



Working paper

2018

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## Independence and Impartiality of Arbitrators - A Rule of Law Analysis

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Schacherer, Stefanie

### How to cite

SCHACHERER, Stefanie. Independence and Impartiality of Arbitrators - A Rule of Law Analysis. 2018

This publication URL: <https://archive-ouverte.unige.ch/unige:107171>

# **Independence and Impartiality of Arbitrators**

## **A Rule of Law Analysis**

Stefanie Schacherer

Seminar Paper  
January 2018

Seminar: International Investment Law and the Rule of Law  
Supervisor: Univ.-Prof. MMag. Dr. August Reinisch, LL.M.

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## Abbreviations

|          |  |
|----------|--|
| BIT      | Bilateral investment treaty                                    |
| CETA     | Comprehensive and Economic Trade Agreement                     |
| EU       | European Union   |
| FTA      | Free trade agreement   |
| ICJ      | International Court of Justice                                 |
| ICS      | Investment Court System  |
| ICSID    | International Centre for the Settlement of Investment Disputes |
| ISDS     | Investor-State dispute settlement                              |
| OECD     | Organization for Economic Cooperation and Development          |
| TFEU     | Treaty on the Functioning of the European Union                |
| TEU      | Treaty on European Union                                       |
| TTIP     | Transatlantic Trade and Investment Partnership                 |
| UN       | United Nations   |
| UNCITRAL | United Nations Commission on International Trade Law           |
| UNCTAD   | United Nations Conference for Trade and Development            |

# 1 Introduction

Investor-State dispute settlement (ISDS) through arbitration remains in a state of legitimacy crisis and discussions on reform are ongoing.<sup>1</sup> Much of the criticism is focussed on *who* is deciding investment dispute cases. Investment arbitrators have been called “private judges” who operate in secrecy, are biased in favour of big multinational companies and have no regard for conflicts of interest.<sup>2</sup> The course of the negotiations on the Transatlantic Trade and Investment Partnership between the European Union (EU) and the United States, highlighted to what extent ISDS through arbitration is perceived as unfair and biased (at least in Europe). As a reaction to the general concerns to ISDS, EU Trade Commissioner Malmström stated in a blog post: “I want the rule of law, not the rule of lawyers”.<sup>3</sup> The statement might be somewhat exaggerated as it assumes that the international investment regime is governed by lawyers and arbitrators and not by States. Yet it points to a crucial legal question, which is whether the current system of international investment arbitration meets the requirements of the rule of law?

The rule of law is a key legal and constitutional principle in the majority of States. According to a definition of the United Nations (UN), central aspects of the rule of law are i.a. equality before the law, accountability to the law, fairness in the application of the law, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.<sup>4</sup> One important procedural aspect of the rule of law is the independent administration of justice. This implies that adjudicators must exercise their adjudicative function in an independent and impartial manner. If concerns arise with respect to the independence and impartiality of adjudicators, it automatically poses a challenge to the rule of law.

With respect to ISDS, the independence and impartiality of arbitrators have been questioned. The main source of concern is the traditional mechanism of appointment by the disputing parties. In more concrete terms, the party-appointment of arbitrators was criticised for the lack of sufficient guarantee of independence and impartiality on the part of the individual arbitrators, the lack of transparency in the appointment process, the limited number of individuals that are repeatedly appointed in ISDS cases and finally the fact that some individuals act as counsel and as arbitrators in different

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<sup>1</sup> In particular at UNCITRAL; the first meeting of Working Group III on ISDS reform took place from 27 November to 1 December 2017 in Vienna.

<sup>2</sup> Gus Van Harten, ‘Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration’, (April 19, 2012) Osgoode CLPE Research Paper No. 41/2012. See also Joost Pauwelyn, ‘The Rule of Law without the Rule of Lawyer?’, 109 AJIL 761 (2015), 763.

<sup>3</sup> Cecilia Malmström, ‘Blog Post’; available at [https://ec.europa.eu/commission/commissioners/2014-2019/malmstrom/blog/investments-ttip-and-beyond-towards-international-investment-court\\_en](https://ec.europa.eu/commission/commissioners/2014-2019/malmstrom/blog/investments-ttip-and-beyond-towards-international-investment-court_en) (last accessed 26 November 2017); quoted in Pauwelyn (n 2) 763.

<sup>4</sup> Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies, S/2004/616. See also report of the Secretary-General, ‘Delivering Justice: Programme of Action to Strengthen the Rule of Law at the National and International Levels’, UN Doc. A/66/749 (16 March 2012), para. 2.

ISDS proceedings. The latter concern is often said to ensue conflicts of interest (also called issue conflicts).<sup>5</sup>

Therefore, new reform approaches that are currently being made focus on “breaking the link” between the parties to the dispute and the arbitrators. One approach is to establish a standing investment tribunal with permanent tribunal members, where the assignment of cases to tribunal members operates in a random and unpredictable manner. The EU has included such standing tribunal in some of its recent investment and trade agreements.

Against this background, the present paper seeks to examine whether the traditional system of international investment arbitration meets the requirements of the rule of law by focussing on the independence and impartiality of arbitrators; in a second step, it seeks to examine whether a more institutionalized ISDS system better guarantees the independence and impartiality of adjudicators. The analysis will be divided into three main parts and will address the following points:

In Part I, the most relevant terms, such as “independence” and “impartiality”, as well as the “rule of law principle” will be defined in order to set out the conceptual framework for the analysis. In Part II, it will be looked at the current guarantees for the independence and impartiality of arbitrators in the investment arbitration system by focussing on arbitral proceedings under the International Centre for Settlement of Investment Disputes (ICSID). It will be discussed whether the current system does or does not contain sufficient safeguards to avoid issues of bias (perceived or actual). This part also looks at challenges to ICSID arbitrators for issue conflicts. And finally in Part III, the discussion will focus on the new approaches to ISDS, namely the establishment of a standing investment tribunal with permanent tribunal members. It questions whether more institutional safeguards (i.e. the pre-selection of the adjudicators, an objective method of case-by-case assignment, the prohibition of certain outside activities, a regular remuneration, as well as requirements on the qualification of adjudicators) better guarantee the independence and impartiality of tribunal members. The focus here will be on the Investment Court System (ICS) contained in the Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU.

## **2 Analytical Framework**

The present paper touches upon a number of concepts and terms that are not unanimously defined at the international level. Hence, it appears relevant to discuss the most important ones before entering into the heat of the debate. Even though the notions of independence and impartiality of the judiciary as well as the rule of law are well-known concepts in national legal systems, the crucial point here is to formulate

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<sup>5</sup> See for the full list UNCITRAL, Possible reform of investor-State dispute settlement (ISDS), Note by the Secretariat, A/CN.9/WG.III/WP.142, para. 44.

the content of these concepts reflecting a common understanding of them and in a way that can be accepted by a majority of States.

## 2.1 *The Rule of Law*

The rule of law is a concept known in most national constitutional systems, i.e. the French *état de droit*, the German *Rechtsstaatlichkeit* or the Italian *stato di diritto* and - of course - the Anglo-American *rule of law*. At the international level, the concept of the rule of law has from the beginning of the United Nations been embedded in the UN Charter<sup>6</sup> as well as in the 1948 Universal Declaration of Human Rights.<sup>7</sup> In 1993, the UN then started its first programme for strengthening the rule of law and thereby seeking to find common ground on the understanding of the concept.<sup>8</sup> The UN is traditionally suggesting a relatively large definition, a so-called “thick” definition of the rule of law, which also refers to fundamental rights, democracy, and criteria of justice.<sup>9</sup> In the 2012 report on “Delivering Justice: Programme of Action to Strengthen the Rule of Law at the National and International Levels”, the concept is defined in the following terms:

The United Nations defines the rule of law as a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.<sup>10</sup>

Legal scholars have furthermore suggested a definition for the international context, a “thinner” or more formal definition of the rule of law, which looks less on the substantive elements, such as the respect of human rights and fairness. The focus here is on the formal aspects, such as “predictability and legal certainty, and to ensure

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<sup>6</sup> The Preamble of the Charter states as one of the aims of the UN “to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained.”

<sup>7</sup> Also giving the rule of law a central place in its preamble, stating that “(...) it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law (...)”

<sup>8</sup> United Nations, ‘Vienna Declaration and Programme of Action, Adopted by the World Conference on Human Rights in Vienna on 25 June 1993’, available at <https://www.un.org/ruleoflaw/what-is-the-rule-of-law/the-rule-of-law-in-un-work/> (last accessed 30 December 2017).

<sup>9</sup> Brian Z Tamanaha, ‘A Concise Guide to the Rule of Law’, Legal Studies Research Paper Series Paper No. 07-0082, September 2007, 3, <http://content.csbs.utah.edu/~dlevin/conlaw/tamanaha-rule-of-law.pdf> (last accessed 30 December 2017). See also Stephan W Schill, ‘Reforming Investor–State Dispute Settlement: A (Comparative and International) Constitutional Law Framework’ (2017) 20 Journal of International Economic Law, 655.

<sup>10</sup> Report of the Secretary General, “Delivering Justice: Programme of Action to Strengthen the Rule of Law at the National and International Levels”, UN Doc. A/66/749 (16 March 2004), para. 2.

government in accordance with law, including the independent administration of justice.<sup>11</sup>

Both definitions set standards for the administration and the exercise of international justice.<sup>12</sup> As such, access to justice, equality of arms, the right to be heard as well as independent and impartial decision-making are at the heart of the rule of law requirement for any international body exercising the functions of the judiciary.

## **2.2 *The Rule of Law and Investor-State Dispute Settlement***

The aspects of the relationship between the concept of the rule of law and international investment law seem to be twofold. One aspect, are the positive effects of ISDS as to promote the rule of law given that “investor-State arbitral tribunals are helping to define specific principles of global administrative law and set standards for States”.<sup>13</sup> The second aspect is that international investment law and the dispute settlement mechanism have to comply with the rule of law standards.<sup>14</sup> It is, this latter aspect that is relevant for the present paper. Henceforth, it is particularly interesting to analyse whether the “traditional” system of investment arbitration meet the requirements of the rule of law.<sup>15</sup> Likewise, the rule of law serves as a standard to analyse and evaluate the newly adopted approaches to ISDS that seek to institutionalise the dispute settlement mechanism.

The issue of independence and impartiality of arbitrators is not the sole reason for the legitimacy crisis of ISDS, yet it is an important part of it. It has been argued that generally accepted legal principles, such as the rule of law assume specific importance in the debate on the legitimacy of ISDS because they constitute “the most important source of legality for the exercise of authority” and thus can “infuse an entire system of law with legitimacy”.<sup>16</sup> What holds generally true, i.e. the fact that the independence and impartiality of adjudicators is a basic feature of any judicial procedure does also apply to ISDS. Concerns about possible conflicts of interests of

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<sup>11</sup> Schill (n 9) 655-656, Tamanaha (n 9) 3, see also Joseph Raz, ‘The Rule of Law and Its Virtue’, 93 *Law Quarterly Review* 195 (1977).

<sup>12</sup> Kenneth J Keith, ‘The International Rule of Law’ (2015) 28 *Leiden Journal of International Law* 403.

<sup>13</sup> Benedict Kingsbury and Stephan W Schill, ‘Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality, and the Emerging Global Administrative Law’, Institute for International Law and Justice, NYU Law School, Working Paper 2009/6 (Global Administrative Law Series), at 1, available at, [www.iilj.org/publications/documents/2009-6.KingsburySchill.pdf](http://www.iilj.org/publications/documents/2009-6.KingsburySchill.pdf) (last accessed 6 January 2018).

<sup>14</sup> August Reinisch, ‘The Rule of Law in International Investment Arbitration’, in: P Pazartzis et al. (eds) *Reconceptualising the Rule of Law in Global Governance, Resources, Investment and Trade* (Hart Publishing, 2016) 292-295.

<sup>15</sup> Ibid. 296. See also Gus van Harten ‘Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law’ in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press 2010) 627-657, 629.

<sup>16</sup> Stephan W Schill, ‘Developing a Framework for the Legitimacy of International Arbitration’, ACIL Research Paper 2017- 1, 6. (Also published in Van den Berg, AJ (ed.), *Legitimacy: Myths, Realities, Challenges* (ICCA Congress Series, 18), Alphen aan den Rijn: Wolters Kluwer (2015): 789-827).



arbitrators pose a challenge to the independence of decision makers and thereby to the rule of law.<sup>17</sup>

### 2.3 *The Notions of Independence and Impartiality*

As has just been deduced from the general definitions of the rule of law, the independence of the judiciary is one of the essential elements of the rule of law and a condition for any fair trial.<sup>18</sup> Even though there are some significant differences between national and international adjudication, the standards that relate to the judicial function including independence standards are rather the same on both levels.<sup>19</sup>

In its basic understanding, independence means that adjudicators take their decisions free from any external pressure or manipulation.<sup>20</sup> In other words, independence is characterised by the absence of any external control or pressure for the decision maker.<sup>21</sup> It can be further distinguished between *institutional* independence, on the one hand, and *personal* independence, on the other hand.<sup>22</sup> Personal independence refers directly to the person of the adjudicator; it is sometimes also called *functional* independence (as it relates to the function of the adjudicator). This type of independence can be considered as a duty as well as an entitlement or privilege of the adjudicator. It is a duty because each adjudicator is required to take decisions free of influence or external interferences; and it is an entitlement because the State or any other entity or person shall not interfere or tempt to influence the decision making of the adjudicator.<sup>23</sup> A couple of safeguards seek to ensure the personal independence of adjudicators. Such are rules on qualifications, conflict of interest rules, and disclosure rules as well as disqualification rules.<sup>24</sup>

*Institutional* independence to the contrary, seeks to ensure that the members of the adjudicative institution are protected in order to exercise their function. It refers to the institution and not to the individual adjudicators. Institutional independence is generally guaranteed through autonomy of the institution with respect to its budget,

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<sup>17</sup> Schill (n 9) 656. He also argues that “[i]nternational arbitration functions as a system of transnational governance that has an impact on society at large and that has to conform to generally accepted standards for governance, such as democracy, the rule of law, and human rights.”

<sup>18</sup> Jiri Melenovsky, *L'indépendance des juges internationaux*, Académie de droit international, Recueil des cours/ Collected Courses, (Martinus Nijhoff, 2010) No 349, 26.

<sup>19</sup> Karin Oellers-Frahms, ‘International Courts and Tribunals, Judges and Arbitrators’, Max Planck Encyclopedia of Public International Law (online version), para. 1.

<sup>20</sup> Jean Salmon (dir), *Dictionnaire de droit international public*, (Bruylant, 2001) 570.

<sup>21</sup> *Abaclat and Others v Argentina Republic*, ICSID Case No ARB/07/5, Decision to Disqualify a Majority of the Tribunal (4 February 2014), para. 75.

<sup>22</sup> Melenovsky (n 18) 26-29.

<sup>23</sup> *Ibid.*, 27.

<sup>24</sup> Georgios Dimitropoulos, ‘Constructing the Independence of International Investment Arbitrators: Past, Present and Future’, 36 Nw. J. Int’l L. & Bus. 371 (2016), 376.

internal organisation and rules on transparent recruitment processes.<sup>25</sup> Further safeguards are also an objective case assignment; a secure tenure of adjudicators and a fixed term of their function.<sup>26</sup>

The notions of independence and impartiality point to similar concerns but they do not mean the same. *Impartiality* (in contrast to independence) refers to the absence of bias or predisposition towards a specific party or a specific legal question that has to be decided upon in a given case.<sup>27</sup> In this way, adjudicators have to exercise their function without any favouritism or prejudice, and they have to adopt a behaviour that minimises the situations, which could lead to challenges to their function.<sup>28</sup> The impartiality of adjudicators thus clearly presents itself as a duty and not as a privilege. Given that the concept of independence is broader, it can be said that independence is the precondition for impartial decision-making.<sup>29</sup>

#### ***2.4 Tensions between Party-Appointment and Independence and Impartiality***

Party autonomy and party appointment are fundamental characteristics of arbitration.<sup>30</sup> A case-by-case appointment of the arbitrators by the disputing parties is, in general, one of the main advantages of arbitration as the parties can choose a person for a given dispute with regard to their suitability for the particular legal questions.<sup>31</sup> At the same time, in the eyes of some this alone raises concerns for bias in the ISDS system because there might be an impact on the independence and impartiality of arbitrators meaning that an arbitrator has a particular connection to the party that appointed him.<sup>32</sup> These assessments are often grounded on comparisons made between arbitrators and (mainly national) judges. Certainly, both, a judge and an arbitrator exercise an adjudicative function; there are however fundamental differences in the type of dispute settlement system in which they exercise their function. A judge is part of an institution and the judiciary. A judge is institutionally insulated from the parties.<sup>33</sup> A judge also does not have to be accepted by the parties

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<sup>25</sup> Melenovsky (n 18) 26-29.

<sup>26</sup> Van Harten (n 15) 641.

<sup>27</sup> Jean Salmon (dir), *Dictionnaire de droit international public*, (Bruylant, 2001), 562 *et seq.* See also *Abaclat* (n 21) para. 75.

<sup>28</sup> Melenovsky (n 18) 29.

<sup>29</sup> Melenovsky (n 18) 26-29.

<sup>30</sup> Geneva Protocol on Arbitration Clauses signed at the Meeting of the Assembly of the League of Nations held on 24 September 1923. “The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties”. See also, International Council for Commercial Arbitration (ICCA), ‘Report of the ASIL-ICCA Joint Task Force on Issue Conflicts in Investor-State Arbitration’, No. 3, 17 March 2016, 9, available at [http://www.arbitration-icca.org/media/6/81372711507986/asil-icca\\_report\\_final\\_5\\_april\\_final\\_for\\_ridderprint.pdf](http://www.arbitration-icca.org/media/6/81372711507986/asil-icca_report_final_5_april_final_for_ridderprint.pdf) (last accessed 6 January 2018).

<sup>31</sup> UNCTAD, ‘Investor-State Dispute Settlement’, UNCTAD Series on Issues in International Investment Agreements II, (United Nations, Geneva, 2014) 93.

<sup>32</sup> Van Harten (n 15) 643.

<sup>33</sup> Nicole Maria Cleis, *The Independence and Impartiality of ICSID Arbitrators: Current Case Law, Alternative Approaches, and Improvement Suggestions* (Brill, Nijhoff, 2017), 23.

or needs to receive their trust.<sup>34</sup> An arbitrator, to the contrary, is not part of an institution; his or her task is of *ad hoc* and temporary nature. The authority of their decision is based on the parties' consent and trust. Consent and trust thus also lay down the bases of the arbitrators' legitimacy. Therefore, arbitrators are under the "permanent watch of the parties".<sup>35</sup>

The above-stated safeguards of institutional independence (autonomous budget, internal organisation, transparent recruitment processes, objective case assignment, a secure and tenure and fixed terms) do not exist in arbitration. It seems thus inevitable that tensions arise between party-appointment and the idea of independence and impartiality as it derives from the context of courts and judges.<sup>36</sup> If parties are free to choose their adjudicators this "logically presupposes some degree of familiarity between the nominee and the appointing party, or counsel for the party".<sup>37</sup> Assuming that institutional independence is the obligatory requirement in order for arbitration to be compatible with the general requirements for an independent and impartial decision maker (as part of the rule of law principle), this would lead to the conclusion that arbitration is not compatible. Such radical conclusion seems however not fully convincing given the fundamental differences between the two systems of adjudication.<sup>38</sup> As a more nuanced solution it seems to be more appropriate to adopt a "differentiated approach".<sup>39</sup> A clear delimitation should be made between, on the one hand the benefices of party-appointments as to facilitate the benign and legitimate interests of the parties, and, on the other hand the requirements for independence and impartiality and thus the effective prevention of dependences and bias.<sup>40</sup>

### 3 Investment Arbitration under the ICSID Convention

The ICSID Convention contains rules and regulations on the independence and impartiality of arbitrators, namely arbitrators' disclosure obligations and the right of the disputing parties to remove arbitrators. In light of the criticism made to investment arbitration, it seems relevant to have a closer look at the ICSID requirements for independence and impartiality of arbitrators.

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<sup>34</sup> Alexis Mourre, 'Conflicts Disclosures: The IBA Guidelines and Beyond', In: Brekoulakis SL, Lew JDM et al (eds), *The Evolution and Future of International Arbitration*, Kluwer Law International, para. 23.1.

<sup>35</sup> *Ibid.*, para. 23.2.

<sup>36</sup> ICCA (n 30), paras. 20-33. See also Cleis (n 33) 24.

<sup>37</sup> Cleis (n 33) 24.

<sup>38</sup> ICCA (n 30), para. 24: "(...) national court litigation differs in important respects from international arbitration. Litigants in national courts do not select their judges. Unlike arbitrators, national judges' decisions are typically subject to oversight by higher national courts. And while legislatures can clarify or revise the law if they conclude that judicial decisions are wanting, no similar system of checks and balances exists to counterbalance or otherwise guide international arbitral awards."

<sup>39</sup> *Ibid.*, 25.

<sup>40</sup> *Ibid.*

### 3.1 Appointment of Arbitrators

Under the ICSID Convention, a tribunal shall consist of a sole arbitrator or any uneven number of arbitrators.<sup>41</sup> The general number of arbitrators is three, one arbitrator appointed by each party and a third, who shall be the president of the Tribunal, appointed by agreement of the parties.<sup>42</sup> ICSID Arbitration Rule 3, further clarifies that in a communication to the other party, each party names two persons, identifying one of the two as the arbitrator appointed by it, and the other as the person suggested to be the President of the Tribunal; furthermore, the other party is then invited to concur in the appointment of the arbitrator proposed to be the President or not.<sup>43</sup> The other party shall reply promptly by appointing its own arbitrator and by accepting or rejecting the proposed President (and in the case of rejection name an alternative). The initiating party shall then also promptly notify its acceptance or its rejection. If one of the parties defaults or the parties cannot find common ground on the choice of the President, the Chairman of ICSID's Administrative Council appoints the missing arbitrator.<sup>44</sup> The Chairman is restricted in his or her choice to the persons that are listed in the ICSID Panel of Arbitrators. This list contains arbitrators that have been selected by the Contracting Parties to the ICSID Convention and by the Chairman himself.<sup>45</sup>

It is an open secret, that disputing parties and their counsel spend substantial time and resources for the selection of “their” arbitrator. In the selection process, the arbitrator's backgrounds are reviewed extensively, including their nationality, education, professional experience, and technical expertise.<sup>46</sup> An important element in this respect is the arbitration experience of the candidate, including prior decisions, but also academic writings, and other professional positions and relations are relevant.<sup>47</sup> Parties also select a given candidate because he or she appears to be able to an independent and impartial decision. It has been argued that the independence of the person would be the most important aspect in the selection of arbitrators.<sup>48</sup> This would be so because, an arbitrator who is perceived as partial (and favouring its appointing party) will lose influence within the arbitral tribunal.<sup>49</sup> Therefore, parties

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<sup>41</sup> ICSID Convention, Art. 37.

<sup>42</sup> Christoph Schreuer, Loretta Malintoppi, August Reinisch A, and Anthony Sinclair, *The ICSID Convention: A Commentary*, 2<sup>nd</sup> edition (Cambridge University Press, 2009), ‘Article 37’, para. 14.

<sup>43</sup> Chiara Giorgetti, ‘The Arbitral Tribunal: Selection and Replacement of Arbitrators’, in: Giorgetti C, *Litigating International Investment Disputes – A Practitioner's Guide*, (Brill/ Nijhoff, 2014) 147.

<sup>44</sup> ICSID Convention, Art. 38.

<sup>45</sup> ICSID Convention, Art. 52(3). The Chairman selects the three members of ad hoc annulment committees. In his selection, the Chairman is also limited to nominate members from the Panel of Arbitrators and cannot designate those nominated to the Panel of Arbitrators.

<sup>46</sup> Claudia T Salomon, ‘Selecting an International Arbitrator: Five Factors to Consider’, 17 Mealey's Int'l Arb. Rep. 25. Salomon suggests five factors: someone with legal and professional experience, an impartial but known party-appointed arbitrator, third, an arbitrator who demonstrates communicative proficiency and juridical open-mindedness, and an arbitrator with a manageable case-load. See also Giorgetti (n 43) 152-154.

<sup>47</sup> Giorgetti (n 43) 152.

<sup>48</sup> *Idid.*, 157.

<sup>49</sup> *Idid.*, 158.

should “avoid the temptation of appointing somebody who could justifiably be considered partial towards their case in the expectation that it will make the case an easier win”.<sup>50</sup> It is thus each party’s interest to appoint an independent and impartial arbitrator.

### **3.2 Arbitrators’ Qualification and Ethical Standards**

Article 14(1) of the ICSID Convention, sets out that “[p]ersons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment (...).”<sup>51</sup> It is interesting to note that the ICSID Convention, at least in its English and French versions, does not contain the term impartiality. In fact, only the Spanish version of the Convention refers explicitly to impartiality.<sup>52</sup> It is however generally accepted that both requirements are mandatory and that Article 14(1) needs to be understood as also incorporating the requirement for impartiality.<sup>53</sup> As has been said before, independence in the precondition of impartiality and therefore impartiality should be understood under the notion of independence.<sup>54</sup>

The rather few and succinct requirements on the qualifications of arbitrators should not be surprising in light of the party autonomy to freely chose a person of their confidence and of whom they judge to be qualified and sufficiently independent. Some States have nonetheless opted for putting specific requirements in their international investment agreements.<sup>55</sup>

### **3.3 Disclosure obligations of Arbitrators**

Related to the ethical standards is that the arbitrator himself needs to ensure that the exercise of his or her adjudicative function is not tainted by appearances of bias. Disclosure requirements of arbitrators are thus a valuable tool to safeguard the disputing parties’ right to an independent and impartial decision-making. Appearances of bias can be avoided by arbitrators through the disclosure of any sensitive information. The ICSID Convention provides that

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<sup>50</sup> Ibid.

<sup>51</sup> ICSID Convention, Art. 14(1). And ICSID Convention, Art. 40(2) states that: “Arbitrators appointed from outside the Panel of Arbitrators shall possess the qualities stated in paragraph (1) of Article 14.”

<sup>52</sup> August Reinisch and Christina Knahr, ‘Conflicts of Interests in International Investment Arbitration’ in: Peters A and Handschin L (eds.), *Conflict of Interest in Global, Public and Corporate Governance*, (Cambridge University Press, 2012) 106-107. See the for the Spanish version: “Las personas designadas para figurar en las Listas deberán (...) inspirer plena confianza en su imparcialidad de juicio.”

<sup>53</sup> All language versions are equally authentic, ICSID Arbitration Rules, Art. 56(1).

<sup>54</sup> See Section 2.3. See also Schreuer *et al* (n 42), ‘Article 14’, para. 5.

<sup>55</sup> Canada-Panama FTA (2010), Art. 9(25). See also Canadian Model BIT (2004), Art. 29(3).

“[b]efore or at the first session of the Tribunal, each arbitrator shall sign a declaration (...) attached is a statement of (a) [his/her] past and present professional, business and other relationships (if any) with the parties and (b) any other circumstance that might cause [his/her] reliability for independent judgment to be questioned by a party (...).”<sup>56</sup>

The difficult question with the disclosure requirement is the question from when on a particular circumstance is likely to give rise to justifiable doubts as to an arbitrator’s independence and impartiality.<sup>57</sup> The standard of review needs to be distinguished from the one under a challenge proceeding.<sup>58</sup> The disclosure requirement aims at “avoiding bias rather than eliminating biased arbitrators” and needs therefore be understood more comprehensively.<sup>59</sup> Out of numerous disclosures only very few will give actually rise to a challenge. As has been said elsewhere, if an arbitrator does not want to fully disclose, he or she should probably better not accept the appointment.<sup>60</sup>

### 3.4 *Challenges to Arbitrators*

Each disputing party has a right to an independent and impartial decision-maker; this right is procedurally enforced and safeguarded by means of disqualification requests.<sup>61</sup> The ICSID Convention, Article 57, foresees such procedure:

“A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14. (...)”<sup>62</sup>

In the event a disputing party wants to request the disqualification of an arbitrator, such request must be made “promptly” according to Article 58 of the ICSID Convention. The ICSID Arbitration Rules set out that when there is a three-person tribunal, the other two arbitrators shall decide the challenge.<sup>63</sup> It is a peculiarity of the ICSID Convention that the decision on a challenge is not made by a third party but by the other two arbitrators.<sup>64</sup> If the two arbitrators cannot agree, the Chairman of the ICSID Administrative Council takes the decision.<sup>65</sup> The same holds true in case of a sole arbitrator or when the majority of arbitrators of a tribunal is being challenged. Disqualification decisions are final and an appeal against them is not possible. The

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<sup>56</sup> ICSID Arbitration Rules, Rule 6(2).

<sup>57</sup> Schreuer *et al* (n 42) ‘Article 40’, paras. 19-20.

<sup>58</sup> Cleis (n 33) 19-20.

<sup>59</sup> *Ibid.*

<sup>60</sup> Albert Jan van den Berg, ‘Justifiable Doubts as to the Arbitrator’s Impartiality or Independence’ (1997) 10 *Leiden Journal of International Law*, 509

<sup>61</sup> Reinisch and Knahr (n 52) 107; Cleis (n 33), 18.

<sup>62</sup> ICSID Convention, Art. 57; see also ICSID Arbitration Rules, Rule 9.

<sup>63</sup> ICSID Arbitration Rules, Rule 9.

<sup>64</sup> Reinisch and Knahr (n 52) 108. In case of the UNCITRAL Rules, the decision over the challenge is made by a third party, i.e. the Secretary-General of the Permanent Court of Arbitration (PAC); see UNCITRAL Arbitration Rules (2010), Art. 13(4) in combination with Art. 6.

<sup>65</sup> ICSID Arbitration Rules, Rule 9(4).

procedure for an arbitrator's disqualification is an important means to avoid a later annulment based on Article 52 of the ICSID Convention.<sup>66</sup>

Specific grounds for disqualification have not been included into the ICSID Convention and finally, the general view was that these grounds should be defined in terms of Article 14(1) of the ICSID Convention.<sup>67</sup> Of the qualities mentioned in Article 14(1) only the requirement of reliability to exercise independent judgement has played a role in disqualification proceedings. The removal of a dependent and biased arbitrator is however subject to a "manifest lack" of the qualities listed in Article 14(1) of the ICSID Convention. The central question is thus the interpretation of the term manifest lack, i.e. the threshold that applies for concluding that an arbitrator is lacking independence and impartiality and how this precondition impacts of the burden of proof.<sup>68</sup> The threshold under the ICSID Convention is arguably a higher threshold for a successful challenge than "justifiable doubts", which is the wording contained in other arbitration rules.<sup>69</sup>

ICSID case law is not providing a coherent approach to determine the threshold applicable to the arbitrators' independence and impartiality. Approaches vary from a "strict proof"<sup>70</sup> to "reasonable doubts", as well as mixed approaches that refer to both thresholds.<sup>71</sup> In the very first disqualification decision, *Amco v. Indonesia*<sup>72</sup>, the tribunal set out a requirement for a "strict proof" of actual bias. In fact, the two unchallenged arbitrators required proof not only of the facts that indicated a lack of independence but also of the actual lack of independence, which had to be "manifest" or "highly probable" and not just "possible".<sup>73</sup>

In the 2001 *Vivendi v. Argentina case*,<sup>74</sup> the two unchallenged annulment committee members then applied a "reasonable doubts" threshold by stating that

"the circumstances actually established (and not merely supposed or inferred) must negate or place in clear doubt the appearance of impartiality. If the facts would lead to the raising of some reasonable doubt as to the impartiality of the arbitrator or member, the appearance

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<sup>66</sup> For more details see Schreuer *et al* (n 42), 'Article 57', paras. 3-5.

<sup>67</sup> Schreuer *et al* (n 42), 'Article 57', para. 17: "During the Convention's drafting there was some debate on whether and in what manner the grounds for disqualification should be specified. (...) In the ensuing debate, several grounds for disqualification, including general unfitness, personal prejudice, misconduct, interest in the subject matter and lack of independence were suggested (...)." <sup>68</sup> Cleis (n 33) 16.

<sup>69</sup> See for instance, UNCITRAL Rules, Art. 10(1) and SCC Rules, Art. 15;

<sup>70</sup> See also Reinisch and Knahr (n 52) 121.

<sup>71</sup> Cleis (n 33) 32-49.

<sup>72</sup> *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No ARB/81/1, Decision on Proposal to Disqualify an Arbitrator (not public), 24 June 1982. See Cleis (n 33) 32.

<sup>73</sup> Schreuer *et al* (n 42) 'Article 57', para. 22.

<sup>74</sup> *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No ARB/97/3, Annulment Proceeding, 3 October 2001.

of security for the parties would disappear and a challenge by either party would have to be upheld.”<sup>75</sup>

For a while, it seemed that the reasonable doubt threshold established in *Vivendi v. Argentina*, presents the tendency in ICSID case law, yet recent decisions again applied the *Amco* threshold or adopted mixed approaches.<sup>76</sup> As of today, 62 disqualification requests have been initiated with only four cases where arbitrators have been effectively disqualified from their function.<sup>77</sup> Moreover, the numbers of challenges to arbitrators have significantly increased in the last years.<sup>78</sup> The reasons for a disqualification request have varied in the past and are mostly based on an arbitrators’ background. The main categories for which the independence and impartiality of arbitrators have been alleged shall be presented here.<sup>79</sup>

### 3.4.1 *The Issue of Role Confusion*

The most controversial issue when it comes to the question of independence and impartiality of arbitrators is the switching of roles between arbitrators, counsels and experts in different cases. This situation has also been called “role confusion”. According to Philippe Sands, role confusion is “a situation where the appearance of an individual as an arbitrator in one ICSID case who acts as counsel as expert in another ICSID case may give rise to a perception of bias, in the sense that his or her role might be perceived to inform actions in the other”.<sup>80</sup> The issue of role confusion is linked to the often-used term of “issue conflict”. The latter term is however more difficult to define and can also be understood as encompassing situations that go beyond the just mentioned definition.<sup>81</sup>

A telling example of role confusion, are the interlinkages in the cases of *Azurix*, *Siemens* and *Duke Energy* (all against Argentina).<sup>82</sup> Andres Rigo Sureda was the

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<sup>75</sup> Ibid., para. 25.

<sup>76</sup> For a detailed analysis see Cleis (n 33) 32-53, at 49: “Between 2013 and 2015, a series of eight decisions seemed to signal a more consistent application of the reasonable doubts threshold established by *Vivendi*.”

<sup>77</sup> See the full list on the ICSID webpage, <https://icsid.worldbank.org/en/Pages/Process/Decisions-on-Disqualification.aspx> (last accessed 3 January 2017). *Pey Casado v. Chile*, ICSID Case No. ARB/98/2, *Burlington v. Ecuador*, ICSID Case No. ARB/08/5, *Blue Bank International v. Venezuela*, ICSID Case No. ARB/12/20, *Caratube Int. v. Kazakhstan*, ICSID Case No. ARB/13/13.

<sup>78</sup> Reinisch and Knahr (n 52) 103.

<sup>79</sup> This division is partially based on the analysis of Cleis (n 33). She also looks at alleged conflicts for the arbitrators’ “Behaviour in Current Proceedings” (53 *et seq*) and “Connection to an Adverse Third Party” (73 *et seq*).

<sup>80</sup> Philippe Sands, ‘Conflict of Interests for Arbitrator and/ or Counsel, in: M Kinnear et al (eds), *Building International Investment Law – The First 50 Years of ICSID*, (New York, Wolters Kluwer Legal, 2016) 655.

<sup>81</sup> ICCA (n 30) 7-9. In its analysis the ICCA Task Force also describes under the heading of “issue conflict” the following situations: scholarly and professional writing and speech of the arbitrator; prior exposure to similar facts; and prior opinions deciding legal issues presented in the current case.

<sup>82</sup> See *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12 (Disqualification decision is not publicly available); *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8



president of the tribunals in *Azurix* and *Siemens*, and Guido Santiago Tawil was in both of these cases one of the parties' counsel. At the same time, Mr. Tawil was the claimant-appointed arbitrator in the *Duke Energy* arbitration, in which in return, the law firm for which Mr. Sureda was working represented the claimant. In other words, Mr. Tawil pleaded two cases before Mr. Sureda, and Mr. Sureda's law firm argued a claim before Mr. Tawil.<sup>83</sup> Argentina lodged disqualification requests against Mr. Sureda in both cases, *Azurix* and *Siemens*.<sup>84</sup> During the challenge proceedings Mr. Sureda withdrew from his position in the law firm. In both cases, the challenges were ultimately rejected. Unfortunately, the decision are not public. Yet, some of the reasoning adopted in the *Siemens* decision entered into the public domain.<sup>85</sup> According to these sources, the two remaining arbitrators in *Siemens* did not agree: one<sup>86</sup> argued that the resignation from the law firm was implicit of his lack of independence, and the other<sup>87</sup> found that the resignation was to silence any conceivable lingering doubts as to his independence.<sup>88</sup>

### 3.4.2 Repeat Appointments of Arbitrators

Arbitrators have also been challenged based on their repeat appointments. For instance, Brigitte Stern was challenged in the *Electrabel v. Hungary* case due to her parallel appointment by Hungary in another proceeding.<sup>89</sup> The challenge has been dismissed. According to the unchallenged arbitrators, an appointment by the same party, in a case concerning the same agreements and the same government actions were harmless.<sup>90</sup> The potential red line however would be a case that arose from the same factual circumstances.<sup>91</sup> In another challenge procedure against Professor Stern, *Tidewater v. Venezuela*, the unchallenged arbitrators set out that "[t]he starting-point is that multiple appointments as arbitrators by the same party in unrelated cases are neutral, since in each case the arbitrator exercises the same independent arbitral function."<sup>92</sup> The unchallenged arbitrators concluded that there was no indication that Professor Stern was influenced in her decision because of her multiple appointments,

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(Disqualification decision is not publicly available); *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19.

<sup>83</sup> Cleis (n 33) 64. See also the commentary in Schreuer *et al* (n 42), 'Article 57', paras. 30-31.

<sup>84</sup> The dates of the decisions are also not public.

<sup>85</sup> Audley Sheppard, 'Arbitrator Independence in ICSID Arbitration', in: Binder C, Kriebaum U *et al*, *International Investment Law for the 21<sup>st</sup> Century – Essays in Honor of Christoph Schreuer* (Oxford University Press, 2009) 145-146.

<sup>86</sup> Professor Domingo Bello Janeiro.

<sup>87</sup> Judge Brower.

<sup>88</sup> Quoted in Sheppard (n 85) 146.

<sup>89</sup> *Electrabel SA v. Republic of Hungary*, ICSID Case No ARB/07/19, Decision On The Claimant's Proposal to Disqualify a Member of the Tribunal, 25 February 2008, paras. 29 and 37. The other proceeding was *AES Summit Generation v. Republic of Hungary*, ICSID Case No ARB/07/22.

<sup>90</sup> *Ibid.*, para. 39.

<sup>91</sup> *Ibid.*, para. 40.

<sup>92</sup> *Tidewater Inc. v Bolivarian Republic of Venezuela*, ICSID Case No ARB/10/5, Decision on Claimants' Proposal to Disqualify Professor Brigitte Stern, Arbitrator, 23 December 2010, para. 60.

quite the contrary, “she has been appointed on subsequent occasions because of her independence.”<sup>93</sup>

Yet a strong overlap of the relevant facts and the applicable law were finally the reasons for the disqualification of Bruno Boesch in the *Caratube v. Kazakhstan* case.<sup>94</sup> Mr. Boesch was the appointed arbitrator by Kazakhstan in *Caratube* as well as in the parallel arbitration *Ruby Roz*.<sup>95</sup> In both cases, the facts were, according to the unchallenged arbitrators of the *Caratube* tribunal basically identical. They concluded that a reasonable and informed third party would find it highly likely that Mr. Boesch could not be completely objective and open-minded, but would be prejudiced.<sup>96</sup>

### 3.4.3 Familiarity with the Subject-matter of the Proceedings

The circumstance that arbitrators have previously dealt with issues and legal questions similar to those in a given case also served as a basis for disqualification requests. An arbitrator’s academic writing or publicly made statements allegedly demonstrate bias because it would prove a familiarity with the subject-matter. A recent and good example to illustrate this type of category is the disqualification proceeding in the *Urbaser v. Argentina* case<sup>97</sup>, where the claimant challenged the respondent appointed arbitrator Campbell McLachlan. According to the claimant, the publications of Professor McLachlan on the question of the application of the most favoured nation clauses to the disputes settlement provisions of a bilateral investment treaty (BIT) proved that he would have prejudged the issues at stake in the *Urbaser* arbitration. The unchallenged arbitrators dismissed the challenge. They found that the opinions expressed in academic writing would need to be “specific and clear enough that a reasonable and informed third party would find that the arbitrator will rely on such opinions without giving proper consideration to the facts, circumstances, and arguments.”<sup>98</sup>

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<sup>93</sup> Ibid., para. 64.

<sup>94</sup> *Caratube International Oil Company LLP & Mr. Devincci Salah Hourani v Republic of Kazakhstan*, ICSID Case No ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch, 20 March 2014.

<sup>95</sup> *Ruby Roz Agricol and Kaseem Omar v Kazakhstan*, UNCITRAL.

<sup>96</sup> *Caratube v Kazakhstan* (n 94), paras. 78-90, at 90: “(...) Arbitrators find that – independently of Mr. Boesch’s intentions and best efforts to act impartially and independently – a reasonable and informed third party would find it highly likely that, due to his serving as arbitrator in the Ruby Roz case and his exposure to the facts and legal arguments in that case, Mr. Boesch’s objectivity and open-mindedness with regard to the facts and issues to be decided in the present arbitration are tainted. In other words, a reasonable and informed third party would find it highly likely that Mr. Boesch would pre-judge legal issues in the present arbitration based on the facts underlying the Ruby Roz case”.

<sup>97</sup> *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, ICSID Case No ARB/07/26, Decision Professor Campbell McLachlan, Arbitrator, 12 August 2010, paras. 20-25. See also the analysis in Reinisch and Knahr (n 52) 115-118.

<sup>98</sup> Ibid., para. 40.

#### 3.4.4 Previous Contact of an Arbitrator with a Party or a Party's Counsel

Disqualification requests have furthermore been made for direct or indirect relations between an arbitrator and a party or a party's counsel.<sup>99</sup> In *Nations Energy v. Panama*, Stanimir Alexandrov (member of the annulment committee) was challenged by the claimant because one of the respondent's counsels had, in the past worked with him for seven years in the same law firm.<sup>100</sup> The claimant's main argument was that the former colleague privileged insights into Dr. Alexandrov's views thereby putting the claimant into disadvantage. The unchallenged members of the annulment committee dismissed the challenge. They found that the establishment of a relationship of "unproven extent and intensity" between the two was an insufficient proof of a manifest lack of independence and impartiality.<sup>101</sup>

In general, challenges based on the previous contact of an arbitrator with a party or party's counsel are mostly unsuccessful due to a failure to establish objective facts that would show that the arbitrators lacked independence and impartiality because of its connection to a party or counsel in the past.<sup>102</sup>

#### 3.5 The IBA Guidelines on Conflict of Interests in International Arbitration

The International Bar Association (IBA) Guidelines<sup>103</sup> are an instrument that applies to international commercial arbitration as well as to international investment arbitration. They provide guidance as to when an arbitrator should disclose certain information. The Guidelines became a relevant instrument for guiding a potential

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<sup>99</sup> Schreuer *et al* (n 42), 'Article 57', para. 28; Cleis (n 33) 57. Cases where the contact of an arbitrator with a party or a counsel of a party was an issue are numerous: *Salini Costruttori and Italstrade S.p.A v the Hashemite Kingdom of Jordan*, ICSID Case No ARB/02/13; *Suez Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19 and *AWG Group Limited v Argentina*, UNCITRAL; *EDF International SA, SAUR International SA and Léon Participaciones Argentinas SA v Argentine Republic*, ICSID Case No. ARB/03/23.

<sup>100</sup> *Nations Energy Corporation, Electric Machinery Enterprises Inc., and Jamie Jurado v The Republic of Panama*, ICSID Case No ARB/06/19, Challenge to Dr Stanimir A Alexandrov (on the annulment committee), 7 September 2011, para. 22.

<sup>101</sup> *Ibid.*, paras. 66-67.

<sup>102</sup> Cleis (n 33) 62. A rather unique example is the *Blue Bank v. Venezuela*, where a disqualification request was upheld, see *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB 12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, 12 November 2013. In *Blue Bank*, the claimant-appointed arbitrator (José Maria Alonso) was a partner at Baker & McKenzie Madrid. In addition, the same law firm (offices of New York and Caracas) represented the claimant in ongoing proceedings, with similar issues also against Venezuela. Under these circumstances, the ICSID Chairman upheld the challenge *inter alia* because of "Mr Alonso's statement that his remuneration depends 'primarily' but not exclusively on the results achieved by the Madrid firm imply a degree of connection or overall coordination between the different firms comprising Baker & McKenzie International" (para 67).

<sup>103</sup> IBA Guidelines on Conflicts of Interest in International Arbitration, October 2014, available at [https://www.ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx](https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx) (last accessed 6 January 2018).

arbitrator in his or her position when and when not to accept an appointment.<sup>104</sup> The Guidelines emphasise the arbitrators' independence and impartiality in the provision setting out the general principle of the instrument by also stating that each future arbitrator shall bear the responsibility for the assessment of his or her potential bias.<sup>105</sup> Different to the ICSID Convention, the Guidelines suggest as the applicable threshold for the independence and impartiality of arbitrators the "justifiable doubts" test, but which is similar to most arbitral rules.<sup>106</sup> To what extent the Guidelines can be used in disqualification decisions under ICSID requires further examination. Yet, the unchallenged arbitrators in *Tidewater* held that the ICSID standard would be different from the "justifiable doubts" test formulated in the IBA Guidelines by omitting however to state reasons for such finding and ultimately still considered the circumstances in light of the IBA Guidelines.<sup>107</sup>

The main practical use of the Guidelines lies however, in their guidance as to what should be disclosed.<sup>108</sup> The instrument sets out four categories of Lists: first, the "Non-waivable Red List". If any of the situations of this list occurs, the individual in question should not accept its appointment. Second, the "Waivable Red List; where situations are listed that allow an individual to be appointed only if a couple of conditions are fulfilled, such as that all parties to the dispute agree to maintain the arbitrator despite the situation. Third, the "Orange List", is a non-exhaustive list of situations, which are generally not subject to disclosure. However, an arbitrator is responsible to assess on a case-by-case basis whether a given situation (even though not listed under the Orange List) can nevertheless give rise to justifiable doubts as to his or her impartiality.<sup>109</sup> Finally, the "Green List" states situations where no appearance and no actual conflict of interest exist and thus there is no requirement for disclosure in those situations.<sup>110</sup>

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<sup>104</sup> Margaret Moses, 'The Role of the IBA Guidelines on Conflicts of Interest in Arbitrator Challenges', Kluwer Arbitration Blog, November 23 2017, available at <http://arbitrationblog.kluwerarbitration.com/2017/11/23/role-iba-guidelines-conflicts-interest-arbitrator-challenges/> (last accessed 6 January 2018).

<sup>105</sup> IBA Guidelines, Art. 1 and General Explanation thereto. Art. 1 of the Guidelines provides: "Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final award has been rendered or the proceedings have otherwise finally terminated".

<sup>106</sup> IBA Guidelines, Art. 2(c): "Doubts are justifiable if a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented."

<sup>107</sup> *Tidewater v Venezuela* (n 92) paras. 41-44. at 43: "The ICSID Convention mandates a general standard for disqualification which differs from the 'justifiable doubts' test formulated in the IBA Guidelines. Further, and in any event, the circumstances relied upon in the Proposal for Disqualification all fall within the 'Orange List' in the IBA Guidelines, to the extent that they fall within the Guidelines at all".

<sup>108</sup> IBA Guidelines, Introduction, para. 6.

<sup>109</sup> IBA Guidelines, Part II: Practical Application, para. 6.

<sup>110</sup> IBA Guidelines, Part II: Practical Application, para. 7.

## 4 Institutionalisation of ISDS: Example of the CETA Investment Court System

As has been mentioned before, ISDS through arbitration remains in a state of legitimacy crisis. In particular the system of party-appointment has been criticised.<sup>111</sup> The EU was among the first suggesting a dispute resolution mechanism for investor-State disputes that seeks to break the link between the disputing parties and their adjudicators by institutionalising the mechanism. The EU's new approach has first been presented in 2015.<sup>112</sup> The interesting question in this context is whether such system better safeguards the independence and impartiality of the adjudicators. In order to shed some light on the question, the focus here shall be on the Investment Court System contained in the Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU.<sup>113</sup>

The dispute settlement system of the CETA establishes the Tribunal of first instance (hereafter: the Tribunal) and the Appellate Tribunal. The Members of the Appellate Tribunal will be held to comply with the same rules as those that apply to those sitting in the Tribunal of first instance; therefore there is no need to specifically consider them here. Most of the aspects will apply *mutatis mutandis* to the Appellate Tribunal.

### 4.1 Election and Case Assignment of Tribunal Members

Under CETA, investors have no say in the determination of the Tribunal Members deciding their claim. This is so with respect to the election process of the Members of the Tribunal and the Appellate Tribunal and with respect to the appointment or assignment of the elected Members to a division deciding a dispute.

As a first step, the CETA Joint Committee will elect the 15 permanent members of the Tribunal.<sup>114</sup> Five of these Members are to be nationals of an EU Member State, five are to be nationals of Canada and five are to be nationals of third countries.<sup>115</sup> If it will be necessary in the future, the CETA Joint Committee can decide to increase or to decrease the number of Tribunal Members by maintaining the same national

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<sup>111</sup> See UNCITRAL, Possible reform of investor-State dispute settlement (ISDS), Note by the Secretariat, A/CN.9/WG.III/WP.142.

<sup>112</sup> European Commission, 'Text proposal for the investment chapter of TTIP', first published on 16 September 2015 and subsequently submitted to the US on 12 November 2015. The proposal is available at [http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc\\_153955.pdf](http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf) (last accessed 6 January 2018).

<sup>113</sup> Comprehensive Economic and Trade Agreement (CETA), between Canada, of the one part, and the European Union and its Member States, of the other part, signed 30 October 2016, published in the Official Journal of the European Union, OJ L 11, 14 January 2017, 23–1079.

<sup>114</sup> Members of the Appellate Tribunal will be elected by the Joint Committee after the entry into force of CETA, CETA, Art. 8.28(3). The CETA Joint Committee is the main organ of the CETA comprising representatives of the EU and Canada, see CETA, Art. 26.1.

<sup>115</sup> CETA, Art. 8.27(2).

proportion.<sup>116</sup> The Members of the Tribunal are appointed for a five-year term, which can be renewed once.<sup>117</sup> The Tribunal is organized by a president and a vice-president that shall be responsible for organizational issues and will be appointed for a two-year term and are to be from the Members of the Tribunal that are nationals of a third country.<sup>118</sup> In addition, the Tribunal may draw up its own working procedures.<sup>119</sup> Nonetheless, the ICSID Secretariat shall act as secretariat for the Tribunal and provide it with appropriate support.<sup>120</sup> This means that no permanent secretariat or registry is created.

Decisions of the Joint Committee are taken on the basis of mutual consent of the contracting parties, Canada and the EU.<sup>121</sup> The fact that the decision is taken by Canada and the EU (i.e. potential respondents in an investment dispute) leads arguably to the appointment of Tribunal Members that would be more sympathetic to the States' positions than to the investors' positions.<sup>122</sup> This argument is not particularly convincing since Canada and the EU elect the Tribunal Members before any dispute arises and thus the prediction of a Tribunal Member being more likely to decide in favour of the respondent are of a rather abstract character. A very important point however, will be that the election procedure is transparent and susceptible to being clearly monitored in order to foster the objectivity and legitimacy of the selection.<sup>123</sup>

In the event of a dispute, a division of three members will hear the case.<sup>124</sup> It is the competence of the President of the Tribunal to assign cases to the Members on a rotation basis ensuring that the composition of a division is random and unpredictable, while giving equal opportunity to all Tribunal Members to serve.<sup>125</sup> The chairperson of the division has to be a third country national.<sup>126</sup> Members of the Tribunal shall be available and be able to perform their functions.<sup>127</sup>

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<sup>116</sup> CETA, Art. 8.27(3).

<sup>117</sup> CETA, Art. 8.27(5). To ensure a differentiated renewal of the Tribunal, seven of the initial members of the tribunal shall exceptionally serve for six years instead.

<sup>118</sup> CETA, Art. 8.27(8).

<sup>119</sup> CETA, Art. 8.27(10).

<sup>120</sup> CETA, Art. 8.27(16).

<sup>121</sup> CETA, Art. 26.3.

<sup>122</sup> EFILA Paper, 'Task Force Paper regarding the proposed International Court System (ICS)', 1 January 2016, 15, available at [http://efila.org/wp-content/uploads/2016/02/EFILA\\_TASK\\_FORCE\\_on\\_ICS\\_proposal\\_1-2-2016.pdf](http://efila.org/wp-content/uploads/2016/02/EFILA_TASK_FORCE_on_ICS_proposal_1-2-2016.pdf) (last accessed 6 January 2018).

<sup>123</sup> Gabrielle Kaufmann-Kohler and Michele Potestà, 'Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism? - Analysis and roadmap', CIDS - Geneva Centre for International Dispute Settlement, 3 June 2016, 60, available at [http://www.uncitral.org/pdf/english/commissionersessions/unc/unc-49/CIDS\\_Research\\_Paper\\_-\\_Can\\_the\\_Mauritius\\_Convention\\_serve\\_as\\_a\\_model.pdf](http://www.uncitral.org/pdf/english/commissionersessions/unc/unc-49/CIDS_Research_Paper_-_Can_the_Mauritius_Convention_serve_as_a_model.pdf) (last accessed 6 January 2018).

<sup>124</sup> CETA, Art. 8.27(6).

<sup>125</sup> CETA, Art. 8.27(7). The president and the vice-president of the Tribunal shall appoint the division within 90 days.

<sup>126</sup> Ibid.

<sup>127</sup> CETA, Art. 8.27(11).

## 4.2 *Qualification of Tribunal Members and Ethical Standards*

The CETA foresees a number of qualifications and ethical requirements that apply to the Tribunal Members. They shall have the qualifications required in their respective countries for appointment to judicial office, or have to be jurists of recognised competence.<sup>128</sup> In particular, they have to demonstrate expertise in public international law.<sup>129</sup> This requirement has been welcomed as it underlines the fundamental character of investment treaties as inter-State agreements.<sup>130</sup> Tribunal Members have to be independent and shall not be affiliated with any government nor shall they take instructions from any organisation or government.<sup>131</sup> The CETA text states more precisely in a footnote that the fact that a person receives remuneration from a government does not in itself make that person ineligible.<sup>132</sup>

As has been mentioned before, an issue that has received a lot of attention in the debate on independence and impartiality of arbitrators is the interplay of roles or the “changing of hats”, the situation in which an individual acts both as counsel and arbitrator in different proceedings.<sup>133</sup> The CETA addresses this issue as it contains an exclusion for Tribunal Members to act as counsel or as party-appointed expert or witness in any pending or new investment dispute under CETA or any other international agreement.<sup>134</sup>

## 4.3 *Disclosure Obligations of Tribunal Members*

In order not to be seen affiliated to any institution or State, Tribunal Members should disclose all relevant information.<sup>135</sup> Moreover, CETA expressly opts-in the IBA Guidelines on conflict of interests in international arbitration that has been discussed in the previous section.<sup>136</sup> It is worth highlighting that the CETA does not yet contain a code of conduct for the Tribunal Members.<sup>137</sup> Such a code could further set out rules

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<sup>128</sup> CETA, Art. 8.27(4).

<sup>129</sup> CETA, Art. 8.27(4); It is also desirable that Members of the Tribunal have expertise in international investment law, in international trade law and the respective dispute resolution.

<sup>130</sup> Caroline Foster, ‘A new Stratosphere? Investment Treaty Arbitration as ‘Internationalized Public Law’, *Int'l and Com L Quart.* 64 (2) (2015), 461-485, 462. See also Ingo Venzke, ‘Investor-State Dispute Settlement in TTIP from the Perspective of a Public Law Theory of International Adjudication’ (2016) *The Journal of World Investment & Trade* 17 (2016) 393-394.

<sup>131</sup> CETA, Art. 8.30(1).

<sup>132</sup> *Ibid.*, Footnote thereto.

<sup>133</sup> Sands (n 80) 655.

<sup>134</sup> CETA, Art. 8.30(1).

<sup>135</sup> Rules on the duty of disclosure can be found in all arbitral rules, for instance ICSID Arbitration Rules, Art. 6 and UNCITRAL Arbitration Rules, Art. 11.

<sup>136</sup> See Section 3.5 *supra*.

<sup>137</sup> CETA, Art. 8.44(2) last paragraph: “The Parties shall make best efforts to ensure that the code of conduct is adopted no later than the first day of the provisional application or entry into force of this Agreement, as the case may be, and in any event no later than two years after such date.”

on the duty of disclosure, on duties of fairness and diligence and the duties to avoid creating appearances of bias.<sup>138</sup>

#### ***4.4 Challenges to Tribunal Members***

If there remain issues relating to the behaviour or relations of a Tribunal Member, either the President of the Tribunal or the Joint Committee can remove the Tribunal Member where his or her behaviour is inconsistent with his or her obligations and incompatible with his or her continued membership.<sup>139</sup> In addition, challenges by the disputing parties to Tribunal Members sitting in a case division are possible under CETA.<sup>140</sup> In the event that a disputing party considers that a Tribunal Member sitting in a division hearing the case has a conflict of interest, it shall send to the President of the International Court of Justice (ICJ) a notice of challenge to the appointment and if after 15 days the appointed Tribunal Member does not resign from the division, the President of the ICJ shall issue a decision within 45 days after having considered the submissions of the parties.<sup>141</sup> Given that CETA has pre-selected Tribunal Members randomly assigned to cases, it might thus lead to the outcome that challenges are less likely. Moreover, the rather strict rules on the “ethics” of Tribunal Members might also lead to preventing challenge proceedings.<sup>142</sup> However, this still needs to be seen in practice since the outcomes of challenge cases are indeed “highly fact-dependent”.<sup>143</sup>

#### ***4.5 Remuneration of Tribunal Members***

As a last point, the remuneration of the Tribunal Members should also be discussed since it is one of the aspects that has been associated with the independence and impartiality of arbitrators.<sup>144</sup> Tribunal Members shall be paid a retainer fee, the amount of which is yet to be determined by the Joint Committee. The EU and Canada pay equally into an account managed by the ICSID Secretariat. For the work performed in relation to a case, the amount of fees and expenses will be determined according to the rules applicable under the ICSID Convention. By decision of the Joint Committee, the retainer fee, other fees and expenses could be transformed into a regular salary in which case the Members would serve on a fulltime and exclusive basis.

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<sup>138</sup> See European Commission, TTIP Proposal (n 112), Annex II, ‘Code of Conduct for Members of the Tribunal, the Appeal Tribunal and Mediators’.

<sup>139</sup> CETA, Art. 8.30(4).

<sup>140</sup> CETA, Art. 8.30(2-3).

<sup>141</sup> Ibid.

<sup>142</sup> Venzke (n 130) 394.

<sup>143</sup> ICCA (n 30), 64-65, pt 183.

<sup>144</sup> David Gaukrodger, ‘Adjudicator Compensation Systems and Investor-State Dispute Settlement, OECD Working Papers on International Investment 2017/05 (OECD Publishing, Paris, 2017) 5-7; see also Van Harten (n 15).



With regard to the Tribunal Members, they receive a monthly retainer fee that still needs to be determined.<sup>145</sup> The rules under ICSID Convention apply in order to determine the amount of fees and expenses a Tribunal Member receives for sitting in a division.<sup>146</sup> It has been argued that the mechanism of case-related remuneration maintains the financial interest of Tribunal Members in future claims.<sup>147</sup> Yet given that Tribunal Members are randomly assigned to cases on a rotating basis means that they cannot influence being appointed more often. In theory a fixed salary might have been preferable since in this way Tribunal Members certainly have no financial interests in a high number of case and to have long proceedings.<sup>148</sup> Such incentives can potentially call into question the independence and impartiality of the Tribunal Members.<sup>149</sup>

## 5 Conclusion

Arbitrators' independence and impartiality have always been one of the fundamental principles of international arbitration. As the present analysis has shown, arbitral rules, in particular the ICSID Convention, contain a number of rules to safeguard the independence and impartiality of decision makers. Given that arbitration is by its nature *ad hoc* and not embedded in an institution and even less so in a well-defined judiciary, the safeguards that arbitral rules are providing for are quite different than the ones that can generally be found in national court systems.<sup>150</sup>

Another fundamental principle of international arbitration is party autonomy, which includes the party's autonomy in appointing an individual who they consider having the necessary competences and abilities. As has been mentioned elsewhere, "[t]he party-appointing system inherently presumes some acquaintance between the party and the appointee".<sup>151</sup> However, party-appointment is, amongst others, one of the elements of criticism to ISDS through arbitration. The current global reform discussions underline this fact.<sup>152</sup> Many States and the wider public perceive the system of investment arbitration as being biased. This perception certainly gains even more ground when one compares arbitration with court proceedings in any given national legal order.

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<sup>145</sup> The remuneration of the Members of the Appellate Tribunal will still need to be determined completely, CETA, Art. 8.28(7)(f).

<sup>146</sup> Art. 8.27(14) referring to Regulation 14(1) of the Administrative and Financial Regulations of the ICSID Convention.

<sup>147</sup> Gus Van Harten, 'Key Flaws in the European Commission's Proposal for Foreign Investor Protection in TTIP' 12(4) Osgoode Legal Studies Research Paper No. 16 (2016).

<sup>148</sup> Venzke (n 130) 394.

<sup>149</sup> Ibid.

<sup>150</sup> Mainly safeguarding the individual independence of the decision maker contrary to the institutional independence, see for the distinction, Section 2.3.

<sup>151</sup> See Schreuer *et al* (n 42), 'Article 57', para. 22 referring to *Amco v Indonesia* (n 72).

<sup>152</sup> UNCITRAL (n 5).

This being said, it is however, difficult to draw from the current perception the conclusion that investment arbitration, as far as the independence and impartiality are concerned, would not comply with the rule of law requirements. The reason is that the dispute settlement mechanism is so fundamentally different.

In the present context, one needs to stress the element of *appearance*, recalling the notorious statement of Lord Hewart: “justice must not only be done, it must also seem to be done”.<sup>153</sup> The European Court of Human Rights referred to the statement in a recent judgement and found that as such “the courts may inspire in the public the confidence which is indispensable”.<sup>154</sup> The current reform discussion can be seen as an opportunity to build up a new system that might “inspire” in the public the confidence in international investor-State dispute resolution.

The EU proposed a first approach to ISDS trying to institutionalise the mechanism and thereby to incorporate to some extent safeguards of institutional independence. Some elements might prove positive in the future. Such as the new mechanism of case assignment, which ensures that there is no link between the Tribunal Members and the disputing parties as well as that there is no link between them and the specific issues of the case. This might be more suitable to clearing appearances of bias than used to be the case under the case-by-case appointment by the disputing parties. The rule that a Tribunal Member cannot work as counsel or expert in another proceeding (role confusion) also seems to be a positive element in this context.

Yet as the overview of the EU approach shows, many elements are still closer to arbitration than to a court-like system.<sup>155</sup> And it is yet unclear whether the EU proposal solves the legitimacy crisis of ISDS in Europe. The multilateral reform discussion at the United Nations Commission on International Trade Law on ISDS *might* be a point in time where a new system of adjudication for investor-State disputes will be the outcome that brings back the confidence of all stakeholders.

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<sup>153</sup> Originally from *R. v. Sussex Justices, Ex parte McCarthy* ([1924] 1 KB 256).

<sup>154</sup> European Court of Human Rights, *A.K. v. Liechtenstein*, No. 38191/12, Judgment, 9 July 2015 (final: 9 October 2015), para. 67

<sup>155</sup> See also August Reinisch, ‘Will the EU’s Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards? - The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration’ (2016) 19 *Journal of International Economic Law* 761.

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