <http://kluwarbitrationblog.com/blog/2010/07/16/more-on-corporate-criticism-of-international-arbitration/> (last visited Jan. 15, 2014) (proposing solutions to the asserted problems in international arbitration).

<sup>7</sup> W. Michael Reisman, *The Diversity of Contemporary International Dispute Resolution: Functions and Policies*, 4 J. INT'L DISP. SETTLEMENT, 47, 47-63 (2013) (explaining the control systems of international arbitration).

<sup>8</sup> CHRISTIAN BÜHRING-UHLE ET AL., ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS 31 (Kluwer Law Int'l 2006) (describing the framework of international arbitration). On ancient or pre-modern arbitrations, see SHEILA L. AGER, INTERSTATE ARBITRATIONS IN THE GREEK WORLD, 337-90 B.C. 3-36 (Univ. of California Press 1996) (recounting the structure of interstate arbitration in Ancient Greece); JACKSON H. RALSTON, INTERNATIONAL ARBITRATION FROM ATHENS TO LOCARNO 153-89 (Lawbook Exchange 2004) (describing arbitration from ancient times until the Jay Treaty of 1794).

<sup>9</sup> David Ma, *A BIT Unfair? An Illustration of the Backlash Against International Arbitration in Latin America*, 2012 J. DISP. RESOL. 571 (2012) (outlining the history and developing of proposed problematic bilateral investment treaties in Latin America); MICHAEL WAIBEL, ET AL., THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY (Wolters Kluwer 2010) (describing the development of the criticism of international arbitration); Stavros Brekoulakis, *Systemic Bias and International Arbitration: a New Approach to Arbitral Decision-Making*, 4 J. INT'L DISP. SETTLEMENT 553 (2013) (asserting approaches to assist in solving the problems of international arbitration). On the tradeoff between fairness and efficiency in arbitration, see William W. Park, *The Procedural Soft Law of International Arbitration: Non-Governmental Instruments*, in LOUKAS A. MISTELIS & JULIAN D.M. LEW (EDS.), PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION 141-54 (Kluwer Law Int'l 2006).

“international arbitration is widely perceived as an inherently fair process,”<sup>10</sup> present challenges against the “fairness” of international arbitration stem from criticism of its evidentiary procedures, the veracity and reliability of the arbitral decision-making process, as well as the substantive outcomes resulting from this mode of dispute resolution.<sup>11</sup>

*1.1. Recontextualizing objectives of international arbitration vis-à-vis international adjudication*

However, the measure of “fairness” does require some contextualization about the actual nature of international arbitration. Among international dispute resolution mechanisms, arbitration has an established pedigree (dating back to ancient arbitrations in Greece to the origins of modern arbitration in the 1794 Jay Treaty)<sup>12</sup> and scope (encompassing interstate as well as mixed arbitrations, on virtually every conceivable subject-matter from

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Fairness, however, can implicate the additional time and cost sometimes needed to provide a meaningful right to be heard. In arbitration, fairness requires some measure of efficiency, since justice too long delayed becomes justice denied. Likewise, without fairness an arbitral proceeding would hardly be efficient, since it would fail to deliver a key element of the desired product: a sense of justice that had been respected.

<sup>10</sup> Robert Pietrowski, *Evidence in International Arbitration*, 22 ARBITRATION INT’L 373, 379 (2006) (“... the increasing use of international arbitration, coupled with the relative infrequency of challenges of arbitral awards, suggests that in fact international arbitration is widely perceived as an inherently fair process . . .”).

<sup>11</sup> See Nana Japaridze, *Fair Enough? Reconciling the Pursuit of Fairness and Justice with Preserving the Nature of International Commercial Arbitration*, 36 HOFSTRA L. REV. 4 1415 (2008) (describing proposed conflicts and problems in international arbitration).

<sup>12</sup> On ancient or pre-modern arbitrations, see SHEILA L. AGER, INTERSTATE ARBITRATIONS IN THE GREEK WORLD, 337-90 B.C. 3-36 (Univ. of California Press, 1996) (describing the procedure of interstate arbitration in Ancient Greece); JACKSON H. RALSTON, INTERNATIONAL ARBITRATION FROM ATHENS TO LOCARNO 153-89 (Lawbook Exchange 2004) (describing general international arbitration in the Ancient World); see also JOHN COLLIER & VAUGHAN LOWE, THE SETTLEMENT OF DISPUTES IN INTERNATIONAL LAW: INSTITUTIONS AND PROCEDURES 32 (Oxford Univ. Press 2005) (describing the early history of international arbitration in the United States); David W. Rivkin, *The Impact of International Arbitration on the Rule of Law: The 2012 Clayton Utz/University of Sydney International Arbitration Lecture*, 29 ARBITRATION INT’L 327-60 (LCIA 2013) (explaining the current proposed problems of international law).

border delimitations to economic disputes).<sup>13</sup> Arbitration is distinct among other international dispute resolution mechanisms for its emphasis on party autonomy, the core principle that allows disputing parties to determine the applicable law governing the merits of a dispute, which they consent to submit to arbitrators that are also freely appointed by the parties themselves.<sup>14</sup> Unlike international adjudication that has a predetermined institutional design and pre-existing governing rules,<sup>15</sup> parties to an international arbitration have greater latitude to structure fact-finding procedures, evidence-taking, identification of issues, and other aspects of the conduct of the arbitration in order to reach the most expedient resolution of the dispute to the satisfaction of the parties.<sup>16</sup> The inherent flexibility of the international arbitral process and its overall utility in producing binding and enforceable arbitral awards, help explain the enduring popularity of international arbitration as

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<sup>13</sup> See Diane A. Desierto, *Is Arbitration a Form of International Justice?*, *Academie du droit de l'arbitrage*, available at <http://www.arbitrationacademy.org/wp-content/uploads/2012/03/Diane-Desierto.pdf> (last visited Jan. 15, 2014) (proposing that international arbitration is not a form of justice).

<sup>14</sup> EMMANUEL GAILLARD & JOHN SAVAGE (EDS.), FOUCHARD, GAILLARD, AND GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 785 (Kluwer Law Int'l 1999) [hereinafter "FOUCHARD, GAILLARD, AND GOLDMAN"] (criticizing the process of allowing both parties to determine the applicable law in international arbitration).

<sup>15</sup> See GERNOT BIEHLER, PROCEDURES IN INTERNATIONAL LAW 278-80 (Springer 2008) (outlining the strengths of international arbitration); Cesare PR Romano, et al., *Mapping International Adjudicative Bodies, The Issues, and Players*, in CESARE ROMANO, ET AL., (EDS.), THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 3-25 (Oxford Univ. Press, 2013).

Judicial bodies (also generically referred to as 'courts' or 'tribunals') *pre-exist* the question that is to be decided. The adjudicators are selected, elected, or nominated through a mechanism that does not depend on the will of the litigating parties. They sit on the body's bench and decide a series of cases. The judge's authority derives from a public mandate and the outcome is, in essence, a 'public good'. Conversely, in arbitration, the adjudicators are selected by the parties *after* the dispute arises, with the aim of deciding a particular case. The arbitral tribunal or panel is dismissed after issuing the decision (known as the 'award'). Since the parties select the members of arbitral bodies, the mandate of arbitrators is circumscribed to administering 'private justice.'

<sup>16</sup> See SHARYN L. ROACH ANLEU, LAW AND SOCIAL CHANGE 137-38 (Sage Publishing 2009) (discussing the sociological informalism of international arbitration); TONY COLE, THE STRUCTURE OF INVESTMENT ARBITRATION xvi (Routledge 2013) ("The essential difference between the straightforward anarchy of public international law, then, and the bounded anarchy of international investment law, is the combination in the latter of a predesigned procedural structure and a substantive anarchy that exists within the boundaries set by that structure.").

global corporate counsels' preferred dispute resolution mechanism. For instance, "frequent users of arbitration explained that, regardless of whether they are claimant or respondent, 'fairness' – above all other considerations – is what companies look for in a dispute resolution mechanism . . . arbitration, because of its neutrality, gives a sense of fairness that litigation in foreign courts sometimes cannot provide."<sup>17</sup> Parties to an international arbitration remain primarily concerned with the resolution of a concrete dispute, under a fair process supported at narrow and specific junctures by the exercise of the State's public power, rather than triggering sweeping State oversight and control as is characteristic of court litigation.<sup>18</sup>

These fundamental ontological differences make it clear that there can be no assumed identity between the community expectations<sup>19</sup> attaching to international adjudication, and those

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<sup>17</sup> *Corporate Choices in International Arbitration: Industry Perspectives*, SCHOOL OF INTERNATIONAL ARBITRATION, CENTRE FOR COMMERCIAL LAW, QUEEN MARY UNIVERSITY OF LONDON, 6-7, available at <http://www.pwc.com/gx/en/arbitration-dispute-resolution/assets/pwc-international-arbitration-study.pdf> (last visited Jan. 15, 2014).

<sup>18</sup> W. Michael Reisman, *Recueil Des Cours: Collected Courses of the Hague Academy of International Law*, 258 RECUEIL DES COURS 39-40 (1996).

Insofar as a legal system enables legal actors to conclude a private contract with respect to future behaviour, it should encounter no theoretical problem with allowing those actors to designate someone else to specify, under procedures and on contingencies agreed upon in the contract, certain obligations that will be deemed, in advance, to be part of the contract . . . the critical factor in the operation of arbitration, as in contracts, is the commitment and effectiveness of the legal system with respect to supporting, assisting and, where necessary, enforcing arbitral agreements and their results . . . though private arbitration is a non-governmental mode of dispute resolution, it cannot operate without the active support of governmental agencies. That support is a mixture of tolerance, encouragement, protection of its autonomy *and* supervision, for arbitration, like any other form of delegated power, is susceptible to moral hazard.

<sup>19</sup> Community expectations are drawn from the constituencies that seek recourse to dispute resolution, availing of international adjudication (such as States submitting disputes to the International Court of Justice), *vis-à-vis* international arbitration (such as States engaged in inter-State arbitrations, individuals and corporate entities engaged in commercial arbitrations with fellow private actors or mixed arbitrations with States). See Myres S. McDougal, *Law as a Process of Decision: A Policy-Oriented Approach to Legal Study*, 1 NAT. L. F. 53, 55 (1956).

For us, as law students, the most important general question is: How does one identify authoritative and controlling rules? In more detail, who in any given community prescribes what rules, with respect to what values, for whom, and by what procedures? Who makes effective

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maintained for international arbitration.<sup>20</sup> While both mechanisms are designed to resolve disputes, parties choosing to resort to either international adjudication or international arbitration ultimately demonstrate their revealed preferences on applicable law and procedural rules, the quality of institutional oversight, the degree of transparency or confidentiality expected in the conduct of proceedings, as well as the operative systems of control that affect the authoritative decision-makers in any given dispute.<sup>21</sup> As such, while one may readily claim that the functionalist objective of every dispute resolution mechanism is to achieve a “just result” under a “fair process,”<sup>22</sup> it should also be clear that the manifold ways to reach that objective under international arbitration would not necessarily be the same as those available under international

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recommendations to such authoritative prescribers and upon what intelligence, achieved by whom and by what procedures? Who, authorized how, may invoke the application of what prescriptions, with respect to whom, in what arenas? Who, for the promotion of what policies, applies what prescriptions to whom, by what procedures? Who appraises prescriptions and terminates them when they cease to serve community purposes? By what factors in environments and predispositions of decision-makers are all the various types of decisions above affected? What is the impact of community process, culture, class, personality, skill, affiliation, crisis, and so on, upon the expectations of decision-makers?

<sup>20</sup> See William W. Park, *Arbitration's Protean Nature: The Value of Rules and the Risk of Discretion*, 334-91, 335, in JULIAN D.M. LEW & LOUKAS A. MISTELIS (EDS.), *ARBITRATION INSIGHTS: TWENTY YEARS OF THE ANNUAL LECTURE OF THE SCHOOL OF INTERNATIONAL ARBITRATION* (Kluwer Law Int'l 2007) (“Like a bespoke tailor, the creative arbitrator cuts the procedural cloth to fit the particularities of each contest, rather than forcing all cases into the type of ill-fitting-off-the-rack litigation garment found in national courts.”).

<sup>21</sup> See W. MICHAEL REISMAN, *SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION: BREAKDOWN AND REPAIR 2-3* (Duke Univ. Press 1992).

Controls are a virtual prerequisite for international third-party decision. When we deal with optional international decision processes, that is those in which, for the most part, participation is voluntary and in which the expectation of the operation of the control mechanism may be an important factor in decisions opting to use a particular process, an actual or anticipated control breakdown such this is likely to induce many actors henceforth to refrain from using the process. Thus controls in international adjudication and arbitration are not simply conditions of efficient operation. They are conditions of operation.

<sup>22</sup> In the words of Lord Bingham, “[m]eans must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve.” See TOM BINGHAM, *THE RULE OF LAW* 66 (Penguin Books 2011).

adjudication.

It is crucial to stress this differentiation at the outset, because the critiques on the seeming “unfairness” of international arbitration apparently arise from expectations wed to a more judicial or structurally adjudicative paradigm of international dispute resolution. When critics seek “more procedural due process” reforms for international arbitration,<sup>23</sup> in reality they advocate a notion of procedural due process that is more closely analogous to how the opportunity to be heard and to present evidence is observed in traditional court proceedings.<sup>24</sup> By urging more document production and far-reaching discovery procedures, more compelled disclosures of evidence, increased third party-participation, a more extensive presentation of witnesses under stricter admissibility rules, as somehow all axiomatic descriptors of “procedural due process,” it is clear that the effort is less towards “reforming” international arbitration than it is to ultimately “transform” it into international adjudication.<sup>25</sup>

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<sup>23</sup> See David C. Sawyer, *Revising the UNCITRAL Arbitration Rules: Seeking Procedural Due Process Under the 2010 UNCITRAL Rules for Arbitration*, 1 INT'L COM. ARB. BRIEF 24, 25-26 (2011) (“Two of the most important concerns underlying the protection of procedural due process when creating arbitration rules are that the rules give participants a sense that the proceedings have been unbiased and that they have thus produced a fair and enforceable award.”).

<sup>24</sup> See MATTI S. KURKELA & SANTTU TURUNEN, *DUE PROCESS IN INTERNATIONAL COMMERCIAL ARBITRATION* 1-2 (Oxford Univ. Press 2010).

. . . a fundamental feature of arbitration is that the arbitral award . . . is a final and binding determination of the parties' rights and obligations. Arbitral awards are widely enforceable, including internationally. Thus the States delegate jurisdictional power to arbitral tribunals indirectly through agreement of the parties. With this delegation of power comes a type of trade-off in the form of standards of quality applicable to arbitration. Making certain the award is enforceable is one of the most central duties of the arbitral tribunal. If the arbitral tribunal wants to issue an enforceable award, the process has to meet certain quality standards. These minimum quality standards are, of course, procedural. They can be called due process requirements just like the minimum standards in ordinary court procedure. In the same way, they establish the minimum procedural safeguards necessary for someone to be deprived of his property or other rights. As such, they can be considered aspects of such elements as procedural fairness, opportunity to be heard, and equal treatment as well as access to justice.

<sup>25</sup> See Dora Marta Gruner, *Accounting for the Public Interest in International Arbitration: The Need for Procedural and Structural Reform*, 41 COLUM. J. TRANSNAT'L L. 923, 926 (2002-2003) (stating that international arbitration is designed to benefit from an efficient and neutral adjudicating proceeding.) By “international adjudication,” I still refer to the conventional understanding of the International

Such veiled attempts to transform international arbitration into international adjudication appear perplexing, given that one of the foremost objectives behind designing international arbitration was precisely to avoid the costs and inefficiencies of court-based litigation.<sup>26</sup> On the other hand, the attempts to introduce more judicial paradigms of procedure, control and oversight into investor-State arbitration, while often debated, are at least more understandable when one considers the State interests implicated in foreign investment disputes between investors (who notably may be purely private commercial actors, or parastatal entities such as State-owned or controlled enterprises) and host States (operating directly or through sub-state contracting entities<sup>27</sup>).<sup>28</sup> In this latter situation

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Court of Justice as a court seized of general jurisdiction to adjudicate any question of international law. Recent scholarship generally designates “international adjudication” as encompassing a “second-generation” of international tribunals, but for purposes of this Article I still differentiate between the jurisdictional mechanisms operative for international litigation before the ICJ (e.g. compromissory clauses, special agreements under the Art. 40 of the ICJ Statute, Optional Clause declarations, forum prorogatum), as opposed to consent to arbitration (usually through the arbitral agreement or arbitral clause in an agreement or national legislation that makes an offer of arbitration) deemed sufficient to vest jurisdiction in institutionally-administered or ad hoc international arbitrations. See Gary Born, *A New Generation of International Adjudication*, 61(4) DUKE L. J. 775, 775-879 (2012).

<sup>26</sup> W. MICHAEL REISMAN, *SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION: BREAKDOWN AND REPAIR* 46 (1992) (“One of the major objectives of international commercial arbitration has been to keep dispute resolution out of the courts of one or the other of the parties and to protect litigants from the costs of plodding through the long corridors of national judicial bureaucracies, with mandatory calls at each successive cubicle to rehear all or parts of the case.”); GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION, VOLUME I* 71 (2009) (“While far from perfect, international arbitration is, rightly, regarded as generally suffering fewer ills than litigation of international disputes in national courts and as offering more workable opportunities for remedying or avoiding those ills which do exist.”).

<sup>27</sup> On the attribution of private conduct to host States, see JAN OLE VOSS, *THE IMPACT OF INVESTMENT TREATIES ON CONTRACTS BETWEEN HOST STATES AND FOREIGN INVESTORS* 139-48 (2010).

<sup>28</sup> See R. Doak Bishop and Margrete Stevens, *A Systemic Perspective of the Foreign Investment Dispute Settlement System: Feedback, Adaptation, and Stability*, in *CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS* 25, 56-57 (2011).

The investment dispute system was “designed” to arbitrate single, isolated cases before *ad hoc* tribunals, in a generally confidential manner, with limited review, and international law obligations of compliance and enforceability . . . . [T]he system was not originally intended to generate a body of decisional jurisprudence, much less a consistent body of decisions. Instead, its characteristics are consistent with the general nature of arbitration and the “one-off” nature of particular cases . . . . [A] review of

when a State enters into a foreign investment contract with the investor, the choice of a dispute settlement mechanism – whether more “privatized” as traditionally understood in international arbitration, or more “public” or “judicial” as associated with court-based litigation – inimitably becomes one that affects both the “public interests”<sup>29</sup> of the State as well as the commercial expectations and interests of the private actor.

### 1.2. Fairness critiques against international arbitration

Accordingly, if one were to map the spectrum of types of international arbitrations according to the degree of State involvement (from purely private international commercial arbitrations, to mixed arbitrations involving a private party and a State, all the way to inter-State arbitrations), it should be easy to visualize that the more contracting parties appear “private” (or de-linked from the State), the greater the expectations parties may harbor for sufficient autonomy to flexibly design a “bespoke” dispute resolution mechanism.<sup>30</sup> Conversely, one might expect a more marked preference for dispute resolution paradigms or procedures that are closer to the degree of State oversight and

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the formal design of the system does not reveal the whole story. Because of the proliferation of investment treaties in which states consent to arbitrate a broader range of disputes than is typical under contracts, and the public nature of such disputes, a tension has developed between the private and public natures of such dispute settlement.

<sup>29</sup> “Public interest” does not necessarily rule out *a priori* the State’s commercial or economic interest in the investment transaction. I subscribe to the definition of “public interest” as “[i]n a particular context, the public interest refers to the outcomes best serving the long-run survival and well-being of a social collective construed as a [']public['].” See BARRY BOZEMAN, PUBLIC VALUES AND PUBLIC INTEREST: COUNTERBALANCING ECONOMIC INDIVIDUALISM 12 (2007) (alternation in original) (discussing the contextual nature of defining what the public interest is).

<sup>30</sup> See MICHAEL MCILWRATH AND JOHN SAVAGE, INTERNATIONAL ARBITRATION AND MEDIATION: A PRACTICAL GUIDE 95-102 (2010) (showing that parties examine considerations of neutrality, enforcement, efficiency, cost, flexibility, competence, convenience, confidentiality, and moderation in choosing international arbitration over court litigation); GARY B. BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 3, 8-14 (2012) (enumerating reasons or objectives of international arbitration such as neutrality, centralized dispute resolution, enforceability of agreements and awards, commercial competence and expertise, finality of decisions, party autonomy and procedural flexibility, cost and speed, confidentiality and privacy of dispute resolution).

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control associated with court-based litigation or international adjudication, whenever a State is directly or indirectly (as in the case of parastatal entities or state-owned and controlled enterprises<sup>31</sup>) involved as a contracting party in the dispute.<sup>32</sup> Community expectations behind fairness in international arbitration should thus be situated within its actual objectives or limitations as a dispute resolution mechanism. If expectations based on more “judicial” paradigms or court-based litigation were to be imposed on international arbitration, it should be stressed that such expectations, in the first place, *ipso facto* seek to transform this mechanism well away from its actual teleological design.<sup>33</sup>

Recognizing the foregoing clarifications, “fairness” critiques in regard to international arbitration can be framed according to four predominant categories. First, the fairness of international arbitration has been questioned on the basis of procedural due process (or “arbitrariness”<sup>34</sup>) considerations, essentially challenging

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<sup>31</sup> See JONATHAN G.S. KOPPELL, *THE POLITICS OF QUASI-GOVERNMENT: HYBRID ORGANIZATIONS AND THE DYNAMICS OF BUREAUCRATIC CONTROL* 18 (2003) (“...state-owned enterprises are clearly products and instruments of public policy.”).

<sup>32</sup> See Hilde Caroli Casavola, *Global Rules for Public Procurement*, in ROZEN NOGUELLOU AND ULRICH STELKENS (EDS.), *COMPARATIVE LAW ON PUBLIC CONTRACTS* 27, 32 (2010).

Public procurement therefore constitutes one of the areas in which economic globalization is causing an increase in transnational litigation. The mechanisms employed and the supranational bodies appointed to settle such litigation (often exclusively) are steadily increasing . . . . [However] [a]nother factor contributing to the erosion of the national judges’ monopoly on dispute resolution involving public contracts is the fact that states prefer to solve problems regarding public contracts by way of arbitration. It has been perceptively observed that the national judges in a contracting body’s country hear a case involving international procedures not so much by virtue of existing supranational rules as because of the fact that the dispute has been, as it were, “abandoned” to their jurisdiction by the other contracting party.

<sup>33</sup> On the functional considerations for choosing between international litigation and arbitration for international project financing contracts, in particular, see Michael Nolan, Julian Stait, and Erin Culbertson, *Dispute Resolution in Project Finance Transactions*, in JOHN DEWAR (ED.), *INTERNATIONAL PROJECT FINANCE: LAW AND PRACTICE* 419, 419-62 (2011). There has been some opposition to permitting international arbitration to mutate into a judicial system. See GEORGIOS I. ZEKOS, *INTERNATIONAL COMMERCIAL AND MARINE ARBITRATION* 489 (2008), at p. 489 (“[A]rbitration cannot become an alternative court system, a system of public justice outsourced to private providers but an alternative dispute system co-equal to courts administered by the state and keeping its classical advantages of speed, cost effectiveness and efficiency, leading to justice and satisfaction.”).

<sup>34</sup> JAN PAULSSON, *THE IDEA OF ARBITRATION* 98 (2013).

supposedly prohibitive levels of costs, policies of confidentiality, and the principles of evidentiary fact-finding adopted in arbitral proceedings.<sup>35</sup> Second, fairness has also been associated with the assessment of the actual outcomes of a dispute, given arbitrators' non-uniform (and at times, perceptibly idiosyncratic<sup>36</sup>) interpretive

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[I]t may be wise to recognize that arbitrariness is, in reality, a type of failure of due process; the supervising court should not censure arbitration because it finds itself in substantive disagreement with them, no matter how acute, but because their reasons do not reveal a proper hearing of the parties...and thus seem to be the product of an otherwise inexplicable preference for a particular outcome.

<sup>35</sup> JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 675 (2003) (footnote omitted) (alteration in original).

Procedural irregularity amounts to violation of the principle of fairness.... It is essential that certain minimum standards are observed and that arbitration proceedings are conducted fairly. Failure to disclose documents may not amount to a serious irregularity justifying challenge of an award. Undoubtedly proper notice of the appointment of arbitrators or notice of the arbitration proceedings are expressions of fairness; so is also the opportunity of each party to present its case and respond to the case put forward by the other party.

See also William W. Park, *Two Faces of Progress: Fairness and Flexibility in Arbitral Procedure*, 23(3) *ARB. INT'L* 499, 499-503 (2007) (discussing two provisions in the context of English arbitration law that while one affords arbitrator substantial discretion in procedural matters, the other offers the arbitral awards to be challenged for serious irregularity and thus assures fairness.); NATHAN D. O'MALLEY, *RULES OF EVIDENCE IN INTERNATIONAL ARBITRATION: AN ANNOTATED GUIDE* 292 (2012).

When applying an evidentiary privilege, it is not uncommon that an "equal treatment" and fairness issue may come about. The problem arises in connection with the application of different rules of privilege to the parties. If, for example, a tribunal uses a private international law analysis to determine that one rule of privilege applies to Party A's communication and a different rule to Party B's, it is effectively applying different standards between the parties.

<sup>36</sup> Tony Cole, *Authority and Contemporary International Arbitration*, 70(3) *La. L. Rev.* 801, 805 (2010).

[T]he procedural innovations that have been adopted to adapt arbitration to the new contexts in which it now occurs have not been effectively designed to provide parties with any reason to accept the award delivered.... [C]ontemporary international arbitration simply no longer functions properly as a means of genuinely resolving disputes and is instead increasingly coming to represent merely a legal game, invoked by the parties due to the enforceability of its awards rather than because the system produces desirable results.

methodologies for reaching reasoned decisions.<sup>37</sup> Third, fairness has also been depicted as a tradeoff ensuing from observing the principle of finality in international arbitration, which traditionally affords only very limited recourse to appeal as a control mechanism.<sup>38</sup> Finally, the fairness of international arbitration has been challenged on the basis of the legitimacy of decision-making arising from the largely unregulated composition of the “arbitral elite,”<sup>39</sup> as well as the limited rights of participation available to third

<sup>37</sup> See Shari Seidman Diamond, *Psychological Aspects of Dispute Resolution: Issues for International Arbitration*, in ALBERT JAN VAN DEN BERG (ED.), *INTERNATIONAL COMMERCIAL ARBITRATION: IMPORTANT CONTEMPORARY QUESTIONS* 328, 329 (2003) (“[E]ven when actual outcomes were held constant and even when those outcomes were negative, the perceived fairness of the procedures strongly influenced the party’s satisfaction with the verdict and willingness to accept the legitimacy of the decision.”); Larry A. DiMatteo, *Soft Law and the Principle of Fair and Equitable Decision-Making in International Contract Arbitration*, 1(2) *CHINESE J. COMP. L.* 221, 221-55 (2013); Catherine A. Rogers, *Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct*, 41 *Stan. J. Int’l L.* 53, 69-71 (2005); Leonardo Graffi, *The Law Applicable to the Validity of the Arbitration Agreement: A Practitioner’s View*, in FRANCO FERRARI AND STEFAN KRÖLL (EDS.), *CONFLICT OF LAWS IN INTERNATIONAL ARBITRATION* 19, 49 (2010) (“[A]rbitrators are more accustomed to specific international arbitration tools (for example, the comparative law method, international law or the conflict of laws theories), than many domestic courts that usually deal with purely domestic matters.”); William W. Park, *The 2002 Freshfields Lecture – Arbitration’s Protean Nature: The Value of Rules and the Risks of Discretion*, 19(3) *ARB. INT’L* 279, 279-301 (2003).

<sup>38</sup> Rowan Platt, *The Appeal of Appeal Mechanisms in International Arbitration: Fairness over Finality?*, 30(5) *J. INT’L ARB.* 531, 532-33 (2013); Noemi Gal-Or, *The Concept of Appeal in International Dispute Settlement*, 19(1) *EUR. J. INT’L L.* 43, 43-65 (2008); Irene M. Ten Cate, *International Arbitration and the Ends of Appellate Review*, 44(4) *NYU J. Int’l L. & Pol.* 1109, 1109-1204 (2012); William H. Knull, III & Noah D. Rubins, *Betting the Farm on International Arbitration: Is It Time To Offer An Appeal Option?*, 11 *AM. REV. INT’L ARB.* 531, 531 (2000).

<sup>39</sup> JAN PAULSSON, *THE IDEA OF ARBITRATION* (Oxford University Press, 2013), 273. See also Michael Waibel and Yanhui Wu, *Are Arbitrators Political?*, available at <http://www.wipol.uni-bonn.de/lehrveranstaltungen-1/lawecon-workshop/archive/dateien/waibelwinter11-12> (finding that the arbitrators’ decision are somehow influenced by their appointing parties); Gus Van Harten, *Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration*, 50(1) *OSGOODE HALL L. J.* 211, 211-68 (2012); Christopher R. Drazohal & Richard W. Naimark, *Commentary*, in *TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH* 147, 156 (Christopher R. Drazohal & Richard W. Naimark eds., 2005) (footnote omitted) (“Is international arbitration dominated by a small group of elite counsel and arbitrators? Some refer to an international arbitration “mafia’ or a ‘club’,” but Jan Paulsson asserts that such characterizations “lack a solid evidentiary basis.””) For contrasting views, see Susan D. Franck, *The Role of International Arbitrators*, 12 *ILSA J. INT’L & COMP. L.* 499, at 504-13 (2006); Daphna Kapeliuk, *The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators*, 96 *CORNELL L. REV.* 47, at 79-88 (2010).

parties asserting public interests in the international arbitration.<sup>40</sup>

1.3. *Rawls' Theory of Justice as Fairness: Criteria for Assessing Fairness in Understanding "Universal Arbitration" as a Sociological Phenomenon*

This Article does not purport to directly engage each of the foregoing four categories of predominant critiques of fairness in international arbitration. Rather, it invites a reassessment of the conceptual use of "fairness" as the underlying criterion deployed in each of these critiques. As an evaluative measure, "fairness" may have an elusive meaning but it is not without identifiable parameters. While "fairness" and "justice" could be viewed as objectives or end values of international arbitration,<sup>41</sup> when cast in the four predominant categories of critique abovementioned these objectives are often seen as inevitable tradeoffs.<sup>42</sup> This Article recognizes such a potential tradeoff or distributive inequality

<sup>40</sup> Cindy G. Buys, *The Tensions Between Confidentiality and Transparency in International Arbitration*, 14 AM. REV. INT'L ARB. 121, 121 (2003); Eugenia Levine, *Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation*, 29(1) BERKELEY J. INT'L L. 200, 200-24 (2011); Yusuf Caliskan, *Dispute Settlement in International Investment Law*, in IMPLEMENTING INTERNATIONAL ECONOMIC LAW: THROUGH DISPUTE SETTLEMENT MECHANISMS 123, 146-52 (Yusuf Aksar ed., 2011) (on the gradual development of *amicus curiae* participation in investment arbitration jurisprudence); Tomoko Ishikawa, *Third Party Participation in Investment Treaty Arbitration*, 59 INT'L & COMP. L. Q. 373, 373-412 (2010); but see, Catherine A. Rogers, *The Arrival of the "Have-Nots" in International Arbitration*, 8 NEV. L. J. 341, 345 (2007) ("[A]s a result of its history and the ethos of its participants, as well as the pragmatic necessities around which it is constructed, the international arbitration system appears to have a more public-oriented approach to the process of resolving disputes.").

<sup>41</sup> HORACIO A. GRIGERA NAÓN, CHOICE-OF-LAW PROBLEMS IN INTERNATIONAL COMMERCIAL ARBITRATION 289 ("International arbitrations have to be therefore based on a choice-of-law methodology enabling them to pursue objectives of fairness and justice compatible with the specific modalities of justice which arbitrators should advance.").

<sup>42</sup> MATTI S. KURKELA & SANTTU TURUNEN, DUE PROCESS IN INTERNATIONAL COMMERCIAL ARBITRATION 205 (2nd ed. 2010).

Does fairness increase costs? Possibly sometimes. In addition, increasing costs limits access to arbitration and to justice and thus reduces the fairness of the proceedings. Just as the above examples show, if and when conflicts between fairness on the one hand and finality, efficiency, flexibility, efficiency or timeliness on the other exist, they really need not be discussed at a general level, but should rather be dealt with case by case when a need for balancing appears.

arising from choices made by parties in designing an international arbitration, but instead proposes to scrutinize the consequences of any resulting inequalities from these design choices. Using philosopher John Rawls' famous theory of "Justice as Fairness" as criteria for parties seeking to reach agreement and distribute any inequalities resulting from such agreement,<sup>43</sup> I seek to examine the actual potency of the four predominant critiques of unfairness in international arbitration.

Admittedly, Rawls conceptualized his theory of justice primarily from the prism of social cooperation, where principles of social justice "provide a way of assigning rights and duties in the basic institutions of society . . . and . . . define the appropriate distribution of the benefits and burdens of social cooperation."<sup>44</sup> Society is deemed to be "well ordered when it is not only designed to advance the good of its members but when it is also effectively regulated by a public conception of justice . . . [which constitutes] the fundamental charter of a well-ordered human association."<sup>45</sup> Rawls saw justice as the "first virtue of social institutions,"<sup>46</sup> an end result that occurs "when no arbitrary distinctions are made between persons in the assigning of basic rights and duties and when the rules determine a proper balance between competing claims to the advantages of social life."<sup>47</sup> While Rawls hesitated to apply his conception of justice to the "fairness of voluntary cooperative arrangements or procedures for making contractual agreements,"<sup>48</sup>

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<sup>43</sup> JOHN RAWLS, A THEORY OF JUSTICE 3-53 (1971).

<sup>44</sup> *Id.* at 4.

<sup>45</sup> *Id.* at 4-5.

<sup>46</sup> *Id.* at 3.

<sup>47</sup> *Id.* at 5.

<sup>48</sup> *Id.* at 8. While Rawls conducted his thought experiment under autarkic assumptions of a "closed system isolated from other societies," he merely dissembled on the possible use of his theory for purely private contracts and saw no conflict with applying his definition of justice to "traditional" justice involving individual actions and entitlements:

These principles *may not* work for the rules and practices of private associations or for those of less comprehensive social groups. They *may* be irrelevant for the various informal conventions and customs of everyday life; they may not elucidate the justice, or perhaps better, the fairness of voluntary cooperative arrangements or procedures for making contractual agreements . . . . I shall be satisfied if it is possible to formulate a reasonable conception of justice for the basic structure of society conceived for the time being as a closed system isolated from other societies . . . . [T]his definition is framed to apply to actions, and persons are thought to be just insofar as they have, as one of the permanent

there is nothing that bars the extension of his theory to international arbitration. As with the original Rawlsian paradigms, international arbitration is also a set of social arrangements otherwise “viewed as a body of norms sufficiently organized, complete, and effective to qualify as a system,”<sup>49</sup> distinguished by various features of social cooperation, such as: 1) “the existence of an extensive body of rules generated at an international level and governing various aspects of international arbitration[;]”<sup>50</sup> 2) the “increasing uniformization of arbitral proceedings,” the “universal[] character and source of rules that apply in international arbitration[;]”<sup>51</sup> and 3) the fact of “international arbitration as a dispute resolution mechanism” that is heavily used by parties around the world.<sup>52</sup> As a form of dispute resolution, international arbitration as supported by States through narrow judicial controls and oversight, should be seen as just as much a product of “rational selection where actors select those institutions that are most effective and appropriate for given disputes.”<sup>53</sup> There is thus no conceivable reason why Rawls’ paradigm of fairness in arrangements for social cooperation (albeit theorized by Rawls at a greater societal level of abstraction), cannot be conceptually applied to assessing the fairness of arrangements that parties (States and non-State parties) jointly choose when deciding to submit their dispute to international arbitration.<sup>54</sup>

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elements of their character, a steady and effective desire to act justly . . . .  
[S]uch entitlements are, I believe, very often derived from social institutions and the legitimate expectations to which they give rise . . . .  
The definition I adopt ...[has] no conflict with the traditional notion.

*Id.* at 10-11 (emphasis added).

<sup>49</sup> Emmanuel Gaillard, *The Emerging System of International Arbitration: Defining “System”*, 106 ASIL PROC. 287, 287-92 (2012).

<sup>50</sup> *Id.* at 288.

<sup>51</sup> *Id.* at 288-89.

<sup>52</sup> *Id.* at 289.

<sup>53</sup> Walter Mattli, *Private Justice in a Global Economy: From Litigation to Arbitration*, 55(4) INT’L ORG. 919, 921-47 (2001).

<sup>54</sup> Indeed, I am certainly not the first to suggest that Rawls’ theory of justice as fairness may be applied to international arbitration. See ANITA ALIBEKOVA & ROBERT CARROW, INTERNATIONAL ARBITRATION AND MEDIATION - FROM THE PROFESSIONAL’S PERSPECTIVE 297 (Lulu.com, 2007).

Rawls’ theory was intended for and limited to the problem of determining social justice for a given society . . . . He himself noted, however, that his theory of justice could be extended to actions within the society, including how to determine the content of its laws, its institutions, the decisions and judgments of its courts, and the attitudes of its persons.

The four predominant categories of critiques of fairness in international arbitration are, themselves, inherently sociological in nature, drawing upon bedrock conceptions of fairness often left obscure (or merely assumed) in such critiques. This Article attempts a preliminary disentanglement of the concept of fairness in the examination of international arbitration as a “sociological phenomenon,”<sup>55</sup> as well as of international arbitrators as members of a professional “vocation.”<sup>56</sup> Jan Paulsson has lent the term “universal arbitration” to describe this convergence of dispute resolution with decreasing linguistic and cultural barriers, owing to shared legal foundations and sources as well as “inclusive” methods of governance and intellectual infrastructures spanning the globe.<sup>57</sup> From his standpoint, “universal arbitration” appears as a mechanism for “international cooperation”<sup>58</sup> – and in this manner, takes us to precisely the very same question of constitutive social arrangements to which Rawls’ theory of justice as fairness does provide some answers.

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William W. Park, *Rectitude in International Arbitration*, 27(3) *ARB. INT’L* 473, 508 (2011) (footnote omitted).

Soft law instruments thus represent one check on the imperial decision-maker, and perhaps the only standard that can permit elaboration of procedural law through what John Rawls called the ‘veil of ignorance’ about the contingencies of a rule’s application. Arbitrators who interpret preexisting norms have less leeway to pick rules that will lead to the outcome favoured by their subjective predispositions.

Robert L.C. Houston, *‘Justice as Fairness’ as a Guiding Principle in Arbitration*, *ABA SEC. LITIG.* (Nov. 12, 2012), <http://apps.americanbar.org/litigation/committees/commercial/articles/fall2012-1112-justice-fairness-guiding-arbitration.html> (last visited Apr. 3, 2015).

<sup>55</sup> Aleksander Goldstajn, *Choice of International Arbitrators, Arbitral Tribunals, and Centres: Legal and Sociological Aspects*, 27, 32, in PETAR ŠARČEVIC (ED.), *ESSAYS ON INTERNATIONAL COMMERCIAL ARBITRATION* (Martinus Nijhoff, 1989).

<sup>56</sup> Catherine A. Rogers, *The Vocation of the International Arbitrator*, 20 *AM. U. INT’L L. REV.* 957, 957-1020 (2005).

<sup>57</sup> Jan Paulsson, *The Alexander Lecture: Universal Arbitration – What We Gain, What We Lose*, *CHARTERED INST. ARB.* (Nov. 29, 2012), available at [http://www.globalarbitrationreview.com/cdn/files/gar/articles/jan\\_Paulsson\\_Universal\\_Arbitration\\_-\\_what\\_we\\_gain\\_what\\_we Lose.pdf](http://www.globalarbitrationreview.com/cdn/files/gar/articles/jan_Paulsson_Universal_Arbitration_-_what_we_gain_what_we Lose.pdf) (last visited Apr. 3, 2015).

<sup>58</sup> See *id.* at 10-14 (elaborating on “international cooperation” as a necessary component to saving the world and on legitimate adjudication as a necessary piece to achieving such cooperation).

## 2. APPLYING RAWLS' JUSTICE AS FAIRNESS CRITERIA TO FAIRNESS-BASED CRITIQUES OF INTERNATIONAL ARBITRATION

### 2.1. Rawlsian Theory: Criteria for Reaching Agreement and Distributing Inequalities

In the initial “bargaining” position (the state in which parties mutually decide on cooperative arrangements), Rawls maintains that the “principles of justice are chosen behind a veil of ignorance”<sup>59</sup> between “rational and mutually disinterested”<sup>60</sup> parties who respectively possess different entitlements (such as resources, endowments, skills) and asymmetric information about the other’s entitlements at the time of bargaining. In this original position, Rawls posits that the parties would agree to the operation of two basic principles: “the first requires equality in the assignment of basic rights and duties, while the second holds that social and economic inequalities, for example inequalities of wealth and authority, are just only if they result in compensating benefits for everyone, and in particular for the least advantaged members of society.”<sup>61</sup> For Rawls, the reason behind this allocation of inequalities is that social cooperation can only be best achieved if everyone participates in the scheme of cooperation, even those less well-situated in the initial bargaining position. Thus, what is crucial to ensuring everyone’s participation in social cooperation is to guarantee that the agreement for social cooperation is reached only under “reasonable terms” which ultimately nullify “the accidents of natural endowment and the contingencies of social circumstances.”<sup>62</sup> Rawls concedes that his theory of justice as fairness is an example of “contract theory” and the “theory of rational choice”: the content of the relevant agreement between the parties is “not to enter a given society or to adopt a given form of government, but to accept certain moral principles . . . that would be chosen by rational persons . . . deal[ing] with conflicting claims upon the advantages won by social cooperation.”<sup>63</sup> The contracting or bargaining process has a “practical aim,” which is “to reach

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<sup>59</sup> RAWLS, *supra* note 43, at 12.

<sup>60</sup> RAWLS, *supra* note 43, at 13.

<sup>61</sup> RAWLS, *supra* note 43, at 14-15.

<sup>62</sup> RAWLS, *supra* note 43, at 15.

<sup>63</sup> RAWLS, *supra* note 43, at 16.

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reasonably reliable agreement in judgment in order to provide a common conception of justice.”<sup>64</sup> As a result of setting reasonable terms for bargaining (and taking into account each party’s veil of ignorance as to the other party’s natural endowments and entitlements), the parties should ultimately converge on a conception of justice acceptable to both of them:

[s]ince it is up to persons in the original position to choose these principles, it is for them to decide how simple or complex they want the moral facts to be. The original agreement settles how far they are prepared to compromise and to simplify in order to establish the priority rules necessary for a common conception of justice.<sup>65</sup>

However, it is important to stress that the process of setting terms for agreement is in no way amoral; the theory of justice as fairness creates inbuilt constraints on bargaining between parties based on the understanding of what is right for social cooperation, and not just maximizing what is good individually for the bargaining parties:

Justice as fairness is a deontological theory . . . [p]ersons accept in advance a principle of equal liberty and they do this without a knowledge of their more particular ends. They implicitly agree, therefore, to conform their conceptions of their good to what the principles of justice require, or at least not to press claims which directly violate them . . . . The principles of right, and so of justice, put limits on which satisfactions have value; they impose restrictions on what are reasonable conceptions of one’s good. In drawing up plans and in deciding on aspirations men are to take these constraints into account . . . . [Parties’] desires and aspirations are restricted from the outset by the principles of justice which specify the boundaries that men’s systems of ends must respect . . . in justice as fairness the concept to right is prior to that of the good. A just social system defines the scope within which individuals must develop their aims, and it provides a framework of rights and opportunities and the means of satisfaction within and by the use of which

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<sup>64</sup> RAWLS, *supra* note 43, 44-45.

<sup>65</sup> RAWLS, *supra* note 43, at 45.

these ends may be equitably pursued.<sup>66</sup>

Given the foregoing understanding of the initial bargaining situation between parties seeking to reach agreement on social cooperation, Rawls then prescribes two principles of justice:

First: each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others. Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all.<sup>67</sup>

The liberties to be equally enjoyed by the bargaining parties under the First Principle include political liberties, freedom of speech and assembly, liberty of conscience and freedom of thought, as well as the "right to hold personal property and freedom from arbitrary arrest and seizure as defined by the concept of the rule of law."<sup>68</sup> The Second Principle (otherwise known as the Difference Principle) recognizes that the distribution of wealth and income need not be equal but that it must be to everyone's advantage: "[o]ne applies the second principle by holding positions open, and then, subject to this constraint, arranges social and economic inequalities so that everyone benefits."<sup>69</sup> Accordingly, injustice would mean "simply inequalities that are not to the benefit of all."<sup>70</sup> Not only should there be reasonable terms for reaching mutually acceptable agreements for social cooperation, but that bargaining parties must enjoy equal liberties in the process of bargaining. Should there be any inequality arising from the ultimate agreement reached, this inequality must be allocated away from the party most disadvantaged in the bargaining process. The following section applies these features of Rawls' Justice as Fairness criteria to the four predominant categories of fairness-based critique against international arbitration.

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<sup>66</sup> RAWLS, *supra* note 43, at 30-31.

<sup>67</sup> RAWLS, *supra* note 43, at 53.

<sup>68</sup> RAWLS, *supra* note 43, at 53.

<sup>69</sup> RAWLS, *supra* note 43, at 53.

<sup>70</sup> RAWLS, *supra* note 43, at 54.

## 2.2. *Testing Critiques of International Arbitration Under Rawlsian Fairness*

As discussed in Part I, charges of “unfairness” against international arbitration rarely clarify the conceptual bases for the understanding of “fairness.” For arbitration to be “fair,” for example, a number of “essential requirements” have been suggested,<sup>71</sup> such as the existence of a “*bona fide* difference”<sup>72</sup> or dispute between the parties, with parties having “an equal right to participate in choosing their arbitrator.”<sup>73</sup> The “absence of bias” by the arbitrators has also been deemed to be a “critical component of procedural equilibrium” as understood in common law systems.<sup>74</sup> Other scholars maintain that the arbitral tribunal should observe certain standards of fairness in the conduct of proceedings,<sup>75</sup> such as giving proper notice of the appointment of the arbitrator and of the conduct of proceedings, as well as ensuring in the conduct of the arbitration that parties have genuinely meaningful opportunities to be heard and to present their respective cases.<sup>76</sup> These considerations of equality “cannot be reduced to a mathematical formula . . . and [are] instead informed by the circumstances of the case.”<sup>77</sup> Lacking a comprehensive or overriding definition of fairness, it would be more plausible to test understandings of “fairness” as used in critiques against international arbitration. For this purpose, I apply Rawls’ Justice as Fairness criteria (specifically the First Principle, also known as the Liberty Principle, and the Second Principle, also known as the Difference Principle) to re-

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<sup>71</sup> Geoffrey M. Beresford Hartwell, *The Commercial Way to Justice*, in LIBER AMICORUM ERIC BERGSTEN INTERNATIONAL ARBITRATION AND INTERNATIONAL COMMERCIAL LAW: SYNERGY, CONVERGENCE AND EVOLUTION 231-50 (Stefan Kröll, et al. eds., 2011).

<sup>72</sup> *Id.* at 234.

<sup>73</sup> *Id.* at 235.

<sup>74</sup> SAM LUTTRELL, BIAS CHALLENGES IN INTERNATIONAL COMMERCIAL ARBITRATION: THE NEED FOR A ‘REAL DANGER’ TEST 30 (2009).

<sup>75</sup> See William W. Park, *Duty and Discretion in International Arbitration*, 93 AM. J. INT’L L. 805, 822-823 (1999) (suggesting that the United States adopt an act that will outline protective review standards for international arbitration in order to ensure fairness).

<sup>76</sup> Loukas Mistelis & Domenico Di Pietro, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)*, in CONCISE INTERNATIONAL ARBITRATION 1, 17 (Loukas A. Mistelis ed., 2010).

<sup>77</sup> MARTIN F. GUSY ET AL., A GUIDE TO THE ICDR INTERNATIONAL ARBITRATION RULES 172 (2011).

examine these critiques of “unfairness” in international arbitration. As the succeeding subsections will show, Rawlsian “fairness” criteria would, at times, support the charge of unfairness in some aspects of the critique, while contradict the charge in others.

### 2.2.1. Critique of unfairness based on procedural due process

As discussed in Part I, claims of unfairness against international arbitration based on procedural due process usually emanate from stronger expectations of transparency in the conduct of arbitral proceedings,<sup>78</sup> as well as a clamor for more extensive evidentiary fact-finding or discovery procedure analogous to court-based litigation.<sup>79</sup> These concerns are often based on “public interest”<sup>80</sup> or public policy considerations, and are somewhat unusual for arbitrators to consider when their evidentiary rulings traditionally ought to be “mindful of the legitimate expectations of the parties,” whose mutual consent, in the first place, is the basis of the arbitral mandate.<sup>81</sup> Arbitral tribunals, after all, also function as “regulators” of the conduct of legal counsels and are inimitably tasked with

<sup>78</sup> See Cyrus Benson, *Can Professional Ethics Wait? The Need for Transparency in International Arbitration*, 3 DISP. RESOL. INT'L 78, 78-94 (2009) (proposing a checklist to ensure fairness and transparency in international arbitration).

<sup>79</sup> See LEW, *supra* note 35, at 675 (insisting on the need for procedural regularity in order to ensure fairness).

<sup>80</sup> See, e.g., Jan Paulsson, *The Public Interest in International Arbitration*, 106 AM. SOC'Y OF INT'L L. PROC. 300, 302 (2012), which states:

[I]n other words, if the presence of public interest is the test of a type of arbitration that must be segregated from private commercial arbitration, we must go back at least a century, and redraw all of our maps.

There is no analytical line to be drawn around arbitration created by treaty. It is impossible to resist the impression that the line being proposed is in fact a *battle line*, a meretricious taxonomy intended to justify an agenda which ought to step out of the shadows. Perhaps the core of all this is the idea that international disputes involving matters of public interest should only be entrusted to bodies comprised of international civil servants or persons directly appointed by states, or (as has been suggested) that all awards arising out of investment-treaty arbitrations should be subject to an appellate body before which the only disputants will be states – and any temporarily victorious private party would be left with the timorous hope that its own foreign ministry will feel that it is in its government's interest to defend the initial award.

<sup>81</sup> Richard M. Mosk & Tom Ginsburg, *Evidentiary Privileges in International Arbitration*, 50 INT'L AND COMP. L. Q. 345, 385 (2001).

safeguarding the fair conduct of arbitral proceedings.<sup>82</sup>

Noticeably, the demand for greater transparency finds more resonance in investor-State treaty arbitration. The recent approval of the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration (“UNCITRAL Transparency Rules”) augurs a policy favoring extensive document disclosures and broad public access to information about investor-State arbitrations.<sup>83</sup> In approving the UNCITRAL Transparency Rules, the UN General Assembly stressed that it recognized “the need for provisions on transparency in the settlement of such treaty-based investor-State disputes to take account of the public interest involved in such arbitrations,” and believed that such rules “would contribute significantly to the establishment of a harmonized legal framework for a fair and efficient settlement of international investment disputes, increase transparency and accountability and promote good governance.”<sup>84</sup> The UNCITRAL Transparency Rules mandate that arbitral tribunals “shall take into account: (a) The public interest in transparency in treaty-based investor-State arbitration and in the particular arbitral proceedings; and (b) The disputing parties’ interest in a fair and efficient resolution of their dispute.”<sup>85</sup>

Applying Rawls’ theory of Justice as Fairness, it is important to first differentiate the “original positions” subsisting between parties to international arbitration. These, I submit, will not necessarily be the same for parties to an international commercial arbitration, as opposed to parties to an investor-State arbitration or an inter-State international arbitration. When private commercial parties negotiate an arbitral agreement or arbitral clause in their contracts, they do so under a situation of some asymmetric information as to each other’s relative resources, capabilities, and pre-bargaining endowments. Applying the First Principle (the Liberty Principle), both parties can be deemed to possess equal basic liberties in the bargaining process, as seen from the governing principles of party

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<sup>82</sup> See R. Doak Bishop & Margrete Stevens, *Safeguarding the Fair Conduct of Proceedings – Report*, in INTERNATIONAL ARBITRATION: THE COMING OF A NEW AGE?, ICCA CONGRESS SERIES VOL. 17 473–95 (Albert Jan Van Den Berg ed., 2013)(describing who may be accurately described as a regulator of an international arbitration).

<sup>83</sup> UNCITRAL, Resolution adopted by the General Assembly 68/109, U.N. DOC. A/68/462 (Dec. 16, 2013) available at <http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf>.

<sup>84</sup> *Id.* at paras. 5–6.

<sup>85</sup> *Id.* at paras., 4(a)–(b).

autonomy and freedom to consent in arbitration.<sup>86</sup> It is also possible to comply with the Second Principle (the Difference Principle) and allocate any ensuing social and economic inequalities to the least advantaged party. On the one hand, parties can authorize arbitrators in advance to rule on the dispute as *amiable compositeur* (permitting the arbitrator to rule *ex aequo et bono* or in equity), enabling the parties to authorize the tribunal in advance to prioritize considerations of equity rather than strict legal formalism.<sup>87</sup> On the other hand, arbitral tribunals themselves could derive authority from the general rule of arbitration that “the parties shall be treated with equality,”<sup>88</sup> to allocate any social or economic inequalities potentially arising from the agreement to submit the dispute to

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<sup>86</sup> See Michael Pryles, *Limits to Party Autonomy in Arbitral Procedure*, INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION (Apr. 15, 2009), [http://www.arbitration-icca.org/media/0/12223895489410/limits\\_to\\_party\\_autonomy\\_in\\_international\\_commercial\\_arbitration.pdf](http://www.arbitration-icca.org/media/0/12223895489410/limits_to_party_autonomy_in_international_commercial_arbitration.pdf) (discussing party autonomy as a basic principle involving their freedom to agree on procedures to be followed in an international commercial arbitration); and ANDREA M. STEINGRUBER, CONSENT IN INTERNATIONAL ARBITRATION, paras. 2.04–2.06 (2012), which states in relevant part:

Party autonomy is the primary source of arbitration jurisdiction and procedure. Indeed the first and foremost principle of law in commercial arbitration is that it is founded on the autonomy of the parties' will. The crucial difference between arbitration and courts thus lies in the fact that the basis of the jurisdiction of an arbitral tribunal is the will of the parties, while courts owe their competence to the procedural norms of a State or of an international convention....In arbitration the freedom of contract, as the primary rule that governs the law, practice, and regulation of arbitration in the vast majority of national jurisdictions, allows the parties to write their own rules of arbitration – indeed, it permits them to have the agreement to establish the law of arbitration for that particular transaction: the parties can customize the arbitral process to fit their needs, eliminate legal rules or trial techniques that might prove inconvenient or unsuitable, and maintain procedural elements they believe necessary to achieve fairness, finality, and functionality.

<sup>87</sup> FOUCHARD, GAILLARD, AND GOLDMAN, at p. 23. See UNCITRAL, Model Law on International Commercial Arbitration, U.N. DOC. A/40/17, art. 28(3) (Jul. 7 2006) [hereinafter *UNCITRAL Model Law*] (stating that “the arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so.”); *id.* at Art. 28(3) (“In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.”) [hereafter, “UNCITRAL Model Law”].

<sup>88</sup> UNCITRAL Model Law, at art. 18. See also UNCITRAL Model Law, at Art. 15(1) (“Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.”) (emphasis added).

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arbitration.<sup>89</sup> This could be illustrated by the residual power of the arbitral tribunal to fill any procedural lacunae in a way that ensures parties have the opportunity to present their respective cases.<sup>90</sup>

The original position in the 'bargaining' process in international investment arbitration is markedly different. The offer of arbitration in these types of disputes may be made through the foreign investment contract (negotiated between the investor and the host State), the foreign investment treaty (negotiated between the home State of the investor and the host State), or the host State's domestic legislation.<sup>91</sup> Applying the First Principle (Liberty Principle), it

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<sup>89</sup> One scholar views the equality of parties as a fundamental part of fairness mandated under "transnational procedural public policy." See Fernando Mantilla Serrano, *Towards a Transnational Procedural Public Policy*, 20 *ARB. INT'L* 4 333, 335 (2004):

A survey of the sources of arbitral procedure shows that a transnational procedural public policy has indeed evolved, and that its baseline is relatively undemanding, *comprising the fairness or equality principle that is embodied in the most basic notions of natural justice or due process*. As one prominent arbitrator has commented, 'Modern arbitration laws have reduced [mandatory rules of law regarding the arbitral procedure] to very few such as that the parties shall be treated with equality and that each party shall be given an appropriate opportunity of presenting its case' . . . . [T]he first source of the parameters of the arbitral procedure is anything but transnational; it is as particular and private as the parties themselves, for '[w]ithout the agreement of the parties to submit to arbitration, there is no arbitral procedure'. Accordingly, the most significant decisions the parties make regarding procedure are their choice of arbitral institution and arbitrator(s). The major international institutions provide that the parties and the arbitral tribunal have relative freedom to establish the arbitral procedure, subject to certain provisos. *These provisos can be summarized as equal treatment of the parties by the arbitral tribunal and an opportunity for each party to present its case.* (emphasis added).

<sup>90</sup> See IBA Rules on the Taking of Evidence in International Arbitration, Art. 9(4) ("The Arbitral Tribunal may, where appropriate, make necessary arrangements to permit evidence to be presented or considered subject to suitable confidentiality protection."); and ALAN REDFERN & MARTIN HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 90-91 (Sweet & Maxwell, 4<sup>th</sup> ed., 2004) ("It is true that the parties to international commercial arbitration will generally (but not always) have a set of procedural rules to follow, whether they are those of an arbitral institution or formulated ad hoc. It is also true that the arbitral tribunal will generally (but not always) have the power to fill any gaps in these rules by giving procedural directions; and this set of rules, whether agreed by the parties or laid down by the arbitral tribunal, may perhaps be said to constitute 'the law of the arbitration' in the same way as a contract may be said to constitute 'the law of the parties' . . . ." (emphasis added).

<sup>91</sup> See Christoph Schreuer, *Consent to Arbitration*, in *THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW* 830-67 (Peter Muchlinski et al., eds., Oxford Univ. Press, 2008) (detailing the different methods of enforcing consent).

should be evident that the parties to the investment treaty arbitration do not possess equal liberties during the bargaining process. In investment arbitration based on bilateral investment treaties or other forms of international investment agreements, investors are not part of the bargaining process at the outset. Rather, as third-party beneficiaries to the investment treaty,<sup>92</sup> investors are simply assigned (after fulfillment of certain nationality and jurisdiction *ratione materiae* requirements) what would ordinarily have been the home State's exclusive right of recourse to arbitration against the host State.

While home States and host States presumably negotiate arbitral clauses in investment treaties in good faith and on equal footing, the types of negotiation leverage (and incentives to negotiate) employed are hardly the same for capital-importing States as for capital-exporting States.<sup>93</sup> As third-party beneficiaries of the dispute settlement mechanism provided for in international investment treaties, investors do not directly assume obligations under these treaties unless explicitly provided for in the treaty language.<sup>94</sup>

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<sup>92</sup> See Martins Paparinskis, *Investment Treaty Arbitration and the (New) Law of State Responsibility*, 24 EUROPEAN JOURNAL OF INTERNATIONAL LAW 617, 620 (2013) (detailing the transition from state regulation to investor regulation).

<sup>93</sup> See Andrea K. Bjorklund, *Convergence or Complementarity?*, 12 SANTA CLARA J. INT'L L. 65, 67 (2014) (discussing agreements between a capital-exporting state and a capital-importing state).

<sup>94</sup> See Thomas W. Wälde, *Improving the Mechanisms for Treaty Negotiation and Investment Disputes*, YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 507, 540-41 (2008)

Host countries have the option to rely less on domestic law and enforcement (under their control) if they want to set up and enforce foreign investor obligations, in which case they can conclude specific investment contracts and include an international arbitral jurisdiction. That strategy—which has at times been pursued by governments—is often the preferred format for contracts between state enterprises and foreign investors. There is no reason why specific investment agreements should not also incorporate—“contractualize”—international treaty obligations. Such specific investment agreements can, and at times do, contain both state-addressed and investor-addressed obligations. Specific investment contracts have long provided an instrument of investment protection that in effect “contractualizes” obligations otherwise found in an investment treaty. The advantage for a government in using the form of an investment contract is the option to replace national courts by an international arbitral tribunal. Although it has often considerable control over national courts, its judgments are rarely enforceable abroad. With an arbitral tribunal it would gain in enforceability what it loses in political influence. But, to my knowledge, governments have not chosen to “load” investment contracts with the type of sustainable development and

Investors are admittedly not part of the initial bargaining process leading to the adoption of the arbitral clause or dispute settlement mechanism provided for in international investment treaties. Accordingly, should investors seek to avail of the benefit of investment treaty arbitration they are, in the first place, already bound to accept the procedural rules that form part of the treaty's pre-designated dispute settlement mechanism (such as the ICSID Arbitration Rules or the arbitral institution's procedural rules for non-ICSID arbitrations), and usually without having taken on any substantive treaty obligations towards the host State.<sup>95</sup> Nevertheless, any resultant inequalities impacting upon procedural due process in the investment arbitration, could, applying the Second Principle (the Difference Principle), be somewhat ameliorated by the investment arbitral tribunal's residual power to fill gaps as to procedure: "[i]f any question of procedure arises which is not covered by this Section [of the ICSID Convention] or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question."<sup>96</sup> Investment arbitral tribunals have invoked this residual power as the legal basis for procedural orders governing the conduct of proceedings, albeit only for narrow purposes of gap filling when there is no explicitly applicable rule under the ICSID Convention or the ICSID Arbitration Rules.<sup>97</sup>

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human rights obligations Western NGOs advocate. But governments are perfectly free to do so; they can, for example, "contractualize" with access to international arbitration the mostly open-ended and non-ratified environmental and human rights treaties or soft-law instruments available. The main reason why governments so far seem not to choose to "internationalize" investment agreements by incorporating modern soft-law, environmental, and human rights standards is that they prefer control and therefore prefer their own system of justice.

<sup>95</sup> See Judith Levine, *Navigating the Parallel Universe of Investor-State Arbitrations under the UNCITRAL Rules*, in *EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION* 369-408 (Cambridge University Press, 2011).

<sup>96</sup> ICSID Convention, Art. 44. See also ICSID Arbitration Rules, Rule 19 ("The Tribunal shall make the orders required for the conduct of the proceeding.").

<sup>97</sup> The famous example of a procedural order predicated on Article 44 of the ICSID Convention is the permission granted to suitable parties making amicus brief submissions, as seen in *Suez and Ors v. Argentina*, Order in Response to a Petition by Five Non-Governmental Organizations for Permission to make an Amicus Curiae Submission, ICSID Case No. ARB/03/19, 12 Feb. 2007, para. 2, and Order in Response to a Petition for Transparency and Participation as Amicus Curiae, 19 May 2005, para. 17. For an example of an arbitral tribunal declining to apply Article 44 of the ICSID Convention, see *Churchill Public Mining Company v. Indonesia*, Procedural Order No. 2, ICSID Case No. ARB/12/14, 5 Feb. 2013, para. 21. Article 44 does not confer unlimited discretionary powers to the Tribunal. Article 44

Taking the above differences in the context of two charges of perceived unfairness based on procedural due process in international arbitration – e.g. the supposed lack of transparency and the demand for more extensive fact-finding procedures – I submit that the application of Rawlsian fairness criteria would yield a result that does not completely concur with the charge of unfairness for all kinds of international arbitration. For example, the charge of unfairness for lack of transparency does not appear well supported in international commercial arbitration, where parties possess virtually the same basic liberties (e.g. party autonomy) in negotiating or bargaining the arbitral agreement, and the arbitral tribunal is empowered to fill procedural lacunae ensure parties the opportunity to present their cases. By contrast, however, the charge of unfairness for lack of transparency in investment arbitration may carry more traction, since, as previously discussed, parties to the arbitration (investors and host States) do not stand in terms of equality during the bargaining process that led to the formulation of the arbitral clause or agreement to submit disputes to arbitration contained within the investment treaty.

More crucially, however, the charge of unfairness for lack of transparency is anchored on the argument that the interests involved in investment arbitrations are not merely limited to those of investors and host States, but also public sector constituencies of host States.<sup>98</sup> While the host State presumably represented the

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provides that “[i]f any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question” (emphasis added). Similarly, Rule 20(2) of the Arbitration Rules requires that the Tribunal “shall apply any agreement between the parties on procedural matters” as long as it does not conflict with the Convention or the Administrative and Financial Regulations. Both these provisions show that the Tribunal must generally defer to the Parties’ agreements on procedural matters. ICSID Convention, Art. 44, *supra* note 96.

<sup>98</sup> See Joachim Delaney & Daniel Barstow Magraw, *Procedural Transparency*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 721, 756 (Peter Muchlinski, Federico Ortino, and Christoph Schreuer, eds., Oxford University Press, 2008) (“The involvement of the State as a party in international investment arbitrations has led to the erosion of the principles of privacy and confidentiality. As noted in the introduction, this is primarily due to the recognition that these cases involve important public interests. In some cases, it is the mere presence of the State or a State entity that gives rise to the need for transparency. In other cases, it is the subject-matter, the issues at stake, the political situation in the host State, or the amount of potential financial liability that gives rise to questions of public interest or public concern and thus, the need for transparency.”); Julie A. Maupin, *Transparency in International Investment Law: the Good, the Bad, the Murky*, in TRANSPARENCY IN INTERNATIONAL LAW 142, 148 (Andrea Bianchi and Anne Peters

interests of these constituencies at the time of the negotiation of the bilateral investment treaty or international investment agreement, it is also conceivable that the host State's political majority (or governing administration) that negotiated the agreement may not, subsequently, be the same political majority by the time investor-State dispute arises which affects those same public sector constituencies. For this reason, the latter may well object to *who* represents the host State at the time the arbitration commences.<sup>99</sup> Admittedly, this particular eventuality remains unaddressed within the confines of international investment arbitration rules, which remains primarily a self-contained set of procedures to which both home States of investors and host States bestow consent. Thus, to the extent that certain public sector constituencies or interest groups cannot be deemed strictly or technically parties to the investment arbitration, there remains merely a narrow mode for articulating such interests through (still heavily debated) *amicus* submissions of non-disputing parties.<sup>100</sup>

Assuming such public sector constituencies or interest groups could even be deemed to be separate and distinct parties (apart from home States of investors, and the host States of these public sector constituencies) in the bargaining process in regard to the arbitral clause in the investment treaty,<sup>101</sup> then applying Rawls' First Principle (Liberty Principle) they should also be entitled to the same equal basic liberties as the other parties. Under Rawls' Second

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eds., Cambridge University Press, 2013) ("...any investigation of transparency in international investment law must pay heed to the many different forms and faces it can take. It must also devote sufficient attention to the individuals and groups whose joint and separate activities are shaping the system's trajectory.").

<sup>99</sup> On issues of legal representation of host States, see Sebastien Manciaux, *The Representation of States before ICSID Tribunals*, 2 J. INT'L DISP. SETTLEMENT, NO. 1, 2011, at 87-96 (examining how problems relating to the representation of a state can be dealt with by curing the lack of authority of the person purporting to act on behalf of the state).

<sup>100</sup> See Charles H. Brower, *Obstacles and Pathways to the Consideration of the Public Interest in Investment Treaty Disputes*, Y.B. INT'L INV. L. & POL'Y 2008-2009, 2009, at 347, 354; and Katia Fach Gomez, *Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorably for the Public Interest*, 35 FORDHAM INT'L L. J., 2012, at 510 (arguing for an improvement or complete termination of the current scheme).

<sup>101</sup> This proposition is admittedly a slippery slope. Treaties remain instruments concluded between States, and binding upon these States, regardless of any internal law that may be asserted by the State later to justify non-performance or non-observance of treaty obligations. See Vienna Convention on the Law of Treaties, Art. 2 & 27 (May 23, 1969) (defining "treaty").

Principle (Difference Principle) any ensuing social and economic inequality arising from the bargain reached in the investment treaty must be allocated away from the party that is *most* disadvantaged.

Even accepting that there could be such a triage of implied and actual 'parties' to the investment treaty – the home State of the investor, the host State, and public interest groups asserting the inability of the host State to genuinely represent their interests – it is not always readily identifiable *which* party is the most disadvantaged. The main difficulty with the charge of unfairness for lack of transparency of investment treaty arbitrations is that the groups or constituencies claiming such "rights" to information and disclosure are generally, in international law, deemed represented by their respective States (home State or host State) that concluded the investment treaty. The clamor for transparency arises when such groups take the view that their host State did not adequately consult them when the investment agreements were concluded.<sup>102</sup> Under such a situation, it is not clear if the remedy for redressing this particular inequality (as asserted by certain constituencies within the host State) lies with reconfiguring the international social cooperation mechanism altogether (e.g. compelling these groups' participation in the dispute settlement mechanism created under the international investment treaty concluded by the home State of the investor and the host State), or by simply leaving it to the internal accountability mechanisms of the host State to ensure that these groups are sufficiently and satisfactorily consulted as regards the impact of these investment treaties on their particular interests. Rawls' Justice as Fairness criteria would, at the very least, require clarification as to the identity of the parties seeking to reach agreement (e.g. home States and host States, or also public interest groups acting independently from these States), before mandating

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<sup>102</sup> Although it still remains an open question whether a State, in signing such an agreement, genuinely consulted its citizens and acted in the "public interest." VALENTINA VADI, PUBLIC HEALTH IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 49 (Routledge, ed., 2012)

[A]s the signature of investment agreements is the faculty of the executive power of the contracting states, the question arises as to whether national constituencies have been duly taken into account. The procedure may lack parliamentary control and long-term consequences and restrictions on policy spaces may not be adequately scrutinized by policy makers. In many instances, the treaties appear to have been drafted with insufficient forethought by the executive branch, and without useful safeguards, exceptions, and limitations.

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that all such parties enjoy equal liberties (the First Principle) and that any ensuing social and economic inequalities be allocated to the party least disadvantaged.

Finally, with regard to the issue of potentially expanding fact-finding and discovery procedures coextensive as those in court litigation proceedings, one can likewise observe differences in the application of Rawlsian criteria. In the “original position” for private parties bargaining the arbitral agreement in international commercial arbitration, as well as for States concluding the arbitral clause within their international investment agreements, it is quite obvious that “consent implies choice”<sup>103</sup> - these parties already pre-contracted and pre-committed themselves to a chosen set of procedures to govern their dispute in any ensuing arbitration,<sup>104</sup> that changing the scope of fact-finding and discovery procedures midstream would certainly contravene the expectations of the parties.

Applying the Rawlsian First Principle (Liberty Principle), if more extensive fact-finding and discovery rules are to be put in place, in order to meet the requirements of fairness, *all* parties consenting to the arbitration should possess equal liberties in regard to the approval and implementation of such rules. Even in the case of international investment arbitration where other groups claim to represent the public interest more than the actual host State, because of the fundamental significance of all parties’ voluntary submission or consent to the arbitration to the intrinsic validity and legitimacy of this mode of dispute settlement,<sup>105</sup> it remains crucial that the

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<sup>103</sup> SIMON GREENBERG ET AL., *INTERNATIONAL COMMERCIAL ARBITRATION: AN ASIA-PACIFIC PERSPECTIVE* 23 (Cambridge University Press, 2011).

<sup>104</sup> GARY B. BORN, *Disclosure and Evidence-Taking in International Arbitration*, in *INTERNATIONAL ARBITRATION: LAW AND PRACTICE* 177, 177 (Gary B. Born ed., 2012).

<sup>105</sup> See V.V. Veeder, *Introduction to Investment Treaty Arbitration and Commercial Arbitration: Are They Different Ball Games?*, in *50 YEARS OF THE NEW YORK CONVENTION: ICCA INTERNATIONAL ARBITRATION CONFERENCE* 91, 91-92 (Albert Jan Van Den Berg ed., Kluwer Law Int’l, ICCA Congress Series 14, 2009)

There are distinct challenges for practitioners and arbitrators in conducting a treaty-based arbitration involving a state as compared to an international commercial arbitration involving private parties only. For example, what are the different strategic and tactical choices for the legal practitioner advising the investor or the state? And what different problems await the unwary, beginning with the choice of arbitral procedure, the forum, waiting-periods, the selection of arbitrators, the pursuit of contract-based claims (as distinct from a breach of treaty), the resort to domestic courts, the exhaustion of local remedies, the distinctions between jurisdiction, admissibility, liability, causation and quantum,

consent of the actual parties to the arbitration be obtained before changes to the fact-finding and discovery rules are to be put in place. Even assuming that an arbitral tribunal imposes more extensive fact-finding and discovery procedures over the explicit objection of any party to the arbitration,<sup>106</sup> I would still submit that, applying the Rawlsian Second Principle (Difference Principle), the party that appears most disadvantaged by the recommended procedural changes (or for whom legal costs would correspondingly increase to meet the altered fact-finding and discovery rules) should, at a minimum, not be made to bear the costs of increased document production demands, requests for interrogatories, and additional

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together with all the practical issues involving a state as a party, including legal representation, document production, interim measures, counterclaims, testimony by officials etc. The list is almost endless.

<sup>106</sup> See JEFF WAINCYMER, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION 869–70 (Kluwer Law Int'l, 2012)

Article 9.2(g) of the IBA Rules of Evidence 2010 allows for exclusion of evidence on the basis of procedural economy and proportionality as well as fairness and/or equality of the parties where these considerations are considered to be compelling. This reaffirms the overall need to promote fairness and efficiency and contemplates that trade-offs will at times need to be made. It also overlaps heavily with the criterion of an unreasonable burden and contemplates that the balancing exercise will take into account the circumstances of both parties. By bolstering the entitlement of a tribunal to promote efficiency of evidentiary material, this should be an added barrier to claims of lack of due process where restrictions are imposed, at least where the parties have selected these Rules. Having said that, parties are always entitled to make such claims and the requirement that the consideration be 'compelling' does not give much assistance where clearly material evidence is excluded by a tribunal not wishing to review voluminous documentation. Furthermore, the criterion also calls for fairness and equality, which in many cases will be the basis of a due process type determination. An example is equalizing rules of privilege where parties come from legal systems with very differing perspectives. The concept of 'procedural economy' may also be uncertain and lead to inconsistent applications. A number of other factors would also be relevant to the exercise of the discretion to direct production of documents. Gabrielle Kaufmann-Kohler suggests consideration of the origin and expectations of the parties, which would include their familiarity with discovery rights, whether they would have expected disclosure when they entered into the arbitration agreement or conversely, whether this would be a shock to them. Another approach to the exercise of discretions is to seek to ensure that the time and expense of production is proportional to the anticipated usefulness, although as William Park points out, such a cost/benefit analysis will in part depend on what one perceives discovery to normally be used for. As noted above, it is also hard to apply as a test before all other evidence is heard and considered.

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hearings, among others.<sup>107</sup> In the case of non-disputing parties to investment arbitration (who arguably assert some degree of representation of the host State's interests) seeking more access to evidence and more document production, applying the Rawlsian Second Principle (Difference Principle) might mean that an arbitral tribunal choosing to grant such requests of a non-disputing party could potentially try to balance the interests at stake by allocating the increased costs more towards the host State who does not object to the participation of the non-disputing party, and whose interests usually form the core of the non-disputing party's participation.<sup>108</sup>

As seen in the above discussion, the application of Rawlsian Fairness criteria to the charges of "unfairness" in relation to procedural due process concerns in international commercial arbitration and international investment arbitration yields mixed results. At best, Rawlsian Fairness criteria make it all the more imperative to differentiate between the nature of consent in each type of arbitration, the respective expectations of the parties to the arbitration (as well as *who* the actual parties are to the arbitration), as well as the actual degree of control or influence each party has over the conduct of the arbitral proceedings. Rawls' theory of justice would not make it that easy to reach a conclusion of "unfairness" without acknowledging these necessary differences.

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<sup>107</sup> See Paul Friedland & Kate Brown de Vejar, *Discoverability of Communications between Counsel and Party-Appointed Experts in International Arbitration*, in *ARBITRATION ADVOCACY IN CHANGING TIMES*, ICCA CONGRESS SERIES NO. 15 160, 175 (Albert Jan Van Den Berg ed. 2011) ("[D]ocument production tends to increase the cost of a case. While document production requests could, in theory, be tailored to seek production of only a few specified documents, this has not been the result in practice."). Although legal counsels do have some level of control over the costs of the arbitration (as well as projected costs from document production), they do have to act expeditiously and prudently to inform their clients of the need to preserve documents if they anticipate the arbitration would eventually warrant document production. IBA Guidelines on Party Representation in International Arbitration, Guideline 12 (May 25, 2013).

<sup>108</sup> See Christina L. Beharry, *Objections to Requests for Documents in International Arbitration: Emerging Practices from NAFTA Chapter 11*, 27 *ICSID REV.* 33, 33-64 (2012) (considering the growing trend in investment arbitration for more extensive documentary discovery and the appropriate scope of requests for documents).

### 2.2.2. Critique of unfairness based on the outcome of a dispute

It is difficult to qualitatively assess, in general, the merits of charges of unfairness on the basis of the end results of international arbitrations. On the one hand, one could understand the critique as a methodological one, where the absence of a hard or strong notion of “precedent” means that *ad hoc* arbitral tribunals constituted to resolve the specific particularized dispute before them decide without necessarily being bound by the decisions of other arbitral tribunals.<sup>109</sup> (Again, the criticism is, at its core, drawn from more judicial or litigation-based sensibilities, where judicial precedents are binding across the board on all courts.) On the other hand, the critique may also be one that zeroes in on the intersubjectivity of arbitral judging as a practice, when biases of arbitral tribunals are alleged to affect the eventual outcomes of disputes.<sup>110</sup> This is specifically problematic for the international arbitral system that does not possess a clear system-wide sanctions rule on arbitrators who breach their duty of fairness:

[t]he penalty for breach of an arbitrator’s duty of fairness carries a certain irony, in that sanctions do not fall directly on the arbitrator who breached his or her duty. Although they may suffer a loss of reputation, offending arbitrators can benefit from immunity even for violations of basic procedural integrity. The price of misconduct thus falls most directly on the prevailing party, in the form of award

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<sup>109</sup> See W. Mark C. Weidemaier, *Toward a Theory of Precedent in Arbitration*, 51 WM. & MARY L. REV. 1895 (2010), at pp. 1895-1958, at pp. 1914-1949 (arguing that considerations relevant to the acceptance of arbitral precedent include structural characteristics of the specific type of arbitration, the gap-filling function of arbitrators, and prevailing attitudes towards arbitrators’ legitimacy as producers of law). The critique is more pronounced in the perennial search for a *jurisprudence constante* in international investment arbitration. See Christoph Schreuer & Matthew Weiniger, *A Doctrine of Precedent?*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 1188, 1188-1205, 1189 (Peter T. Muchlinski, Federico Ortino & Christoph Schreuer eds., Oxford Univ. Press 2008).

<sup>110</sup> See generally Charlotte Knapper, Joseph M. Tirado & Rebecca Wright, *Arbitrator Bias: An International Comparison*, 4 TRANSNATIONAL DISPUTE MGMT. art. no. 2 (2008); Mary E. Comeau, John J. Marshal & Andrea R. Sparkes, *Six Degrees of Separation: Arbitrator Independence in International Arbitration*, 4 TRANSNATIONAL DISPUTE MGMT. art. no. 5 (2008).

annulment for breach of procedural integrity.<sup>111</sup>

Rawlsian fairness criteria can be applied to test charge of unfairness in international arbitration based dispute outcomes, e.g. absence of precedent and arbitrator bias.

In regard to the first aspect of this critique – the supposed unfairness of the absence of ‘precedent’ in international arbitration – one first has to reexamine the “original position” of parties submitting their dispute to arbitration. In international commercial arbitrations, where awards between disputing parties are frequently not published, and the controlling intention of the parties submitting the dispute is to reach an expeditious and fair resolution (so as not to jeopardize the unique business interests at stake and business relationships between the parties); it is more than likely that parties would not expect that their dispute could be resolved by adherence to some “precedent”. By contrast, international arbitrations, which involve more State involvement (such as inter-State arbitrations or investor-State arbitrations) and which purposely include general principles of international law as part of the applicable law for the dispute, could make the case for resorting to other international jurisprudence as evidence of custom or the relevant interpretive practice of international courts of international treaties and other similar instruments. As former President of the International Court of Justice Gilbert Guillaume rightly points out, the value of precedent in international arbitration has to be differentiated according to the purposes for which the arbitration is organized:

Of course, the situation is quite different in international arbitration. In fact, tribunals are normally constituted for each different arbitration, and thus lack the permanence that is characteristic of a jurisdiction. Furthermore, *their decisions are of variable quality. What is more, not all of their decisions are rendered public, and hence the tribunals do not have knowledge of all decisions previously rendered.* Thus, for arbitrators, precedent plays a much lesser role than for judges. Legal coherence sometimes suffers as a consequence.

However, in certain sectors permanence and transparency

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<sup>111</sup> William W. Park, *Procedural Tension in International Arbitration: Arbitration in Autumn*, in INTERNATIONAL ARBITRATION: CONTEMPORARY ISSUES AND INNOVATIONS 3, 9 (John Norton Moore ed., Martinus Nijhoff Publishers 2013).

are stronger than in others. Thus the portrait is more complex than one might be led to believe at first sight.

Interstate arbitration is most frequently entrusted to members of international tribunals (particularly from the International Court of Justice) or to academics who are familiar with these institutions. The decisions are always published. Thus, they are more frequently imprinted with jurisprudence from the International Court of Justice and arbitration tribunals on which they rely. They can at times distance themselves from this jurisprudence in an attempt to complete it or add nuances to it. Yet they are essentially faithful to the precedent that they cite abundantly.

At the opposite extreme of the spectrum are the arbitral awards rendered in commercial disputes between private companies. These decisions remain confidential in the vast majority of cases. Arbitrators settle specific contractual disputes in light of the parties' undertakings and the facts of the case. Due to this double reason, they often arbitrate without reference to arbitral jurisprudence.

. . . In conclusion, the arbitration tribunals presently reference precedent more frequently than in the past. *But the demand of transparency and coherence is not the same in all domains, or for all actors. This demand is stronger in interstate relations than in commercial relations.* Dispute settlement in the field of investments, for its part, constitutes an intermediate case in which a certain progress is both possible and necessary.<sup>112</sup> (emphasis added)

Applying the Rawlsian First Principle (Liberty Principle) to parties concluding the arbitral agreement, if "precedent" were to be entrenched as a rule applicable to an international arbitration, then the parties should have equal liberties in regard to the approval and acceptance of this doctrine of precedent as part of their chosen design for the arbitration. The difficulty with striving for a hard and fast doctrine of precedent is that this would make it a duty (much

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<sup>112</sup> Gilbert Guillaume, *The Use of Precedent by International Judges and Arbitrators*, 2 J. INT'L DISP. SETTLEMENT 5, 14-15, 17-18 (2011).

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like the magisterial duties of common-law judges<sup>113</sup>) on the part of arbitrators to comb through all applicable arbitral awards (published or unpublished) as substantive authority for their eventual decisions, when, outside of the bedrock of mandatory rules applicable to the arbitration,<sup>114</sup> parties themselves generally choose the substantive law and the *lex arbitrii* (the law governing the existence and proceedings of the arbitral tribunal) as part of the core principle of party autonomy in international arbitration.<sup>115</sup> Under the Rawlsian First Principle (Liberty Principle), this would be deemed fair only if the parties *chose in advance* to be bound by such a hard doctrine of precedent, such that all parties have equal liberties to deliberate and decide upon the inclusion of such a doctrine as part of the applicable law governing the arbitration.

Assuming the parties do exercise this choice, the Rawlsian Second Principle (Difference Principle) would require that any ensuing inequalities arising from the inclusion of this doctrine be allocated *away from* the party most disadvantaged by this decision. Where parties agree in advance to accept a hard doctrine of precedent, however, an arbitral tribunal would be hard put to identify a party more disadvantaged than the other through the resort to other arbitral awards as precedent. One could think of variances in party access to unpublished arbitral awards as a

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<sup>113</sup> See Stephen R. Perry, *Judicial Obligation, Precedent, and the Common Law*, 7 OXFORD J. LEGAL STUD. 215, 215-57 (1987) (contemplating the nature of judicial obligation).

<sup>114</sup> See generally Loukas Mistelis, *Mandatory Rules in International Arbitration: Too Much Too Early or Too Little Too Late?*, in MANDATORY RULES IN INTERNATIONAL ARBITRATION (George A. Berman & Loukas Mistelis eds., Juris Publ'g 2011). For the proposal to hold arbitrators liable when they fail to comply or to ensure compliance with mandatory rules, see Andrew T. Guzman, *Arbitrator Liability: Reconciling Arbitration and Mandatory Rules*, 49 DUKE L.J. 1279, 1279-1334 (2000) (proposing a mechanism to require arbitrators to use mandatory rules).

<sup>115</sup> See generally ALAN REDFERN, MARTIN HUNTER, NIGEL BLACKABY & CONSTANTINE PARTASIDES, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 76-77 (Sweet & Maxwell eds. 2004); see also Yas Banifatemi, *The Law Applicable in Investment Treaty Arbitration*, in ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES 191, 192 (Katia Yannaca-Small ed., Oxford Univ. Press 2010)

Being an arbitral process, investment treaty arbitration in no way differs from international commercial arbitration in that the principle of party autonomy is the primary rule governing the arbitration, including as regards the law applicable to the substance of the dispute. When the applicable law has been chosen by the parties, the arbitrators have a duty to apply such law and nothing but such law.

potential source of party disadvantage that could justify the application of the Rawlsian Second Principle (Difference Principle). As a matter of fairness, if parties *are* consenting to expand the applicable law to the arbitration to include a hard doctrine of precedent, that consent should be mutually well-informed by identification of the actual universe of jurisprudence from which precedents could be drawn. Lacking this form of notice or transparency of information to the parties, arbitrators could well be vulnerable to the charge of unfairness when their interpretive methodologies and/or discretion cause them to invoke bodies of jurisprudence nowhere anticipated by the parties or contemplated in the consent to arbitration.<sup>116</sup>

With respect to the second aspect of the critique of unfairness based on dispute outcomes – e.g. arbitrator bias, which, as one scholar argues, does not just manifest itself with individual arbitrators but supposedly exists as a “systemic” matter characteristic of international arbitration as a whole, and not just from the standpoint of attitudinal, cognitive or behavioral conceptions of individual arbitrator bias.<sup>117</sup> Applying Rawlsian fairness criteria to this particular charge of unfairness, this charge of unfairness based on alleged “systemic bias” would not prosper. At least in the “original position” when parties decide *ab initio* upon the

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<sup>116</sup> On the illustrated dangers of “surprise” references to precedents stemming from an entirely separate body of law (e.g. WTO jurisprudence) without regard for the actual text and genealogy of an investment treaty provision, see Kathleen Claussen, *The Casualty of Investor Protection in Times of Economic Crisis*, 118 YALE L.J. 1545, 1545-55 (2009). I have likewise warned against the casual acceptance of trade law jurisprudence as entirely applicable to investment treaty interpretation to generate supposed public policy solutions. Diane A. Desierto, *Public Policy in International Investment and Trade Law: Community Expectations and Functional Decision-Making*, 26 FLA. J. INT’L L. 51, 117-30 (2014). One scholar goes to the extent of arguing that international arbitration in and of itself is a “flawed vehicle for harmonizing law,” such that investment arbitral tribunals should altogether resist abiding by any norm of precedent or deference to earlier awards. Irene M. Ten Cate, *The Costs of Consistency: Precedent in Investment Treaty Arbitration*, 51 COLUM. J. TRANSNAT’L L. 418, 418 (2013) (“Substantive investment law, currently consisting of approximately three thousand instruments, is fragmented and dynamic. And due to its ad hoc character, arbitration is flawed as a vehicle for harmonizing law.”).

<sup>117</sup> This claim turns, of course, on the author’s definition of ‘systemic’ bias. See Stavros Brekoulakis, *Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making*, 4 J. INT’L DISPUTE SETTLEMENT 3, 553-85, at 584 (2013) (explaining “. . . the multilateral and fluid processes of selecting arbitrators, as well as the lack of tenured arbitrators and the lack of *stare decisis* underpin the pluralistic, diverse, and democratic potential of international arbitration.”).

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arbitral agreement and the design of the arbitration, it is clear that parties have equal opportunities to choose the appointments procedure for arbitrators (as well as to select party-nominated arbitrators and devise procedures for selection of the independent arbitrator or chair of the arbitral tribunal). Insofar as the appointments procedure is concerned, parties to any form of international arbitration (international commercial arbitration, inter-State arbitration, or investor-State arbitration) can avail of the same grounds to challenge and disqualify arbitrators for bias.<sup>118</sup> The Rawlsian First Principle (Liberty Principle) is met at the front end as well as the back end of the arbitration proceedings because parties possess the same liberties and opportunities not just within the processes of arbitrator selection but also in the processes available for arbitrator disqualification – even up to the potential to seek denial of recognition and/or enforcement of arbitral awards that are tainted by arbitrator bias, serious arbitrator misconduct, or irregularity in the proceedings.<sup>119</sup> The Rawlsian Second Principle (Difference Principle) is likewise met because any inequalities ensuing from the parties' appointment of arbitrators are allocated away from the party that stands to be most disadvantaged from the appointment of the offending arbitrator – that party is purposely given the right of recourse to challenge and disqualification procedures, if not further opportunities to prevent enforcement and recognition of arbitral awards issued under manifest arbitrator bias. At the very least, from the standpoint of Rawls' theory of justice, it is difficult to identify what the actual critique of "unfairness" is stemming from the consensual nature of arbitrator appointments as a whole, and the various modes by which parties can regulate the conduct of arbitrators as they could or would tend to affect their disputes. Lacking a clear nexus between the supposedly pervasive "systemic bias" (one might also say that this eventuality is expected by parties voluntarily submitting their disputes to arbitration) inherent in international arbitration and the actual dispute outcomes

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<sup>118</sup> See SAM LUTTRELL, *BIAS CHALLENGES IN INTERNATIONAL COMMERCIAL ARBITRATION: THE NEED FOR A 'REAL DANGER' TEST* 1-28 (Kluwer Law Int'l 2009) (on bias challenges and arbitrator appointment procedure in international commercial arbitration); *id.* at 211-48 (on bias challenges and arbitrator appointment procedure in investor-State arbitration).

<sup>119</sup> See United Nations Conference on International Commercial Arbitration, N.Y., U.S., 1958, Convention on the Recognition and Enforcement of Arbitral Awards, Art. V (outlining how a party may refuse recognition and enforcement of an award invoked against it); ICSID Convention, Art. 52.

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allegedly ensuing from this bias,<sup>120</sup> a generalized and nebulous charge of 'unfairness' cannot be readily admitted.

### 2.2.3. Critique of unfairness for lack of a sufficient appeals mechanism

International arbitration exists through judicial support and some limited degree of court supervision.<sup>121</sup> Its design is such that

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<sup>120</sup> One need not look further than the debate over this particular question in investor-State arbitration, where scholars have viscerally clashed on whether arbitral tribunals are pro-investor or pro-host State. See Susan Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARV. INT'L L.J. 435, 487 (2009) (finding that "at a general level, the outcome of investment treaty arbitration was not reliably associated with the development status of the respondent state, the development status of the presiding arbitrator, or some interaction between those two variables."); Van Harten, *supra* note 39 at 252.

First, in the context of arbitrator resolutions of contested jurisdictional issues, there is tentative support for expectations of systemic bias arising from the interests of arbitrators in light of the system's asymmetrical claims structure and the absence of conventional markers of judicial independence. Second, the results of this study suggest a need for further scrutiny and evaluation of the design and performance of investment treaty arbitration. Third, based on legal doctrine and comparative institutional analysis, there is reason to take a cautious approach to the risk of actual bias in an adjudicative system of public importance by adopting institutional safeguards to reduce any reasonably perceived bias arising from the system's structure or performance.

<sup>121</sup> See Jan Paulsson, *Why Good Arbitration Cannot Compensate for Bad Courts – Freshfields Hong Kong University Arbitration Lecture*, 30 J. INT'L ARB. 344, 349-50 (2013).

Is the objective therefore above all to quell judicial tendencies to assert dominance? Is this a zero-sum game, where every successful assertion of arbitral jurisdiction is a victory, and every instance of judicial predominance to be deplored? The answer is emphatically negative. There is nothing inherently superior about the activity of arbitrators. To the contrary, in an ideal world public justice would be of such a quality, in terms of fairness, insight and empathy, that the allure of arbitration would vanish. That ideal is impossibly remote, so arbitration remains attractive. Yet arbitration unchecked inevitably means arbitration abused. Ultimate freedom is not the goal. An arbitration-friendly venue is not the one where awards are totally inviolate; that rather indicates a degree of indifference that invites abuse. Yet there is such a thing as good annulments of awards. Before railing against interventionist courts, one would do well to consider the perceived deficiencies of arbitral performance.

. . . Whatever the quality of their comprehension of the arbitral process, judges are naturally sensitive to a number of principles which should

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the efficacy of international arbitration also depends, to a significant extent, on the systems of public justice available through the courts. Courts decide various pressing questions to international arbitration: whether they should refer a dispute to arbitration on the basis of prior agreement by the parties; whether they should issue orders to give effect to the procedural orders or provisional measures issued by arbitral tribunals; as well as whether they should recognize and enforce an arbitral award within their respective jurisdictions.<sup>122</sup> In deciding whether to extend recognition and order enforcement of an arbitral award, courts do not generally conduct appellate review or review *de novo* of the legal issues on the merits.<sup>123</sup> The principle of finality of arbitral awards

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facilitate their interaction with arbitrators. There is, for example, broad agreement with the proposition that an essential feature of human rights, and thus the assigned objective of judges and arbitrators alike, is the right to a fair trial. Unfortunately, dictators and bureaucrats are prone to turn this principle on its head, invoking it as an excuse to impose their justice (the only fair one) to the exclusion of all others. This is in reality their own project of entrenchment; it has nothing to do with the aspiration of affording acceptable justice to all. The fortunate countries that in fact succeed in delivering decent justice to their populace at large are, if we look around, precisely the ones which at the same time embrace arbitration.

Why is it that the places where public justice has the weakest grip also tend to be those where arbitration is most fiercely resisted by the courts? The plausible answers are dismaying – incompetence, xenophobia, corruption – and should warn us that arbitration cannot flourish when the courts are substandard. To escape from courts would be to seek islands, unique self-contained environments which may be of use to the happy few, but are incapable of a broader reach.

Systems that deliver poor formal justice have no right to close the door to arbitration. Equally, when a particular form of arbitration proves defective, it has no title to claim immunity from challenge and control; arbitrators have no greater entitlement to their office than do dictators or bureaucrats. Whether those who resolve disputes are appointed by the state or chosen by the parties, both categories have the duty to pursue the same objective: decent justice as a right of those who come before them. In a good legal culture, each is respectable and respected. The ideal is symbiosis of two types of decision-makers who ultimately pursue the same end.

<sup>122</sup> HANS SMIT & V. PECHOTA, INTERNATIONAL COMMERCIAL ARBITRATION AND THE COURTS at A1-A9 (Juris Publ'g 4th ed. 2004).

<sup>123</sup> 1958 New York Convention on Recognition and Enforcement of Arbitral Awards. See also, Herbert S. Kronke, *The New York Convention Fifty Years On: An Overview and Assessment*, in RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 1, 8 (Herbert Kronke, Patricia Nacimiento, Dirk Otto & Nicola Christine Port eds., Kluwer Law

extends from the fundamental principle of party autonomy in international arbitration.<sup>124</sup>

Notably, the charge of 'unfairness' arising from the lack of a satisfactory and sufficient appeals mechanism (similar to the notion of multiple stages of appellate review in national courts) resonates more in investor-State arbitration than in international commercial arbitration.<sup>125</sup> Article 52 of the ICSID Convention only refers to limited procedural grounds for annulment of an arbitral award by an ICSID ad hoc committee constituted for the purpose, and does not permit any appellate review on the merits.<sup>126</sup> Those who have sought a more extensive appeals mechanism in investor-State arbitration point to the need for jurisprudential coherence and consistency (if not aiming for predictable uniformity) between investment arbitral tribunals, often citing the experience of the WTO Appellate Body, but also noting fundamental differences between WTO and ICSID processes.<sup>127</sup> Opponents of the proposal for WTO-like appeals mechanisms in the ICSID system point to the proposal's lack of legitimacy, inappropriateness for the institutional and structural context of investor-State dispute settlement, and incompatibility with the expectations of States signing on to the ICSID Convention.<sup>128</sup>

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Int'l 2010) ("The trend in modern law is to reduce the grounds on which national courts can review arbitral awards in international commercial arbitrations.").

<sup>124</sup> See Clive M. Schmitthoff, *Finality of arbitral awards and judicial review*, in CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 230, 230-31 (Julian D.M. Lew ed., Ctr. for Commercial Law Studies 1987) (addressing the inherent tension between arbitration's desirable finality and the lacking need for judicial review).

<sup>125</sup> See generally Rivkin, *supra* note 12, at 357-59; Asif H. Qureshi, *An Appellate System in International Investment Arbitration?*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 1154, 1168-169 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., Oxford Univ. Press 2008).

<sup>126</sup> ICSID Convention, Article 52.

<sup>127</sup> See Donald McRae, *The WTO Appellate Body: A Model for an ICSID Appeals Facility?*, 1 J. Int'l Disp. Settlement 2, 371-87 (2010) ("[T]he Appellate Body deals with a system of agreements that are interrelated and not with a series of separate agreements involving different parties."); Theodore R. Posner, *An Appellate Mechanism for Investor-State Dispute Settlement: A Perspective Based on the WTO Appellate Body Experience*, (Crowell Moring LLP, Working Paper), <http://www.crowell.com/documents/An-Appellate-Mechanism-for-Investor-State-Dispute-Settlement.pdf>.

<sup>128</sup> See Thomas W. Walsh, *Substantive Review of ICSID Awards: Is the Desire for Accuracy Sufficient to Compromise Finality?*, 24 Berkeley J. Int'l L. 444, 462 (2006) (explaining how the Contracting States' decision against the ICSID's decisions was not surprising); Barton Legum, *Options to Establish an Appellate Mechanism for Investment Disputes*, in APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES

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It is difficult to sustain the critique of unfairness when one applies Rawlsian fairness criteria. Indeed, in the “original position” when States signed, concluded, and acceded to the ICSID Convention which created a “self-contained system,”<sup>129</sup> access to a centralized appellate mechanism was not part of the States’ expectations of terms and benefits under the ICSID Convention. For decades, States have been devising their respective investment treaty programs without reference to any centralized appellate mechanism, and without stipulating that arbitral awards were reviewable through an appeal on the merits in some court, tribunal, or other institution. Applying the Rawlsian First Principle (Liberty Principle), all States signing on to the ICSID Convention possess equal liberties to indicate the terms of their accession (as well as any reservations) to the ICSID system. Applying the Rawlsian Second Principle (Difference Principle), because States accepted the applicability of ICSID procedures as such a self-contained system (including its limited grounds for annulment of arbitral awards under Article 52 of the ICSID Convention), then any inequality that could supposedly arise from this system is not, by any stretch,

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231 (Karl Sauvant ed., Oxford Univ. Press, 2008); Christian J. Tams, *An Appealing Option? The Debate About an ICSID Appellate Structure*, Essays in Transnational Economic Law No. 57 41-42 (2006), available at <http://www.telc.uni-halle.de/sites/default/files/altbestand/Heft57.pdf> (last accessed 15 Jan. 2014)

The strongest argument supporting the creation of an appellate system is the hope a reform of the system would be more coherent. Unfortunately, however, this argument presupposes the creation of a specific form of appellate institution, which is most difficult to agree on, namely a single, comprehensive, and permanent appeals mechanism. The consistency argument thus requires a considerable degree of political will. In contrast, other arguments put forward by supporters of reform are of a much lesser value. It may be that an appeals system could render ICSID dispute settlement more rational; but this hope has to be balanced against the certain prospects of longer and more expensive proceedings. Much then suggests that the initial approach, adopted by the ICSID drafters, should not be lightly discarded, especially since the ICSID record testifies to its popularity. It may also be that an appeals system would increase the authority of ICSID decisions. But that in itself does not seem to justify a reform, as ICSID decisions already enjoy much authority, and there are no real compliance problems. Lastly, introducing an appeals facility would be clearly an inappropriate way of rendering ICSID dispute settlement more State-friendly. On balance, there are therefore no compelling reasons to create an appellate investment structure. The present system is not perfect. But it should be given time to work out pragmatic solutions to the problem of inconsistent decisions . . .

<sup>129</sup> CHRISTOPH H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* 1102 (Cambridge Univ. Press 2009).

“imposed” upon any State that deems itself disadvantaged by the system. Rather, States themselves voluntarily assume any such ensuing inequality across the board.

Since the critique of unfairness on this ground of appeals mechanisms is based on *a priori* conceptions of a more extensive or judicialized paradigm, one has to scrutinize the extent to which an expectation of *review de novo* is in accord with what States contemplate in designing the investor-State arbitration. There is nothing that supports a preconceived scope of an appeals mechanism as somehow directly proportional to one’s conception of fairness — this is, at its core, a design preference of parties to the international arbitration as is the matter of the constitution of the arbitral tribunal, the substantive choice of law, as well as the applicable *lex arbitrii*. That ICSID does *not* have an appellate mechanism calling for *review de novo* of ICSID arbitral awards is certainly a given fact — but that this situation somehow is intrinsically “unfair” remains an unproven proposition. At the very least, where reasonable terms of negotiation are transparently and evenly applied to all parties in the “original position,” and all parties possess equal liberties in deciding whether or not to accede to the ICSID Convention, including accepting in advance the eventuality that there would be only narrow procedural due process grounds for annulling ICSID arbitral awards, it cannot be said, at least under Rawlsian fairness criteria, that any such “unfairness” has occurred.

Of course, the normative choice of *whether investor-State arbitration should have a centralized appellate mechanism* could itself be a separate question for the application of Rawlsian fairness criteria. If this were the question forming the basis of the critique of unfairness, then one would have to look to the original position of States designing investor-State arbitration as modes of dispute settlement within their international investment treaties.<sup>130</sup> Do States genuinely negotiate on “reasonable terms” in this situation, and do all States concluding these agreements (especially in the

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<sup>130</sup> The history behind the negotiation of various generations of international investment agreements is a complex tapestry of multiple interests in play. See KENNETH J. VANDEVELDE, *BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, INTERPRETATION* 19–74 (Oxford Univ. Press 2010) (recounting the development of international law in treaties, beginning with the Treaty of Westphalia); see also JESWALD W. SALACUSE, *THE THREE LAWS OF INTERNATIONAL INVESTMENT: NATIONAL, CONTRACTUAL, AND INTERNATIONAL FRAMEWORKS FOR FOREIGN CAPITAL* 331–62 (Oxford Univ. Press 2013) (discussing the “treatification” of international law and investment).

usual case of bilateral negotiations) possess the same liberties during the bargaining process? To the extent that it is shown that some States have more bargaining leverage than others<sup>131</sup> especially in investment agreements,<sup>132</sup> it is clear that the Rawlsian First Principle (Liberty Principle) would not be met. In such a case where inequalities could ensue from this form of dispute settlement (*sans* appeal on the merits) being “crammed down” upon States with less bargaining capacity,<sup>133</sup> the Rawlsian Second Principle (Difference Principle) would thus favor designing a solution that allocates the inequality away from the disadvantaged State. Perhaps a solution at the front end of the process would be to place more conditions or requirements before the more advantaged party (whether the State with leverage or its nationals) could trigger or invoke the dispute settlement mechanism against the State with less bargaining leverage. A solution at the back end of the process would, inevitably, have to mean redesigning the dispute settlement system somewhat to permit the State with less leverage to have some form of review over the arbitral tribunal’s decisions. That is unlikely to occur in bilateral negotiations where one party already has leverage unless more training is given to negotiators from the disadvantaged State (or developing countries, which are usually the recipients of a

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<sup>131</sup> See, e.g., DIANA PANKE, *UNEQUAL ACTORS IN EQUALISING INSTITUTIONS: NEGOTIATIONS IN THE UNITED NATIONS GENERAL ASSEMBLY 51* (Palgrave Macmillan, 2013) (discussing the typical bargaining dynamics that exist in the U.N. and the relation between a State’s bargaining leverage and its bargaining success rate).

<sup>132</sup> JOSE E. ALVAREZ, *THE PUBLIC INTERNATIONAL LAW REGIME GOVERNING INTERNATIONAL INVESTMENT 196* (Hague Acad. of Int’l Law 2011).

<sup>133</sup> Somewhat analogous to the “doctrine of unequal treaties” theorized some years ago regarding investment treaties. See M. Sornarajah, *Compensation for Nationalization: The provision in the European Energy Charter*, in *THE ENERGY CHARTER TREATY: AN EAST-WEST GATEWAY FOR INVESTMENT AND TRADE 386, 400* (Thomas W. Walde ed., Kluwer Law Int’l 1996).

Some writers have pointed out that the bilateral investment treaties are, by nature, unequal treaties. One writer described them as a “one-way ratchet designed to benefit multinationals.” Another has referred to the “asymmetry between the parties” to such treaties. Though not directly made, the charge is that these treaties involve an inequality which may invoke the application of the theory of unequal treaties. There is a dominant capital exporter and a weak capital recipient in the making of such treaties. The treaty is made on the assumption that capital inflows into the receiving State will benefit its economy. Though they are made on the express statement that they are intended to cover bilateral flows of foreign investment, the reality is that they are only a one-way flow of investments . . . . [T]he theory invalidates obligations created by unequal treaties.

developed country model investment treaty).<sup>134</sup> Ultimately, that kind of redesign would entail going back to the negotiation table to create some kind of 'bespoke[n]' investor-State arbitration that allows States to decide on opportunities for appeal to disadvantaged parties. Reinventing the wheel in that manner, however, will pose its own form of costs to States. For this article's narrow purpose of testing the critique of unfairness for lack of an appeals mechanism under Rawlsian fairness criteria, however, it is unnecessary at this juncture to address the deeper systemic structural design dilemma in international investment arbitration.

#### 2.2.4. Critique of unfairness based on community decision-making and the public interest

Finally, the most viscerally contested charges of unfairness against international arbitration lie with the supposedly "elitist" composition of the international community of arbitrators,<sup>135</sup> and

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<sup>134</sup> J. ANTHONY VANDUZER, PENELOPE SIMONS & GRAHAM MAYEDA, INTEGRATING SUSTAINABLE DEVELOPMENT INTO INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE FOR DEVELOPING COUNTRY NEGOTIATORS 3 (Commonwealth Secretariat 2013) ("Inequalities between developed and developing countries are more easily exploited when negotiations are based on a pre-existing IIA model drafted by developed countries with only their interests in mind.").

<sup>135</sup> See Jan Paulsson, *Ethics, Elitism, Eligibility*, 14 J. INT'L ARB. 5, 19 (1997) (discussing exchanges on the merits and demerits of an "arbitral elite").

Given the high stakes and great sensitivities frequently involved in arbitration, there seems to be a good case for supporting the emergence and recognition of an elite corps of international arbitrators. Here the notion of an elite is that of a meritocracy in terms of legal skill, honesty and experience. Of course such a thing cannot be a Pantheon of immortals, and it would be intolerable if it were a closed shop by any standard (of culture, gender or nationality). Properly understood, this notion turns back complaints about a self-perpetuating clique of international arbitrators who appoint and reappoint each other, and instead tends to the conclusion that the establishment of an elite corps is a good thing. The mutual recognition of its members does not reflect an unsavoury system of *quid pro quo*, rather it builds the confidence of all participants in the process. More or less jocular (or perhaps wistful) references to an international arbitration "mafia" not only lack a solid evidentiary basis, but in fact do not seem to reflect any probing reflection. The proposition is that there are a few dozen well-known arbitrators who see to it that outsiders are kept out. However, arbitral institutions, on the one hand, and the parties and their lawyers, on the other, have a far greater say in who gets appointed than do arbitrators.

the aptitude and competence of this “elite” to properly resolve issues of public interest when they arise in international arbitration disputes.<sup>136</sup> This critique particularly arises in the context of international investment arbitration, where the public interest consequences of arbitral decisions have been most vividly (and repeatedly) depicted as nothing short of a “legitimacy crisis.”<sup>137</sup>

From the standpoint of Rawlsian fairness criteria, it is crucial to revisit the “original position” of States agreeing to the design of investor-State arbitration, particularly with respect to anticipated uses (or misuses) of the appointments procedures for arbitrators. When States negotiate to provide for investor-State dispute settlement within their investment treaties (whether ICSID or non-ICSID arbitration), were there reasonable terms of negotiation in regard to what States anticipate could be the composition of investment arbitral tribunals? Under the ICSID Convention, the

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*See also* Lord David Hacking, *Ethics, Elitism, Eligibility: A Response, What Happens if the Icelandic Arbitrator Falls through the Ice?*, 15 J. INT’L ARB. 73, 74–75 (1998).

... [W]henver there are groupings of professional people there is always a tendency for that group to be kept small and exclusive; and, whether the members of the group wish it or not (many do not), the work tends to remain within that group rather than go outside it. . . . However there are disadvantages. Any grouping of professionals which becomes exclusive will tend to operate (intentionally and unintentionally) against the arrival of new persons into their ranks—in the case of arbitration against the arrival into the ranks of new arbitrators hopefully with new ideas and fresh approaches. Ultimately this will limit the choice of the consumer in obtaining arbitral services.

<sup>136</sup> See generally Nigel Blackaby, *Public Interest and Investment Treaty Arbitration* in INTERNATIONAL COMMERCIAL ARBITRATION, 1 TRANSNAT’L DISP. MGMT (Albert Jan van den Berg ed., 2002) available at [www.transnational-dispute-management.com/article.asp?key=36](http://www.transnational-dispute-management.com/article.asp?key=36); see also Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration’s Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41 VAND. J. TRANSNAT’L L. 775 (2008) (discussing the issue of a lack of public participation in international arbitration); see also Alexander Belohlavek, *Confidentiality and Publicity in Investment Arbitration, Public Interest and Scope of Powers Vested in Arbitral Tribunals*, 2 CZECH YEARBOOK INT’L L., 23, 23-45 (2011) (analyzing the effect of globalization on regulatory schemes).

<sup>137</sup> Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1521-1625 (2005); see also Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT’L L. 45, 45-94 (2013) (describing the incoherence of international law and investment policy); see also Amokura Kawharu, *Participation of Non-Governmental Organizations in Investment Arbitrations as Amici Curiae*, 275, 283–85 in THE BACKLASH AGAINST INVESTMENT AND ARBITRATION: PERCEPTIONS AND REALITY (Michael Waibel et al. eds., 2010) (discussing the importance of involvement of amicus curiae in investment arbitration).

Contracting States themselves each designate up to four persons to the Panel of Arbitrators (the list from which arbitrators for investor-State disputes at ICSID are drawn) with the Chairman of the Administrative Council (or the President of the World Bank who is *ex officio* Chairman) permitted to designate up to ten more persons in the Panel of Arbitrators,<sup>138</sup> paying due regard to “the importance of assuring representation on the Panels of the principal legal systems of the world and of the main forms of economic activity.”<sup>139</sup> States (as well as the President of the World Bank) can only designate “persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment, [where] competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.”<sup>140</sup>

Thus, at the outset, it should be clear that the universe of arbitrators available for investor-State arbitration under the ICSID system is already delimited and made subject to the *ex ante* preferences of the Contracting States to the ICSID Convention under strict criteria. The importance of this representative selection process under strict criteria for ICSID arbitrators was evident early on in the history of the drafting of the ICSID Convention, where it was even contemplated that to help the Contracting States in making their designations to the Panel of Arbitrators, they would be required first to “seek such advice as they may deem appropriate from their highest courts of justice, schools of law, bar associations and such commercial, industrial and financial organizations and shall be considered representative of the professions they embrace.”<sup>141</sup> (This requirement, however, did not make it to the final language adopted for the ICSID Convention). Considering that the Contracting States themselves designate the arbitrators that would govern the system of ICSID arbitration under uniform criteria for all designations, there is some basis for concluding that at least, in the sense of the Rawlsian ‘original position’, Contracting

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<sup>138</sup> ICSID Convention, Art. 13.

<sup>139</sup> *Id.* at Art. 14(2).

<sup>140</sup> *Id.* at Art. 14(1).

<sup>141</sup> ANTONIO R. PARRA, *THE HISTORY OF ICSID* 27–37 (Oxford Univ. Press 2012) (quote sourced as footnote 39 in the main text). There are of course other narratives asserted pertaining to the public-private dichotomy inherent in investment law. See Alex Mills, *Antinomies of Public and Private at the Foundations of International Investment Law and Arbitration*, 14 J. OF INT’L ECON. L. 469, 471–76 (2011) (addressing the indeterminacy of public international law).

States themselves set reasonable conditions for bargaining (e.g., the constitution of arbitral tribunals for future investor-State disputes).

The Rawlsian First Principle (Liberty Principle) is also met by the fact that parties to the investor-State dispute possess equal or the same liberties in regard to the appointment of arbitrators and challenges to the qualification of arbitrators. Parties to the investor-State dispute agree on the number of arbitrators to comprise the tribunal,<sup>142</sup> with a procedure for the Chairman of the Administrative Council to appoint arbitrators if the Tribunal shall not have been constituted within 90 days after dispatch of the notice of registration of the request for arbitration.<sup>143</sup> Parties may choose to appoint arbitrators outside of the ICSID's Panel of Arbitrators, so long as they meet the same criteria as those required for individuals designated to the Panel of Arbitrators.<sup>144</sup> Any party to the arbitration can move to disqualify an arbitrator in the tribunal if there is a "manifest lack" of the qualities required under Article 14(1) of the ICSID Convention.<sup>145</sup> The Rawlsian Second Principle (Difference Principle) is also met in this situation, because any ensuing inequality from the Contracting States' designation of arbitrators to the Panel of Arbitrators could be mitigated (or allocated away from the most disadvantaged States) by the Chairman's ability to designate other arbitrators to ensure the genuine representativeness of the Panel in reflecting all principal legal systems as well as forms of economic activity. If parties cannot agree on the constitution of the tribunal within the above-mentioned ninety-day period, the Chairman likewise has the ability (and in consultation with both parties as much as possible) to appoint the remaining arbitrator. Thus, at least from a structural perspective and to the extent that any potential inequality could arise from the creation of the Panel of Arbitrators, the appointment of arbitrators to tribunals in future investor-State disputes, and the disqualification of arbitrators unable to abide by the same criteria required under Article 14(1) of the ICSID Convention, the most disadvantaged party (State or investor) would not bear the impact of that inequality.

The same Rawlsian fairness criteria may likewise be used to test the veracity of the charge of unfairness due to the supposed inability

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<sup>142</sup> ICSID Convention, Art. 37.

<sup>143</sup> *Id.* at Art. 38.

<sup>144</sup> *Id.* at Art. 40.

<sup>145</sup> *Id.* at Art. 57, 58.

of ICSID arbitrators to contend with the public interest dimensions of investor-State disputes. As previously discussed, in the “original position” of acceding to or negotiating with respect to the terms of accession to the ICSID Convention, it cannot be said that none of the Contracting States were unaware of the public interests attaching to investor-State disputes. If at all, the detailed history behind the drafting of the ICSID Convention affirms that particular solicitude and interest on the part of the World Bank as well as the Contracting States (both developed and developing),<sup>146</sup> leading the drafters of the ICSID Convention to decide on imposing restrictions to the usual broad scope of party autonomy found in international commercial arbitration. By pre-specifying the list of potential arbitrators, as well as subjecting individuals continuously to the highest professional criteria before they could be appointed and serve as arbitrators in investor-State disputes, the ICSID Convention was evidently intended at the outset to differentiate and distinguish the pool of arbitrators for this form of arbitration from the usual forms of commercial arbitration. If there is, thus, any trouble with the supposed lack of aptitude<sup>147</sup> of particular ICSID arbitrators for appreciating the public interest dimensions inevitable in investor-State arbitration, the lens of scrutiny must be redirected towards the way the Contracting States are making their designations to the ICSID Panel of Arbitrators, as well as how parties themselves (both the private investor as well as the presumably public-interest driven host State) are appointing their arbitrators and constituting the arbitral tribunal to govern their particular dispute. With respect to that particular selection process, the Rawlsian First Principle (Liberty Principle) would require the broadest possible consultation and transparent vetting procedures by Contracting States before they designate arbitrators to the ICSID Panel of Arbitrators, so much so that all parties that *do* have a stake in the public interest dimensions inherent in investor-State arbitrations (such as non-governmental organizations and citizens groups, among others) could also weigh in on the choice of arbitrators long before investor-

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<sup>146</sup> PARRA, *supra* note 141, at 27-94; see ICSID, Arbitration Rules 1-9 (discussing the procedure for international investment disputes).

<sup>147</sup> It should be noted that this particular criticism has arisen in regard to specific investor-State arbitrations such as the arbitrations involving the measures taken by Argentina in its 2000-01 financial crisis. See Ian H. Eliasoph, *A Missing Link: International Arbitration and the Ability of Private Actors to Enforce Human Rights Norms*, 10 NEW ENG. INT'L & COMP. L. ANN. 83-120 (2004) (describing the importance of private actors in public international law enforcement).

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State disputes arise. Additionally, host States choosing to appoint arbitrators outside of the ICSID Panel of Arbitrators for specific investor-State disputes should likewise be responsible for consulting all interest groups and constituencies in their respective jurisdictions, especially those who would most stand to be affected by the arbitration. The Rawlsian Second Principle (Difference Principle) would then require that any inequality ensuing from the Contracting State's designation of arbitrators to the ICSID Panel should be allocated away from whichever group or party is most disadvantaged by the selection process – at the very least, that party should not be prejudiced in the future by the State's appointment of that arbitrator. If the protection of the public interest<sup>148</sup> means that arbitral tribunals for investor-State disputes can only be deemed “fair” if arbitrators have a proven capacity and track record to adjudicate public interest issues imbuing investor-State disputes, then it is up to the Contracting States to police the composition of the ICSID Panel of Arbitrators and the appointment of arbitrators, as well as the continuing criteria to serve as an ICSID arbitrator, to conform to this specific expectation.

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<sup>148</sup> “Public interest” is such a broad political concept, which, as I have pointed out in other works, could just as easily be served by the economic development benefits and gains from investment as well as other human rights interests. See Diane A. Desierto, *Conflict of Treaties, Interpretation, and Decision-Making on Human Rights and Investment in Economic Crises*, 1 *TRANSNAT'L DISP. MGMT* (2013) (discussing the conflict of human rights and investments during economic crises); Diane A. Desierto, *Calibrating Human Rights and Investment in Economic Emergencies: Prospects of Treaty and Valuation Defenses*, 9 *MANCHESTER J. OF INT'L ECON. L.* 162 (2012) (describing the importance of maintaining the sanctity of human rights during economic crises).

## 3. CONCLUSION

Admittedly, fairness is a strange thing: most people will share a sense of what is fair and unfair, yet a meaningful definition will be hard to come up with . . . most definitions of fairness entail three characteristics: Fairness relates to procedural questions. It concerns the proportionality of ends and means, and it goes to the roots of social interaction in a community.<sup>149</sup>

It is all too easy to fault international arbitration as “unfair” for not having attributes one expects in a more judicial system of dispute resolution. It is also just as easy to regard international arbitration as somehow intrinsically or systemically unfair, when one proceeds from an *a priori* conception of what a perfectly fair mode of dispute resolution is. This kind of critique is very much Platonic<sup>150</sup> – because somehow there is a “perfect” conception stemming from the vantage point of the critic, where it becomes altogether acceptable to charge international arbitration as “unfair” when it is perceived deficient in any way from that “perfect” conception.

This Article was written to reset and recalibrate our critiques of “fairness” or “unfairness” that may or may not pervade international arbitration. Rawls’ Fairness as Justice criteria provide a useful theoretical prism for reflecting on the cacophony of critiques now associated with various communities seeking the reform (and for some, the outright abolition<sup>151</sup>) of international arbitration as a method of dispute resolution for certain disputes, towards a more judicialized or court litigation-based paradigm. It may be the case, as shown in various aspects of this Article, that the current design of international arbitration yields unfairness with respect to certain issues, and perhaps not in others. But what is

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<sup>149</sup> WOLFGANG FIKENTSCHER ET AL., FAIR ECONOMY: CRISIS, CULTURE, COMPETITION AND THE ROLE OF LAW 72 (Springer-Verlag Berlin Heidelberg 2013) (describing general fairness principles).

<sup>150</sup> See Plato’s allegory of the cave in PLATO, THE REPUBLIC, BOOK VII (G. R. F. Ferrari ed., Tom Griffith trans., Cambridge Univ. Press 2000)(on shadows and realities in education).

<sup>151</sup> See *Public Statement on the International Investment Regime*, OSGOODE HALL LAW SCHOOL, (Jan. 15, 2014) [http://www.osgoode.yorku.ca/public-statement/documents/Public\\_Statement\\_\(final\)\\_\(Dec\\_2013\).pdf](http://www.osgoode.yorku.ca/public-statement/documents/Public_Statement_(final)_(Dec_2013).pdf) (discussing the importance of protecting international investors).

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crucial is to invite a debate on our conceptions of fairness and what our metric really is for reaching a conclusion of unfairness. The genius of John Rawls' theory of justice as fairness is that he anticipated our social arrangements are as much a product of the shared equality of parties in deliberative decision-making processes, as they are in the distribution of inequalities away from inevitably disadvantaged parties. International arbitration, after all, is yet another social and sociological arrangement that can likewise be shaped under justice as fairness.