

# How can International Law Tackle Concerns Regarding the Independence and Impartiality of Investment Treaty Arbitrators?

Candidate number: 9005

Submission deadline: 15 May 2019

Number of words: 17974





## TABLE OF CONTENTS

1.	Introduction .....	1
1.1.	Research question .....	1
1.2.	Relevance of the topic .....	3
1.3.	Methodology.....	4
2.	The Background of the Legitimacy crisis.....	6
2.1.	The Architecture of ITA.....	6
2.2.	The ITA Legitimacy Crisis.....	8
3.	Existing Rules and Recurring Issues .....	11
3.1.	How are the independence and impartiality of investment arbitrators currently regulated?.....	11
3.1.1.	The ICSID Convention framework .....	11
3.1.2.	The UNCITRAL Arbitration Rules.....	13
3.1.3.	The International Bar Association’s Guidelines on Conflicts of Interest .....	16
3.1.4.	The EU Investment Court System.....	17
3.2.	Behaviours viewed as a threat to independence and impartiality.....	20
4.	How International Courts Regulate the conduct of their judges in relation to independence and impartiality.....	24
4.1.	The rationale behind comparing ITA to international courts.....	24
4.2.	The ICJ.....	26
4.3.	The ECtHR .....	30
4.4.	The WTO Dispute Settlement Mechanism (DSM).....	32
4.5.	Interim Conclusions.....	35
5.	Possible reform tracks.....	36
5.1.	Repeat Appointments.....	37
5.2.	Issue Conflicts .....	38
5.3.	Double Hatting/Role Confusion .....	41
5.4.	National and Geopolitical Bias .....	42
5.5.	Career-motivated Judicial Behaviours .....	45
6.	Conclusion.....	46
	Annex.....	49
	Table of References.....	52

## ACKNOWLEDGEMENTS

I would like to thank my supervisor Dr. Szilárd Gáspár-Szilágyi for the quality of the guidance he provided, and his insightful remarks and advices. Dr. Gáspár-Szilágyi was always available to answer my questions and clarify my doubts. For these reasons, I am immensely grateful to him.

I wish to extend my acknowledgements to my university colleagues and good friends Gilma Boci and Nathan Erik Blikstad for their unfailing support, and for their numerous and valuable comments.

## 1. INTRODUCTION

### 1.1. Research question

Over the past decades, investment treaty arbitration ('ITA') has become a controversial area of international law. Criticisms have mostly focused on the inconsistent nature of arbitral decisions, the proceedings' lack of transparency, and a lack of independence on the part of arbitrators, as some may argue that they have a financial incentive in being appointed or re-appointed.<sup>1</sup>

In *The Judicial Trilemma*, the authors hold three features to be of a critical importance for international judges and adjudicators: judicial independence, judicial accountability and judicial transparency. They argue, however, that 'with respect to these three characteristics, judicial systems face potential trade-offs, such that any given court can maximize two, but not all three, of these features'.<sup>2</sup> This paper focuses on one of these features: judicial independence. Judicial independence is defined by Dunoff and Pollack as 'the freedom of judges to decide disputes upon the facts and the law, free of outside influences such as the preferences of powerful states'.<sup>3</sup> However, not being under the influence of extraneous and potentially powerful institutional actors does not necessarily stop adjudicators from being partial, by showing preferences towards a claim for personal reasons. Conversely, in order to exercise impartiality a judge needs to enjoy independence.<sup>4</sup> French legal scholar Gérard Cornu defines impartiality as:

- [T]he absence of bias, prejudice, preference or preconceived ideas (...)
- a judge's scrupulous commitment to comply and ensure compliance with the adversarial principle, by seeing that each party enjoys the same opportunity to assert their claims (...)
- an obligation not to rule in favour of one of the claimants for other reasons than those relating to the validity of their claim (...)<sup>5</sup>

---

<sup>1</sup> Jonathan Ketcheson, 'Investment Arbitration: Learning from Experience', in Steffen Hindelang and Markus Krajewski (eds), *Shifting Paradigms in International Investments Law: More Balanced, Less Isolated, Increasingly Diversified* (OUP 2016), 102.

<sup>2</sup> Jeffrey Dunoff, Jackson Pollack, « The Judicial Trilemma » (2017) 111 AJIL 225, 241.

<sup>3</sup> Ibid., 1.

<sup>4</sup> Emmanuelle Jouannet, 'Actualité des questions d'indépendance et d'impartialité des juridictions internationales: la consolidation d'un tiers pouvoir international ?' ('Topicality of the Issues Relating to the Independence and Impartiality of International Courts: the Consolidation of an International Third Power?'), in Hélène Ruiz Fabri and Jean-Marc Sorel (eds), *Indépendance et impartialité des juges internationaux (Independence and Impartiality of International Judges)*, (Editions A. Pédone 2010) 291.

<sup>5</sup> G Cornu, 'Impartialité' ('Impartiality') *Vocabulaire Juridique (Legal Vocabulary)*, (PUF 2014) 521.

Unlike independence, which is an external judicial feature, impartiality is a ‘judicial virtue’ that appeals to the judge’s inner sense of ethics,<sup>6</sup> and may therefore prove difficult to detect and to regulate.

Examining the neutrality of arbitrators in light of the concepts of independence and impartiality can be beneficial, as these features seem to be complementary, and equally necessary. This double requirement is reflected in the statutes of several international courts, which require judges to perform their duties by exercising both independence and impartiality.<sup>7</sup>

In the context of ITA, the question of independence and impartiality generally concerns the relation between the arbitrators and the appointing parties. To this effect, independence may be defined more specifically as ‘the absence of an actual, identifiable relationship with one of the disputing parties, or with someone closely connected to the parties.’<sup>8</sup>

Article 14 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (‘ICSID Convention’) requires arbitrators to exercise independence and impartiality when performing their duties. Article 12(1) of the United Nations Commission on International Trade Law (‘UNCITRAL’) Arbitration Rules also provides for a disqualification procedure against arbitrators in case doubts should arise as to their independence and impartiality.

Yet, concerns have emerged over a number of practices adopted by arbitrators, that are said to undermine their independence and impartiality. Arbitrators have, for example been involved in double hatting, a practice consisting in acting ‘simultaneously as arbitrators and legal counsel in international investment arbitration’ in separate disputes.<sup>9</sup> Double hatting is a consequence of arbitrations being ‘one-off disputes that do not provide tenured appointments.’<sup>10</sup> It also results from ITA’s reliance on a decentralized and fragmented framework of treaties and soft law instruments. Although it is not prohibited as such, it is questionable whether this, and certain other practices —

---

<sup>6</sup> Emmanuelle Jouannet (n 4) 292.

<sup>7</sup> Charter of the United Nations and Statute of the International Court of Justice (open for signature 26 June 1945, entered into force 24 October 1945), 1 UNTS XVI, art 2, art 20; Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), 2187 UNTS 3, art 36(3)(a), art 40; Statute of the International Tribunal for the Law of the Sea (adopted 10th December 1982, entered into force 16 November 1994), 1833 UNTS 561, art 2(1), art 11.

<sup>8</sup> Maria Nicole Cleis, *The Independence and Impartiality of ICSID Arbitrators – Current Case Law, Alternative Approaches, and Improvement Suggestions* (Brill Nijhoff 2017), 20.

<sup>9</sup> Langford M, Behn D, and Hilleren Lie R, ‘The Ethics and Empirics of Double Hatting’ [2017] 6 ESIL Reflections, 1.

<sup>10</sup> *Ibid.*, 7.

such as repeat appointments<sup>11</sup> and situations in which an arbitrator has previously adjudicated similar disputes in a similar way,<sup>12</sup> which create doubts as to their ability to arbitrate open-mindedly — are compatible with the principles of independence and impartiality, or if they should be banned.

In light of the above, this paper examines how international law can tackle concerns regarding the independence and impartiality of investor-State arbitrators. Furthermore, it assesses whether exploring how international courts regulate the conduct of their members could help in addressing issues faced by ITA arbitrators. At last, this paper develops possible ways forward in order to reform the system.

## 1.2. Relevance of the topic

Judicial independence and impartiality are key features of the rule of law in domestic legal system. The rule of law itself was defined by the Secretary General of the United Nations 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 (...)’<sup>13</sup> Judicial independence is also rooted in the doctrine of separation of powers, according to which there is no liberty ‘if the power of judging is not separate from legislative power and from executive power.’<sup>14</sup> Although there is no clear separation of powers in international law, due to the absence of a centralized supranational authority, international courts are required to abide by rule of law standards. This is justified by the rising powers of international courts, and the notion that states are more likely to abide by their international obligations if they have the assurance that international courts will adjudicate disputes with fairness.<sup>15</sup>

---

<sup>11</sup> Kapeliuk D, ‘The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators’ [2010], 96 Cornell Law Review 47, 68.

<sup>12</sup> International Council for Commercial Arbitration, *Report of the ASIL-ICCA Joint Task Force on Issue Conflicts in Investor-State Arbitration* (No. 3, 2017), 7 <[https://www.asil.org/sites/default/files/ASIL\\_ICCA.pdf](https://www.asil.org/sites/default/files/ASIL_ICCA.pdf)> accessed 7 May 2019.

<sup>13</sup> Report of the Secretary-General, ‘The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies’ (2004) UN Doc S/2004/616, para. 6.

<sup>14</sup> Charles de Montesquieu, *The Spirit of the Laws*, (first published 1748, Cambridge University Press 1989), 157.

<sup>15</sup> Geir Ulfstein, ‘International Courts and Tribunals and the Rule of Law in Asia’, in T. Suami, A. Peters, D. Vanoverbeke, & M. Kumm (eds), *Global Constitutionalism from European and East Asian Perspectives* (Cambridge University Press 2018), 521.

The issue of arbitrators' independence and impartiality ought to be explored, because ITA, like other areas of international justice, has strong rule of law implications. One could say that these implications have followed ITA since its creation, as one of the regime's *raison d'être* was the need to put investment disputes beyond the reach of domestic courts that were feared to be politically driven.<sup>16</sup>

ITA has been described as potentially having a negative impact on the host State's regulatory sovereignty.<sup>17</sup> Furthermore, since arbitration may result in the host State paying high amounts of taxpayers' money in damages, it is in the public interest that investment disputes be adjudicated according to the rule of law. Thus, understanding the flaws of ITA regarding independence and impartiality, and putting solutions forward, are necessary steps towards addressing the public's distrust in the system.

### 1.3. Methodology

This paper is organized in four chapters. Chapter 2 provides a short description of the rules governing ITA, and outlines the key issues faced by arbitrators in terms of legitimacy. Chapter 3 explains which aspects of the ITA legitimacy crisis concern the independence and impartiality of arbitrators, and how these principles are handled under the current regulatory framework. It also outlines practices adopted by arbitrators which affect these two principles. Chapter 4 analyses how international courts tackle the issue of judicial independence and impartiality. This chapter relies on the cross-analysis of a number of international instruments in order to set out a framework of common ethical standards of independence and impartiality shared between three international courts of a decisive importance: the International Court of Justice ('ICJ'), the European Court of Human Rights ('ECtHR') and the World Trade Organization's dispute settlement mechanism ('DSM').

These three courts exercise public authority, which may be defined as 'the capacity to affect the freedom of others in the pursuit of common interests (...)'<sup>18</sup> Exploring how they regulate the conduct of their judges regarding independence and impartiality provides a basis for comparison

---

<sup>16</sup> Rudolph Dolzer, Christoph Schreuer, *Principles of International Investment Law* (2<sup>nd</sup> edn OUP 2012), 235.

<sup>17</sup> Maruta A, 'State Sovereignty and Foreign Investors' Rights: Persistent Imbalances from Cape to Hamburg' [2014], 23.

<sup>18</sup> Venzke I, 'Investor-State Dispute Settlement in TTIP from the Perspective of a Public Law Theory of International Adjudication', [2016] 17 JWIT 374, 391.



with ITA, and a source of inspiration, as these courts enjoy normative legitimacy by providing the disputing parties with a clear procedural framework on the appointment and disqualification of judges. It also reflects a premise adopted in this paper, according to which investment tribunals exercise public authority the same way as mainstream international courts, by reviewing sovereign acts of host States in light of international standards, requiring them to pay compensation, potentially affecting their regulatory sovereignty, or by denying compensation to foreign investors. In order to conduct this comparative study, the paper combines a descriptive method with a more analytical approach.

Lastly, chapter 5 suggests alternative court models that could be used to reform ITA, and evaluates their strengths and weaknesses in light of several issues that can affect the independence and impartiality of arbitrators.

## 2. THE BACKGROUND OF THE LEGITIMACY CRISIS

### 2.1. The Architecture of ITA

ITA is used to settle disputes between investors and host States.<sup>19</sup> Arbitration in the context of investment disputes shares similarities with commercial arbitration, such as the parties' freedom to appoint arbitrators. However, commercial and investment disputes differ in other aspects. Commercial disputes oppose corporate entities, or states acting in their private capacity, and arise out of commercial transactions, whereas disputes settled under ITA typically arise when a foreign investor claims that the State on the territory of which the investment is located breached standards of protection undertaken pursuant to an investment treaty. Furthermore, the substantive rules governing a commercial dispute are to be found in the commercial contract the breach of which is alleged by one of the parties. Conversely, under ITA such rules are contained in bilateral investment treaties ('BIT') and free trade agreements ('FTAs') containing investment chapters, such as the North American Free Trade Agreement ('NAFTA'). Such agreements are collectively referred to as international investment agreements ('IIAs'). As a result, ITAs involve a fair share of treaty interpretation.<sup>20</sup>

Investment arbitration may take place before a large number of judicial fora. However, most known disputes are submitted to the International Centre for the Settlement of Investment Disputes ('ICSID').<sup>21</sup> A dispute resolution mechanism created under the auspices of the World Bank, ICSID is governed by the the ICSID Convention, and handles disputes between investors and states. Furthermore, ICSID possesses its own procedural rules, and provides disputing parties with institutional support.

ICSID is competent over 'legal disputes arising directly out of an investment, between a Contracting State (...) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.'<sup>22</sup>

---

<sup>19</sup> Gary Born, *International Arbitration: Law and practice*, (2<sup>nd</sup> edn, Kluwer 2015), chap 18 para 1.

<sup>20</sup> *Ibid.*, para 11.

<sup>21</sup> Out of 904 known pending and settled investor-state disputes, 569 are or have been handled by the Centre. Source: UNCTAD Investment Policy Hub, <<https://investmentpolicyhub.unctad.org/ISDS/FilterByRulesAndInstitution>> (accessed 7 February 2019).

<sup>22</sup> Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (open for signature 18 march 1965, entered into force 14 October 1966), 575 UNTS 159, art 25(1).

Participation in the Convention need not be confused with consent to arbitration. Consent to arbitration can be given through different means.<sup>23</sup> If the host State and the foreign investor are bound by a contract, consent to arbitrate future disputes may be expressed by including a compromissory clause in the contract. Consent to arbitrate a dispute that has already arisen needs to be expressed through a *compromis*. Consent may also be offered by the host State either unilaterally through domestic legislation, or within a treaty (IIA) with the foreign investor's home State. Consent needs to be reaffirmed once a dispute has arisen. The Host State's consent to arbitrate a specific dispute is assumed, due to its domestic legislation or its participation in an IIA, whereas the foreign investor's consent follows from their filing of a request for arbitration.<sup>24</sup>

When either the host state or the investor's home state are not part to the ICSID Convention, the dispute may be settled under the ICSID Additional Facility. Disputes are handled by ICSID in a substantially identical way, with notable differences at the enforcement level. Indeed, when the proceedings are governed by the ICSID Additional Facility Rules instead of the ICSID Convention, provisions regarding the enforcement of arbitral awards are to be found in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. Unlike awards rendered under the ICSID Convention, such awards may be reviewed by domestic courts, and annulled on certain grounds.<sup>25</sup>

Several non-ICSID arbitration mechanisms exist as well. The parties to a dispute may for example submit it to an arbitration institution, such as the Stockholm Chamber of Commerce ('SCC') or the London Court of International Arbitration ('LCIA'). Arbitration institutions generally administer commercial and investment disputes by giving technical assistance, providing a list of available arbitrators, and sometimes acting as appointing authorities. Arbitration institutions may also provide the litigants with their own set of procedural rules.

Alternatively, the parties to a dispute may wish to settle it under a set of procedural rules, without the case being administered by a specific institution. In doing so, the parties can select the UNCITRAL Arbitration Rules, an instrument developed by the UNCITRAL in 1976 and revised in 2010 and in 2013, which enjoys broad recognition as 'a modern, universally established set of

---

<sup>23</sup> Born (n 19) chap 18 para 18.

<sup>24</sup> Dolzer, Schreuer (n 16), 254.

<sup>25</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959), 330 UNTS 3, art V.

international arbitration rules.<sup>26</sup> However, this arbitration regime requires the litigants to set up an *ad hoc* tribunal which will receive no institutional support, as the UNCITRAL Arbitration Rules ‘do not establish a machinery to administer proceedings in a particular case.’<sup>27</sup>

Lastly, arbitration may take place before the Permanent Court of Arbitration (‘PCA’) in the Hague, which uses the UNCITRAL Arbitration Rules.

## 2.2. The ITA Legitimacy Crisis

ITA has been facing a legitimacy crisis for nearly three decades now. This crisis, according to commentators, can be dissected into three distinct periods.<sup>28</sup> The first period runs from 1990, when the first treaty-based arbitral award was released, to the mid-2000s, after a series of cases highlighted flaws affecting ITA: arbitrators’ permeability to political pressure, threats against states’ regulatory sovereignty, tensions between investment protection standards and domestic public policies, and case law’s lack of consistency. The second period runs from the mid-2000s to 2010, and is characterized by the reaction of some developing states to the phenomena underlined above, resulting in withdrawals from the ICSID framework and from a number of BITs. This period is also characterized by the emergence of an academic discussion on the investment arbitration legitimacy crisis.<sup>29</sup> The last period, running from 2011 up to the present day, has been marked by a number of controversial cases putting corporate interests in conflict with host states’ environmental and health legislations. These cases — many of which were brought against developed states (e.g. *Vattenfall v. Germany*<sup>30</sup>, *Phillip Morris v. Australia*<sup>31</sup>) — intensified the public debate over the legitimacy of investment arbitration, and ‘triggered partial exit strategies.’<sup>32</sup> For example, in 2011 under the Gillard Government, Australia stopped entering into international investment agreements (‘IIAs’)

---

<sup>26</sup> Dolzer, Schreuer (n 16), 243.

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

<sup>28</sup> Malcolm Langford, Daniel Behn, ‘Managing Backlash: The Evolving Investment Treaty Arbitrator?’ (2017) 29 EJIL 551, 554-558.

<sup>29</sup> *Ibid.*, 556.

<sup>30</sup> *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12.

<sup>31</sup> *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12.

<sup>32</sup> Langford, Behn (n 28), 557.

that provide for investor-state arbitration. This policy was however overturned by the following government, which agreed to investor-state disputes on a case-by-case assessment.<sup>33</sup>

An important share of the criticisms against investment arbitration originates from developing countries. It is based on the premise that investment treaty arbitration was merely conceived to protect investors originating from developed countries rather than to ensure a fair settlement of investment disputes, and constitutes thus a continuation of colonialism through other means.<sup>34</sup> As Schultz and Dupont put it, there is a strong perception that investment arbitration ‘is neo-colonial in that its purpose is to allow developed countries to exercise control over and exploit developing countries.’<sup>35</sup> However, several developing countries have emerged as powerful capital exporters in recent years,<sup>36</sup> thus leading to an increase in south-south investment flows. As the north-south divide becomes blurry, the neo-colonial perception of international investments needs to be nuanced.

Seeking to reinforce the independence and impartiality of arbitrators may not be enough to address such claims of unfairness against the ITA regime and investment law as a whole. It should indeed be kept in mind that a discussion over these two concepts may only focus on a limited range of procedural aspects of ITA. Substantive investment law, which stems from a fragmented network of investment treaties, contracts and domestic legislations, is not concerned by this debate, regardless of whether it is deemed to be illegitimate or not.

Independence and impartiality are set in the concept of legitimacy. Legitimacy exists when an institution ‘is perceived as having the right or the authority to make decisions and when its decisions are viewed as worthy of respect or obedience.’<sup>37</sup> In relation to a court of justice,

---

<sup>33</sup> Kawharu A, and Nottage L, ‘Renouncing Investor-State Dispute Settlement in Australia, Then New Zealand: Déjà Vu’ (2018) Sydney Law School Research Paper No. 18/03, 5 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3116526](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3116526)> accessed 6 mai 2019.

<sup>34</sup> Brian Ellsworth, Robert Edison Sandiford, ‘Exclusive: Top Venezuela firm files arbitration against Chavez’ Reuters, Reuters (Caracas/Bridgetown, 16 February 2013) <<https://www.reuters.com/article/us-venezuela-arbitration/exclusive-top-venezuela-firm-files-arbitration-against-chavez-idUSTRE81F0SO20120216>> accessed 6 may 2019.

<sup>35</sup> Thomas Schultz and Cédric Dupont, ‘Investment Arbitration: Promoting the Rule of Law or Over-empowering Investors? A Quantitative Empirical Study’ (2015) 25 EJIL 1147, 1152.

<sup>36</sup> China’s foreign direct investment stock rose from little over USD 27 billion in 2000 to almost USD 1.5 trillion in 2017, making it the second biggest foreign investor after the United States of America. Similar patterns can be observed with Hong Kong and Singapore. Source: UNCTAD, World Investment Report 2018, *Investment and New Industrial Policies*, 189 <[https://unctad.org/en/PublicationsLibrary/wir2018\\_en.pdf](https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf)> accessed 6 Mai 2019.

<sup>37</sup> Delmar Karlen, James L. Gibson and Others, ‘Court’, *Encyclopædia Britannica*, <<https://www.britannica.com/topic/court-law>> accessed 13 November 2018.

legitimacy is said to derive ‘from the belief that judges are impartial and that their decisions are grounded in law, not ideology and politics.’<sup>38</sup> Grossmann goes further, holding that ‘international actors are unlikely to view a tribunal as legitimate unless it contains a core set of provisions guaranteeing (...) impartial, competent, and independent individual adjudicators.’<sup>39</sup> These considerations seem to indicate that the concept of legitimacy carries two meanings. Objectively, legitimacy results from the upholding of certain legal guarantees. Subjectively, legitimacy builds on the public’s perception that a court adjudicates with fairness.

Nevertheless, the need for investment arbitrators to be independent and impartial appears not to have been a decisive concern in the beginning of the drafting phase of the ICSID Convention.<sup>40</sup> A plausible explanation lies in the fact that commercial arbitration, which ICSID drafters used as a source of inspiration, expects less from party-appointed arbitrators when it comes to independence or impartiality. For example, until 2003, the American Arbitration Act Commercial Rules established a presumption of partiality towards party-appointed arbitrators, while they referred to presiding arbitrators as ‘neutral’.<sup>41</sup>

As Cleis puts it, ‘the prerequisite of independence was only inserted towards the end of the drafting process’, when several delegates ‘highlighted the significance of arbitrators’ independence and impartiality for the legitimacy of the system.’<sup>42</sup> It seems safe to say that delegates gradually reached an understanding that members of an arbitral tribunal needed to meet these requirements for their decisions to be regarded as authoritative by the litigants and, more broadly, by the public.

The next chapter describes how the independence and impartiality requirements are construed in relation to investment arbitrators under the most widely used ITA instruments, and analyses practices and behaviours that threaten such requirements the most, with a view to highlight regulatory weaknesses.

---

<sup>38</sup> Ibid.

<sup>39</sup> Grossman N, ‘Legitimacy and International Adjudicative Bodies’ [2010] 41 GWILR 107, 115.

<sup>40</sup> Cleis (n 8), 13.

<sup>41</sup> Born (n 19), chap 7 para 24.

<sup>42</sup> Cleis (n 8), 13.

### 3. EXISTING RULES AND RECURRING ISSUES

#### 3.1. How are the independence and impartiality of investment arbitrators currently regulated?

Due to the fragmented nature of ITA's legal framework, arbitrators' independence and impartiality are regulated under a variety of instruments. I will focus on the ICSID Convention, the UNCITRAL Arbitration Rules and the International Bar Association's Guidelines on Conflicts of Interests in International Arbitration ('IBA Guidelines').

##### 3.1.1. The ICSID Convention framework

The ICSID Convention provides that 'Persons 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>43</sup> For its part, the Spanish version of the Convention provides instead for a requirement of impartiality. All language versions of the ICSID Convention being equally authentic, there is an academic consensus as to the fact that arbitrators are required to exercise both independence and impartiality.<sup>44</sup>

As highlighted by Maria Nicole Cleis, violations of that provision may result in the triggering of two separate mechanisms.<sup>45</sup> An annulment procedure can be triggered after the award has been rendered, pursuant to article 52(1)(c) of ICSID Convention, on the ground, among other things, that a member of the Tribunal was corrupt.<sup>46</sup> Another, more commonly used mechanism, consists in the opening of a disqualification procedure under article 57 of the ICSID Convention, according to which '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.' The absence of a definition of 'manifest lack' caused significant uncertainty over

---

<sup>43</sup> ICSID Convention, art 14.

<sup>44</sup> *Ibid.*, 12.

<sup>45</sup> Cleis (n 8), 15

<sup>46</sup> *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3; Argentina argued that the arbitral award had to be annulled on the ground, among other things, that claimant-appointed arbitrator Kaufmann-Kohler had displayed a lack of impartiality by being employed by UBS, a bank that held a significant amount of shares in the claimant's company, at the time of the dispute.

the interpretation of article 14, and a debate is on as to ‘whether the standard of disqualification under ICSID is the ‘justifiable doubts’ test, or some higher standard.’<sup>47</sup>

Despite these uncertainties, as pointed out by Vasani and Palmer, ‘it has traditionally been held that the standards of ‘impartiality’ and ‘independent judgment’ embodied in article 14 and 18 of the ICSID Convention together with the provisions of article 57 requiring a ‘manifest lack’ of those qualities, create a higher bar for disqualification than either the standards prescribed by other international arbitral bodies or ordinary conflict rules which adopt a general objective test of ‘reasonable doubts.’<sup>48</sup> In that regard, the 2013 ICSID case *Blue Bank v. Venezuela*<sup>49</sup> stands out as a trend reversal, in that it lowered the disqualification threshold to a significant extent.

In *Blue Bank v. Venezuela*, the chairman of the ICSID Administrative Council had to rule on disqualification proceedings brought against José Maria Alonso, the claimant-appointed arbitrator. Mr Alonso held a position as a Managing Partner in the Litigation and Arbitration Department at the Madrid branch of an international law firm, while the New York branch of that same law firm represented the claimant in *Longreef v. Venezuela*, a parallel ICSID case filed against the same respondent. In his decision, the chairman asserted that ‘Articles 57 and 14(1) of the ICSID Convention do not require proof of actual dependence or bias; rather it is sufficient to establish the appearance of dependence or bias.’<sup>50</sup> Interpreting article 57, he added that the word ‘manifest’ ‘relates to the ease with which the alleged lack of the qualities can be perceived.’<sup>51</sup>

The chairman further noted that the law firms shared a corporate name and that Mr Alonso’s remuneration depended on the results achieved by both the international law firm and its Spanish branch. Thus he deduced that there was ‘a degree of connection or overall coordination between the different firms (...).’<sup>52</sup> He also held that given the similarities between the case at hand and *Longreef v. Venezuela* Mr Alonso would have been ‘in a position to decide issues that are relevant in

---

<sup>47</sup> Loretta Malintoppi and Alvi Yap, ‘Challenges of Arbitrators in Investment Arbitration: Still Work in Progress?’, in Katia Yannaca-Small (ed), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (OUP 2018), 156.

<sup>48</sup> Vasani B, Palmer S, ‘Challenge and Disqualification of Arbitrators at ICSID: A New Dawn?’ [2015] 30 ICSID Review - Foreign Investment Law Journal 194, 197.

<sup>49</sup> *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, Decision on the Parties’ Proposal to Disqualify a Majority of the Tribunal, ICSID Case No. ARB/12/20.

<sup>50</sup> *Ibid.*, para 59.

<sup>51</sup> *Ibid.*, para 61.

<sup>52</sup> *Ibid.*, para 67.



*Longreef v. Venezuela* if he remained an arbitrator in this case.<sup>53</sup> The chairman then concluded that Mr Alonso lacked the qualities required by ICSID Convention article 14(1), noting that ‘a third party would find an evident or obvious appearance of lack of impartiality on a reasonable evaluation of the facts in this case’.<sup>54</sup>

The ultimate decision to disqualify the claimant’s arbitrator came rather unexpectedly, as the chairman’s interpretation of articles 14 and 57 ICSID Convention did not deviate radically from that adopted in previous cases under similar circumstances.<sup>55</sup> Moreover, it seems to have paved the way for further successful disqualification proceedings. Indeed, until *Blue Bank v Venezuela* ‘only one arbitrator in ICSID’s nearly 50 year history had been disqualified from serving on an arbitral tribunal’,<sup>56</sup> whereas two challenges have succeeded since then.<sup>57</sup>

### 3.1.2. The UNCITRAL Arbitration Rules

Under the UNCITRAL Arbitration Rules an arbitrator lacking independence or impartiality may face disqualification. Article 13 provides that the the disqualification of an arbitrator falls within the competence of the appointing authority. Articles 6.1 and 6.2 of the Arbitration Rules provide that the appointing authority may be a person or institution designated by the parties or, in the absence of such a choice, it may be designated by the Secretary General of the PCA. UNCITRAL Arbitration Rules article 12 provides that such challenge may be triggered when ‘circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence.’ As pointed out by Malintoppi and Yap, ‘mere doubt as to the arbitrator’s independence or impartiality is not sufficient.’<sup>58</sup>

Case law indicates that when applying article 12 of the UNCITRAL Arbitration Rules, appointing authorities faced with the challenge of an arbitrator have resorted to the reasonable third

---

<sup>53</sup> *Ibid.*, para 68.

<sup>54</sup> *Ibid.*, para 69.

<sup>55</sup> Vasani, Palmer (n 48), 199.

<sup>56</sup> *Ibid.*, 195. Namely arbitrator Mohammed Bedjaoui, in *Victor Pey Casado and President Allende Foundation v Republic of Chile*, ICSID Case No ARB/98/2.

<sup>57</sup> *Burlington Resources Inc. v. Republic of Ecuador*, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, ICSID Case No. ARB/08/5; see also *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, Decision on the Proposal for Disqualification of Bruno Boesch, ICSID Case No. ARB/13/13.

<sup>58</sup> Malintoppi, Yap (n 47), p 159.

party test as well. In *National Grid v. the Republic of Argentina*, a request for the dismissal of arbitrator Judd Kessler was submitted by the defendant, on the basis of a statement previously made by the arbitrator about that same case. Mr Kessler was notably blamed for saying that ‘there was harm or major change in the expectations of the investment’, thus exercising bias by prejudging the final result of the arbitration.<sup>59</sup> The Division of the London Court of Arbitration, acting as the appointing authority, held that the justifiable doubts test ‘is an objective one, pursuant to which it has to be determined whether a reasonable, fair-minded and informed person has justifiable doubts as to the arbitrator's impartiality.’<sup>60</sup> It further added that it would be inappropriate under a reasonable third person test to examine Mr Kessler’s statement in isolation, without considering the intervention as a whole, and the context in which it was made.<sup>61</sup> Noting that later in the same intervention Mr Kessler clarified his statement by referring to mere allegations of harm or major change in the expectations of the investment, the Division affirmed that the arbitrator had ‘made clear beyond any reasonable doubt that he was not prejudiced.’<sup>62</sup>

In *Gallo v Canada*, a NAFTA-based ITA constituted under the UNCITRAL Arbitration Rules, a request was made by the claimant that arbitrator J. Christopher Thomas be dismissed due to circumstances creating doubts as to his impartiality and independence. The ICSID Deputy Secretary General, acting as the appointing authority, stated, quoting a previous decision on the challenge of an arbitrator, that ‘[U]nder the UNCITRAL Arbitration Rules doubts are justifiable ... if they give rise to an apprehension of bias that is, to the objective observer, reasonable.’<sup>63</sup> The ICSID Deputy Secretary General eventually asked arbitrator Thomas to choose between continuing his parallel activities or serving as arbitrator in the case.

In addition, arbitrators are subject to a duty to disclose. Article 11 of the UNCITRAL Arbitration Rules provides that a person approached in connection to his or her possible appointment as an arbitrator ‘shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence.’

---

<sup>59</sup> *National Grid PLC v the Republic of Argentina*, Decision on the Challenge to Mr Judd L. Kessler, LCIA Case No. UN 7949, para 36.

<sup>60</sup> *Ibid.*, para 80.

<sup>61</sup> *Ibid.*, para 93.

<sup>62</sup> *Ibid.*, para 99.

<sup>63</sup> *Vito G. Gallo v. The Government of Canada*, Decision on the Challenge to Mr. J. Christopher Thomas, QC, UNCITRAL, PCA Case No. 55798.

The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ('Transparency Rules'), adopted in 2014, significantly expanded the list of information to be disclosed by arbitrators under article 11 of the UNCITRAL Arbitration Rules. Articles 2 and 3 of the Transparency Rules require an extensive number of information to be made public including the name of the parties, the economic sector involved, the notice of arbitration and the response to the notice of arbitration etc.

Article 1 of the Transparency Rules provides that they apply to disputes settled under the UNCITRAL Arbitration Rules and arising out of IIAs entered into after 1 April 2014 unless the parties agree otherwise. If the parties so agree, the Transparency Rules may also apply to disputes arising out of IIAs entered into prior to 1 April 2014.

The Transparency Rules also apply automatically to disputes arising out of IIAs entered into prior to 1 April 2014, provided that the contracting parties to the said IIA have both adhered to the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration ('Mauritius Convention'), adopted on 10 December 2014. By adhering to the Mauritius Convention, contracting States agree, on an opt-in basis, to apply the Transparency Rules to investment disputes arising out of their respective IIAs. A consistent move towards fostering transparency in ITA, the adoption of the Mauritius Convention is also a highly pragmatic one, as it does not require States to renegotiate their IIAs to make the Transparency Rules applicable.<sup>64</sup>

Noting that the notice of arbitration and the response, the disclosure of which is required under the Transparency Rules, may include the names of the arbitrators appointed by the parties to the dispute, Malintoppi and Yap argue that when they apply, the Transparency Rules may prove an effective tool in detecting conflicts of interests and other issues such as repeat appointments, thus making challenges easier.<sup>65</sup> This outlook might, however, be excessively optimistic, as the small number of states having ratified the Mauritius Convention so far limits the application of the Transparency Rules, and thus their usefulness in detecting arbitrators' lack of independence and impartiality.<sup>66</sup>

---

<sup>64</sup> Kaufmann-Kohler G, Potestà M, '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?' (2016) ICSID Research Paper, 28.

<sup>65</sup> Malintoppi, Yap (n 47), 160.

<sup>66</sup> As of February 2019, the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration has been ratified by five states. Source: United Nations Commission on International Trade Law, <[http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2014Transparency\\_Convention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention_status.html)> (accessed on 14 February 2019).

Moreover, some commentators hold that the Mauritius Convention's opt-in feature can be used in order to establish a permanent investment court or an appellate mechanism incrementally, that is, without having to redesign the ITA normative framework by reviewing all existing IIAs.<sup>67</sup> This prospect will be further discussed in chapter 5.

### 3.1.3. The International Bar Association's Guidelines on Conflicts of Interest

The International Bar Association's Guidelines on Conflicts of Interest are a set of non-binding standards, adopted in 2004 and revised in 2014. The guidelines establish standards of good conduct and display a variety of situations in which arbitrators' independence and impartiality may not be ensured. The situations are sorted based on a colour code, which determines the course of action that needs to be taken. Situations belonging to the *red list* are deemed so serious that they require the arbitrator to resign. They typically concern cases of identity or close proximity between an arbitrator and a party. The red list itself is split between waivable and non-waivable situations. The *orange list* is made up of situations that ought to be disclosed by the concerned arbitrator to the rest of the tribunal. Situations described on the orange list can however be waived by the parties. Lastly, the *green list* is composed of situations which do not need to be disclosed, and do not require the concerned arbitrator to resign.

As previously mentioned, the Guidelines are non-binding. ICSID tribunals have repeatedly reasserted their indicative nature,<sup>68</sup> while recognizing their utility as the reflect of a 'transnational consensus on the subject matter (...).'<sup>69</sup> Furthermore, institutions such as the Stockholm Chamber of Commerce and the International Chamber of Commerce reference them as persuasive authority,<sup>70</sup> thus granting them a significant level of international recognition as a supplement to ICSID and UNCITRAL rules on conflicts of interests.

Nevertheless, the Guidelines also suffer from serious shortcomings. In addition to rarely being effective in predicting the outcome of a challenge, due to the extensiveness and non-

---

<sup>67</sup> Kaufmann-Kohler, Potestà (n 64), 31.

<sup>68</sup> *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, Decision on the Proposal to disqualify L. Yves Fortier, Q.C., Arbitrator ICSID Case No. ARB/07/30, para 59.

<sup>69</sup> *Total S.A. v. The Argentine Republic*, Decision on Argentine Republic's Proposal to Disqualify Ms. Theresa Chang ICSID Case No. ARB/04/01, para 98.

<sup>70</sup> Cleis (n 8), 159.

exhaustiveness of the orange and green lists,<sup>71</sup> the Guidelines are focused mostly on commercial arbitration while having little regard for issues more specific to ITA. In other words, they 'fail to mention some situations which are frequently invoked as grounds for challenges in investment arbitration,'<sup>72</sup> such as arbitrators with a previous career in the public sector.<sup>73</sup>

#### 3.1.4. The EU Investment Court System

In the new generation of FTAs between the EU and Canada, Vietnam, Mexico and Singapore, a strong emphasis is placed on changing the rules on investment disputes settlement, in order to address flaws traditionally attributed to ITA, such as '[the absence of a] possibility to appeal errors of law or facts', and the system's alleged 'lack of legitimacy, accountability and transparency.'<sup>74</sup> Such concerns have translated into the elaboration of a new dispute settlement mechanism called the Investment Court System (ICS). In the Comprehensive Economic and Trade Agreement ('CETA'), negotiated between the EU and Canada, the ICS is laid out in Chapter 8 Section F. On 30 April 2019, the CJEU declared the ICS to be compatible with EU law,<sup>75</sup> following a request for opinion introduced by the government of Belgium pursuant to art. 218(11) of the Treaty on the Functioning of the European Union ('TFEU').<sup>76</sup>

The ICS will handle investment disputes arising between an investor from a party to the treaty and the other party.<sup>77</sup> Claims may be submitted under any arbitration rules the parties have agreed on, such as the ICSID Arbitration Rules, the Additional Facility Rules, or the UNCITRAL Arbitration Rules.<sup>78</sup>

---

<sup>71</sup> Ibid., 167.

<sup>72</sup> Ibid., 168.

<sup>73</sup> Ibid.

<sup>74</sup> Cecilia Malmström, 'The Way Ahead for an International Investment Court', (*Blog of Cecilia Malmström*, 18 July 2016), <[https://ec.europa.eu/commission/commissioners/2014-2019/malmstrom/blog/way-ahead-international-investment-court\\_en](https://ec.europa.eu/commission/commissioners/2014-2019/malmstrom/blog/way-ahead-international-investment-court_en)> accessed 6 May 2019.

<sup>75</sup> *Opinion 1/17 pursuant to article 218 TFEU*, EU:C:2019:341, European Union: Court of Justice of the European Union, 30 April 2019, para 245

<sup>76</sup> Vajda C, 'The EU and Beyond: Dispute Resolution in International Economic Agreements' [2018] 29 EJIL 205, 223.

<sup>77</sup> Comprehensive Economic and Trade Agreement [2017] OJ L11/23, art 8.18(1).

<sup>78</sup> Ibid., art 8.23(2).

The ICS will consist of fifteen judges: five EU nationals, five Canadian nationals, and five nationals of third countries,<sup>79</sup> who must ‘possess the qualifications required in their respective countries for appointment to judicial office.’<sup>80</sup> ICS judges will be appointed for five-year terms renewable once,<sup>81</sup> by the CETA Joint Committee, a decision-making organ established under chapter 26 of CETA. The CETA Joint Committee is composed of representatives of the EU and Canada, and adopts decisions based on mutual consent.<sup>82</sup> As this procedure seems to fall under the definition of state-driven appointment, some commentators have stressed the fact that it may become a political issue, with the EU and Canada appointing pro-state judges thus making the ICS biased against investors.<sup>83</sup> Others argue that predicting an ICS judge’s likelihood to display pro-state bias amounts to speculation as judges are appointed before disputes arise rather than on an *ad hoc* basis as is currently the case in ITA.<sup>84</sup> This argument, I believe, is misguided as empirical studies on the ICJ have shown that tenured judges can also display pro-state bias (see chapter 4). Furthermore, it relies excessively on the idea that pre-dispute appointments make judges immune to political pressure, while ignoring that political pressure may also loom when judges seek reappointment.

An important provision lies in article 8.27(12) CETA, according to which ‘[I]n order to ensure their availability, the Members of the Tribunal shall be paid a monthly retainer fee (...).’ Although the judges’ monthly retainer fee is to be paid by the disputing parties,<sup>85</sup> it may be transformed into a regular salary if the CETA joint Committee decides so.<sup>86</sup>

---

<sup>79</sup> Ibid., art 8.27(2).

<sup>80</sup> Ibid., art 8.27(4).

<sup>81</sup> Ibid., art 8.27(5).

<sup>82</sup> Ibid., art 26.3(3).

<sup>83</sup> EFILA Paper, *Task Force Paper regarding the proposed International Court System (ICS)*, 1 January 2016, 15 <[https://efila.org/wp-content/uploads/2016/02/EFILA\\_TASK\\_FORCE\\_on\\_ICS\\_proposal\\_1-2-2016.pdf](https://efila.org/wp-content/uploads/2016/02/EFILA_TASK_FORCE_on_ICS_proposal_1-2-2016.pdf)> accessed 6 May 2019.

<sup>84</sup> Schacherer S, *Independence and Impartiality of Arbitrators: A Rule of Law Analysis* (2018) University of Geneva working paper, 18 <[https://eur-int-comp-law.univie.ac.at/fileadmin/user\\_upload/i\\_deicl/VR/VR\\_Personal/Reinisch/Internetpublikationen/Schacherer.pdf](https://eur-int-comp-law.univie.ac.at/fileadmin/user_upload/i_deicl/VR/VR_Personal/Reinisch/Internetpublikationen/Schacherer.pdf)> accessed 7 May 2019.

<sup>85</sup> CETA, art 8.27(13).

<sup>86</sup> Ibid., art 8.27(15).

The aforementioned provisions suggest that ICS drafters acknowledge that the employment status of adjudicators, and more precisely, the manner in which they are remunerated, have implications with regard to their independence.

As mentioned in chapters 2 and 3, there is a perception that ITA arbitrators have financial incentives in being regularly appointed in investor-state disputes due to the one-off nature of arbitration panels, but also due to the fact that remunerations are generally substantial.<sup>87</sup> Such financial incentives may pressure arbitrators into deciding cases ‘in a manner that favors the party that appointed them [in order] to assure a flow of future cases,’<sup>88</sup> and raises serious questions as to how to ensure that a judge’s behaviour does not rely on expectations of future profits. One commentator suggests that the issue might be addressed by complementing ITA with security of tenure, a move that would ‘[insulate] the adjudicator from influence by powerful private interests.’<sup>89</sup>

Efforts to establish an international investment court or an appellate tribunal should therefore pay particular attention to questions linked to the composition of the future tribunal, such as the election of judges, their gratification, the availability of reappointments and the process under which judges are assigned disputes.<sup>90</sup> Failing to address such questions may result in the new system being affected by the same issues as the old one. This will be further discussed in chapter 5.

Although the features enumerated so far appear to make the ICS fall within the category of permanent international courts, it is noteworthy that it maintains characteristics evoking arbitration. In addition to the aforementioned freedom for the parties to select rules governing the dispute, the very operating mode of ICS divisions is reminiscent of how arbitration panels work: judges are remunerated by the disputing parties monthly for the duration of the dispute, and divisions are composed of three members, one from each nationality group, the third-country judge acting as chair.<sup>91</sup>

---

<sup>87</sup> For example in *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2009-23, the presiding arbitrator was paid a €652,120.00 fee.

<sup>88</sup> Puig S, Shaffer G, ‘Imperfect Alternatives: Institutional Choice and the Reform of Investment Law’ [2018] 112 AJIL 361, 366.

<sup>89</sup> Gus Van Harten, ‘A Case for an International Investment Court’ (Society of International Economic Law Inaugural Conference, Geneva, July 2008), 20.

<sup>90</sup> Kaufmann-Kohler, Potestà (n 64), 60-62.

<sup>91</sup> CETA, art 8.27(6)

CETA Chapter 8 Section F contains a few provisions relating to the independence and impartiality of tribunal members. Article 8.30(1) provides that ‘members of the tribunal shall be independent’ and that ‘they shall not be affiliated with any government’. Members are also required to ‘refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment dispute under this or any other international agreement.’ This article also includes a direct reference to the IBA guidelines, that tribunal members are required to comply with. Originally a soft law instrument, the IBA guidelines were transformed into hard law in the context of the ICS by being included in the treaty text. Regarding enforcement, rules on the challenging of tribunal members are enshrined under article 8.30(2) to 8.30(4) CETA.

Furthermore, CETA provides that a code of conduct for the members of the Tribunal shall be adopted and ‘address topics including: (...) the independence and impartiality of the Members of the Tribunal.’<sup>92</sup>

### 3.2. Behaviours viewed as a threat to independence and impartiality

The question of investment arbitrators’ ethics is traversed by a tension, between the requirements for arbitrators to act independently and impartially, and the ‘open secret’<sup>93</sup> that when selecting them, parties will consider experience, academic publications, and previous judgements to maximize their chances to win. However, this temptation is tempered by the fact that arbitrators perceived as dependent or biased may at best lose influence with the other members of the tribunal, and at worst face disqualification.<sup>94</sup>

Case law provides a fair amount of situations in which arbitrators were found to lack independence and/or impartiality, and were subsequently disqualified.

In the aforementioned *Blue Bank v. Venezuela* case,<sup>95</sup> the claimant-appointed arbitrator was challenged due to his position as a partner in the Madrid branch of a global law firm, the New York and Caracas branches of which represented the claimant in a parallel investment dispute brought against Venezuela, displaying similar issues. The degree of connection between the branches, and the fact that the challenged arbitrator could have decided issues that might also have been relevant

---

<sup>92</sup> Ibid., art 8.44(2)

<sup>93</sup> Schacherer S (n 86), 8

<sup>94</sup> Chiara Giorgetti, ‘The Arbitral Tribunal: Selection and Replacement of Arbitrators’ in Chiara Giorgetti (ed), *Litigating International Investment Disputes: A Practitioner's Guide* (Brill Nijhoff 2014), 158

<sup>95</sup> *Blue Bank v. Venezuela* (n 51)



in the parallel dispute, led the chairman of ICSID's administrative council, acting as the appointing authority, to conclude that the facts showed an 'obvious appearance of lack of impartiality',<sup>96</sup> thus upholding the challenge.

In *Burlington Resources Inc. v. Republic of Ecuador*<sup>97</sup> the claimant-appointed arbitrator was challenged for failing to fulfill his disclosure duty and for having been appointed by the same law firm eight times in the past six years. It was also held that he had failed to exercise independence and impartiality during the proceedings by asking questions favorable to the claimant, while trying to undermine the position of the respondent and the credibility of some of the respondent's witnesses. Lastly, in his explanations, the challenged arbitrator had alleged that the respondent's counsel lacked ethics. Although the claims pertaining to repeat appointment and failure to disclose were dismissed for untimeliness, the arbitrator was disqualified for his allegations. According to the chairman of ICSID's Administrative Council, acting as the appointing authority, a reasonable third party would have concluded that the comments 'manifestly evidences an appearance of lack of impartiality with respect to the Republic of Ecuador and its counsel.'<sup>98</sup>

In *Caratube v. Kazakhstan*,<sup>99</sup> the respondent-appointed arbitrator was challenged as he had previously been appointed by the same law firm defending the same respondent state, in several cases. One of these cases, namely *Ruby Roz v. Kazakhstan*,<sup>100</sup> showed an important number of similarities with the case at hand. The arbitrator was disqualified as the other members of the panel considered that a third observer 'would find it highly likely that [the challenged arbitrator] would pre-judge legal issues in the present arbitration based on the facts underlying the Ruby Roz case.'<sup>101</sup>

In *CC/Devas v. India*<sup>102</sup> the claimant-appointed arbitrator was challenged for what the respondent considered to be a risk of prejudgment. The challenged arbitrator had interpreted the same treaty provision consistently in three previous cases, and later defended his opinion in an academic article. Doubts had thus arisen as to his impartiality. The president of the ICJ, ruling on

---

<sup>96</sup> *Ibid.*, para 69

<sup>97</sup> *Burlington Resources v. Ecuador* (n 59)

<sup>98</sup> *Ibid.*, para 80

<sup>99</sup> *Caratube International v. Kazakhstan* (n 59)

<sup>100</sup> *Ruby Roz Agricol and Kaseem Omar v. Kazakhstan*, UNCITRAL, 2013

<sup>101</sup> *Caratube International v. Kazakhstan* (n 59), para 90

<sup>102</sup> *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v. India*, Decision on the Respondent's Challenge to the Hon. Marc Lalonde and Prof. Francisco Orrego Vicuña, PCA Case No. 2013-09.

the challenge as appointing authority, held that, although the challenged arbitrator had a right to express his views, ‘equally the Respondent is entitled to have its arguments heard and ruled upon by arbitrators with an open mind.’<sup>103</sup> The arbitrator was therefore disqualified.

In *Grand River v. United States of America*,<sup>104</sup> a case arising under NAFTA, the claimant-appointed arbitrator was challenged for his parallel work as a counsel, representing parties before the Inter American Court of Human Rights against the United States. Noting that both positions required the challenged arbitrator to evaluate compliance by the United States with international commitments, ICSID secretary-general Ana Palacio, considered that his impartiality was compromised. The challenge was not sustained, but the arbitrator was asked to resign from one of his positions.

In *Telkom Malaysia v. Ghana*,<sup>105</sup> the claimant-appointed arbitrator was challenged as he was simultaneously acting as counsel in an ICSID annulment proceeding involving similar issues. Ruling on the challenge, The Hague District Court held that the positions were not compatible, and ordered the arbitrator to resign from one of the positions.

These decisions provide valuable insight as to a number of issues that affect arbitrators’ independence and impartiality. This paper will focus on a few of them:

- a) **Repeat appointments:** situations in which an arbitrator has been appointed repeatedly by the same applicant or respondent over a given period of time, creating a perception that their appointment obeys a logic of mutual convenience (e.g.: *Burlington Resources Inc. v. Republic of Ecuador*);
- b) **Issue Conflict:** situations in which the arbitrator has previously expressed opinions on a question of interpretation, or decided over similar legal issues, giving rise to doubts as to their ability to arbitrate open-mindedly, that is, without prejudging the case (e.g.: *Caratube v. KazakhstanCC/Devas v. India*).
- c) **Role Confusion/Double Hatting:** situations in which an individual acts as an arbitrator in one case and as a counsel in another, suggesting a bias ‘in the sense that their role in one case may

---

<sup>103</sup> Ibid., para 64

<sup>104</sup> *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, Decision on the Challenge to Arbitrator James Anaya

<sup>105</sup> *Telkom Malaysia Berhad v. The Republic of Ghana*, PCA case No. 2003-03

be perceived to inform actions in the other.’<sup>106</sup> No disqualification was pronounced on the ground of double hatting so far.<sup>107</sup> Yet it has been found to be practiced by a ‘highly visible and powerful core of some of the most influential actors of the system.’<sup>108</sup> Addressing this issue as part of the reform of ITA would only be normal, as it is widely accepted by domestic legal systems and international courts that counseling and adjudication are mutually exclusive functions.

Two further issues, which mainly affect international judges, will be diluted from chapter four.

---

<sup>106</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*, (Wolters Kluwer Legal, 2016) 655

<sup>107</sup> Ibid.

<sup>108</sup> Langford M, Behn D, Hilleren Lie R, ‘The Revolving Door in International Investment Arbitration’ [2017] 20 *Journal of International Economic Law* 301, 329

#### 4. HOW INTERNATIONAL COURTS REGULATE THE CONDUCT OF THEIR JUDGES IN RELATION TO INDEPENDENCE AND IMPARTIALITY

##### 4.1. The rationale behind comparing ITA to international courts

Although they appear similar in many aspects (freedom to appoint arbitrators, procedural rules etc.), international commercial arbitration and ITA are fundamentally different.<sup>109</sup> The sovereign capacity states exert when they consent to ITA (as opposed to the private capacity exerted when entering a commercial contract), the different nature of violations for which relief is sought, and the different nature of the rights that investors may invoke create a distinction between ITA and commercial arbitration, which resembles the distinction between public and private law.

Unlike international commercial arbitration, a mechanism meant to settle disputes arising out of a commercial relationship between parties acting in their private capacity — provided that they have both expressed consent thereto —, ITA ‘originates in the authority of the state to use adjudication to resolve regulatory disputes between individuals and the state.’<sup>110</sup> In other words, ITA is not available as the result of an agreement between foreign investors and the host state, but as a mechanism to which the host state gives ‘general consent’,<sup>111</sup> exercising its sovereign powers in doing so.

Furthermore, violations for which investors seek relief are not necessarily contractual breaches, as legislative or regulatory acts may be found to violate investors’ rights. Relief for contractual breaches may also be sought by investors when the foreign investor and the host state are bound by a contract, and when the IIA under which the dispute arises includes umbrella clauses. Such clauses equate contractual violations with treaty violations, thus ‘[bringing] contractual commitments and others under the treaty’s protective umbrella.’<sup>112</sup> Case law is divided over the effect of umbrella clauses. While some panels interpret umbrella clauses narrowly, as applying only

---

<sup>109</sup> Stephan Schill, ‘International Investment Law and Comparative Public Law—an Introduction’, in: Stephan Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2011), 14.

<sup>110</sup> Gus Van Harten, *Investment Treaty Arbitration and Public Law* (OUP 2007), 59.

<sup>111</sup> *Ibid.*, 65.

<sup>112</sup> Dolzer, Schreuer (n 16), 166.

to obligations contained in investment agreements entered into by states in their sovereign capacity,<sup>113</sup> others interpret them broadly by holding that they apply to all sorts of obligations, including ordinary commercial contracts.<sup>114</sup> Such lack of consensus seems to indicate that there is a debate between arbitrators over the public and private law implications of ITA.

Apart from controversial cases involving umbrella clauses, investment disputes generally consist in ‘determining the conformity of government conduct with standards contained in an international agreement (...)’,<sup>115</sup> and may thus be said to amount to administrative or constitutional review.<sup>116</sup>

The role of ITA panels may further be seen as equivalent to that of international courts, as both are tasked with ensuring that states comply with their international obligations. The comparison is even more relevant when drawn between ITA panels and human rights courts, which handle disputes arising when states fail to comply with their international obligations in relation to individuals. The public law conception of ITA thus constitutes the theoretical footing on which comparisons will be drawn between investment arbitrators and international judges, in light of independence and impartiality requirements.

Arbitrators and international judges may be faced with the same issues. Highlighting them will help to determine which features may foster or hinder the independence and impartiality of future adjudicators, should the ITA reform go towards the establishment of an international investment court. Conversely, the main issues that affect the independence and impartiality of arbitrators in ITA — *repeat appointment*, *issue conflicts* and *doubles hatting* — may not be problematic under public international law adjudication. Understanding why international courts are immune to some of the issues that affect arbitrators in relation to standards of independence and impartiality may bring to light judicial features that could be used to reform ITA.

---

<sup>113</sup> *EI Paso Energy International Company v. The Argentine Republic*, Decision on Jurisdiction, ICSID Case No. ARB/03/15, para 79.

<sup>114</sup> *Siemens A.G. v. The Argentine Republic*, Award, ICSID Case No. ARB/02/8, para 206.

<sup>115</sup> Schill (n 111), 17.

<sup>116</sup> *Ibid.*

## 4.2. The ICJ

Fifteen judges sit permanently on the ICJ. National groups at the Permanent Court of Arbitration (PCA) nominate one candidate each. Judges are then elected among the candidates by the UN General Assembly and Security Council, for nine-year renewable terms. One third of the seats are up for re-election every three years (ICJ Statute, art 3, 4 and 13). However, some commentators argue that national groups at the PCA are vulnerable to politicization, and that appointments are in fact carried out mainly by states, often informally.<sup>117</sup> Member states that are parties to a dispute without being represented at the court may appoint an *ad hoc* judge of their choice. The Court can thus comprise up to seventeen members.

Articles 16 and 17(1) of the ICJ Statute limit activities judges may pursue while in office. Article 17(2), supplemented by Practice Directions VII and VIII, bars judges and *ad hoc* judges from adjudicating a case in which they serve or have previously served as counsel, agent, advocate, or in any other capacity, that is from engaging in double-hatting. Cleis summarizes the situation by holding that ‘the roles are not only mutually exclusive when exercised simultaneously, but also successively, when the person has acted in the other role in the three years preceding the date of the nomination.’<sup>118</sup> Moreover, article 18 of the Statute, for its part, provides that a judge may only be dismissed from the Court if, in the unanimous opinion of the other members, he or she has ceased to fulfill the required conditions. As a result, states may not remove their judge from office following, for example, an unfavourable decision. Additionally, article 19 of the ICJ Statute grants judges diplomatic privileges and immunities in the discharge of their duties.

The attention paid to avoiding conflicts of interests and putting the dismissal of judges beyond the reach of member states seems to indicate a high level of judicial independence. Nevertheless, this observation may be nuanced, considering that the independence and impartiality of ICJ judges can be affected by issues specific to the ICJ — such as *national bias* — whilst other issues are traditionally more linked to ITA — such as *issue conflicts*, *repeat appointments* and *double hatting*.

Three cases have raised questions concerning the independence of ICJ judges in relation to *issue conflicts*. None of them did, however, result in the disqualification of a judge, nor did they

---

<sup>117</sup> Ruth Mackenzie, Kate Malleson, Penny Martin, and Philippe Sands QC, ‘The Nomination Process’, in Mackenzie, Malleson, Martin, and Sands QC (eds), *Selecting International Judges: Principle, Process, and Politics* (OUP 2010), 85-86

<sup>118</sup> Cleis (n 8), 95

provide for deep legal reasoning clarifying the court's interpretation of independence and impartiality standards.

In the *South West Africa Cases*,<sup>119</sup> neither the application nor the hearings were published, but commentators believe that the challenge followed 'the position taken by a Member when he represented his Government at a United Nations General Assembly meeting that discussed the matter of South West Africa.'<sup>120</sup>

In the *Namibia (South West Africa) Advisory Opinion* case<sup>121</sup>, three judges were challenged for statements made before being appointed, on behalf of their respective governments. The statements had been made while they served on UN bodies that dealt with matters linked with the situation in Namibia, and were ultimately considered as not falling under ICJ Statute article 17(2).

In the *Israeli Wall Advisory Opinion* case,<sup>122</sup> a judge was challenged during the proceedings due to his prior involvement in the UN committee that had made the request for the advisory opinion, his work at the Egyptian ministry of foreign affairs, where he had dealt with issues concerning Israel, and due to his alleged anti-Israel stance, reflected in a newspaper interview he had given in 2001. Noting that the professional activities had been carried out long before the case had arisen, that the interview did not deal with the wall question, and that the challenged judge 'could not be regarded as 'having previously taken part' in the case in any capacity'<sup>123</sup>, the court dismissed the request almost unanimously. In his dissenting opinion, the only judge who voted against dismissing the challenge admitted that the facts held against his colleague did not fall under Article 17(2) of the ICJ Statute, and thus did not justify in themselves his disqualification. However, drawing on the other meaning of impartiality, linked to the perception that a court adjudicates with fairness, he then criticized the Court's 'formalistic and narrow construction of Article 17, paragraph

---

<sup>119</sup> *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*: Judgment of 18 July 1966 and Order of 18 March 1965

<sup>120</sup> UNFCCC Compliance Committee, Summary of Relevant Case Law on Conflict of Interest (2010) CC/7/2010/2, para 12

<sup>121</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 16.

<sup>122</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I. C.J. Reports 2004, p. 136

<sup>123</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Order of 30 January 2004, I.C.J. Reports 2004, p. 3

2,<sup>124</sup> and concluded that the interview had created an appearance of bias justifying the disqualification.

Despite the succinctness of the court's reasonings, it can be inferred that one of the main issues that affect ICJ judges when it comes to independence and impartiality is linked to the perception that a judge will not be able to adjudicate disputes with an open mind, due to previous professional experiences, stances or statements.

On the other hand, *repeat appointment* does not arise in the same manner in a system in which judges are not appointed on a case by case basis. In the context of an international court in which judges are granted security of tenure, repeat appointment can be observed as a practice by which states reappoint their judge to the ICJ for a second or a third term. As a result, some judges hold their position for significantly long lapses of time.<sup>125</sup> In addition to slowing down the rotation of ICJ judges, this feature grants states the ability to leverage their reappointing power in order to rid the Court of undisciplined judges, thus establishing a high level of judicial accountability. This may in turn pressure judges to adopt career-motivated rulings, although, as noted by Dunoff and Pollack, empirical evidence in support of that claim is hard to gather.<sup>126</sup> The fact is, however, that unlimited reappointments, even in the absence of actual pro-home state bias, may create suspicion thereof, to the detriment of judges and the legitimacy of the ICJ.

Furthermore, ICJ judges were allowed until a few month ago to act as arbitrators in ITA and commercial disputes, based on 'a long-standing tradition of the Permanent Court of International Justice (...)'<sup>127</sup> While engaging in what may be compared to *double hatting* or *role confusion*, ICJ judges were required to prioritize their work as members of the Court, and carry out arbitration only in cases which would not be submitted to the ICJ in the future,<sup>128</sup> although it is not clear how such certainty may have been attained.

The tacit authorization for ICJ judges to act as ITA and commercial arbitrators during their term seems to be in sharp opposition with Articles 16 and 17(1) of the ICJ Statute, which establish professional incompatibilities. It is all the more serious considering that ICJ judges are paid an

---

<sup>124</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Dissenting Opinion of Judge Buergenthal, para 13

<sup>125</sup> Former ICJ judge Manfred Lachs, appointed by Poland in 1967, held his position until his death in 1993.

<sup>126</sup> Dunoff, Pollack (n 2), 41

<sup>127</sup> Report of the Secretary-General, 'Conditions of service and compensation for officials other than Secretariat officials, Members of the International Court of Justice' (1995) U.N. Doc. A/C.5/50/18, para 31

<sup>128</sup> *Ibid.*, para 32



annual salary of approximately USD 173.000 free of taxes, whereas the average individual fee of an ITA arbitrator approaches USD 426.000 per case,<sup>129</sup> therefore suggesting that judges may have a financial interest in prioritizing their work as arbitrators over their work as judges. More importantly, this raises concerns in terms of judicial independence, as it creates doubts that a judge's relation to a state in the context of an ITA dispute may dictate that judge's behavior in relation to the same state during an ICJ dispute.

In recent years, the ICJ faced substantial backlash over this practice. While a number of academics (including a former ICJ judge) took a strong stance against double hatting,<sup>130</sup> drafters of the CETA were careful to ban it in relation to ICS judges.<sup>131</sup> In October 2018, the ICJ, represented by its President, announced that judges would stop engaging in commercial and investor-state arbitration. The decision was introduced as an attempt to '[place] beyond reproach the impartiality and independence of Judges,'<sup>132</sup> thus indicating a certain degree of critical reflexivity exercised by the Court.

*Role confusion, issue conflicts and repeat appointments* are, however, not the only issues that affect ICJ judges. *National bias* has also been described as a possible threat to the independence and impartiality of ICJ judges.<sup>133</sup> For instance, national identity may influence a judge's decision-making on three separate grounds:<sup>134</sup>

- a) psychologically when, due to a previous career in the administration or judiciary of their home state, judges are inclined to adopt their government's views on a topic;
- b) economically, when a judge's rulings are motivated by their desire to be reappointed by the appointing state;

---

<sup>129</sup> Nathalie Bernasconi-Osterwalder, Martin Dietrich Brauch, 'Is "Moonlighting" a Problem? The role of ICJ judges in ISDS' (IISD Commentary, 2017), 2-3 <<https://www.iisd.org/sites/default/files/publications/icj-judges-isds-commentary.pdf>> accessed 7 May 2019

<sup>130</sup> Marie Davoise, 'Can't Fight the Moonlight? Actually, You Can: ICJ Judges to Stop Acting as Arbitrators in Investor-State Disputes' (EJIL: Talk!, November 2018) <<https://www.ejiltalk.org/cant-fight-the-moonlight-actually-you-can-icj-judges-to-stop-acting-as-arbitrators-in-investor-state-disputes/>> accessed 7 May 2019

<sup>131</sup> CETA, art 8.30(1)

<sup>132</sup> Speech by H.E. Mr. Abdulqawi A. Yusuf, President of the International Court of Justice, on the Occasion of the Seventy-Third Session of the United Nations General Assembly (Press release, 25 October 2018), 12 <<https://www.icj-cij.org/files/press-releases/0/000-20181025-PRE-02-00-EN.pdf>> accessed 7 May 2019

<sup>133</sup> Cleis (n 8), 99.

<sup>134</sup> Posner E, de Figueiredo M, 'Is the International Court of Justice Biased?' [2005] 34 Journal of Legal Studies 599, 608

c) through the selection process, by which states may be tempted to appoint a loyal judge in order to maximize their chances of obtaining favourable judgements.

It has been suggested that ICJ judges tend to exercise geopolitical bias, by favouring disputing states that resemble their home state, be it economically, culturally, or in terms of political regime.<sup>135</sup> This issue, which results from the appointment process being state-driven, will need to be addressed as part of the ITA reform. Different appointment methods and institutional features could make judges less responsive to career incentives, while mitigating the impact of national and geopolitical bias. For example, financial incentives to vote in favour of the appointing state in order to maximize chances of reelection could be zeroed by making terms non renewable, and by making appointments fall within the competence of a collegial body. On the other hand, pro-home state bias due to a judge's cultural background or past career as a public servant seems more challenging to tackle, although setting up more geographically and culturally diverse panels may contribute to downplay the issue. These issues are discussed in more detail under chapter 5.

#### 4.3. The ECtHR

Article 21(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR') provides that 'during their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office.' Article 22 ECHR provides that each of the 47 members of the Council of Europe nominates three candidates, one of which is then elected by the Parliamentary Assembly. Thus, there is one judge per contracting state.

Several provisions are of significant importance in relation to independence. ECHR articles 23(1) and 23(3) respectively provide that judges are elected for non-renewable nine-year terms, and that they can only be removed from office if the other judges decide so by a majority of two-thirds. Rule no. 4 of the ECHR Rules of Court deals with incompatibilities. Rule 4.1 prohibits ECtHR judges from engaging in 'political or administrative activity or any professional activity which is incompatible with their independence or impartiality or with the demands of a full-time office', whereas rule 4.2 prohibits former ECtHR judges from acting as counsel in proceedings before the ECtHR that have been lodged while they were still in office, and from acting as counsel in

---

<sup>135</sup> Ibid.

proceedings before the ECtHR during the two years following the date on which they have ceased to hold office.

The rule establishing non-renewable nine-year terms was adopted through ECHR Protocol no. 14, which entered into force in 2010, as a response to concerns that had emerged over several states' decision not to reappoint their judges based on political considerations. Such had been the case for the Bulgarian judge in 1997, the Moldovan judge in 2001 and the Slovakian judge in 2004.<sup>136</sup> The detrimental result of such policy was to deter judges who wanted to stay in office from voting against their state,<sup>137</sup> which would hinder their independence.

András Sajó, former Hungarian judge at the ECtHR between 2008 and 2017 holds that far from suggesting national bias on behalf of ECtHR judges, studies 'indicate the personal integrity of the judges.'<sup>138</sup> Indeed, Voeten points out that ECtHR judges are less likely to rule in favor of their government when such finding would put them at odds with the other judges, thus suggesting 'a desire not to be perceived as the lone dissenter in favor of the home government.'<sup>139</sup> Moreover, evidence shows that judges are more likely to vote in favour of their home state when the case involves a violation of art 3 ECHR (prohibition of torture). On the other hand, the idea that career incentives have an influence over judges' behaviours and the idea that judges are biased in favour of states that resemble theirs economically or politically are not supported. ECtHR judges do, however, engage in policy seeking. Judges from former socialist countries are indeed more likely to find violations against their home state, but also against other former socialist states. Voeten concludes that ECtHR judges do not display systematic bias, whether geopolitical or career-oriented.<sup>140</sup> Rather, judges are influenced by their professional and geographical background, which is reflected in judicial behaviours.<sup>141</sup>

---

<sup>136</sup> Voeten E, 'The Impartiality of International Judges: Evidence from the European Court of Human Rights' [2008] 102 *The American Political Science Review* 417, 421.

<sup>137</sup> *Ibid.*

<sup>138</sup> András Sajó, 'An All-European Conversation: Promoting a Common Understanding of European Human Rights', in S. Flogaitis et al. (eds.), *The European Court of Human Rights and Its Discontents* (Elgar, 2013), 189.

<sup>139</sup> Voeten (n 136), 426.

<sup>140</sup> *Ibid.*, 430.

<sup>141</sup> *Ibid.*, 431.

#### 4.4. The WTO Dispute Settlement Mechanism (DSM)

Disputes brought before this mechanism oppose WTO member-states, and arise from a state's breach of its commitments under WTO Law. WTO Law is based on the Agreement Establishing the World Trade Organization ('WTO Agreement'), and the array of agreements that stem from it. These agreements include for example the the General Agreement on Tariffs and Trade ('GATT') and the General Agreement on Tariffs and Services ('GATS'). A variety of disputes are heard, as the mechanism's jurisdiction ranges from disputes over measures regarding customs duties, sanitary measures, subsidies, measures affecting market access for services, etc.<sup>142</sup>

Dispute settlement is performed on two levels. In the first instance level, disputes are submitted to *ad hoc* panels, composed of three or five members. Panelists are appointed jointly by the disputing parties, based on suggestions made by the WTO Secretariat,<sup>143</sup> which may use, in doing so, a list of qualified governmental and non-governmental officials.<sup>144</sup> When disputing parties fail to agree, panelists are appointed by the WTO Director General<sup>145</sup>.

Panels do not issue decisions but reports, which may then be appealed before the Appellate Body ('AB'). Unlike panels, the AB has a permanent structure, and is composed of seven judges appointed for four-years terms by the DSB, an emanation of the WTO General Council composed of delegates from every WTO member states.<sup>146</sup>

When administering trade disputes, panelists and AB members are subject to independence and impartiality requirements. Such regulations are to be found in the Understanding on the Rules and Procedures Governing the Settlement of Disputes ('DSU'). Panels must be 'selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience'<sup>147</sup>, and should not include nationals of one of the disputing parties, unless the parties have agreed otherwise.<sup>148</sup>

---

<sup>142</sup> Peter Van Bossche, Werner Zdouc, *The Law and Policy of the World Trade Organization* (3rd ed. Cambridge University Press, 2013), 163.

<sup>143</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, art 8.6.

<sup>144</sup> *Ibid.*, art 8.4.

<sup>145</sup> *Ibid.*, art 8.7.

<sup>146</sup> *Ibid.*, art 17.2.

<sup>147</sup> *Ibid.*, art 8.2.

<sup>148</sup> *Ibid.*, art 8.3.

AB members may be nationals of one of the disputing parties, this being offset by their duty to 'be unaffiliated with any government.'<sup>149</sup> They must not participate in the adjudication of 'any disputes that would create a direct or indirect conflict of interest,'<sup>150</sup> and they are required to officiate 'without accepting or seeking instructions from any international, governmental, or non-governmental organization or any private source.'<sup>151</sup> Furthermore, panelists and AB members are under a duty to disclose 'the existence or development of any interest, relationship or matter that that person could reasonably be expected to know and that is likely to affect, or give rise to justifiable doubts as to, that person's independence or impartiality.'<sup>152</sup> They may face disqualification in case of violation of their obligations of independence, impartiality or confidentiality.<sup>153</sup>

Despite a limited number of provisions guaranteeing the independence of panelists and AB members, the latter have been described by commentators as 'highly independent from the litigants and member states.'<sup>154</sup> Possible evidence of this is that no challenge has been filed against panelists or AB members in the course of WTO disputes. It could be explained by the combination of a party-driven appointment system, which requires the parties to agree on all panelists, with an institution-driven appointment system coming into play when the first situation does not materialize. By removing party influence, such a system 'diminishes the parties' reciprocal mistrust.'<sup>155</sup> Another factor is the existence of an appeal mechanism, which alleviates the incentives to '[avert] an unfavorable outcome by filing arbitrator challenges.'<sup>156</sup>

The panels and the AB enjoy a high degree of judicial independence in relation to WTO member-states. Firstly, because although reports only become effective once adopted by WTO members, a unanimity vote is required for reports to be overruled (i.e. negative consensus rule). Secondly, because the high material cost induced by a withdrawal from the WTO tend to deter

---

<sup>149</sup> Ibid., art 17.3.

<sup>150</sup> Ibid.

<sup>151</sup> Working Procedures for Appellate Review, WT/AB/WP/6, rule 2(3).

<sup>152</sup> Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes WT/DSB/RC/1, rule III.1.

<sup>153</sup> Ibid., rule VIII.8.

<sup>154</sup> Dunoff, Pollack (n 2), 47.

<sup>155</sup> Cleis (n 8), 105.

<sup>156</sup> Ibid., 106.

states from threatening to exit the dispute process. Lastly because reports issued by the AB may not be overridden by WTO members through legislative processes.<sup>157</sup>

State influence over WTO AB members may, however, play out in other circumstances, as evidenced by the blocking by the United States of the reappointment of Korean judge Seung Wha Chang.<sup>158</sup> This move can be construed as the last manifestation of the United States' distrust towards the WTO, fueled among other things by the alleged tendency of the organization's DSM to display judicial activism at the expense of US trade interests<sup>159</sup>, but also by the unfair competition said to result from the granting of special treatment to developing yet powerful economies such as China, Korea, and India.<sup>160</sup> It was then followed by the blocking of all appointments of AB members, leaving the organ with three members only — the minimum number required for it to be able to examine appeals.<sup>161</sup>

This situation is a consequence of Articles 2.4 and 17.2 of the DSU, which provide that decision-making at the DSB is based on consensus and that AB members are appointed by the DSB. It raises the question whether institutional appointment as practiced at the WTO benefits from unanimous decision-making. On the one hand, unanimity grants selected judges a strong legitimacy, thus making their decisions harder to question. On the other hand, it gives states a right to monitor and possibly to block appointment processes until a candidate they find acceptable is suggested. Chapter 5 will determine whether and how institutional appointment could be adopted in the context of a reform of ITA, and how it could be improved in order to avoid situations of blockage such as the one currently faced by the WTO.

---

<sup>157</sup> Dunoff, Pollack, *The Judicial Trilemma* (n 10), 47.

<sup>158</sup> Simon Lester, 'Commentary: Trump's dangerous approach to the 'supreme court' of global trade', Reuters (19 June 2018) <<https://www.reuters.com/article/us-lester-wto-commentary/commentary-trumps-dangerous-approach-to-the-supreme-court-of-global-trade-idUSKBN1JF1UI>> (accessed 6 April 2019).

<sup>159</sup> *Ibid.*,

<sup>160</sup> Tom Miles, 'U.S. drafts WTO reform to halt handouts for big and rich states', Reuters (Geneva, 15 February 2019) <<https://www.reuters.com/article/us-usa-trade-wto/u-s-drafts-wto-reform-to-halt-handouts-for-big-and-rich-states-idUSKCN1Q426T>> (accessed 6 April 2019)

<sup>161</sup> *US blocks renewal of WTO trade court judge as deadlock looms*, France 24, 28 August 2018 <<https://www.france24.com/en/20180828-us-blocks-renewal-wto-trade-court-judge-deadlock-looms>> (accessed 6 April 2019)

#### 4.5. Interim Conclusions

Evidence from the ICJ, the ECtHR and the WTO has shown that State-appointed judges are rather independent, although certain issues need to be resolved. In addition to the ICJ judges' perceived or actual proneness to adopt *career-motivated behaviours* by showing deference towards their home state in order to secure reappointment or future work opportunities in the public sector, commentators have exposed that some of these judges adjudicate in favor of states culturally and economically similar to theirs, thus exercising *national and geopolitical bias*. ECtHR judges have been described as likely to engage in policy-seeking judicial behaviors, while being overall immune to *repeat appointment* and *double hatting*, and unlikely to display *national or geopolitical bias*. WTO panelists and AB members, who perform similarly with respect to these issues, have also been praised for their independence. However, recent attempts from states to exert influence over WTO AB members at the pre-appointment level may downgrade this assessment in the future.

The next chapter will provides for an assessment of how the issues highlighted in chapters three and four could be tackled in light of three possible reform models.

## 5. POSSIBLE REFORM TRACKS

Taking account of the substantial backlash faced by ITA in relation to the system's lack of independence, diversity and predictability, the United Nations Commission on International Trade Law tasked its Working Group No. III with assessing the flaws of the current system, investigating the prospects of reforming ITA and elaborating recommendations based on its findings. The Working Group, which is composed of state delegates and legal scholars, had its first session in November 2017.<sup>162</sup> However, the group soon appeared to be deeply divided, since depending on which end of the investment flux they are on, states have diverging views as to how investment disputes should be settled.

Such views, despite their broad diversity, can be categorized in three groups based on how comprehensive a reform they call for.<sup>163</sup> *Incrementalists* hold that the current system is globally satisfactory, although one-off improvements may be achieved through limited reforms. *Systemic reformists* do not call into question the relevance of investor-state dispute settlement as a means of settling investment disputes. However, as they acknowledge that ITA suffers from a lack of legitimacy, they call for changes in the normative framework governing it. *Paradigm shifters* dispute the very idea that investors may sue states before international courts or tribunals.<sup>164</sup>

This chapter puts forward three models of courts, each one of which may be deemed acceptable by one of the three aforementioned perspectives. The first option consists of establishing a multilateral investment court competent over disputes between investors and states. This option, which I will refer to as the *ECtHR model*, may satisfy the aspirations of systemic reformists by preserving the investor-state nature of investment disputes while fostering the normative framework within which those disputes are handled. The second option, which is referred to as the *WTO AB model*, consists of keeping the current system untouched, while establishing an appellate mechanism accessible for states on an opt-in basis, according to the same model used for the Mauritius Convention.<sup>165</sup> Such a scenario would probably suit incrementalists, as it would have a minimum impact on ITA while allowing states to individually take an extra step towards improving

---

<sup>162</sup> UNCITRAL, Working Group III: Investor-State Dispute Settlement Reform <[http://www.uncitral.org/uncitral/en/commission/working\\_groups/3Investor\\_State.html](http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html)> (accessed 7 May 2019).

<sup>163</sup> Roberts A, 'Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration' [2018] 112 *American Journal of International Law* 410, 416-419.

<sup>164</sup> *Ibid.*

<sup>165</sup> Kaufmann-Kohler, Potestà (n 64) 31.



its legitimacy and consistency. The third option consists of establishing a permanent investment court competent over interstate investment disputes, thus putting an end to ITA in accordance with the wishes of paradigm shifters. This option is referred to as the *ICJ model*.

I will analyze how each of these models would perform in relation to the five main issues that, as explained above, affect the independence and impartiality of ITA arbitrators and international judges. These are *repeat appointment*, *issue conflict*, *role confusion/double hatting*, *national and geopolitical bias*, and *responsiveness to career-driven incentives*.

### 5.1. Repeat Appointments

Repeat appointment may arise under ITA, when an arbitrator is appointed repeatedly over time by the same claimant or by the same law firm. Should the ECtHR-model be used to reform investor-state dispute settlement, repeat appointment would not arise in the same way as in ITA, as judges would be appointed for fixed terms. Repeat appointment based on multiple terms, as may be the case at the ICJ, would not be an issue either since terms would not be renewable.

In the context of a reform based on the *WTO AB-model*, ITA would not be abolished. The specificity of this model lies in the establishing of a standing AB. At the first instance level, case-based repeat appointment would thus continue to be an issue, as the model would not bring any changes to ITA as it currently exists. Repeat appointment on the part of arbitrators at first instance may, however, be avoided if the issue were a ground for annulment on appeal. Implementing such a feature would require to determine how many past appointments by the same party, or by the same counsel, are necessary to jeopardize an arbitrator's independence, and which timeframe to consider. The IBA guidelines, for example, mention situations in which an arbitrator has, in the past three years, been appointed by one of the parties on two or more occasions, or has been appointed by the same counsel on more than three occasions.<sup>166</sup> However, such situations belong to the orange list, which means that they are waivable if the parties so agree. In order to constitute a ground for annulment, the threshold would therefore need to be set higher. For instance, it seems reasonable to raise the maximum number of same-party appointments to three or more, and the maximum number of same-counsel appointment to five or more, while maintaining the two-year timeframe.

In appeal, repeat appointments based on multiple terms would constitute an issue, given that members of the WTO AB are appointed for renewable four-year terms. The likelihood of repeat

---

<sup>166</sup> IBA Guidelines, para 3.1.3 and 3.3.8

appointments based on multiple terms occurring at the WTO AB should however be nuanced for at least two reasons. Firstly, the appointment process is conceived in a way that it only takes one state delegate of the DSB to block the appointment of an AB member. This institutional feature, which gives member states the ability to counterweight each other's ambitions, may however have detrimental results in other situations. By obstructing the reappointment process, any state may have a real influence on the composition of the AB, as recently demonstrated by the USA's blocking of judge Seung Wha Chang's reappointment. Secondly, a few prominent members of the WTO (the EU, China and India) recently spoke in favour of a reform that would make AB members' terms non-renewable but longer. It has been suggested that terms should last between six and eight years rather than four as is currently the case.<sup>167</sup> Should the reform go through, repeat appointments based on multiple terms would therefore become impossible. If the WTO model was transposed to investment disputes, with the inclusion of the reform project abolishing renewable terms, it would solve the issue of repeat appointments.

If the ICJ-model was adopted in its current state, repeat appointment based on multiple terms would be an issue. A simple solution would thus consist of making terms non-renewable in order to prevent repeat appointment and to ensure that judges do not adjudicate based on possible career prospects. Reasonably long judicial terms could also be implemented (as is presently the case with the ICJ, where terms last nine years), in order to foster the consistency of case law.

## 5.2. Issue Conflicts

Issue conflicts arise when a judge's known opinions or previous decisions on a given topic create a perception that they will be unable to adjudicate a dispute with an open mind. Issue conflicts exist when the arbitrator has a 'relationship with the subject matter of, as opposed to the parties to, a dispute.'<sup>168</sup> Tangible elements, such as a payment or a friendship, can indicate that there is some form of relationship between a judge and one of the parties. In contrast, a relationship with the subject matter of a dispute falls within a judge's personal convictions and is therefore more difficult to quantify. It must be acceptable for judges to issue reasonings based on their own mindset, and

---

<sup>167</sup> Communication from the European Union, China and India to the WTO General Council (26 November 2018) WT/GC/W/753, 1 <[http://trade.ec.europa.eu/doclib/docs/2018/november/tradoc\\_157514.pdf](http://trade.ec.europa.eu/doclib/docs/2018/november/tradoc_157514.pdf)> (accessed 7 May 2019)

<sup>168</sup> Gavan Griffith, Daniel Kalderimis. 'Pure' Issue Conflicts in Investment Treaty Arbitration' in (eds) David D. Caron, Stephan W. Schill, Abby Cohen Smutny, and Epaminontas E. Triantafylou, *Practising Virtue: Inside International Arbitration* (OUP 2015), 607.

that a small share of subjectivity is inevitable. Nevertheless, it is necessary to shield the disputing parties from such subjectivity whenever it poses a threat to fair process.

ITA arbitrators are not the only adjudicators who may be subject to issue conflicts. The *South West Africa* cases and the *Construction of a Wall* case have shown that ICJ judges sometimes raise doubts as to their ability not to prejudge a case, due to stances they may have previously expressed. Although no ECtHR judge or WTO AB member were challenged due to issue conflicts, I did not find anything that points out to their immunity to such bias. Therefore, it appears that none of the three models would, if adopted as it is now, provide for a solution to issue conflicts. Furthermore, a judge sitting on the WTO-like AB may be subject to issue conflicts if he or she was to review an arbitral award similar to one they had rendered several years prior to being appointed, while acting as an arbitrator.

Institutional features, however, may be of help in circumventing the detrimental effects issue conflicts have on the parties' conviction that adjudication is carried out with fairness. A distinction must be drawn between solutions that may be applied to the reform tracks that involve the creation of a permanent court, those that would apply to the WTO-model in first instance only, and those that would apply to the WTO-model on appeal only.

A reform according to the *ECtHR model*, the *WTO AB model* or the *ICJ model* could achieve a significant level of independence and impartiality by facilitating the dismissal of biased judges. Such an objective may be attained by establishing courts with tenured judges, among which small *ad hoc panels* would be set up to settle individual disputes. Panels would only include a fraction of the judges so that, in case of issue conflict, biased judges could be disqualified by their peers and replaced by another member of the court. Should the appointment of judges be institution-driven, an alternative could consist in making the appointing authority competent over disqualification procedures.

As to the first instance of the *WTO AB model*, the margin for manoeuvre is rather limited regarding the enhancement of independence and impartiality. This is due to the fact that the purpose of this model is to keep ITA's features as they are. Some commentators advocate for the establishment of an Appointment and Confirmation Committee,<sup>169</sup> tasked with assessing whether a selected arbitrator meets the independence and impartiality requirements, and rejecting the appointment where appropriate. This solution seems reasonable. Indeed, it would add consistency to the disqualification process, by making it fall within the jurisdiction of a permanent body bound by

---

<sup>169</sup> Cleis (n 8), 229

its precedents. Additionally, it would result in the disqualification process not being handled by the challenged arbitrator's co-arbitrators, who may display indulgence towards their colleague for various reasons.<sup>170</sup> However, since this option requires the modification of ITA's current institutional framework, it shows little compatibility with a model meant to gather support from states that are reluctant to revolutionize the system.

Another solution could consist in making issue conflict on the part of an arbitrator at first instance a ground for annulment of the award on appeal. This solution is likely to encourage arbitrators to lean towards a more neutral position, out of concern that their reputation might be tarnished should their bias result in the award being annulled on appeal. On the other hand, issue conflicts might be hard to prove. That is why both this solution and the one which involves the constitution of panels with substitutable members would require the drafters to set out clear standards for disqualification in one case and annulment in the other case.

The IBA guidelines on conflicts of interest constitute an example of how quantitative standards may be established<sup>171</sup> although, as mentioned above, this instrument failed to achieve predictability in respect of disqualification proceedings, in addition to not being best suited for ITA. From a methodological point of view, however, the technique consisting in anticipating and setting out scenarios involving the risk of an issue conflict may be used here too. The IBA guidelines may, in this regard, be incorporated in the statute of the future court, provided that it is supplemented with situations specific to investment disputes. Situations amounting to issue conflicts, thus constituting grounds for disqualification in a future investment court or grounds of annulment on an appellate mechanism, may include cases in which an adjudicator has expressed animosity towards one of disputing parties prior to or during the dispute. Similarly, situations where one of the adjudicators is faced with the interpretation of a provision that they have repeatedly interpreted in the same manner in the past, or on which their opinion is well known, may become grounds for disqualification or annulment.

---

<sup>170</sup> Ibid., 231

<sup>171</sup> Ibid., 233.

### 5.3. Double Hatting/Role Confusion

Double hatting — a practice through which the same person acts alternatively as adjudicator and as counsel in different disputes — has been described as a threat to the independence of arbitrators. Double hatting is no longer a critical issue regarding international judges. While the ECtHR and the WTO AB impose strict limitations on activities that may be pursued by their judges, the ICJ recently banned double hatting by prohibiting its members from engaging in commercial and investment treaty arbitration. This prohibition was, however, the result of a self-regulating process that ICJ judges may be free to overturn in the future.

Whichever court model is chosen, the issue of *double hatting* seems, at first sight, simple to avoid, by enacting regulations prohibiting judges from holding positions besides their judicial office. Such a prohibition may, however not be absolute. Furthermore, it should be balanced by granting judges certain benefits. Similarly to domestic judges in multiple countries, this prohibition may be set out in a way that would not cover academic positions.<sup>172</sup> This requirement would furthermore need to be complemented with the granting of a long-term tenure to judges and the establishment of a reasonably high, fixed salary, paid on a monthly basis rather than on a case-by-case basis. Prominent commentators hold that granting adjudicators security of tenure would ensure their independence by freeing them ‘from incentives related to possible reappointments.’<sup>173</sup> The international court may otherwise fail to attract skilled judges, who may instead be tempted to continue working in ITA or in commercial arbitration.

On the other hand, putting an end to party-appointment would deprive investment disputes of what has been described as a factor of legitimacy in the eyes of both investors and host states,<sup>174</sup> while creating a risk that only pro-state adjudicators be appointed.<sup>175</sup> However, I submit that granting judges security of tenure, and subjecting them to tighter independence and impartiality requirements with better defined sanction mechanisms in case of a violation, would increase the normative legitimacy of the system. In a court paradigm, this would probably compensate for the loss of legitimacy incurred for the abolition of party-appointment. As to the risk that exclusively

---

<sup>172</sup> In France, Article 8 of Ordonnance no. 58-1270 of 22 December 1958 provides that derogations to the general prohibition may be granted to judges who wish to teach subjects in their field of competence, whereas no prior authorization is required for a judges to carry out scientific work.

<sup>173</sup> Kaufmann-Kohler, Potestà (n 64), 18.

<sup>174</sup> Brower C, Schill S, ‘Is Arbitration a threat or a Boon to the Legitimacy of International Investment Law?’ [2009] 9 Chicago Journal of International Law 471, 494.

<sup>175</sup> Kaufmann-Kohler, Potestà (n 64) 18,19.

pro-state judges may be appointed, it could be minimized through a series of adjustments, which will be further explained in chapter 5.4.

Judges of the *WTO AB model* may be subject to double hatting issues if they were also allowed to act as arbitrators at first instance. Two different situations can be conceived: the situation in which a member of the appellate mechanism adjudicates ITA disputes and appellate reviews simultaneously, and the situation in which a member of the appellate mechanism reviews an award that he or she has rendered as an ITA arbitrator, or in which he or she acted as counsel before being appointed as member of the AB.

These situations do not occur at the WTO AB, as the functions of panelist and AB member are mutually exclusive pursuant to the DSU. The reform track based on the WTO-model would therefore benefit greatly from a provision prohibiting members of the appellate mechanism from acting as arbitrators, and requiring them to recuse themselves if faced with reviewing an award that they would have rendered prior to being appointed as members of the appellate mechanism.

#### 5.4. National and Geopolitical Bias

National and geopolitical bias, which are issues faced by ICJ judges, seem likely to arise in an interstate investment court based on the *ICJ model*. In an investment court based on the *ECtHR model*, it seems reasonable to think that judges will also be influenced by cultural and political factors. For example, a judge from a country that has been sued before ICSID panels many times in the past (Venezuela or Argentina for example) may be more inclined to show leniency towards respondent states than a British or a Dutch judge would. Similarly, judges from civil law and common law countries may display profound differences in their legal reasoning, although it has been demonstrated that, at least in the context of the ECtHR, these differences do not translate into cultural bias.<sup>176</sup>

The issue of *national and geopolitical bias* also raises the question whether such a manifestations of partiality should, in order to be prevented, be taken into consideration when appointing judges, and later when assigning cases to them.

A possible solution at the appointment level in order to prevent judges from siding with their appointing state would consist in abolishing state appointment, and replacing it with institutional appointment as currently practiced at the WTO. As mentioned above, members of the WTO AB are appointed through consensus by the DSB, an assembly representing each of the organization's

---

<sup>176</sup> Voeten (n 136), 430.

member states. The absence of a direct link between appointees and appointers is, to a significant extent, a reason why AB members enjoy a high degree of perceived independence and impartiality, and why no AB member was challenged so far. Cases could furthermore be assigned in a way that judges would be automatically barred from adjudicating disputes involving their state of nationality, or an investor of the same nationality as theirs. Judges would thus be unable to display national bias. The aforementioned feature consisting of a court with tenured judges sitting on small *ad hoc* panels would allow to implement that prohibition while making sure that disputes are always settled by the same number of judges.

In the case of a permanent court settling disputes between investors and states another question arises: what if state-driven or institution-driven appointment result in judges being biased against investors? As a response, some have suggested that the future appointment process could involve the consultation of business organizations.<sup>177</sup> Such a feature would, in turn, raise a number of difficulties. States and business organizations may, for example, appoint judges jointly through unanimous decision-making, although it seems unlikely that states would agree to be treated on an equal basis with private companies for that purpose. States may otherwise appoint half of the judges while business organizations would appoint the other half. This may however create an impression that the court is divided between pro-state judges and pro-investor judges, which would undermine the perceived impartiality of judges.

Lastly, national and geopolitical bias could be minimized by ensuring that, by virtue of its composition, the future court be geographically, legally and culturally diverse. Some observers argue that most of the influential pool of arbitrators are European and North American men, and that by enhancing the system's diversity, stronger normative and sociological diversity might be achieved.<sup>178</sup> Others suggest that diversity improves the quality of decision making.<sup>179</sup> Article 9 of the ICJ Statute provides that 'representation of the main forms of civilization and of the principal legal systems of the world should be assured.' Similarly, pursuant to an informal rule, three or four of the seven members of the WTO AB must originate from developing countries. A multifaceted concept, diversity may however be difficult to attain only through the prism of geography, given

---

<sup>177</sup> Kaufmann Kohler, Potestà (n 64), 61.

<sup>178</sup> Andrea Kay Björklund, 'The Diversity Deficit in Investment Arbitration' (EJIL: Talk!, 4 April 2019) <<https://www.ejiltalk.org/the-diversity-deficit-in-investment-arbitration/>> accessed 7 May 2019.

<sup>179</sup> Gabrielle Kaufmann-Kohler, Michele Potestà, 'The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards' (CIDS Supplementary Report, 2017), 27 <[https://www.uncitral.org/pdf/english/workinggroups/wg\\_3/CIDS\\_Supplemental\\_Report.pdf](https://www.uncitral.org/pdf/english/workinggroups/wg_3/CIDS_Supplemental_Report.pdf)>.

that a geographically diverse court may not necessarily be a gender-diverse, or a background-diverse one.

In this regard, the International Criminal Court (ICC) appears even more committed to ensuring representativity: when electing ICC judges, member states of the Rome Statute are bound by minimum voting requirements (MVR), that are established in respect of different factors such as geographical origin, gender, and professional/academic background.<sup>180</sup> The result is that at any given time no less than six members of the court are women, and no less than six are men, no less than three members of the court originate from each of the five regional groups of states, no less than nine judges have a background in criminal law, and no less than five have a background in another relevant field.<sup>181</sup> One third of the 18 seats are up for reelection every six years. MVRs are therefore redefined at every election, based on the qualifications needed from future judges in order to match the court's diversity requirements.

Despite being somewhat complicated and slow,<sup>182</sup> the ICC's institution-driven mode of appointment stands out as the one that truly grasps the complex meaning of the concept of diversity. If used in any of the three models put forward in this paper, it would ensure that diversity criteria are not 'considered individually and in a strict isolation from one another',<sup>183</sup> which would certainly enhance the future court's degree of representativity and lessen the risk that judges side uniformly with or against one disputing party. At the same time, it would provide for an alternative to both party-driven appointment and state-driven appointment, thus isolating judges from powerful private actors and states.

Considered together, diversity and insulation from both private and public decision-makers are two features that would significantly foster the independence and impartiality of judges.

---

<sup>180</sup> 'The Nomination and Election of Six New ICC Judges', (Coalition for the International Criminal Court, December 2017), 2, 3 <[http://www.coalitionfortheicc.org/sites/default/files/cicc\\_documents/cicc\\_memo\\_2017\\_icc\\_judicial\\_elections.pdf](http://www.coalitionfortheicc.org/sites/default/files/cicc_documents/cicc_memo_2017_icc_judicial_elections.pdf)> accessed 7 May 2019

<sup>181</sup> ICC Assembly of State parties, 'Informal guide and commentary to the procedure for the nomination and election of judges of the International Criminal Court' (16th session, 5 May 2017) ICC-ASP/16/INF.2, 6-8

<sup>182</sup> *Ibid.*, 2-3

<sup>183</sup> Polonskaya K, 'Diversity in the Investor-State Arbitration: Intersectionality Must be part of the Conversation', 19 *Melbourne Journal of International Law* 260, 279



## 5.5. Career-motivated Judicial Behaviours

Career- and economically-motivated judicial behaviours can result from the belief that, by adjudicating in accordance with the interests of their appointing party or state, arbitrators and judges may secure a reappointment or the renewal of their term, and thus future economic opportunities. Tackling that issue would require to reduce the level of accountability of adjudicators towards states, which could be achieved in part with the same remedies suggested to tackle national and geopolitical bias. Appropriate guarantees would consist in ensuring that states have no power over the appointment, reappointment and disqualification of judges, by making appointments institution-driven, reappointments unavailable, and keeping disqualifications within the competence of the challenged judge's peers or the appointing body — should there be one.

Nonetheless, if the model selected to replace ITA was to retain features such as state-driven appointment and availability of reappointment, alternative remedies could be considered in order to prevent the appointing state from knowing decisions taken by its judge. Implementing secrecy of deliberation would, for example, limit the appointing state's ability to retaliate against its judge following an unfavorable decision. It would however prevent judges from issuing dissenting opinions, a power that, in relation to the ICJ, has been described as enhancing the court's prestige and reliability.<sup>184</sup> The remedy consisting of barring judges from adjudicating disputes involving their state of nationality may also prove useful, by isolating judges from their appointing states' potential expectations in terms of outcome.

---

<sup>184</sup> Domenico di Pietro, 'The Controversial Role of Dissenting Opinions In International Arbitral Awards' (*Transnational Notes*, 24 October 2011) <<https://blogs.law.nyu.edu/transnational/2011/10/the-controversial-role-of-dissenting-opinions-in-international-arbitral-awards/>> accessed 6 May 2019

## 6. CONCLUSION

In the introduction, I raised two main questions: how international law can tackle the apparent lack of independence of some ITA arbitrators, and whether analyzing how international courts deal with these issues can be of any help in reforming the system.

This paper demonstrates that international judges are sometimes immune to issues that may affect ITA arbitrators. The reason is that, due to their power to regulate the conduct of their members while protecting them from outside influence, international courts are better suited to deal with problems relating to the independence and impartiality judges. In order to establish an international court or appellate mechanism, future drafters will therefore need to build on the characteristics of international courts. Granting judges with security of tenure and a fixed salary is, in that regard, an essential step towards that objective.

By highlighting institutional features that protect the independent and impartiality of international judges, this paper goes further in detail in explaining how ITA must be reformed. In my view, *case-by-case repeat appointment* should be abolished by granting judges security of tenure and a fixed salary regardless of the court's workload. Aside from the *WTO AB model* at first instance, this would effectively put an end to investor-state arbitration. *Repeat appointments based on multiple terms* should be avoided too, by making terms non renewable. Facilitating the disqualification of biased judges would certainly prove decisive in tackling *issue conflicts*. *Double hatting* should be abolished by establishing stricter regulations on professional incompatibilities while making terms of office sufficiently long and allowing judges to engage in innocuous activities such as research and teaching. Furthermore, the effects of *national bias* on judges' behaviour should be tackled by endowing the future court with an appointment process that takes account of the need for diversity among judges, and by preventing judges from officiating in a dispute involving their state of nationality. Lastly, setting up non-renewable — but longer — terms will also prove essential in tackling the judges' *career-driven behaviours*. Making court deliberations secret will serve that purpose too, although preventing judges from issuing dissenting opinions may constitute a drawback.

Several remarks should however be made. Firstly, none of the three models suggested in chapter 5 would, if transposed in their current form, provide for a definitive solution to the issues outlined in this paper. The ECtHR model displays a high level of judicial independence, although it is unlikely to prevent future judges from exercising national, cultural and geopolitical bias. The WTO model allows for a review of arbitral awards. As such, it may inspire confidence among the

parties, while fostering the consistency of case law. Nevertheless, it would not modify the normative framework governing arbitral disputes. Therefore, it would have close to no impact on the arbitrators' independence and impartiality. At last, the ICJ model provides judges with long term tenure. However, judges may be subject to the influence of states and private actors due to the state-driven appointment procedure, the availability of reappointments, and the weak regulatory framework governing professional incompatibilities.

Accordingly, drawing inspiration from international courts will not suffice. Rather, it is essential that drafters anticipate potential issues and develop creative solutions. I believe, for example, that there ought to be a normative debate on whether disqualifications for bias and lack of independence should be subject to quantitative standards, in order to ensure predictability in a field where matters are handled on a case-by-case basis. If the WTO model is chosen, an other debate should focus on whether the appellate mechanism may be able to review the behaviour of arbitrators at the first instance level in light of independence and impartiality standards. Failing to address these issues with innovating perspectives may cause the future investment court to face the same criticisms as ITA and international courts.



**The three alternative court models, and how they would perform in relation to the five issues**

		The ECtHR model	The WTO model		The ICJ Model
			1 <sup>st</sup> instance	Appeal stage	
<b>Repeat appointment</b>	<b>Case by case repeat appointment</b>	Not an issue, as judges enjoy security of tenure	This would continue to be an issue	Not an issue, as judges enjoy security of tenure	Not an issue, as judges enjoy security of tenure
	<b>Repeat appointment based on multiple terms</b>	Not an issue, as reappointments are not available	Not an issue due to arbitrators being appointed ad hoc.	This would be an issue, unless reappointment are not available	This would be an issue, unless reappointment are not available
	<b>Issue conflict</b>	Probably an issue, unless partial judges can be dismissed for the duration of the proceedings.	Probably an issue, unless issue conflicts are a ground for annulment on appeal (quantitative standards are needed).	Probably an issue, but it may be circumvented if cases are assigned to a fraction of the AB members. This way, biased judges can easily be replaced with other members of the AB	Probably an issue, unless partial judges can be dismissed for the duration of the proceedings.

	The ECtHR model	The WTO model		The ICJ Model
		1 <sup>st</sup> instance	Appeal stage	
<b>Double hatting</b>	Not an issue, since ECtHR judges are prohibited from counseling in other proceedings or holding parallel judicial functions, while granted a fixed monthly salary.	This would continue to be an issue, unless double hatting is a ground for annulment on appeal (quantitative standards are needed).	Not an issue, since AB members are prohibited from counseling in other proceedings or holding parallel judicial functions, while granted a fixed monthly salary.  This would be an issue if members of the appellate mechanisms could act as arbitrators at 1 <sup>st</sup> instance, and review their own award, or awards similar to theirs.	Not an issue, since ICJ judges are now prohibited from counseling in other proceedings or holding parallel judicial functions (although this is the result of a self-regulatory process), while granted a fixed monthly salary.

	The ECtHR model	The WTO model		The ICJ Model
		1 <sup>st</sup> instance	Appeal stage	
<b>National and geopolitical bias</b>	<p>Probably an issue, as judges from developed countries may display bias against developing countries and vice versa. The issue may be tackled by:</p> <ul style="list-style-type: none"> <li>- replacing institution-driven appointment with institution-driven appointment;</li> <li>- establishing a culturally, geographically and gender diverse court.</li> </ul>	<p>This would probably be an issue, unless national/geopolitical bias is a ground for annulment on appeal (again, quantitative standards are needed.)</p>	<p>Probably an issue, as judges from developed countries may display bias against developing countries and vice versa. However, this concern may be nuanced, due to:</p> <ul style="list-style-type: none"> <li>- institution-driven appointment instead of state-driven appointment;</li> <li>- geographical diversity.</li> </ul>	<p>This would probably be an issue, since appointments are in practice state driven. The issue may be tackled by:</p> <ul style="list-style-type: none"> <li>- replacing state-driven appointment with institution-driven appointment;</li> <li>- establishing a culturally, geographically and gender diverse court.</li> </ul>
<b>Career-motivated judicial behaviours</b>	<p>Probably not an issue, because:</p> <ul style="list-style-type: none"> <li>- long terms;</li> <li>- unavailability of reappointments;</li> <li>- non-removability of judges during their term.</li> </ul> <p>Independence could be fostered by making deliberations secret.</p>	<p>This would probably continue to be an issue.</p>	<p>Probably not an issue, due to appointments being institution-driven.</p> <p>Independence could be fostered by</p> <ul style="list-style-type: none"> <li>- setting up long and non-renewable terms;</li> <li>- making deliberations secret</li> </ul>	<p>Probably an issue due to:</p> <ul style="list-style-type: none"> <li>- judges being <i>de facto</i> appointed by their home state;</li> <li>- availability of reappointment.</li> </ul> <p>Independence could be fostered by:</p> <ul style="list-style-type: none"> <li>- making terms long and non-renewable terms;</li> <li>- making deliberations secret.</li> </ul>

## TABLE OF REFERENCES

### International Treaties and Conventions

- Charter of the United Nations and Statute of the International Court of Justice (open for signature 26 June 1945, entered into force 24 October 1945), 1 UNTS XVI
- Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), 2187 UNTS 3
- Statute of the International Tribunal for the Law of the Sea (adopted 10th December 1982, entered into force 16 November 1994), 1833 UNTS 561
- Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (open for signature 18 March 1965, entered into force 14 October 1966), 575 UNTS 159
- Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959), 330 UNTS 3
- Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401
  - Working Procedures for Appellate Review, WT/AB/WP/6
  - Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, WT/DSB/RC/1

### Soft law instruments

- UNCITRAL Arbitration Rules (adopted 1976)
- UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (adopted 2013)
- IBA Guidelines on Conflicts of Interest in International Arbitration (adopted 2004)



## ICJ cases

- South West Africa (Ethiopia v. South Africa; Liberia v. South Africa),
  - Second Phase, Judgment, I.C.J. Reports 1966, p. 6
  - Order of 18 March 1965, I.C.J. Reports 1965, p. 3
- Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16
- Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,
  - Advisory Opinion, I. C.J. Reports 2004, p. 136
  - Order of 30 January 2004, I.C.J. Reports 2004, p. 3
  - Dissenting Opinion of Judge Buergenthal

## ITA cases

- *Burlington Resources Inc. v. Republic of Ecuador*, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, ICSID Case No. ARB/08/5
- *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, Decision on the Parties' Proposal to Disqualify a Majority of the Tribunal, ICSID Case No. ARB/12/20
- *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, Decision on the Proposal for Disqualification of Bruno Boesch, ICSID Case No. ARB/13/13
- *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v. India*, Decision on the Respondent's Challenge to the Hon. Marc Lalonde and Prof. Francisco Orrego Vicuña, PCA Case No. 2013-09
- *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2009-23

- *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3
- *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, Decision on the Proposal to disqualify L. Yves Fortier, Q.C., Arbitrator ICSID Case No. ARB/07/30
- *El Paso Energy International Company v. The Argentine Republic*, Decision on Jurisdiction, ICSID Case No. ARB/03/15
- *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, Decision on the Challenge to Arbitrator James Anaya
- *National Grid PLC v the Republic of Argentina*, Decision on the Challenge to Mr Judd L. Kessler, LCIA Case No. UN 7949
- *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12
- *Ruby Roz Agricol and Kaseem Omar v. Kazakhstan*, UNCITRAL, 2013
- *Siemens A.G. v. The Argentine Republic*, Award, ICSID Case No. ARB/02/8
- *Telkom Malaysia Berhad v. The Republic of Ghana*, PCA case No. 2003-03
- *Total S.A. v. The Argentine Republic*, Decision on Argentine Republic's Proposal to Disqualify Ms. Theresa Chang ICSID Case No. ARB/04/01
- *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12.
- *Victor Pey Casado and President Allende Foundation v Republic of Chile*, ICSID Case No ARB/98/2
- *Vito G. Gallo v. The Government of Canada*, Decision on the Challenge to Mr. J. Christopher Thomas, QC, UNCITRAL, PCA Case No. 55798

## Other cases

- *Opinion 1/17 pursuant to article 218 TFEU*, EU:C:2019:341, European Union: Court of Justice of the European Union, 30 April 2019

## Domestic legislation

- Ordonnance n° 58-1270 du 22 décembre 1958 portant loi organique relative au statut de la magistrature (*ordonnance* pertaining to the status of the members of the judiciary)

## UN Reports

- Report of the Secretary-General, ‘The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies’ (2004) UN Doc S/2004/616
- United Nations Framework Convention on Climate Change (UNFCCC) Compliance Committee, Summary of Relevant Case Law on Conflict of Interest (2010) CC/7/2010/2
- Report of the Secretary-General, ‘Conditions of service and compensation for officials other than Secretariat officials, Members of the International Court of Justice’ (1995) U.N. Doc. A/C.5/50/18

## Other Reports

- EFILA Paper, *Task Force Paper regarding the proposed International Court System* (2016), <[https://efila.org/wp-content/uploads/2016/02/EFILA\\_TASK\\_FORCE\\_on\\_ICs\\_proposal\\_1-2-2016.pdf](https://efila.org/wp-content/uploads/2016/02/EFILA_TASK_FORCE_on_ICs_proposal_1-2-2016.pdf)> accessed 6 May 2019
- International Council for Commercial Arbitration, *Report of the ASIL-ICCA Joint Task Force on Issue Conflicts in Investor-State Arbitration* (No. 3, 2017) <[https://www.asil.org/sites/default/files/ASIL\\_ICCA.pdf](https://www.asil.org/sites/default/files/ASIL_ICCA.pdf)> accessed 7 May 2019
- UNCTAD, World Investment Report 2018, *Investment and New Industrial Policies*, <[https://unctad.org/en/PublicationsLibrary/wir2018\\_en.pdf](https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf)> accessed 6 May 2019

- Nathalie Bernasconi-Osterwalder, Martin Dietrich Brauch, ‘Is “Moonlighting” a Problem? The role of ICJ judges in ISDS’ (IISD Commentary, 2017) <<https://www.iisd.org/sites/default/files/publications/icj-judges-isds-commentary.pdf>> accessed 7 May 2019
- Gabrielle Kaufmann-Kohler, Michele Potestà, ‘The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards’ (CIDS Supplementary Report, 2017) <[https://www.uncitral.org/pdf/english/workinggroups/wg\\_3/CIDS\\_Supplemental\\_Report.pdf](https://www.uncitral.org/pdf/english/workinggroups/wg_3/CIDS_Supplemental_Report.pdf)> accessed 7 May 2019.
- ‘The Nomination and Election of Six New ICC Judges’, (Coalition for the International Criminal Court, December 2017), <[http://www.coalitionfortheicc.org/sites/default/files/cicc\\_documents/cicc\\_memo\\_2017\\_icc\\_judicial\\_elections.pdf](http://www.coalitionfortheicc.org/sites/default/files/cicc_documents/cicc_memo_2017_icc_judicial_elections.pdf)> accessed 7 May 2019

## Books

- Gary Born, *International Arbitration: Law and practice*, (2<sup>nd</sup> edn, Kluwer 2015)
- Maria Nicole Cleis, *The Independence and Impartiality of ICSID Arbitrators – Current Case Law, Alternative Approaches, and Improvement Suggestions* (Brill Nijhoff 2017)
- Rudolph Dolzer, Christoph Schreuer, *Principles of International Investment Law* (2<sup>nd</sup> edn, OUP 2012)
- Chiara Giorgetti, ‘The Arbitral Tribunal: Selection and Replacement of Arbitrators’ in Chiara Giorgetti (ed), *Litigating International Investment Disputes: A Practitioner's Guide* (Brill Nijhoff 2014)
- Gavan Griffith, Daniel Kalderimis. ‘Pure’ Issue Conflicts in Investment Treaty Arbitration’ in David D. Caron, Stephan W. Schill, Abby Cohen Smutny, and Epaminontas E. Triantafylou (eds), *Practising Virtue: Inside International Arbitration* (OUP 2015)
- Emmanuelle Jouannet, ‘Actualité des questions d’indépendance et d’impartialité des juridictions internationales: la consolidation d’un tiers pouvoir international ?’ (‘Topicality of the Issues Relating to the Independence and Impartiality of International Courts: the Consolidation of an International Third Power?’), in Hélène Ruiz Fabri, Jean-Marc Sorel (eds), *Indépendance et*

*impartialité des juges internationaux (Independence and Impartiality of International Judges)*, (Editions A. Pédone 2010)

- Jonathan Ketcheson, 'Investment Arbitration: Learning from Experience', in Steffen Hindelang and Markus Krajewski (eds), *Shifting Paradigms in International Investments Law: More Balanced, Less Isolated, Increasingly Diversified* (OUP 2016)
- Ruth Mackenzie, Kate Malleson, Penny Martin, Philippe Sands QC, 'The Nomination Process', in Mackenzie, Malleson, Martin, and Sands QC (eds), *Selecting International Judges: Principle, Process, and Politics* (OUP 2010)
- Charles de Montesquieu, *The Spirit of the Laws* (first published 1748, Cambridge University Press 1989)
- Loretta Malintoppi, Alvi Yap, 'Challenges of Arbitrators in Investment Arbitration: Still Work in Progress?', in Katia Yannaca-Small (ed), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (OUP 2018)
- 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*, (Wolters Kluwer Legal, 2016)
- Stephan Schill, 'International Investment Law and Comparative Public Law—an Introduction', in: Stephan Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2011), 14
- Adrás Sajó, 'An All-European Conversation: Promoting a Common Understanding of European Human Rights', in S. Flogaitis et al. (eds), *The European Court of Human Rights and Its Discontents* (Elgar, 2013)
- Geir Ulfstein, 'International Courts and Tribunals and the Rule of Law in Asia', in T. Suami, A. Peters, D. Vanoverbeke, & M. Kumm (eds), *Global Constitutionalism from European and East Asian Perspectives* (Cambridge University Press 2018)
- Peter Van Bossche, Werner Zdouc, 'The Law and Policy of the World Trade Organization' (3rd ed. Cambridge University Press, 2013)
- Gus Van Harten, *Investment Treaty Arbitration and Public Law* (OUP 2007)

## Articles

- Brower C, Schill S, 'Is Arbitration a threat or a Boon to the Legitimacy of International Investment Law?' [2009] 9 Chicago Journal of International Law 471
- Dunoff J, Pollack J, 'The Judicial Trilemma' [2017] 111 American Journal of International Law 225
- Grossman N, 'Legitimacy and International Adjudicative Bodies' [2010] 41 George Washington International Law Review 107
- Kapeliuk D, 'The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators' [2010] 96 Cornell Law Review 47
- Langford M, Behn D, and Hilleren Lie R, 'The Ethics and Empirics of Double Hatting' [2017] 6 European Society of International Law Reflections
- Langford M, Behn D, 'Managing Backlash: The Evolving Investment Treaty Arbitrator?' [2017] 29 European Journal of International Law 551
- Langford M, Behn D, Hilleren Lie R, 'The Revolving Door in International Investment Arbitration' [2017] 20 Journal of International Economic Law 301
- Maruta A, 'State Sovereignty and Foreign Investors' Rights: Persistent Imbalances from Cape to Hamburg' [2014], 23
- Polonskaya K, 'Diversity in the Investor-State Arbitration: Intersectionality Must be part of the Conversation', 19 Melbourne Journal of International Law 260
- Posner E, de Figueiredo M, 'Is the International Court of Justice Biased?' [2005] 34 Journal of Legal Studies 599
- Puig S, Shaffer G, 'Imperfect Alternatives: Institutional Choice and the Reform of Investment Law' [2018] 112 American Journal of International Law 361
- Roberts A, 'Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration' [2018] 112 American Journal of International Law 410

- Schultz T, Dupont C, 'Investment Arbitration: Promoting the Rule of Law or Over-empowering Investors? A Quantitative Empirical Study' [2015] 25 *European Journal of International Law* 1152
- Vajda C, 'The EU and Beyond: Dispute Resolution in International Economic Agreements' [2018] 29 *European Journal of International Law* 205
- Vasani B, Palmer S, 'Challenge and Disqualification of Arbitrators at ICSID: A New Dawn?' [2015] 30 *ICSID Review - Foreign Investment Law Journal* 194
- Venzke I, 'Investor-State Dispute Settlement in TTIP from the Perspective of a Public Law Theory of International Adjudication', [2016] 17 *Journal of World Investment and Trade* 374
- Voeten E, 'The Impartiality of International Judges: Evidence from the European Court of Human Rights', 102 *The American Political Science Review* (2008) 417

#### Research papers and working papers

- Kaufmann-Kohler G, Potestà M, '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?' (2016) CIDS Research Paper
- Kawharu A, and Nottage L, 'Renouncing Investor-State Dispute Settlement in Australia, Then New Zealand: Déjà Vu' (2018) Sydney Law School Research Paper No. 18/03, 5 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3116526](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3116526)> accessed 6 mai 2019
- Schacherer S, *Independence and Impartiality of Arbitrators: A Rule of Law Analysis* (2018) University of Geneva working paper, <[https://eur-int-comp-law.univie.ac.at/fileadmin/user\\_upload/i\\_deicl/VR/VR\\_Personal/Reinisch/Internetpublikationen/Schacherer.pdf](https://eur-int-comp-law.univie.ac.at/fileadmin/user_upload/i_deicl/VR/VR_Personal/Reinisch/Internetpublikationen/Schacherer.pdf)> accessed 7 May 2019

#### Conference papers

- Gus Van Harten, 'A Case for an International Investment Court' (Society of International Economic Law Inaugural Conference, Geneva, July 2008)

## Blogs

- Andrea Kay Björklund, 'The Diversity Deficit in Investment Arbitration' (EJIL: Talk!, 4 April 2019) <<https://www.ejiltalk.org/the-diversity-deficit-in-investment-arbitration/>> accessed 7 May 2019
- Marie Davoise, 'Can't Fight the Moonlight? Actually, You Can: ICJ Judges to Stop Acting as Arbitrators in Investor-State Disputes' (EJIL: Talk!, 5 November 2018) <<https://www.ejiltalk.org/cant-fight-the-moonlight-actually-you-can-icj-judges-to-stop-acting-as-arbitrators-in-investor-state-disputes/>> accessed 7 May 2019
- Cecilia Malmström, 'The Way Ahead for an International Investment Court', (*Blog of Cecilia Malmström*, 18 July 2016), <[https://ec.europa.eu/commission/commissioners/2014-2019/malmstrom/blog/way-ahead-international-investment-court\\_en](https://ec.europa.eu/commission/commissioners/2014-2019/malmstrom/blog/way-ahead-international-investment-court_en)> accessed 6 May 2019
- Domenico di Pietro, 'The Controversial Role of Dissenting Opinions In International Arbitral Awards' (*Transnational Notes*, 24 October 2011) <<https://blogs.law.nyu.edu/transnational/2011/10/the-controversial-role-of-dissenting-opinions-in-international-arbitral-awards/>> accessed 6 May 2019

## Encyclopedias

- G Cornu, 'Impartialité' ('Impartiality') *Vocabulaire Juridique (Legal Vocabulary)*, (PUF 2014) 521
- Karlen D, Gibson J and Others, 'Court', *Encyclopædia Britannica* <<https://www.britannica.com/topic/court-law>> accessed 13 November 2018

## Newspaper articles

- Brian Ellsworth, Robert Edison Sandiford, 'Exclusive: Top Venezuela firm files arbitration against Chavez', Reuters (Caracas/Bridgetown, 16 February 2013) <<https://www.reuters.com/>



[article/us-venezuela-arbitration/exclusive-top-venezuela-firm-files-arbitration-against-chavez-idUSTRE81F0SO20120216](https://www.reuters.com/article/us-venezuela-arbitration/exclusive-top-venezuela-firm-files-arbitration-against-chavez-idUSTRE81F0SO20120216)> accessed 6 May 2019

- Simon Lester, 'Commentary: Trump's dangerous approach to the 'supreme court' of global trade', Reuters (19 June 2018) <<https://www.reuters.com/article/us-lester-wto-commentary/commentary-trumps-dangerous-approach-to-the-supreme-court-of-global-trade-idUSKBN1JF1UI>> accessed 6 April 2019
- 'US blocks renewal of WTO trade court judge as deadlock looms', France 24 (Geneva 28 August 2018) <<https://www.france24.com/en/20180828-us-blocks-renewal-wto-trade-court-judge-deadlock-looms>> accessed 6 April 2019
- Tom Miles, 'U.S. drafts WTO reform to halt handouts for big and rich states', Reuters (Geneva, 15 February 2019) <<https://www.reuters.com/article/us-usa-trade-wto/u-s-drafts-wto-reform-to-halt-handouts-for-big-and-rich-states-idUSKCN1Q426T>> accessed 6 April 2019

#### Websites

- United Nations Conference on Trade and Development, Investment Policy Hub, <<https://investmentpolicyhub.unctad.org/ISDS/FilterByRulesAndInstitution>> accessed 7 February 2019
- United Nations Commission on International Trade Law, Working Group III: Investor-State Dispute Settlement Reform <[http://www.uncitral.org/uncitral/en/commission/working\\_groups/3Investor\\_State.html](http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html)> accessed 7 May 2019

#### Other sources

- Communication from the European Union, China and India to the WTO General Council (26 November 2018) WT/GC/W/753, <[http://trade.ec.europa.eu/doclib/docs/2018/november/tradoc\\_157514.pdf](http://trade.ec.europa.eu/doclib/docs/2018/november/tradoc_157514.pdf)> accessed 7 May 2019
- ICC Assembly of State parties, 'Informal guide and commentary to the procedure for the nomination and election of judges of the International Criminal Court' (16th session, 5 May 2017) ICC-ASP/16/INF.2