Justice must not only be done, but also seen to be done

A study of independence and impartiality in ICSID arbitration

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INTRODUCTION

1. To be judged by an independent and impartial tribunal is one of the most fundamental aspects of the rule of law.[1] A tribunal lacking those qualities will not gain the public trust and confidence it needs to be perceived as legitimate. This is precisely the problem which Investor-State Dispute Settlement (ISDS) systems are currently facing. Support for ISDS is plummeting, among states, academics and the general public alike.[2] But what exactly is ISDS? As explained in due detail below, ISDS allows for the settlement of disputes between countries and foreign companies who have invested in that country, *inter alia* through arbitration. The most prominent forum for facilitating such arbitration procedures is the International Centre for the Settlement of Investment Disputes ('ICSID'), a multinational organisation based in Washington D.C. of which all states can become a member by ratifying its treaty.

2. This dispute settlement system has proven controversial from the moment it was conceived.[3] In the EU, recent manifestations of this controversy are the *Achmea* saga,[4] in which the Court of Justice of the European Union ('CJEU')

[1] D. M. BEATTY, *The Ultimate Rule of Law*, Oxford, Oxford University Press, 2004, 4.
[2] M. SORNARAJAH, "International Investment Law as Development Law: The Obsolescence o. a Fraudulent System" in M. BUNGENBERG, C. HERMAN, M. KRAJEWSKI, J.P. TERHECHTE (eds.), *European Yearbook of International Economic Law* 2016, Springer International Publishing, 2016, 209-231 (hereinafter: M. SORNARAJAH, I*nternational Investment Law as Development Law: The Obsolescence of a Fraudulent System*); G. VAN HARTEN, *Investment Treaty Arbitration and Public Law*, Oxford, Oxford University Press, 2008; A. KULICK, 'Investment arbitration, investment treaty interpretation, and democracy', *Cambridge Journal of International and Comparative Law* 2015, vol. 4, no. 2, 441-460. See also *infra* 2 for the withdrawal of certain states from ICSID, the opposition towards investment treaties in the EU and the many proposals for reform.
[3] M. SORNARAJAH, *The International Law on Foreign Investment,* Cambridge, Cambridge University press 2017, 1-11.
[4] CJEU 6 March 2018, nr. C-284/16, ECLI:EU:C:2018:158.

decided that an arbitration clause in a Bilateral Investment Treaty ('BIT') between EU members was incompatible with EU law;[5] and the attempts to replace current ISDS systems with 'Investment Court Systems' or a 'Multilateral Investment Court'.[6] Elsewhere in the world ISDS has been stirring controversy as well. A certain sense of distrust towards ISDS has emerged among many nations, with some countries even withdrawing from ICSID.[7] The reasons given to justify this sentiment are varied, but one which often occurs is the impression that the ISDS system is 'crooked' or even 'corrupt'.[8]

3. ISDS is controversial in its nature because it allows private arbitrators to restrict state sovereignty by condemning states to damages if they deem investors to have suffered harm from certain state actions.[9] What makes the system even more contentious is the fact that many observers feel that the arbitrators who decide the investment disputes are biased.[10] Some academics even go as far as calling it a 'fraudulent system', hijacked by multinational corporations and large law firms.[11] In theory, the appointment procedure of the arbitrators should neutralise any bias: each party gets to appoint one arbitrator of their choice, with the third arbitrator and president of the tribunal being appointed by these two arbitrators.[12] As such, there should be a balance between the interests of the state party and those of the investor. Nevertheless, as international investment law is a highly specialised field of law which requires specific knowledge, the pool of arbitrators from which to choose is rather small.[13] The majority of investment arbitrators answer to a specific profile: they are generally older people coming

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[5] C. FOUCHARD, M. KRESTIN, "The Judgment of the CJEU in Slovak Republic v. Achmea – A Loud Clap of Thunder on the Intra-EU BIT Sky", *Kluwer Arbitration Blog*, 7 March 2018.

[6] See *infra* 140-142; European Commission, *Recommendation for a Council decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes*, 13 September 2017, EUR-Lex 52017PC0493; see also C. LEVESQUE, "The European Commission Proposal for an Investment Court System: Out with the Old, In with the New?" in A. DE MESTRAL (ed.), *Second Thoughts: Investor-State Arbitration between Developed Democracies*, Centre for International Governance Innovation, 2017, 59-87.

[7] For example, Bolivia and Venezuela denounced their membership in 2007 and 2012 respectively. Ecuador withdrew in 2009 but rejoined in 2021; see J. CAZALA, "La dénonciation de la convention de Washington établissant le CIRDI", *Annuaire Français de Droit International* 2012, 551-565.

[8] M.SORNARAJAH, I*nternational Investment Law as Development Law: The Obsolescence of a Fraudulent System*, *supra* note 2, 209-231.

[9] G. VAN HARTEN, *Investment Treaty Arbitration and Public Law*, Oxford, Oxford University Press, 2008.

[10] See i.a. L.M. Caplan, 'ISDS Reform and the Proposal for a Multilateral Investment Court', *Berkeley Journal of International Law* 2019, vol. 37, no. 2, 207-214; D.M. HOWARD, 'Creating Consistency through a World Investment Court', *Fordham International Law Journal* 2017, vol. 41, no.1, 1-52; A. KULICK, 'Investment arbitration, investment treaty interpretation, and democracy', *Cambridge Journal of International and Comparative Law* 2015, vol. 4, no.2, 441-460; A.ROBERTS, 'Clash of paradigms: Actors and analogies shaping the investment treaty system', *American Journal of International Law* 2013, vol. 107, no.1, 45-94; G. VAN HARTEN, *Investment Treaty Arbitration and Public Law*, Oxford, Oxford University Press, 2008.

[11] M.SORNARAJAH, I*nternational Investment Law as Development Law: The Obsolescence of a Fraudulent System*, *supra* note 2, 209-231.

[12] *Infra* 21.

[13] A. KULICK, 'Investment arbitration, investment treaty interpretation, and democracy', *Cambridge Journal of International and Comparative Law* 2015, vol. 4, no. 2, 441-460; G. VAN HARTEN, Investment Treaty Arbitration and Public Law, Oxford, Oxford University Press, 2008.

from rich western countries and were educated at 'prestigious' universities.[14] Furthermore, as they want to secure their reappointment, arbitrators have an incentive to decide in favour of the party who appointed them.[15] Investment arbitrators also usually work in academia or for elite law firms (or both). As these law firms often have ties to the multinational companies and the countries that are party to investment arbitration proceedings, the perception of bias is further increased.[16]

4. This paper exactly looks at how the issue of independence and impartiality is handled in ICSID arbitration. It has the following structure. The first chapter defines the scope of this research project and the methodology that was implemented to achieve the research objectives. In a second chapter, I describe the general nature of Investor-State Dispute Settlement and some background information on ICSID and ICSID arbitrators. Chapters 3 and 4 examine the procedural mechanisms which can be invoked if a party has doubts about the independence or impartiality of an arbitrator: disqualification and annulment. First, I describe the legal requirements that have to be met for successfully initiating these two procedures and subsequently I analyse the most important case law regarding disqualification and annulment. Chapter 5 describes the standard of conduct arbitrators should adhere to for avoiding conflicts of interest. The claim that ICSID arbitrators are biased is evaluated in chapter 6. In chapter 7, I assess some recent suggestions to improve and reform the ISDS system in general, as well as ICSID arbitration in particular. Chapter 8 contains the conclusion.

1. SCOPE AND METHODOLOGY

5. One of the main causes of the legitimacy crisis in which ICSID finds itself today, is the perceived lack of independence and impartiality of its arbitrators. Thus, the question of how ICSID arbitration deals with problems of independence and impartiality is highly relevant. That is the subject of this paper. Specifically, the research objectives are (i) to detect the factual situations that have cast doubt on arbitrators' independence or impartiality; (ii) to find out which of those situations have led to disqualification or annulment; (iii) to discern the standard of conduct arbitrators should adhere to in order to avoid conflicts of interest; and (iv) to evaluate the claim that ICSID arbitrators are inherently 'biased'. These objectives are achieved by formulating an answer to the following research question: *"Under which circumstances can an ICSID arbitrator be disqualified or an ICSID award be annulled for lack of independence or impartiality?"* Of course, independence and impartiality are vague notions which are open to many interpretations. In ICSID jurisprudence,

[14] *Infra* 23-28.
[15] *Infra* 130.
[16] A. KULICK, 'Investment arbitration, investment treaty interpretation, and democracy', *Cambridge Journal of International and Comparative Law* 2015, vol. 4, no.2, 441-460; G. VAN HARTEN, *Investment Treaty Arbitration and Public Law*, Oxford, Oxford University Press, 2008.

a specific conception of these two notions has developed over time. It is this conception, further discussed in the respective chapters on disqualification and annulment,[17] that is used throughout this paper.

6. As the research question suggests, there are two angles from which the issue of independence and impartiality can be examined. A party to an ICSID arbitration procedure which is confronted with one or more members of an arbitral tribunal it deems insufficiently independent or impartial, has two options to contest those members. It can introduce a disqualification procedure against the arbitrator in question,[18] or it can seek the annulment of the arbitral award.[19] Both courses of action come with different conditions and consequences. They are discussed extensively below, so at this point it suffices to set out some general principles. The main distinguishing point between these two procedures is chronological: disqualification is only possible before the arbitral tribunal has rendered its final award, while annulment is the appropriate remedy after the award has been rendered. Disqualification aims at the dismissal and replacement of an arbitrator; annulment seeks the nullification of an award, meaning it is declared null and void. Disqualification is decided on by the other members of the tribunal who are not subject to the proposal for disqualification (or by the Chairman of ICSID), annulment cases are dealt with by a newly appointed committee of arbitrators.[20] As such, these are very different procedures, but they serve the same objective: ensuring the integrity of ICSID proceedings. For the purposes of this paper, this means ensuring that cases are decided by an independent and impartial tribunal. It is by no means excluded that a party resorts to both disqualification and annulment in the same procedure: if a proposal for disqualification is rejected, the option of annulment remains open to the unsuccessful party. However, as discussed below, in such a case there will be certain procedural implications and limitations.[21]

7. The most appropriate method to examine the topic of independence and impartiality in ICSID arbitration is a case law analysis. Whether someone is independent and impartial is mostly a matter of factual circumstances, and case law is the most easily available source describing those circumstances. In other words, a case law analysis displays the real-life conflicts of interest that have arisen in the context of ICSID arbitration. Furthermore, the legal provisions ensuring independence and impartiality in ICSID arbitration are quite vague and general in wording; to analyse them one must look at how they are applied in practice.

8. In her Handbook on Legal Methodology, Kestemont describes a case law analysis as follows: "*An interpretation based on jurisprudence interprets legal provisions in view of the opinions of the judiciary which are expressed in their courts judgments and are applied in (case) law. [...] When opting for an*

[17] *Infra* 34 and 84.
[18] Art. 57 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 18 March 1965, *United Nations Treaty Series* vol. 575, 159 (hereinafter: ICSID Convention).
[19] Art. 52 ICSID Convention.
[20] *Infra* 29-32 and 81-83.
[21] *Infra* 91-94.

interpretation based on jurisprudence, a legal scholar should focus on the relationship between different (deviant) court judgments and their reasoning."[22] Thus, to analyse case law is to look beyond the theoretical scope of legal provisions and to examine how these provisions are applied in practice by (arbitral) courts. For this paper, this means that a selection of ICSID disqualification and annulment cases are discussed extensively. The relevant facts of the case will be summarised, followed by a display of the arbitrator's decisions, their interpretation and application of the relevant legal standards and, most importantly, the reasoning behind their decisions. Disqualification and annulment challenges are often based on multiple grounds; lack of independence and impartiality is usually but one of the grounds invoked. However, as this paper focuses on the issue of independence and impartiality, other grounds for disqualification or annulment are not part of the examination and hence shall not be discussed.[23]

9. Since time and resources are scarce when writing a paper, a selection or relevant cases must be made. How to make such a selection is an important methodological question. Luckily, ICSID provides an online database with (most of) its case law. As of today,[24] the ICSID database contains a total of 96 disqualification cases and 170 annulment cases. Obviously, not all these cases can be discussed in a limited research project such as this. Furthermore, not all of them are relevant for the purpose of this research. Thus, the challenge is to select the most important cases. In doing so, both practical and substantive criteria are considered.

10. First of all, in order to discuss a case, one must have access to its materials. Only those ICSID cases that are published in the database can be considered for selection. Secondly, cases can be excluded based on their relevance. There may be a lot of disqualification and annulment cases, but not all of them deal with the issue of independence and impartiality. The selection is limited to those cases in which a lack of independence or impartiality is invoked as a ground for disqualification or annulment. As one of the objectives of this paper is to discern under which circumstances a lack of independence or impartiality must lead to disqualification or annulment, the most informative cases shall presumably be those in which the challenge was effectively upheld. Thus, any case in which an arbitrator was disqualified or an award annulled on the ground of lack of independence or impartiality is automatically part of the selection.

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[22] L. KESTEMONT, Handbook on Legal Methodology, Intersentia, 2018, 29-30; see also the useful definition formulated by the Supreme Court of Estonia: "*Case law analysis is practical research whose primary and main objective is to identify how certain legal provisions or legal institutions are applied. The process of analysis results in an analysis document that generalises case law and highlights its trends and problems.*", https://www.riigikohus.ee/en/case-law-analysis/methodology, accessed 5 May.

[23] Consequently, where an argument relating to independence or impartiality is rejected, but disqualification or annulment is accepted on another ground, the disqualification or annulment challenge for lack of independence or impartiality is still deemed to be rejected.

[24] 14 June 2022.

11. Applying these three criteria already substantially reduces the number of cases.[25] Still, a further selection has to be made among those cases in which the challenge was not upheld. Therefore, in a final phase, cases will be classified according to their importance. How to measure importance? A decisive factor is the reception of a case in the investment arbitration world. If a case is referred to regularly by other arbitrators in different ICSID cases, or if it is mentioned in scholarly articles, then it is likely the case will be an important one. When consulting standard works, articles or blogposts, one quickly detects which decisions have had an impact on the ICSID case law. Nevertheless, 'importance' remains a subjective criterion to some extent, so it is very well possible that another scholar might have come to a different selection.

12. The method of case-law analysis of course has certain downsides. One obvious limitation lies in the very nature of investment arbitration: it is a somewhat opaque and non-transparent world.[26] While a lot of ICSID cases are published, not all of them are and ICSID alone does not have the monopoly on investment arbitration. Therefore, one must always be careful in drawing conclusions based on the cases that are available, as this might not be the full picture. Furthermore, since ICSID does not have an appellate mechanism to ensure the coherence of its case law, arbitral awards might sometimes contradict each other or come to different conclusions.[27] There is no clear solution to deal with these conflicting decisions, and this makes it difficult to discern patterns in the case law and to make predictions for future cases. Finally, the selection of cases implies that a number of cases will not be covered, although these cases might also contain interesting decisions or bring nuance to the debate. Nevertheless, their exclusion is justified if the selection is made in such a way that all the decisive cases[28] are included.

13. Of course, this paper does not rely entirely on case law. Legal doctrine is also an important source. One publication in particular, Professor Christoph Schreuer's commentary on the ICSID Convention[29], is considered a standard work by those doing research on ICSID arbitration. It is often cited by arbitrators in their awards as well. This commentary will be one of the cornerstones of the theoretical parts of this paper. Another study, The Independence and Impartiality of ICSID Arbitrators by M.N. Cleis[30] was particularly helpful given its extensive discussion of the topic under review. This paper builds on Cleis' conclusions but also goes further in that it includes more recent case law, covers the annulment procedure, discusses the factual background of the landmark

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[25] I found three disqualification cases and one annulment case which were upheld for lack of independence or impartiality.

[26] See e.g. OCDE, *Transparence et participation de tierces parties aux procédures de règlement des différends entre investisseurs et états*, Documents de travail de l'OCDE sur l'investissement international 2005/01, June 2005, 4.

[27] C. SCHREUER, L. MALINTOPPI, A. REINISCH, A. SINCLAIR, *The ICSID Convention: a Commentary*, Cambridge, Cambridge University Press, 2009, 901 (hereinafter: SCHREUER et al., *The ICSID Convention*); *Infra* 38, 80, 116.

[28] Those cases in which an important point of law is settled.

[29] SCHREUER et al., *The ICSID Convention*, *supra* note 24.

[30] M. N. CLEIS, The Independence and Impartiality of ICSID Arbitrators, Leiden, Brill Nijhof, 2017 (hereinafter: CLEIS, *The Independence and Impartiality of ICSID Arbitrators*).

cases and provides some background information on ICSID arbitrators. Also, I had the opportunity to interview a former ICSID arbitrator, who wished to remain anonymous, on his views regarding this issue.

2. INVESTMENT ARBITRATION AND ICSID

2.1. INVESTMENT ARBITRATION

14. Investment arbitration is a subcategory of Investor-State Dispute Settlement (ISDS). As its name suggests, ISDS is the branch of law that aims to settle disputes between states and investors in those states. Precursors of ISDS can be found in the ancient practice of extraterritorial jurisdiction, which allowed foreign merchants to be judged according to the laws of their own 'tribe' or state in consular courts.[31] Throughout the 17th, 18th and 19th centuries, mostly western foreign investors enjoyed substantive protections under so called Friendship, Commerce and Navigation treaties and under customary (western) international law, granting them such extraterritorial rights.[32] After the fall of the colonial empires in the second half of the 20th century and the subsequent decolonisation movement, Bilateral Investment Treaties (BITs) were introduced to safeguard and maintain those earlier forms of investment protection to some extent.[33] Other examples of ISDS mechanisms applied in the past are the use of diplomatic protection of investors under customary international law, which allowed for retorsion and reprisals, mixed-claims commissions and ad-hoc tribunals such as the Iran – United States Claims Tribunal.[34] This shows that the practice (or, as some would say, the privilege) allowing investors to escape the domestic judicial authorities of the countries they invest in, has strong roots in history.

15. Nowadays, investor-state disputes are mostly settled through investment arbitration systems provided for in BITs, which are concluded to secure and increase Foreign Direct Investment (FDI) flows between countries.[35] Both of these concepts need some further explanation. The OECD defines Foreign Direct Investment as "*a category of cross-border investment in which an investor resident in one economy establishes a lasting interest in and a significant degree of influence over an enterprise resident in another economy.*"[36] Thus, any investment made by a national of one country in another country can qualify as

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[31] W. THEUS, "There and Back Again: From Consular Courts through Mixed Arbitral Tribunals to International Commercial Courts" in *Mixed Arbitral Tribunals, 1919–1930: An Experiment in the International Adjudication of Private Rights*, Nomos, 2021, 4.
[32] Ibid, 20; S. SCHILL, C. TAMS, R. HOFMANN (eds.), *International Investment Law and History*, Edward Elgar 2018.
[33] S. SCHILL, C. TAMS, R. HOFMANN (eds.), *International Investment Law and History*, Edward Elgar 2018, 144-145.
[34] Ibid.
[35] W. SHAN, *The Legal Protection of Foreign Investment, A comparative Study*, Oxford, Hart Publishing, 2012, 59-63.
[36] https://www.oecd-ilibrary.org/finance-and-investment/foreign-direct-investment-fdi/indicator-group/english_9a523b18-en, accessed 8 June 2022.

FDI, as long as the investment is sufficiently large.[37] Foreign direct investment was and still is promoted as one of the most efficient means to foster the development of poor countries,[38] although some scholars argue that FDI does not live up to its promises.[39] A Bilateral Investment Treaty is, as its name suggests, a treaty between two parties, usually two states, with the objective of securing private investment flows between the two parties.[40] A BIT legally protects investments made in the 'host country' by investors based in the other country against, for example, expropriation or stringent regulation which threatens the profitability of the investment.[41] One of the main advantages of a BIT, at least from the point of view of the investor, lies in the dispute settlement mechanism it provides.[42] Most, if not all, BITs contain an ISDS clause.[43] Under this clause, a private investor with the nationality of one of the treaty parties who made an investment in the other treaty party may submit any disputes arising from this investment to an arbitral tribunal, either in addition to or to the exclusion of a domestic court.[44] One of the rationales behind this practice is the sense of distrust felt by many investors towards developing countries' judicial systems.[45] These countries are often characterised by weak institutions and are vulnerable to corruption, is their perception.[46] In other words, there are doubts as to the

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[37] I. MOOSA, *Foreign Direct Investment: Theory, Evidence and Practice*, New York, Palgrave, 2002, 1-6.

[38] Ibid; M. SORNARAJAH, *The International Law on Foreign Investment*, Cambridge, Cambridge University Press, 2017, 61-67.

[39] M. SORNARAJAH, *The International Law on Foreign Investment*, Cambridge, Cambridge University Press, 2017, 67-69.

[40] S. P. SUBEDI, "International Investment Law" in M. D. EVANS (ed.), *International Law*, Oxford, Oxford University Press, 2018, 731-736; J. SCHOKKAERT, Y. HECKSCHER, *International Investments Protection*, Brussels, Bruylant, 2009, 619-626.

[41] M. SORNARAJAH, *The International Law on Foreign Investment*, Cambridge, Cambridge University press 2017, 217-222.

[42] Ibid; S. P. SUBEDI, "International Investment Law" in M. D. EVANS (ed.), *International Law*, Oxford, Oxford University Press, 2018, 731-736.

[43] J. SCHOKKAERT, Y. HECKSCHER, *International Investments Protection*, Brussels, Bruylant, 2009, 507.

[44] For example, article 10 of the BIT between the Belgium – Luxembourg Economic Union and the Republic of Mozambique (18 July 2006, *BS* 29 December 2009) provides the following:
1. Any dispute concerning an investment between an investor of One Contracting Party and the other Contracting Party shall, if possible, be settled amicably.
2. If any such dispute cannot be settled within six months following the date on which the dispute has been raised by the investor through written notification to the Contracting Party, each Contracting Party hereby consents, to the submission of the dispute, at the investor's choice, for resolution by international arbitration to one of the fora mentioned hereafter. To this end both Parties waive the right to demand that all domestic administrative or judiciary remedies be exhausted,
I) the International Centre for Settlement of Investment Disputes (ICSID) for settlement by arbitration under the Washington Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States provided both Contracting Parties have adhered to the said Convention; or
ii) the Additional Facility of the Centre, if the Centre is not available under the Convention; or
iii) an ad hoc tribunal set up under Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). The appointing authority under the said rules shall be the Secretary General of ICSID.

[45] Although doubts about the rule of law are by no means limited to developing countries, see for example the recent discussions about the rule of law in EU member states such as Poland, Hungary and Spain.

[46] S. P. SUBEDI, "International Investment Law" in M. D. EVANS (ed.), *International Law*, Oxford, Oxford University Press, 2018, 727; C. TIETJE, F. BAETENS, "The Impact of Investor-State-

solidity of the rule of law in these countries. Another factor deterring investors from relying on local remedies is the doctrine of sovereign immunity applied in many domestic courts, meaning state organs cannot be subject to judicial proceedings.[47] Investment disputes could also be settled through diplomatic protection, but in that case, investors are dependent on the willingness of their home state to espouse the investors' claims.[48] Having potential disputes settled by arbitral tribunals is seen as a form of investor protection, as they are no longer reliant on domestic courts.[49] This should secure and increase investment flows into developing countries and benefit their economic growth,[50] although some scholars doubt whether this promise has been fulfilled.[51]

2.2. ICSID

16. There are many fora through which investor-state disputes can be settled,[52] such as the International Chamber of Commerce in Paris (ICCP)[53] and the London Court of International Arbitration (LCIA).[54] The United Nations Commission on International Trade Law (UNCITRAL)[55] is not, strictly speaking, an arbitration forum, but deserves to be mentioned because it has developed a set of Arbitration Rules which can be applied to investment arbitration proceedings.[56] By far the most important forum, however, is the International Centre for the Settlement of Investment Disputes or ICSID, which is a multilateral organisation located in Washington D.C as part of the World

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Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership, Study prepared for Minister for Foreign Trade and Development Cooperation", *Ministry of Foreign Affairs,* The Netherlands, MINBUZA-2014.78850, 24/06/2014.

[47] E.g. the ancient English rule of 'The King can do no wrong.', see E. CHEMERINSKY, "Against Sovereign Immunity", *Stanford Law Review* 2001, vol. 53, no. 5, 1201-1224. Not to be confused with state immunity in foreign courts.

[48] J. SCHOKKAERT, Y. HECKSCHER, *International Investments Protection*, Brussels, Bruylant, 2009, 520.

[49] Nevertheless, some jurisdictions such as the U.S. require exhaustion of local remedies before a dispute can be submitted to investment arbitration. Furthermore, sometimes investors have the choice between local remedies and arbitration. Usually, this choice is subject to a fork-in-the-road clause, meaning once either option has been chosen, the other option is no longer available. See W. SHAN, *The Legal Protection of Foreign Investment, A comparative Study*, Oxford, Hart Publishing, 2012, 59-63.

[50] S. P. SUBEDI, "International Investment Law" in M. D. EVANS (ed.), *International Law*, Oxford, Oxford University Press, 2018, 731; C. TIETJE, F. BAETENS, "The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership, Study prepared for Minister for Foreign Trade and Development Cooperation", *Ministry of Foreign Affairs*, The Netherlands, MINBUZA-2014.78850, 24/06/2014; M. SORNARAJAH, *The International Law on Foreign Investment*, Cambridge, Cambridge University press 2017.

[51] Susan Franck concludes evidence is mixed, see S. D. FRANCK, "Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law", *Pacific McGeorge Global Business & Development Law Journal* 2006, vol. 19, no. 2, 337.

[52] J. SCHOKKAERT, Y. HECKSCHER, *International Investments Protection*, Brussels, Bruylant, 2009, 507 et seq.

[53] Ibid., 509-517; https://iccwbo.org, accessed 20 May 2022.

[54] Ibid., 553-564; https://www.lcia.org, accessed 20 May 2022.

[55] https://uncitral.un.org, accessed 20 May 2022.

[56] UNCITRAL Arbitration Rules, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/21-07996_expedited-arbitration-e-ebook.pdf, accessed 20 May 2020.

Bank.[57] The Centre was established by the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States of March 1965 ('ICSID Convention' or 'the Convention').[58] This Convention, which has the form of an international treaty, contains all the jurisdictional and procedural rules according to which ICSID operates.[59] As of today, there are 156 contracting parties to the Convention.[60]

17. ICSID is not an international court.[61] Its purpose, as described in article 1(2) of the Convention, is to "provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention."[62] Hence, ICSID is an arbitration forum. As the wording of article 1(2) suggests, its jurisdiction is limited to specific disputes. Article 25(1) of the Convention sets out the requirements for the Centre to have jurisdiction: "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally."[63]

18. This article contains some interesting elements. Firstly, only disputes arising directly out of an investment can be brought to ICSID. The term 'investment' is not defined in the Convention itself. Nevertheless, there is relative unanimity that the will of the parties is not decisive.[64] The existence of an investment is an objective requirement, regardless of the qualification the parties give to their relationship.[65] Since the landmark *Salini v. Morocco* case,[66] most tribunals have applied the so-called 'Salini test', which states that investment will ordinarily entail (i) a contribution by the investor, (ii) an element of risk, and (iii) a certain

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[57] J. SCHOKKAERT, Y. HECKSCHER, *International Investments Protection*, Brussels, Bruylant, 2009, 520-553; R. ECHANDI, 'The Debate on Treaty-Based Investor–State Dispute Settlement: Empirical Evidence (1987–2017) and Policy Implications', *ICSID Review* 2019, vol. 34, no. 1, 32–61; https://icsid.worldbank.org, accessed 3 June 2022.

[58] A. PARRA. "Introduction", in *The History of ICSID*, Oxford, Oxford University Press, 2012, 1-10.

[59] M. RUBINO-SAMMARTANO, "Chapitre 39 - Convention pour le règlement des différends relatifs aux investissements entre États et ressortissants d'autres États" in *Arbitrage international*, Brussels, Bruylant, 2019, 1665-1772.

[60] https://icsid.worldbank.org/about/member-states/database-of-member-states, accessed 8th March 2022

[61] SCHREUER et al., *The ICSID Convention*, *supra* note 24, 10-12; J. SCHOKKAERT, Y. HECKSCHER, *International Investments Protection*, Brussels, Bruylant, 2009, 520.

[62] Article 1(2) ICSID Convention.

[63] Article 25(1) ICSID Convention.

[64] J. FOURET, R. GERBAY, G. M. ALVAREZ, *The ICSID Convention, Regulations and Rules*, London, Edward Elgar Publishing, 2019, 115 (hereinafter: FOURET et al., *The ICSID Convention, Regulations and Rules*).

[65] Ibid.

[66] *Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco*, ICSID Case No ARB/00/4, Decision on Jurisdiction, 23 July 2001.

duration.[67] A fourth and more controversial element requires a contribution to the economic development of the host state, but this is not universally accepted in the case law.[68]

19. A second element of article 25(1) is the limitation *ratione personae* to disputes between contracting states and nationals of contracting states.[69] Thus, as is usual in Investor-State Dispute Settlement, one of the parties must be a state and the other party a private (natural or legal) person.[70] ICSID is not open to inter-state arbitration or arbitration between private companies. What is specific to ICSID, is that both the State party and the home country of the private party must be contracting parties to the ICSID convention.[71] This condition is non-waivable.[72] Both states and private investors can file a claim under the Convention, but in the large majority of the cases it is the investor who initiates the proceedings against a state.[73]

20. Finally, both parties must consent to the jurisdiction of the centre.[74] In other words, there is no compulsory jurisdiction. A state may consent to ICSID jurisdiction through a contract with an investor or through domestic legislation, but most often state consent is derived from a clause in the Bilateral Investment Treaty between that State and the home state of the investor party which submits any dispute arising from that treaty to arbitration under the ICSID Convention.[75] As for the investor, it is usually considered that the filing of a request for arbitration equals consent. Should the request for arbitration come from the state party, the investor shall have to explicitly accept the offer for arbitration.[76]

21. Once a request for arbitration under the ICSID Convention has been filed, an arbitral tribunal is constituted to handle the case.[77] Pursuant to article 37 of the Convention, parties may decide in mutual agreement on the number of arbitrators to be appointed to the tribunal, provided that the number is uneven.[78] As a default rule, in case there is no agreement between parties, a tribunal

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[67] Ibid.; FOURET et al., *The ICSID Convention, Regulations and Rules*, *supra* note 60, 117-118; M. RUBINO-SAMMARTANO, "Chapitre 39 - Convention pour le règlement des différends relatifs aux investissements entre États et ressortissants d'autres États" in *Arbitrage international*, Brussels, Bruylant, 2019, 1674.
[68] FOURET et al., *The ICSID Convention, Regulations and Rules*, *supra* note 60, 117-118
[69] Ibid., 138-144.
[70] Ibid.
[71] Ibid.
[72] Ibid.
[73] Ibid.
[74] Ibid., 145-147; M. RUBINO-SAMMARTANO, "Chapitre 39 - Convention pour le règlement des différends relatifs aux investissements entre États et ressortissants d'autres États" in *Arbitrage international*, Brussels, Bruylant, 2019, 1676-1682.
[75] In more recent BIT's, parties often have the choice between ICSID or other arbitration fora, such as UNCITRAL, the ICC or ad hoc arbitration; see W. SHAN, *The Legal Protection of Foreign Investment, A comparative Study*, Oxford, Hart Publishing, 2012, 59-63.
[76] FOURET et al., *The ICSID Convention, Regulations and Rules*, *supra* note 60, 145-147.
[77] Art. 37 (1) ICSID Convention.
[78] Article 37 (2) (a) ICSID Convention.

consists of three arbitrators, whereby each party gets to appoint one arbitrator and the third one, the president, is appointed by mutual consent.[79]

22. The first case was submitted to ICSID in 1972, and for the following two decades very few cases were filed. However, since the late 90's, there has been a sharp increase in the number of cases, with 66 cases in the year 2021, the highest amount in the history of ICSID.[80] In total, since its establishment, ICSID has received 869 cases. Most defendants are developing countries, the majority of them situated in South America, Eastern Europe & Central Asia and Sub-Saharan Africa (at least for 2021).[81]

2.3. ARBITRATOR BACKGROUND

23. Who are the ICSID arbitrators deciding investment disputes? To what extent are the allegations that they form a closed and privileged community correct? In this section, the background of some of these arbitrators is examined. In a limited research project such as a paper, it is of course not possible to examine every arbitrator who has ever decided an ICSID case. Therefore, the background check is limited to the arbitrators who decided one or more of the disqualification cases contained in the ICSID database in which a lack of independence or impartiality was invoked as a legal ground. In total, this amounts to 21 cases and 50 arbitrators. All of the background information about these arbitrators was found in their CV or in other publicly available databases such as Jus Mundi.[82]

24. Among the 50 arbitrators included in the examination, 25 nationalities are represented.[83] While at first sight this may seem like a significant degree of diversity, when taking a closer look, it appears that a few countries are dominant. Half of the arbitrators come from four countries alone: 10 from the U.S., 5 from the U.K., 5 from France and 5 from Switzerland. The remaining 25 arbitrators almost exclusively come from western and some South American countries.[84] Lebanon and Israel are the only Middle Eastern countries represented; the rest of Asia and Africa are completely absent. In total, 81% of the arbitrators have the nationality of a western country.[85] These numbers confirm the view that ICSID arbitration is still largely dominated by western countries. The presence of South American arbitrators may be explained by the fact that many of the respondents in the case sample were South American countries.

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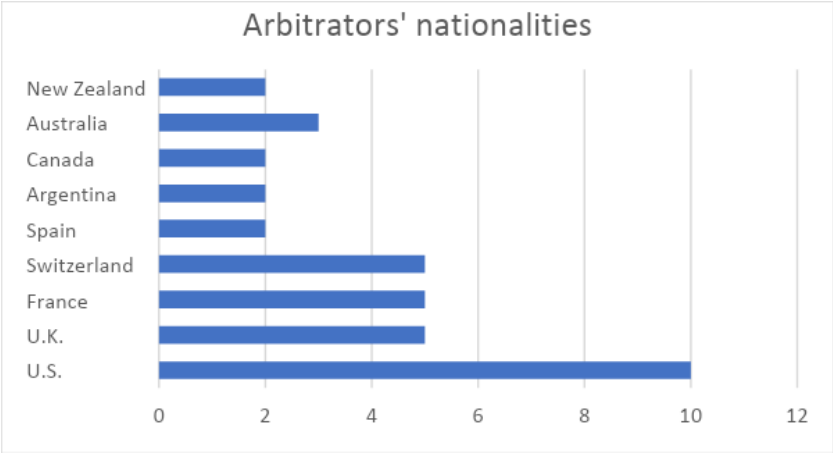
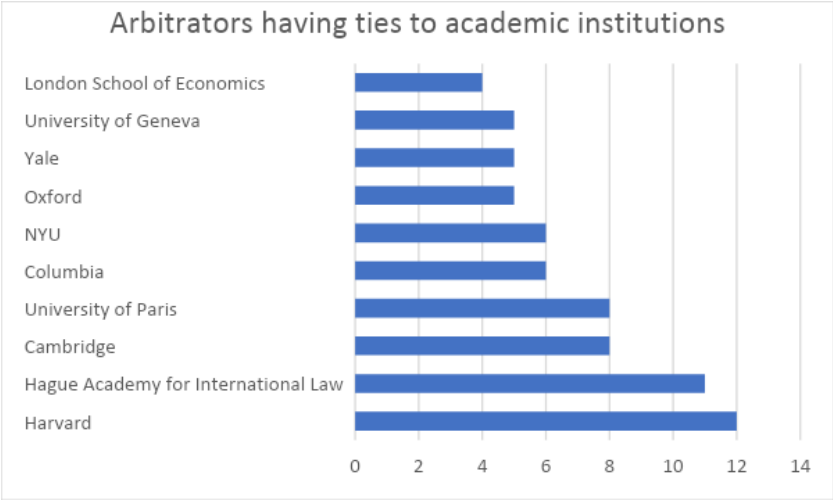
[79] Article 37 (2) (b) ICSID Convention.
[80] ICSID Caseload – Statistics, Issue 2022 – 1, https://icsid.worldbank.org/sites/default/files/documents/The_ICSID_Caseload_Statistics.1_Edition_ENG.pdf, accessed 8 March 2022.
[81] Ibid.
[82] https://jusmundi.com/en;, accessed 28 May 2022.
[83] Although it must be noted that some arbitrators have a double nationality, so this may distort the picture.
[84] Sweden, Australia, New Zealand, Canada, Belgium, Bulgaria, Italy, Spain, Finland, Germany, Slovakia, Brazil, Chili, Costa Rica, Argentina, Venezuela, Cuba, Mexico and Peru.
[85] 'Western' being defined as North America, Europe, New Zealand and Australia.



25. A similar conclusion can be drawn when looking at the academic background. A few renowned educational institutions seem to exert a disproportionate influence over the arbitrators' education. For example, no less than 12 arbitrators (which corresponds to 24%) have either studied, conducted research or taught at Harvard Law school. 11 out of them are in some way connected to the Hague Academy for International Law. 8 arbitrators are alumni of Cambridge and the University of Paris respectively. Other institutions frequented by these arbitrators are Columbia, NYU, Oxford, Yale and the University of Geneva. In short, a limited number of prestigious, exclusively western and predominantly Anglo-Saxon universities are overly represented. Of course, these institutions are known for their academic excellence and high standards, so the fact that many arbitrators attended them is not in itself problematic. Nevertheless, it does reinforce the image of an exclusive and closed community in which everyone somehow knows one another.



26. The CV's of all 50 arbitrators included in this examination mention other professional experience apart from investment arbitration, either at a law firm, in academics or as a government official or judge. 35 arbitrators have worked or are working at a law firm. Some of them have their own independent office, but in most of the cases they work for an international business-oriented firm based in the U.S., U.K. or sometimes Switzerland.[86] Many of these firms are considered to be among the world's most elite law firms.[87]

27. A few of these 50 arbitrators have been particularly industrious and appear in multiple cases. Brigitte Stern tops the list with six cases in which she was involved. This means almost one in three cases were decided by ms. Stern. Gabrielle Kaufmann-Kohler has four cases on her record. Stanimir Alexandrov, Philippe Sands, Francisco Orrego Vicuña and Guido Santiago Tawil decided two cases each.

28. A large-scale study conducted by Sergio Puig in 2014 confirms most of these findings.[88] In his conclusion, Puig finds that "*the network of international arbitration professionals is heavily dependent on a small number of socially prominent actors.*"[89] In summary, according to this study the arbitrator community is small and interconnected, dominated by a few influential arbitrators, usually from Europe, an Anglo-Saxon country or South America who have studied in the U.S., the U.K. or France.[90] Of course, despite these

[86] Ibid.
[87] According to rankings such as Legal 500 and Chambers.
[88] S. PUIG, "Social Capital in the Arbitration Market", *European Journal of International Law* 2014, vol. 25 no.2; see also A.S. KING, P. K. BOOKMAN, 'Travelling Judges', Pre-publication manuscript accepted by the American Journal of International Law, Published online by Cambridge University Press.
[89] S. PUIG, 'Social Capital in the Arbitration Market', *European Journal of International Law* 2014, vol. 25, no.2, 424-425.
[90] Ibid.

observations arbitrators can still be independent and impartial, but the chances of bias or conflicts of interest significantly increase in such a closed community.

3. INDEPENDENCE AND IMPARTIALITY IN THE DISQUALIFICATION PROCEDURE

3.1. DISQUALIFICATION IN GENERAL

3.1.1. Legal basis

29. Most legal systems have some form of procedure whereby a judge can be excluded from a procedure because he or she is deemed not to meet the necessary requirements.[91] The same is true for ICSID arbitration. The ICSID Convention provides for a disqualification mechanism which allows parties to challenge the position of an arbitrator and, when successful, have him or her removed from the tribunal.[92] A proposal for disqualification must be made before the final award is rendered.[93] Once there is an award, the appropriate procedural remedy is annulment.[94] The relevant article for the disqualification procedure is article 57 of the Convention: "*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. A party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV.*"[95] Article 57 refers to article 14, the first paragraph of which in turn sets out the qualities an ICSID arbitrator should possess: "*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. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.*"[96]

30. Thus, any arbitrator who does not possess one of the qualities listed in article 14(1), can be disqualified. It is especially the requirement that arbitrators 'may be relied upon to exercise independent judgment' which is of interest for this paper, as this sentence forms the legal basis for disqualification for lack of independence or impartiality.

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[91] For example, art. 828 of the Belgian Judicial Code provides for the "wraking/recusation" of a judge who cannot be considered independent. A similar provision can be found in article L111-6 of the French Judicial Code.
[92] Art. 57 ICSID Convention; SCHREUER et al., *The ICSID Convention*, *supra* note 24, 1198 et seq.
[93] ICSID Arbitration Rule 9 (1).
[94] Art. 52 ICSID Convention; *infra* 81-83.
[95] Art. 57 ICSID Convention.
[96] Art. 14 (1) ICSID Convention.

3.1.2. Procedure

31. Per article 58 of the Convention, a proposal to disqualify an arbitrator should in principle be decided by the remaining tribunal members who are not subject to the disqualification challenge[97] (the 'unchallenged arbitrators'). Thus, in the most common case in which a tribunal consists of three arbitrators and one of them faces a proposal for disqualification, the two unchallenged arbitrators decide on the proposal. However, in some situations the decision lies with the Chairman of the ICSID Administrative Council.[98] This is the case where the arbitrator facing the challenge is the sole arbitrator on the tribunal, meaning there are no other arbitrators to decide on the proposal.[99] The Chairman also decides when the proposal for disqualification is directed at the majority of the members of the tribunal. In practice, as almost all tribunals consist of three arbitrators, this means that when two or three arbitrators are challenged at the same time, the Chairman decides on their disqualification. Finally, if two unchallenged members cannot agree on a decision, the decision lies with the Chairman as well.[100]

32. The filing of a proposal for disqualification leads to the suspension of the proceedings.[101] In an informal and non-adversarial procedure, the challenged arbitrator may provide explanations to the unchallenged arbitrators or the Chairman.[102] If the proposal is rejected, the proceedings simply continue without further consequences. If the proposal is accepted, however, the arbitrator in question is removed from the tribunal and must be replaced. Under Arbitration Rule 11, "*a vacancy resulting from the disqualification [...] of an arbitrator shall be promptly filled by the same method by which his appointment has been made.*"[103] This means that the party who appointed the disqualified arbitrator gets to appoint his replacement. If the arbitrator was appointed by the Chairman, the Chairman also appoints his successor.

3.1.3. Independence and impartiality

33. Article 14 requires independent judgment as a necessary quality for an arbitrator to possess but makes no mention of impartiality.[104] However, the Spanish versions of this article use a slightly different wording. It requires that a person *"...inspira[r] plena confianza en su* ***imparcialidad*** *de juicio."*[105] Thus,

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[97] Art. 58 ICSID Convention, SCHREUER et al., *The ICSID Convention*, *supra* note 24, 1210.
[98] The President of the World Bank is *ex officio* designated as Chairman of the Administrative Council, see art. 5 ICSID Convention. However, in practice this competence is often delegated to the Secretary-General, see CLEIS, *The Independence and Impartiality of ICSID Arbitrators*, *supra* note 27, 194.
[99] SCHREUER et al., *The ICSID Convention,* supra note 24, 1210.
[100] Ibid.
[101] ICSID Arbitration Rule 9 (6); SCHREUER et al., *The ICSID Convention*, supra note 24, 1211.
[102] Ibid.
[103] ICSID Arbitration Rule 11 (1).
[104] *Supra* 29.
[105] Translation: "inspires full confidence in the impartiality of his judgment", art. 14(1) Convenio sobre Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de Otros Estados.

while the English (and French)[106] versions require independence, the Spanish version considers impartiality as the essential quality. Since both versions of the Convention are equally authentic, tribunals have derived from this difference in wording the requirement that arbitrators must be both independent and impartial.[107] This interpretation is in accordance with other sets of arbitration rules, such as those of UNCITRAL, which contain the same requirement.[108] In short, an arbitrator can be challenged through the disqualification procedure for lacking either independence, impartiality, or both.

34. One question remains: how to define independence and impartiality? This paper adheres to the definition as adopted by ICSID case law. In the disqualification case of *Suez v. Argentina*, the tribunal defined independence as follows: "*Independence relates to the lack of relations with a party that might influence an arbitrator's decision.*"[109] Such relations must not necessarily have had an influence on an arbitrator, their mere existence can be sufficient to question his or her independence.[110] Impartiality, on the other hand, was defined as "*the absence of a bias or predisposition towards one of the parties.*"[111] This definition describes impartiality as more of a subjective quality, making it harder to verify.[112] These definitions were later endorsed by other tribunals.[113] The criteria of independence and impartiality "*serve the purpose of protecting the parties against arbitrators being influenced by factors other than those related to the merits of the case.*"[114] In practice, however, these concepts are often used interchangeably.[115]

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[106] "*Les personnes désignées pour figurer sur les listes doivent [...] offrir toute garantie d'indépendance dans l'exercice de leurs fonctions.*", art. 14(1) Convention pour le règlement des différends relatifs aux investissements entre Etats et ressoritssants d'autres Etats.
[107] FOURET et al., *The ICSID Convention, Regulations and Rules*, *supra* note 60, 69.
[108] Art. 6(7) UNCITRAL Arbitration Rules.
[109] *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17 and *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on the proposal for the disqualification of a member of the arbitral tribunal, 22 October 2007, para. 29 (hereinafter: *Suez v. Argentina*, Disqualification Decision).
[110] CLEIS, *The Independence and Impartiality of ICSID Arbitrators*, *supra* note 27, 20.
[111] *Suez. Argentina*, Disqualification decision, *supra* note 111, para. 29.
[112] CLEIS, *The Independence and Impartiality of ICSID Arbitrators*, *supra* note 27, 21.
[113] *Alpha Projektholding GMBH v. Ukraine*, ICSID Case No. ARB/07/16, Decision on Respondent's Proposal to Disqualify Aribtrator Dr. Yoram Turbowicz,, 19 March 2010, para. 35-36; *Blue Bank International & Trust (Barbados) Ltd. v. Bolviarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, 12 November 2013, para. 59; *Getma International, NCT Necotrans, Getma International Investissements, NCT Infrastructure & Logistique v. République de Guinée*, ICSID Case No. ARB/11/29, Décision sur la demande en recusation de monsieur Bernardo M. Cremades, Arbitre, 28 June 2012, para. 59.
[114] *Urbaser S.A., Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Claimants' Proposal to Disqualify an Arbitrator, 12 August 2010, para 43; *ConocoPhillips Company et al v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/07/30, Decision on the proposal to disqualify L. Yves Fortier, Q.C. Arbitrator, 27 February 2012, para 55.
[115] SCHREUER et al., *The ICSID Convention: a Commentary*, *supra* note 24, 1202-1206.

3.1.4. Manifest lack of independence and impartiality

35. Article 57 requires the existence of a *manifest* lack of independence or impartiality for an arbitrator to be disqualified. The facts demonstrating a lack of independence or impartiality must be sufficiently serious for such a lack to be manifest. The term manifest is open to multiple interpretations, and in fact different tribunals have come to different conclusions regarding the meaning of 'manifest'.[116]

36. The first ever disqualification challenge to an arbitrator was made in *Amco Asia*.[117] In that case, the unchallenged arbitrators set a rather high burden by requiring not just proof of facts indicating a lack of independence or impartiality, but proof of an arbitrator's actual lack of those qualities.[118] In their view, the term 'manifest' meant 'highly probable' and justified doubts regarding an arbitrator's independence were insufficient to accept a proposal for disqualification.[119] Given the obvious challenges in proving actual bias, this standard makes it difficult, if not nearly impossible, to disqualify an arbitrator for lacking independence or impartiality.[120] Nevertheless, the *Amco Asia* standard was adopted in many subsequent cases.[121]

37. In *Vivendi,*[122] however, the unchallenged members came to a different conclusion. They applied a two-step test.[123] First, the challenging party must demonstrate the existence of circumstances grave enough to put the arbitrator's independence or impartiality into question. If the party is able to do so, then in a second step it is allowed to draw inferences from these circumstances. In other words, if the circumstances established by the party cast reasonable doubt on the independence and impartiality of an arbitrator, a challenge can be upheld.[124]

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[116] P. HORN, A Matter of Appearances: Arbitrator Independence and Impartiality in ICSID Arbitration, *NYU Journal of Law & Business* 2014, vol. 11, no.2, 356-373.

[117] *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on the Proposal to Disqualify an Arbitrator, 24 June 1982 (hereinafter: *Amco Asia v. Indonesia*, Disqualification Decision); CLEIS, *The Independence and Impartiality of ICSID Arbitrators*, supra n.27, 32.

[118] *Amco Asia v. Indonesia*, Disqualification Decision, *supra* note 119.

[119] P. HORN, A Matter of Appearances: Arbitrator Independence and Impartiality in ICSID Arbitration, *NYU Journal of Law & Business* 2014, vol. 11, no.2, 357-358.

[120] P. HORN, A Matter of Appearances: Arbitrator Independence and Impartiality in ICSID Arbitration, *NYU Journal of Law & Business* 2014, vol. 11, no.2, 356-373.

[121] E.g. *Participaciones Inversiones Portuarias SARL v République gabonaise*, Affaire CIRDI ARB/08/17, Disqualification Decision, 12 November 2009; *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, 23 December 2010; *OPIC Karimum Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/14, Decision on the Proposal to Disqualify Professor Philippe Sands, 5 May 2011, *Universal Compression International Holdings, S.L.U. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Decision on the Proposal for the Disqualification of two Members of the Arbitral Tribunal, 20 May 2011.

[122] *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on the Challenge to the President of the Committee, 3 October 2001, para. 25.

[123] CLEIS, *The Independence and Impartiality of ICSID Arbitrators*, *supra* note 27, 33.

[124] Ibid.

Thus, the Vivendi arbitrators clearly reject the *Amco Asia* standard by allowing disqualification in the case of 'reasonable doubts' as to the existence of bias. The burden of proof here is lower, as no actual bias must be established but the possibility of bias suffices for disqualification.[125] The ICSID case law is clearly divided on this issue, since a great deal of arbitrators chose to follow the *Vivendi* rather than the *Amco Asia* standard.[126]

38. In summary, there is a strong divergence among tribunals regarding the meaning of the term 'manifest' and the standard to be applied to disqualification challenges.[127] Decisions are inconsistent and at times even contradict one another.[128] Absent any rule of precedent or overriding judicial authority, each arbitral tribunal has the absolute freedom to decide as it sees fit, without having to ponder about the coherence and legitimacy of the ICSID system as a whole.[129] The obvious drawbacks of this approach shall be discussed below, but it is important that the reader be aware of this divergence before embarking upon the case law analysis.

3.1.5. Disclosure

39. Apart from the obligation to always remain independent and impartial, arbitrators are also required to disclose certain information about their background to the parties.[130] The legal basis for this obligation is article 6(2) of the ICSID Arbitration Rules, sometimes combined with General Standard (3) of the International Bar Association Guidelines on Conflicts of Interest in International Arbitration ('IBA Guidelines').[131]

40. Arbitration Rule 6(2) contains a statement that each arbitrator must sign before or at the first session of the tribunal. Particularly interesting is the following part of the declaration: *"Attached is a statement of (a) my past and present professional, business and other relationships (if any) with the parties and (b) any other circumstance that might cause my reliability for independent*

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[125] Ibid.
[126] E.g. *EDF International S.A, SAUR International S.A., Léon Participaciones Argentinas S.A.* v. Argentine Republic, ICSID Case No. ARB/03/23, Challenge Decision, 25 June 2008; *Alpha Projektholding GMBH v. Ukraine*, ICSID Case No. ARB/07/16, Decision on respondent's Proposal to Disqualify Aribtrator Dr. Yoram Turbowicz,, 19 March 2010; *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Disqualification decision, 12 August 2010; *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decision to disqualify a majority of the tribunal, 12 November 2013; *Caratube International Oil Company LLP & Mr. Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the proposal for disqualification of Mr. Bruno Boesch, 20 March 2014.
[127] CLEIS, *The Independence and Impartiality of ICSID Arbitrators*, *supra* note 27, 49.
[128] The *Amco Asia* and *Vivendi* decisions seem to lead to opposite conclusions, for example.
[129] CLEIS, The Independence and Impartiality of ICSID Arbitrators, supra note 27, 32.
[130] CLEIS, *The Independence and Impartiality of ICSID Arbitrators*, *supra* note 27, 19.
[131] IBA Guidelines on Conflicts of Interest in International Arbitration, Adopted by resolution of the IBA Council on Thursday 23 October 2014 (hereinafter: IBA Guidelines); See e.g. *Alpha Projektholding GMBH v. Ukraine*, ICSID Case No. ARB/07/16, Decision on respondents' Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz, 19 March 2010 (hereinafter: *Alpha v. Ukraine*, Disqualification Decision).

judgment to be questioned by a party. I acknowledge that by signing this declaration, I assume a continuing obligation promptly to notify the Secretary-General of the Centre of any such relationship or circumstance that subsequently arises during this proceeding."
Thus, Rule 6(2) states which information ought to be disclosed, either through attachment to the declaration or through notification of the Secretary-General. Rule 6(2)(a) only addresses relationships, professional or otherwise, between arbitrators and parties, whereas rule 6(2)(b) is much broader: it refers to 'any other circumstance'. In other aspects, 6(2)(b) is more limited: it does not include the words 'past and present' or 'if any'. In *Alpha v. Ukraine*, the unchallenged arbitrators interpreted rule 6(2)(b) as entailing a 'justifiable doubts' test rather than the 'manifest' threshold which applies to arbitrator challenges. Thus, when there is justifiable doubt about whether a circumstance might lead the parties to question an arbitrator's independence or impartiality, it must be disclosed.

41. Also in *Alpha v. Ukraine*, the unchallenged members consulted the IBA Guidelines for further guidance as to the disclosure requirement.[132] General Standard 3 of the IBA Guidelines states that: "(*a) If facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence, the arbitrator shall disclose such facts or circumstances [...] prior to accepting his or her appointment [...] (b) Any doubt as to whether an arbitrator should disclose certain facts or circumstances should be resolved in favour of disclosure."*[133] Furthermore, in its second part, the IBA Guidelines list four categories of fact patterns:[134]
(1) a non-waivable red list of facts which must be disclosed in every case and turn the arbitrator in question ineligible for appointment;[135]
(2) a waivable red list of facts which must always be disclosed but which the parties can choose to waive;[136]
(3) an orange list of relationships which must be disclosed but are deemed to be accepted unless a party objects;[137]
and (4) a green list of relationships which must not be disclosed.[138]

42. The obligation of disclosure does not alter the burden of proof for arbitrator challenges.[139] The scope of the duty to disclose information is broader than the scope of the factors which can lead to disqualification. This means that an arbitrator is under a duty to disclose even such information which might not necessarily lead to disqualification.[140] The purpose of Arbitration Rule 6(2) is to avoid bias rather than eliminating biased arbitrators.[141] No disqualification

[132] Ibid., para. 56-59.
[133] General Standard 3 IBA Guidelines.
[134] IBA Guidelines, 20-27.
[135] E.g. where an arbitrator is an employee or a director of a party or has regularly advised a party.
[136] E.g. where an arbitrator has provided legal advice to or holds a financial interest in a party.
[137] E.g. where an arbitrator has, within the past three years, served as counsel for a party.
[138] E.g. where an arbitrator has expressed a legal opinion on an issue that arises in the arbitration.
[139] CLEIS, *The Independence and Impartiality of ICSID Arbitrators*, *supra* note 27, 19.
[140] Ibid., see also *Alpha v. Ukraine*, Disqualification Decision, *supra* note 133.
[141] CLEIS, *The Independence and Impartiality of ICSID Arbitrators*, *supra* note 27, 20.

challenge based upon the non-respect of the disclosure obligation has thus far been successful.[142]

3.1.6. Timeliness

43. A proposal for disqualification must be made 'promptly', according to Arbitration Rule 9(1).[143] Promptly means "*as soon as the party concerned learns of the grounds for a possible disqualification.*"[144] This requirement is strict; a party is deemed to have waived its right to object if it has not done so promptly.[145] In *Suez v. Argentina*, Argentina filed a proposal for disqualification 53 days after it gained knowledge of a possible ground for disqualification. The unchallenged arbitrators ruled that Argentina had not acted promptly.[146] In any case, a proposal must be filed before the proceedings are closed.[147] If a party becomes aware of a ground for disqualification after the proceedings have been closed, it may have recourse to the annulment procedure. However, as discussed below, the question whether the information was available before the closure of the proceedings may have an impact on the admissibility of the annulment proceedings.[148]

3.2. CASE LAW ANALYSIS

44. In this section, I discuss some of the most important ICSID disqualification cases dealing with independence and impartiality.[149] Whether an arbitrator is independent and impartial is in the first place a matter of fact, rather than a legal question. Therefore, the facts of each case must be discussed separately and in detail. The cases are clustered according to the factual circumstances which led the parties to file a proposal for disqualification. In the first group of cases, the issue was an arbitrator's involvement in a panel deciding an earlier case against the same party. In the second group, disqualification had been proposed because of personal opinions an arbitrator had expressed. The third group handles the professional and social relations which arbitrators entertain and the conflicts of interest that may arise therefrom.

3.2.1. Involvement in other panels

45. In the *Suez v. Argentina* case,[150] Argentina accused one of the arbitrators on the tribunal, Professor Kaufmann-Kohler, of lacking independence and impartiality because she had been an arbitrator in a previous case against

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[142] Ibid.
[143] CLEIS, *The Independence and Impartiality of ICSID Arbitrators*, *supra* note 27, 18; Arbitration Rule 9 (1).
[144] SCHREUER et al., *The ICSID Convention, supra* note 4, 1200; Note B to Arbitration and Conciliation Rule 9 of 1968, 1 ICSID Reports 76/7, 131.
[145] Arbitration Rule 27.
[146] *Suez v. Argentina*, Disqualification Decision, *supra* note 111, para. 26.
[147] Arbitration Rule 9(1).
[148] *Infra* 96.
[149] As to the method applied for selecting these cases, see *supra* 9-11.
[150] *Suez v. Argentina*, Disqualification Decision, *supra* note 111.

Argentina, *Aguas del Aconquija*.[151] In that case, Argentina had been condemned to the payment of US $105,000,000 in damages. From the fact that Professor Kaufmann-Kohler had previously decided against it, and had allegedly interpreted the facts incorrectly. Argentina inferred a lack of independence and impartiality on her part and accordingly proposed her disqualification from the tribunal.[152]

46. The unchallenged arbitrators who had to decide on the disqualification challenge, after reviewing the *Aguas del Aconquija* award, found no evidence of a lack of independence or impartiality.[153] Furthermore, they emphasized that differing opinions over the interpretation of a set of facts does not necessarily indicate bias. Parties may disagree with the factual or legal interpretation of an arbitrator. This is an essential characteristic of judicial processes throughout the world, which results from the conflictual nature of litigation. It does not mean that the decision process has been flawed. In their own words: "*A judge or arbitrator may be wrong on a point of law or wrong on a finding of fact but still be independent and impartial.*"[154] Moreover, the decision in the *Aguas* case had been accepted unanimously by all three arbitrators, further weakening the case for any preconception on the part of Professor Kaufmann-Kohler.[155] Thus, the arbitrators concluded that the facts cited by Argentina did not meet the high threshold of a manifest lack of independence or impartiality and the proposal for disqualification was dismissed.[156]

47. A similar situation arose in *PIP SARL v. Gabon*.[157] Gabon sought the disqualification of an arbitrator, Professor Fadlallah, because he had decided against Gabon in an earlier arbitral procedure which involved the same issue as the present case: the expropriation of concession agreements. For Gabon, this constituted a conflict of interest. For the Chairman who had to decide on the proposal for disqualification, the link between the cases was not sufficiently strong to warrant disqualification, as expropriation is a recurring issue in investment law.[158] In a structure where arbitrators frequently interact in different positions on different tribunals, deciding otherwise would have hampered the proper functioning of the system.[159] Accordingly, the disqualification was rejected.[160]

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[151] *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Resubmission decision, 20 August 2007.
[152] *Suez v. Argentina*, Disqualification Decision, *supra* note 111, para. 12.
[153] Ibid., para. 34.
[154] Ibid., para. 35.
[155] Ibid.
[156] Ibid., para. 43.
[157] *Participaciones Inversiones Portuarias SARL v République gabonaise*, Affaire CIRDI ARB/08/17, Disqualification Decision, 12 november 2009 (hereinafter: *PIP SARL v. Gabon*, Disqualification Decision).
[158] Ibid., para 33.
[159] M. KIRTLAND, B. SABAHI, "Recent Challenges to Arbitrators in Investment Treaty Cases – Is There an Emerging Trend?", 16 *IBA Arb. News*, 171.
[160] *PIP SARL v Gabon,* Disqualification Decision*, supra* note 162, para. 35.

48. In *Caratube v. Kazakhstan*,[161] American oil company Caratube submitted a proposal for disqualification of Mr. Boesch, an arbitrator appointed by Kazakhstan. It invoked two grounds for disqualification: the fact that Mr. Boesch was appointed by Kazakhstan in an earlier case, *Ruby Roz v. Kazakhstan,*[162] and his numerous appointments as arbitrator by law firm Curtis, Mallet-Prevost, Colt & Mosle, which represented Kazakhstan in the present case.[163]

49. From the outset, the unchallenged arbitrators considered that this was a case not about actual lack of independence or impartiality, but pertaining to the appearance of a lack of impartiality, namely Mr. Boesch's "*perceived ability to serve as arbitrator in the present arbitration without bias or predisposition towards one party*".[164] The unchallenged arbitrators observed that "*a problem can arise where an arbitrator has obtained documents or information in one arbitration that are relevant to the dispute to be determined in another arbitration. In this situation, the arbitrator "cannot reasonably be asked to maintain a 'Chinese wall' in his own mind: his understanding of the situation may well be affected by information acquired in the other arbitration.*"[165] Hence, the question here is whether the two cases, *Ruby Roz* and *Caratube*, were so similar that information obtained by Mr. Boesch in the former might affect his judgment in the latter.[166]

50. The unchallenged arbitrators answered affirmatively. Both disputes had arisen out of the same context. The two claimants, Ruby Roz and Caratube, both argued they had been expropriated by the Kazakh government because of a 'campaign of persecution' against the President of Kazakhstan's son in law, which had fallen out of grace, and the latter's associates Devincci Hourani and Kassem Omar.[167] Hourani and Omar were the owners of Caratube and Ruby Roz respectively, and shared professional and personal relations.[168] Furthermore, many of the witnesses that submitted statements in the *Ruby Roz* case were also likely to submit statements in the *Caratube* case.[169] For these reasons, the unchallenged arbitrators concluded that *Ruby Roz* and *Caratube* partially overlapped, in fact and in law, and that information which Mr. Boesch obtained as arbitrator in *Ruby Roz* might also be relevant for *Caratube.*[170] Therefore, the unchallenged arbitrators found that "*independently of Mr. Boesch's intentions and best efforts to act impartially and independently, a reasonable and informed third party would find it highly likely that, due to his serving as arbitrator in the Ruby Roz case and his exposure to the facts and legal arguments in that case,*

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[161] *Caratube International Oil Company LLP & Mr. Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the proposal for disqualification of Mr. Bruno Boesch, 20 March 2014 (hereinafter: *Caratube v. Kazakhstan*, Disqualification Decision).
[162] Ibid., para. 24.
[163] Ibid., para. 30.
[164] Ibid., para 74.
[165] Ibid., para. 75.
[166] Ibid., para. 77.
[167] Ibid., para. 78.
[168] Ibid., para. 84.
[169] Ibid., para. 86.
[170] Ibid., para. 88.

Mr. Boesch's objectivity and open-mindedness with regard to the facts and issues to be decided in the present arbitration are tainted."[171]

51. For the same reasons, the unchallenged arbitrators concluded that a manifest imbalance existed within the Tribunal, due to the information to which Mr. Boesch had access and the other arbitrators had not. This imbalance put the claimants at a disadvantage.[172] However, as to the legal consequences of this imbalance, the unchallenged arbitrators remained opaque. They explicitly left open the question whether such an imbalance may constitute a separate ground for disqualification or merely forms an aggravating circumstance.[173]

52. The second ground for disqualification invoked by Caratube were Mr. Boesch's repeat appointments by the law firm Curtis, Mallet-Prevost, Colt & Mosle LLP and Kazakhstan in various arbitration cases. Caratube relied on the award in the *OPIC v. Venezuela* case, in which the tribunal decided that "*multiple appointments of an arbitrator are an objective indication of the view of parties and their counsel that the outcome of the dispute is more likely to be successful with the multiple appointee as a member of the tribunal than would otherwise be the case.*"[174] Therefore, if the same arbitrator is appointed multiple times by a party, there may be a manifest lack of independence on his or her part. The unchallenged arbitrators, however, rejected the *OPIC* decision and decided that the mere fact that an arbitrator has been appointed multiple times by the same party, does not in itself indicate a manifest lack of independence or impartiality.[175] Nevertheless, Mr. Boesch was disqualified on the basis of the first ground invoked by Caratube.[176]

3.2.2. Personal opinions

53. Can an opinion expressed in academic writing be an indication of partiality? That was the central question in the case of *Urbaser v. Argentina*.[177] Urbaser reproached the arbitrator appointed by Argentina, Professor McLachlan, of showing bias and lacking impartiality because of views expressed in his publications as a legal scholar. Specifically, he had criticized the tribunal's decision in the ICSID *Maffezini* case.[178] As the legal question to be considered in the *Maffezini* case, the outcome of which Professor McLachlan had expressed his disagreement with, was similar to the legal question in the present case, Urbaser asserted that Professor McLachlan had "*already prejudged an essential*

[171] Ibid., para. 90.
[172] Ibid., para. 93.
[173] Ibid., para. 96.
[174] Ibid., para. 103.
[175] Ibid., para. 107.
[176] Ibid., para. 111.
[177] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Disqualification decision, 12 August 2010 (hereinafter: *Urbaser v. Argentina*, Disqualification Decision).
[178] *Emilio Augustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000.

element of the conflict that is the object of this arbitration."[179] For the same reasons, Urbaser questioned Professor McLachlan's criticism of the tribunal's decision in the *CMS* case.[180]

54. The unchallenged arbitrators had to decide whether the expression of these opinions was of such a nature as to warrant the disqualification of Professor McLachlan. They started their reasoning by pointing out that absolute independence and impartiality seems utopian. Every human being has opinions and values, and it is impossible to eliminate them. What is required of an arbitrator, however, is "*the ability to consider and evaluate the merits of each case without relying on factors having no relation to such merits.*"[181] Thus, the central issue is whether the opinions expressed by Professor McLachlan were specific and clear enough that a reasonable and informed third party would find that he would rely on such opinions to form his decision instead of giving proper consideration to the facts and circumstances of the proceedings at hand.[182]

55. This was not the case, the unchallenged arbitrators decided. They conceded that in ICSID arbitration, the personal opinion of an arbitrator might play a bigger role than in 'ordinary' systems of adjudication (i.e., domestic judicial systems) where judges are restrained by rules of precedent and appellate bodies.[183] Nevertheless, the unchallenged arbitrators stated that expressing an opinion, however relevant to a particular arbitration, in itself cannot be sufficient to constitute a lack of independence or impartiality.[184] Deciding to the contrary would mean that no ICSID arbitrator would dare to express views on any subject relating to investment arbitration.[185]

56. Upon examination of the actual statements Professor McLachlan made in his legal scholarship, the two other members could not find any proof of prejudice or prejudgment on any of the issues relevant to the present case. The statements were merely an analysis of international law and the BITs involved in the cases under discussion.[186] Furthermore, the cases criticized by Professor McLachlan were not as similar to the present case as Urbaser contended, meaning that his opinions on those cases were not decisive to the outcome of the arbitration between Urbaser and Argentina.[187] Thus, the threshold of "*presenting an appearance that Prof. McLachlan was not prepared to consider each party's position with full independence and impartiality*", was not met.[188]

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[179] *Urbaser v. Argentina*, Disqualification Decision, *supra* note 182, para. 23.
[180] Ibid., para. 25.
[181] Ibid., para. 40.
[182] Ibid., para. 44.
[183] Ibid., para. 49.
[184] Ibid, para. 45.
[185] Ibid., para. 48
[186] Ibid., para. 54.
[187] Ibid.
[188] Ibid., para. 58.

57. In *Burlington v. Ecuador,*[189] Professor Francisco Orrego Vicuña was disqualified from his position as an arbitrator because of statements he made in a letter.[190] Originally, Ecuador sought to disqualify him because he had repeatedly been appointed as an arbitrator in other cases by Freshfields, the law firm which represented Burlington in this case, and he had not disclosed this information.[191] This ground for disqualification was rejected because Ecuador did not raise the argument in a timely manner.[192] However, in Professor Orrego Vicuña's reaction to this challenge, Ecuador found a separate ground for disqualification. In a response to the challenge directed at him, Professor Orrego Vicuña explained his position in a letter in which he questioned the ethics of Ecuador's counsel, the law firm Dechert: *"[...] the real ethical question seems to lie with Dechert's submissions and the handling of confidential information. [...] Dechert is in the knowledge of such correspondence as counsel for Bolivia, but it does not seem appropriate or ethically justified that this information be now used to the advantage of a different client of Dechert [...]"*[193] In the Chairman's view, these allegations were uncalled for. They did not serve any purpose in explaining Professor Orrego Vicuña's position or in defending him against the accusations that he lacked independence and impartiality.[194] Therefore, the Chairman agreed they were a manifestation of bias, and that a third party would conclude "*that the paragraph quoted above manifestly evidences an appearance of lack of impartiality.*"[195] The challenge was upheld.

58. Can the choice of words of an arbitrator indicate bias? That was the argument made by RSM in *RSM v. Saint-Lucia.*[196] The issue at hand was third-party funding. One of the arbitrators, Dr. Griffith, apparently did not think much of third-party funding and made some negative comments about this phenomenon, much to the dissatisfaction of RSM, which was itself third party funded.[197] In an assenting opinion, Dr. Griffith had made the following statements ``It *is increasingly common for BIT claims to be financed by an identified, or (as here) unidentified third party funder [...]. Such a business plan for a related or professional funder is to embrace the gambler's Nirvana: Heads I win, and Tails I do not lose. The founders of the Convention could not have foreseen in any way the emergence of a new industry of mercantile adventurers as professional BIT claims funders.*"[198] Especially the use of the expressions 'gambler's Nirvana' and 'mercantile adventurers' for RSM demonstrated bias

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[189] *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on the proposal for disqualification of Professor Francisco Orrego Vicuña, 13 December 2013 (hereinafter: *Burlington v. Ecuador*, Disqualification Decision).

[190] See also for a discussion of this case, P. HORN, A Matter of Appearances: Arbitrator Independence and Impartiality in ICSID Arbitration, *NYU Journal of Law & Business* 2014, 11(2), 377-380.

[191] *Burlington v. Ecuador*, Disqualification Decision, *supra* note 194, para. 20.

[192] Ibid., para. 75.

[193] Ibid., para. 79.

[194] Ibid.

[195] Ibid., para. 80.

[196] *RSM Production Corporation v. Saint-Lucia*, ICSID Case No. ARB/12/10, Decision on Claimant's Proposal for the Disqualification of Dr. Gavan Griffith Qc, 23 October 2014 (hereinafter: *RSM v. Saint-Lucia*, Disqualification Decision).

[197] Ibid., para. 41.

[198] Ibid.

against third party funded parties such as herself.[199] Thus, Dr. Griffith could no longer be perceived as independent and impartial and RSM proposed his disqualification. The unchallenged arbitrators pointed out that the assenting opinion did not relate to the merits of the case, but to a procedural issue: Saint-Lucia's request for security for costs. Thus, they could not make any inference as to Dr. Griffith's position on the merits following these statements.[200] As to the substance of the assenting opinion, the arbitrators admitted that Dr. Griffith used 'strong and figurative metaphors'. However, this choice of words did not indicate the existence of bias but was meant to emphasize the point Dr. Griffith wanted to make about third-party funding. The unchallenged arbitrators said: "*As long as such wording does not clearly reveal any preference for either party, it cannot serve as a ground for a challenge.*"[201] While Dr. Griffith "*stepped close to the edge of what can be considered as an objective reasoning*", his statements did not cross the line of clearly demonstrating bias.[202] The proposal for disqualification was rejected.[203]

3.2.3. Professional and social relations

a. Educational background

59. In *Alpha v. Ukraine*,[204] the contentious issue was the educational background of an arbitrator. The facts of the case were the following: the Claimant party, Alpha Projektholding GmbH ('Alpha') had appointed Dr. Yoram Turbowicz as arbitrator to the tribunal.[205] As its legal counsel, Alpha appointed among others Dr. Leopold Specht.[206] The Respondent, the state of Ukraine, later became aware of the fact that Dr. Turbowicz and Dr. Specht had a common educational background. They had both attended the LLM and SJD programmes at Harvard University simultaneously (in 1987-1988 and 1988-1990 respectively). Dr. Turbowicz had not disclosed this information upon acceptance of the position as arbitrator.[207] Ukraine believed an arbitrator and a counsel who studied at Harvard at the same time inevitably shared a connection. Hence, for Ukraine this shared history between Dr. Turbowicz and Dr. Specht was reason enough to question the former's independence and challenge his position through a proposal for disqualification.[208]

60. The unchallenged arbitrators explained that they were not aware of any case or scholarly learning supporting the view that "*long-ago encounters at an educational institution, standing alone, provide objective ground, either real or*

[199] Ibid., para. 42.
[200] Ibid., para. 77.
[201] Ibid., para. 84.
[202] Ibid., para. 86.
[203] Ibid., para. 91.
[204] *Alpha v. Ukraine,* Disqualification Decision*, supra* note 133.
[205] Ibid., para. 3.
[206] Ibid.
[207] Ibid., para. 10.
[208] Ibid., para. 12.

perceived, for justifying an obvious misgiving as to impartiality or for demonstrating an evident lack of reliability as to independence."[209] They rejected this ground for disqualification, referring to the decision in the *Aguas/Vivendi v. Argentina* case that a challenging party must rely on established facts rather than mere speculation or inference.[210] The unchallenged arbitrators held that to accept Ukraine's argument required drawing precisely those inferences which the use of the word 'manifest' in article 57 does not permit.[211]

61. A separate matter was the lack of disclosure by Dr. Turbowicz of his shared education with Dr. Specht, which Ukraine invoked as a distinct ground for disqualification. The unchallenged arbitrators considered the scope of the duty to disclose information to be broader than the scope of the factors which can lead to disqualification.[212] They examined Arbitration Rule 6(2), the legal basis for the disclosure obligation, and consulted the IBA Guidelines for further guidance.[213] The issue at stake here, an arbitrator and a counsel having been classmates, is not mentioned in the Guidelines' green list, let alone the orange or the red list.[214] Apparently, the drafters of the Guidelines did not consider this situation to even raise questions regarding independence or impartiality. This suggests that long-ago acquaintanceship at school is too distant a relationship to require disclosure. Accordingly, after applying Arbitration Rule 6(2) in light of the IBA Guidelines, the other members decided the justifiable doubts test[215] was not passed and the situation of having been classmates at Harvard did not warrant disclosure.[216]

b. Membership of a Board of Directors

62. The landmark case of *EDF v. Argentina*[217] once again involves Argentina and Professor Kaufmann-Kohler. This time, Argentina sought the disqualification of Professor Kaufmann-Kohler due to her position on the board of Swiss investment bank UBS. UBS had financial interests in EDF, the claimant in this case, and for Argentina this was proof of a lack of independence and impartiality.[218]

63. The unchallenged arbitrators identified four criteria for assessing the relationship between an arbitrator and a party and whether it might be problematic from the perspective of independence or impartiality: *(i) proximity of the connection between the challenged arbitrator and the party;*

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[209] Ibid., para. 42.
[210] Ibid., para. 43.
[211] Ibid., para. 44.
[212] Ibid., para. 47.
[213] *Supra* 41.
[214] *Alpha v. Ukraine.*, Disqualification Decision, *supra* note 133, para. 61; see *supra* 6.1.5 about the red, orange and green lists.
[215] *Supra* 41.
[216] *Alpha v. Ukraine*, Disqualification Decision, *supra* note 133, para. 66.
[217] *EDF International S.A, SAUR International S.A., Léon Participaciones Argentinas S.A.* v. Argentine Republic, ICSID Case No. ARB/03/23, Challenge Decision, 25 June 2008 (hereinafter: EDF v. Argentina, Disqualification Decision).
[218] Ibid., paras. 9-12.

(ii) intensity and frequency of the interactions between the challenged arbitrator and the party; (iii) dependence of the challenged arbitrator on the party; and (iv) materiality of the benefits accruing to the challenged arbitrator as a result of the alleged connection.[219]

64. There were a few specific facts which for Argentina were unacceptable. First of all, UBS had recommended EDF as 'a good investment opportunity.' However, the unchallenged arbitrators considered the connection between Professor Kaufmann-Kohler and EDF too indirect for there to be any consequences, as there was no direct incentive to favor EDF.[220] Nonetheless, they added that they might have ruled differently in case the arbitrator owned a substantial amount of stock in a bank '*which owned and actively promoted a company that was party to the proceedings.*'[221]

65. UBS also held a shared interest in the Singaporean company AEM with a daughter company of EDF. The unchallenged arbitrators took into account the size of UBS and decided that for one of the world's largest investment banks, the interest in AEM was part of the 'ordinary course of business', especially because the stake of UBS in AEM was smaller than 1,5%.[222] They came to the same conclusion with regard to UBS's stake in Motor Columbus, a company in which EDF had an interest as well.[223] Another point of contention was the fact that UBS participated in the listing of EDF shares on the French market. The arbitrators decided that this fact did not lead to any benefit for Professor Kaufmann-Kohler in case she would favor EDF.[224]

66. Finally, there was the fact that the UBS Investment Foundation, an investment fund linked to UBS, had invested directly in EDF. As the unchallenged arbitrators recognised, the loss of the arbitration case would mean financial loss for EDF. Consequently, there would be financial loss for UBS, as its investment would be worth less. Given that Professor Kaufmann-Kohler held a position on the board of UBS, she had the duty to defend UBS's financial interests and thus might have been incentivised to decide in favor of EDF.[225] Still, the arbitrators decided there was no conflict of interest for three reasons. First, the Foundation served as a vehicle for investments by Swiss pension funds. As such, the ultimate beneficiaries of the investments made were the pension funds, and not UBS itself.[226] Second, the investments were made in the form of bonds rather than shares.[227] Third, the UBS Foundation's stake of bonds in EDF

[219] Ibid., p.35.
[220] Ibid., para. 76.
[221] Ibid., para. 78.
[222] Ibid., paras. 79-81.
[223] Ibid., paras. 82-83.
[224] Ibid., para. 88.
[225] Ibid., paras. 89-90.
[226] Ibid., para. 93.
[227] Ibid., para. 94

amounted to less than 1,5%.[228] Under these circumstances, there could have been no incentive for Professor Kaufmann-Kohler to favor EDF.[229]

67. In conclusion, in *EDF v. Argentina* the arbitrators implicitly recognised that under certain circumstances, a position on the board of a company which has ties to one of the claimants can constitute a lack of independence or impartiality for an arbitrator.[230] However, in this case these circumstances were not present as the relationships between both EDF and UBS and UBS and Professor Kaufmann-Kohler were too indirect. Accordingly, Professor Kaufmann-Kohler was not disqualified.[231]

c. Law firms

68. In *Aguas del Aconquija/Vivendi v. Argentina*,[232] Mr. Yves Fortier, was subject to a proposal for disqualification by Argentina.[233] The facts were the following. One of the partners working at Mr. Fortier's law firm Ogilvy Renault had advised a predecessor company of Vivendi, the Claimant, on tax matters under Quebec law. Mr. Fortier himself was not involved in this work.[234] Furthermore, the remuneration that the law firm had received for this advice was limited compared to its total turnover. Also, Ogilvy Renault was acting on instruction of a U.S law firm and was not Vivendi's principal legal advisor.[235] Nevertheless, Argentina regarded this as a conflict of interest implicating Mr. Fortier's independence and impartiality.

69. The unchallenged arbitrators referred to the *Amco Asia* case,[236] in which a similar situation had occurred, the difference being that in *Amco Asia* the arbitrator himself had given advice to the claimant. The arbitrators in *Amco Asia* decided that this did not form a problem and rejected the disqualification, as there had not been a risk of inability to exercise independent judgment.[237] Interestingly, the unchallenged arbitrators in the *Aguas/Vivendi* case inferred the existence of a *de minimis* rule from this decision. In their view, the decision to reject disqualification in *Amco Asia* could only be justified under such a *de minimis* rule: an arbitrator who had a lawyer-client relationship with a claimant, can only be deemed to remain impartial if "*the extent and the content of the advice given can be regarded as minor and wholly discrete.*"[238]

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[228] Ibid., para. 96.
[229] Ibid., para. 135.
[230] Ibid., para. 78.
[231] Ibid., para. 135.
[232] *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on the Challenge to the President of the Committee, 3 October 2001 (hereinafter: *Vivendi v. Argentina*, Disqualification Decision).
[233] Ibid., para. 1.
[234] Ibid., para. 15.
[235] Ibid., para. 16.
[236] *Amco Asia v. Indonesia*, Disqualification Decision, *supra* note 119.
[237] *Vivendi v. Argentina*, Disqualification Decision, *supra* note 237, para. 21.
[238] Ibid., para. 22.

70. The unchallenged arbitrators described the threshold for disqualification as follows. If the facts would cast some reasonable doubt as to the impartiality of the arbitrator, a challenge by either party would have to be upheld. Once the unchallenged arbitrators had become convinced of this conclusion, there would no longer be room for the view that the deficiency was not "manifest". Thus, once reasonable doubt has been established, it does not matter whether the shortcoming was manifest or not.[239] Eventually, the unchallenged arbitrators decided that disqualification was not required in this case, for the following reasons: (i) Mr. Fortier had been transparent and had disclosed the relationship; (ii) Mr. Fortier himself had no lawyer-client relationship with the claimant; (iii) the advice given by his colleague was not related to the present case; (iv) the advice did not amount to general legal counsel but concerned a specific transaction and was given at the request of another law firm; (v) the legal relationship would soon come to an end.[240] Even if the unchallenged members had come to a different conclusion, they added, the *de minimis* rule would still have provided them with a legal basis to reject the request for disqualification.[241]

71. In *Blue Bank v. Venezuela*,[242] the latter decided to challenge the appointment of Mr. José María Alonso, who was appointed by Blue Bank.[243] Mr. Alonso worked for the Madrid office of international law firm Baker & McKenzie and was a member of Baker & McKenzie's International Arbitration Steering Committee. Two other branches of this law firm, Baker & McKenzie Caracas and Baker & McKenzie New York, represented the company Longreef in a separate ICSID case against Venezuela.[244] As such, Venezuela held that there was a conflict of interest on the part of Mr. Alonso which required his disqualification.[245]

72. In his defense, Mr. Alonso stated that each branch of Baker & McKenzie is a separate legal entity. As a lawyer at Baker & McKenzie Madrid, he had no direct relations with the New York and Caracas offices, meaning there could be no conflict of interest.[246] The Chairman of ICSID, who had to decide on the proposal for disqualification, disagreed with Mr. Alonso. He pointed out the fact that all branches of Baker & McKenzie share a corporate name and that the existence of an international arbitration steering committee indicates a degree of connection between Baker & McKenzie's different offices. This conclusion was further reinforced by Mr. Alonso's statement that his remuneration depends primarily, but not exclusively on the results of the Madrid firm. In other words,

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[239] Ibid., para. 25.
[240] Ibid., para. 26.
[241] Ibid., para. 27.
[242] *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decision to disqualify a majority of the tribunal, 12 November 2013 (hereinafter: *Blue Bank v. Venezuela*, Disqualification Decision).
[243] Ibid.
[244] *Longreef A.V.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/5, Decision on Jurisdiction, 12 February 2014.
[245] *Blue Bank v. Venezuela*, Disqualification Decision, *supra* note 247, para. 66.
[246] Ibid., para. 38.

the performance of other branches also influenced his remuneration.[247] Furthermore, the issues that had to be decided in *Longreef v. Venezuela* were similar to those in the present case, which risked putting Mr. Alonso in a position where he had to decide on issues relevant to the *Longreef* case.[248] For these reasons, the Chairman concluded that "*a third party would find an evident or obvious appearance or lack of impartiality on a reasonable evaluation of the facts in this case.*"[249] Accordingly, the proposal for disqualification was upheld.

73. In the *ConocoPhillips* case,[250] Venezuela challenged the position of arbitrator Mr. Yves Fortier because the law firm of which he was a partner, Norton Rose, had announced plans to merge with Macleod Dixon, another law firm.[251] Venezuela had an 'adverse relationship' with Macleod Dixon for multiple reasons: Macleod provided legal services to ConocoPhillips, the claimant, represented the claimant in another ICSID case in which Venezuela was the respondent, and acted on behalf of ConocoPhillips in an ICCP case against Venezuelan state-owned company Petróleos de Venezuela.[252] Mr. Fortier disclosed the relationship between Norton Rose and Macleod Dixon at the time of the formal vote on the merger. However, according to Venezuela an obligation of disclosure existed much earlier, namely at the moment when Mr. Fortier knew or should have known of Macleod Dixon's practice. For Venezuela, this tardive disclosure was a reason for disqualification.[253]

74. Mr. Fortier had stated that he had not been involved in any way in the negotiations between the two law firms,[254] and that he was not aware of the existence and extent of adverse relations between Macleod Dixon and Venezuela on the one hand and the professional relationship between Macleod Dixon and ConocoPhillips on the other hand until shortly before the moment of disclosure.[255] Venezuela did not accept this explanation and suggested that Mr. Fortier was under a duty "*to make reasonable enquiries into a possible conflict of interest arising from the merger discussion.*"[256] This argument was rejected by the unchallenged arbitrators. They pointed out that merger discussions sometimes fail and did not see a sufficient legal basis for stating that, before he actually disclosed the information, Mr. Fortier should have been aware of the relations between Macleod and Venezuela.[257] The proposal for disqualification was dismissed.[258]

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[247] Ibid., para. 67.
[248] Ibid., para. 68.
[249] Ibid., para. 69.
[250] *ConocoPhillips Company et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on the proposal to disqualify L. Yves Fortier, Q.C., Arbitrator, 27 February 2012 (hereinafter: *ConocoPhillips v. Venezuela*, Disqualification Decision).
[251] Ibid., para. 1.
[252] Ibid., para. 2.
[253] Ibid., para.27.
[254] Ibid., para. 44.
[255] Ibid., paras. 45-46.
[256] Ibid., para. 66.
[257] Ibid., para. 67.
[258] Ibid., para. 68.

3.3. INTERMEDIARY CONCLUSION

75. What conclusions can be drawn from this case law analysis? A first important observation is that the burden for disqualifying an ICSID arbitrator on the ground of lack of independence or impartiality is rather high. In only three of the eleven discussed cases was the proposal for disqualification upheld.[259] A second, perhaps slightly more problematic remark is that in two of the three cases in which an arbitrator was disqualified, the decision was made by the Chairman and not by the unchallenged arbitrators.[260] In fact, *Caratube v. Kazakhstan* was the first case in which two unchallenged arbitrators decided to disqualify their peer.[261] This may be an indication of the fact that for unchallenged arbitrators, the barrier for disqualifying a colleague is higher than for the Chairman. Since investment arbitrators form a small community and often entertain personal relations with one another,[262] it might be difficult for them to take such an adverse measure as disqualification against a fellow member of that community.[263] Consequently, one could ask the question if the disqualification procedure in its current form can ensure the integrity of ICSID proceedings, given that unchallenged arbitrators seem less likely than the Chairman to disqualify arbitrators, even when presented with similar circumstances.[264]

76. Which are the circumstances, then, that can lead to disqualification? One element which in any case does not warrant disqualification is the fact that an arbitrator decided against a party in an earlier case. In both *Suez*[265] and *PIP SARL*,[266] disqualification on that ground was rejected. This does not mean that an arbitrator's involvement in previous cases is irrelevant, however. In *Caratube v. Kazakhstan*,[267] an arbitrator's position on an earlier case against Kazakhstan with a lot of factual similarities was accepted as a ground for disqualification. What was decisive here, however, was the fact that the arbitrator had gained access to information in the earlier case which could be relevant in *Caratube* and to which his two co-arbitrators did not have access.

77. Similarly, expressing an opinion is in principle not sufficient to disqualify an arbitrator. In *Urbaser*,[268] the unchallenged arbitrators decided that an academic

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[259] In *Burlington v. Ecuador*, Disqualification Decision, *supra* note 194, *Blue Bank v. Venezuela*, Disqualification Decision, *supra* note 247 and *Caratube v. Kazakhstan*, Disqualification Decision, *supra* note 166.

[260] *Burlington v. Ecuador,* Disqualification Decision, *supra* note 194, *Blue Bank v. Venezuela*, Disqualification Decision, *supra* note 247.

[261] C. GIORGETTI, "Caratube v. Kazakhstan: For the First Time Two ICSID Arbitrators Uphold Disqualification of Third Arbitrator", *American Society for International Law INSIGHTS* 2014, vol. 18, no. 22.

[262] *Supra* 23-28.

[263] L. MARKERT, "Challenging Arbitrators in Investment Arbitration: The Challenging Search for Relevant Standards and Ethical Guidelines", *Contemporary Asia Arbitration Journal* 2010, vol. 3, no.2, 248-250.

[264] Although, of course, one must be cautious when drawing conclusions from such a small number of cases.

[265] *Supra* 45-46.

[266] *Supra* 47.

[267] *Supra* 48-52.

[268] *Supra* 53-56.

opinion on a topic relevant to the case must only lead to disqualification when the arbitrator bases his decision solely on his preconceived opinion and does not consider any of the facts and arguments presented by the party. As such a situation will almost never occur, the unchallenged arbitrators effectively preserved the academic freedom of all ICSID arbitrators, which is important given that many among them are academically active.[269] In *RSM*,[270] negative statements about third party funding (in a case in which one of the parties was third party funded), were rejected as a ground for annulment as they did not reveal any preference for either party and they were unrelated to the merits of the case. However, an arbitrator does not get away with anything. When an arbitrator questioned the ethics of a party's counsel in *Burlington*,[271] he was disqualified. It is not entirely clear which factors led the unchallenged arbitrators in *RSM* and *Burlington* to come to opposite decisions.

78. Perhaps the most interesting category of cases are those dealing with arbitrators having connections to either the parties or their counsel. In *EDF*,[272] that connection was indirect: a position on the board of a bank which had ties to one of the parties. The unchallenged arbitrators in this case accepted that such a situation might under certain circumstances be problematic. However, as the bank's interests in the party concerned were rather small and not directly connected to the arbitrator, they felt that there was no need for disqualification. Interestingly, however, they identified four criteria for assessing whether a relationship between an arbitrator and a party is problematic, which can serve as guidance in future cases:
(i) proximity of the connection between the challenged arbitrator and the party; (ii) intensity and frequency of the interactions between the challenged arbitrator and the party; (iii) dependence of the challenged arbitrator on the party; and (iv) materiality of the benefits accruing to the challenged arbitrator as a result of the alleged connection.[273]
In *Alpha v. Ukraine*,[274] there was a connection between an arbitrator and a party's counsel: they had studied at the same time at Harvard. The unchallenged arbitrators held that 'long-ago encounters at an educational institution did not provide sufficient ground for demonstrating a lack of independence or impartiality. Once again, deciding otherwise might have set a dangerous precedent, as many ICSID arbitrators are somehow connected to Harvard and similar prestigious institutions.[275] One of the most recurring issues is that of ties between arbitrators, law firms and parties, as was the case in Aguas/*Vivendi v. Argentina*.[276] While the connection was deemed too remote to warrant disqualification, the unchallenged arbitrators in this case interestingly discerned the existence of a *de minimis* rule: an arbitrator who had a lawyer-client

[269] *Supra* 23-28.
[270] *Supra* 58.
[271] *Supra* 57.
[272] *Supra*, 62-67.
[273] *Supra* 63. To my knowledge, these criteria have not yet been applied in other cases.
[274] *Supra* 59-61.
[275] *Supra* 25.
[276] *Supra* 68-70.

relationship with a claimant, remains impartial if "*the extent and the content of the advice given can be regarded as minor and wholly discrete.*" Thus, under this case law, an ICSID arbitrator who provided legal advice to a party does not compromise his impartiality as long as the advice does not exceed the *de minimis* threshold. It remains to be seen how this threshold would be applied in practice. In *ConocoPhillips v. Venezuela,*[277] a possible merger between an arbitrator's law firm and a law firm which had 'adverse relations' with the respondent, Venezuela, was rejected as a ground for disqualification. In *Blue Bank v. Venezuela*,[278] the fact that an arbitrator's law firm (albeit a separate office) had acted as counsel for Venezuela's opponent in a previous case convinced the Chairman to uphold a proposal for disqualification. The different offices of the firm were too integrated to be considered separate entities. Remuneration was partly determined by the firm's earnings on the group level. Furthermore, the previous case dealt with a similar issue as the present case, increasing the risk of a conflict of interest. Therefore, there was an appearance of a lack of impartiality.

79. In none of the cases, in which the disqualification was accepted, did the unchallenged arbitrators conclude that an arbitrator was in fact not independent or impartial. The ground for disqualification was that a reasonable third party would detect an appearance of a lack of independence or impartiality, not an actual lack. Thus, all three cases in which the challenge was upheld adopted the *Vivendi* standard described above.[279] Indeed, whereas the *Amco Asia* standard makes it virtually impossible to obtain a disqualification, the *Vivendi* standard lowers the threshold.[280] Even under the latter, most proposals for disqualification are rejected, but still the challenging party seemingly has better chances of having an arbitrator disqualified if the unchallenged arbitrators or the Chairman decide to follow the *Vivendi* standard.[281] As arbitrators are completely free to opt for one or the other standard, or even to reject them both, this raises questions as to legal certainty and the equal treatment of all parties. A seemingly arbitrary and unpredictable choice, purely based on the convictions of those deciding the challenge, significantly affects the chances of success of a party's proposal for disqualification.

80. The problems of inconsistency and arbitrariness relate to the same issue: there is no mechanism to ensure the coherence of ICSID case law, such as a rule of binding precedents or an appeals procedure. This leads to differing results and conflicting decisions.[282] In any adjudication system, including ICSID arbitration, standards of independence and impartiality should apply equally to all parties making use of that system and to all adjudicators alike. The credibility and legitimacy of ICSID is seriously undermined if something as fundamental

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[277] *Supra* 73-74.
[278] *Supra* 71-72.
[279] *Supra* 48-52, 57, 71-72.
[280] P. HORN, "A Matter of Appearances: Arbitrator Independence and Impartiality in ICSID Arbitration", *NYU Journal of Law & Business* 2014, vol. 11, no. 2, 349.
[281] Ibid.
[282] *Infra* 135-138; CLEIS, *The Independence and Impartiality of ICSID Arbitrators*, supra n.27, 31 et seq.

as ensuring the integrity of the proceedings is left to the absolute discretion of a tribunal.[283]

4. INDEPENDENCE AND IMPARTIALITY IN THE ANNULEMENT PROCEDURE

4.1. ANNULMENT IN GENERAL

4.1.1. Legal basis

81. In principle, any arbitral award rendered under the ICSID Convention is final. There is no possibility of appeal.[284] Nevertheless, article 52 of the Convention does set out a procedure for the annulment of an award in a limited number of situations: "Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: (a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based."[285]

82. Thus, if one of the above-mentioned conditions is met, a party can request the annulment of an arbitral award. An ad hoc committee consisting of three arbitrators, different from the ones who rendered the original judgment, is then appointed by the Chairman of the Administrative Council.[286] The committee must decide whether the ground for annulment which was invoked is persuasive. If it finds that this is the case, it may annul the award or a part thereof.[287] All the legal consequences of the award are then nullified, and the award can no longer be enforced.[288] Upon their request, one or both of the parties can bring the dispute to a newly constituted tribunal after annulment.[289]

83. It should be emphasised that annulment is therefore not a form of appeal.[290] Unlike an appellate body, the ad hoc committee does not express itself on the

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[283] CLEIS, *The Independence and Impartiality of ICSID Arbitrators*, supra n.27, 31 et seq.
[284] B. M. ARONSON, "A New Framework for ICSID Annulment Jurisprudence: Rethinking the 'Three Generations'", *Vienna Journal on International Constitutional Law* 2012, vol. 6, no.1, 7-8.
[285] Art. 52 (1) ICSID Convention.
[286] Art. 52 (3) ICSID Convention.
[287] Ibid.
[288] SCHREUER et al., *The ICSID Convention*, *supra* note 24, 1041.
[289] Art. 52 (6) ICSID Convention.
[290] *EDF International S.A., SAUR International S.A. and Leon Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Annulment Decision, 5 February 2016, para. 143 (hereinafter: *EDF v. Argentina*, Annulment Decision); see also SCHREUER et al., *The ICSID Convention*, *supra* n.24,.901; B. M. ARONSON, "A New Framework for ICSID Annulment Jurisprudence: Rethinking the 'Three Generations'", *Vienna Journal on International Constitutional*

merits of the case. The grounds for annulment are listed exhaustively in article 52 and they are all procedural of nature. Only if one of those grounds has occurred, can a decision be annulled.[291] Furthermore, the legal consequences are different. An ad hoc committee cannot reform an award, it can only maintain or set aside the judgment.[292] As such, the annulment procedure is somewhat comparable to the '*cassatieberoep/recours en cassation*' which exists in countries like France and Belgium.[293]

4.1.2. Article 52(1)(a) and (d)

84. Parties who wish to initiate an annulment procedure for lack of independence or impartiality of an arbitrator usually base their claims on article 52(1)(a) and (d) of the ICSID Convention. Neither of these provisions explicitly mention lack of independence or impartiality as a ground for annulment. However, in the case law it is generally accepted that the grounds for annulment listed in these two subparagraphs include the situation in which an arbitrator does not meet the requirements of independence and impartiality.[294] As to the meaning of these concepts, the annulment case law applies the same definitions as those used in disqualification challenges.[295] Thus, the observations made in Chapter 3[296] apply here as well.

a. Article 52(1)(a)

85. Article 52 (1) (a) allows for annulment in case a tribunal was not properly constituted.[297] For a tribunal to be properly constituted, its members need to be independent and impartial.[298] However, there is some discussion as to the temporal scope of this provision.[299] Does a tribunal have to be properly constituted only at the outset of the proceedings or throughout the entire proceedings? The answer makes a difference in practice, as in the former case, a party who discovers a conflict of interest on the part of an arbitrator only after the tribunal has been formed cannot file for annulment, while in the latter case it can.

Law 2012, vol. 6, no. 1, 7-8; N. LISNEY, J. TEMME, "Annulment of awards in ICSID arbitration", Practical Law UK Practice Note 0-504-3971, 5-9.

[291] SCHREUER et al., *The ICSID Convention*, *supra* note 24, 901-903.

[292] Ibid.

[293] See art. 608 et seq. Belgian Judicial Code and art. 606 et seq. French Code of Civil Procedure.

[294] SCHREUER et al., *The ICSID Convention*, *supra* note 24, 935-936; N. LISNEY, J. TEMME, "Annulment of awards in ICSID arbitration", Practical Law UK Practice Note 0-504-3971, 5-9.

[295] E.g. *EDF v. Argentina,* Annulment Decision, *supra* note 295.

[296] *Supra* 34.

[297] Art. 52 (1) (a) ICSID Convention.

[298] SCHREUER et al., *The ICSID Convention*, *supra* note 24, 936; N. LISNEY, J. TEMME, "Annulment of awards in ICSID arbitration", Practical Law UK Practice Note 0-504-3971, 5-9.

[299] See *Eiser Infrastructure Ltd. and Energía Solar Luxembourg S.A.R.L v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Annulment Decision, 11 June 2020, para. 151-155 (hereinafter: *Eiser v. Spain*, Annulment Decision).

86. This question was quite extensively discussed by the ad-hoc committee in the *Eiser v. Spain* case.[300] The committee started with indicating the relevant rules of interpretation applicable to art. 52(1)(a). As the Convention is an international treaty, it is the Vienna Convention on the Law of Treaties, as a rule of customary international law, which ought to govern the interpretation of the ICSID Convention.[301] More specifically, article 31 of the Vienna Convention applies here, and accordingly art. 52(1)(a) must be interpreted in light of its text, context, object and purpose and any relevant rule of international law applicable in the relations between the parties.[302]

87. In the ordinary meaning of the words of art. 52(1)(a), also confirmed by the French and Spanish versions,[303] the committee found no indication that 'properly constituted' is restricted to the initial formation of the tribunal.[304] It also points out "*that the phrase is in the past tense, because annulment is sought after the relevant grounds, relied upon, have arisen.*"[305] Thus, taking into account the plain meaning and context of the provision, the Committee decided that, whilst a tribunal must obviously be properly constituted at the time of its initial formation, it must remain so during the entire proceedings, until a decision or award has been rendered and the tribunal is dissolved.[306]

b. Article 52(1)(d)

88. A second legal basis often invoked by those seeking the annulment of an award for lack of independence or impartiality of an arbitrator is art. 52(1)(d), usually in addition to art. 52(1)(a).[307] Art. 52(1)(d) contains two separate requirements: there must be a departure from a fundamental rule of procedure and that departure must be serious.[308] A violation of a rule of procedure, however fundamental that rule may be, is not a ground for annulment if it is not serious. Inversely, a serious violation of a role of procedure which is not fundamental is not sufficient to be a ground for annulment. Both criteria must be met at the same time.[309]

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[300] *Eiser v. Spain,* Annulment Decision, *supra* note 304, para. 156-178; *infra* 110-112.
[301] Ibid., para. 156.
[302] Ibid.; Art. 31 Vienna Convention on the Law of Treaties, *United Nations, Treaty Series*, vol. 1155, 331.
[303] French: '*Chacune des parties peut demander [...] l'annulation de la sentence pour [...]*: (a) *vice dans la constitution du tribunal*'; Spanish: '*Cualquiera de las partes podrá solicitar la anulación del laudo [...] fundado en una [...] de las siguientes causas:* (a) *que el tribunal se hubiere constituido incorrectamente*'.
[304] *Eiser v. Spain*, Annulment Decision, supra note 304, para. 158.
[305] Ibid.
[306] Ibid., para. 168.
[307] N. LISNEY, J. TEMME, "Annulment of awards in ICSID arbitration", Practical Law UK Practice Note 0-504-3971, 5-9.
[308] SCHREUER et al., *The ICSID Convention, supra* note 24, 980-983.
[309] Ibid., see also *MINE v. Guinea*, ICSID Case No. ARB/84/4, Decision on Annulment, 22 December 1989, para. 4.06; *Wena Hotels v. Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment, 29 June 2005, para. 56; *CDC v. Seychelles*, ICSID Case No. ARB/02/14, Decision on Annulment, 29 June 2005, para. 48.

89. In *MINE v. Guinea*, the committee clarified the meaning of these two concepts. It considered that the requirement that a departure be serious "*establishes both quantitative and qualitative criteria: the departure must be substantial and be such as to deprive a party of the benefit or protection which the rule was intended to provide.*"[310] Regarding the meaning of 'fundamental' the committee stated that: "*a clear example of such a fundamental rule is to be found in Article 18 of the UNCITRAL Model Law on International Commercial Arbitration which provides: 'The Parties shall be treated with equality and each party shall be given full opportunity of presenting his case.' The term "fundamental rule of procedure" is not to be understood as necessarily including all of the Arbitration Rules adopted by the Centre.*"[311] This was further elaborated in *Wena Hotels v. Egypt*, in which the committee held 'fundamental rules' to mean "*a set of minimal standards of procedure to be respected as a matter of international law.*" [312]

90. The right to be judged by an independent and impartial judge (or in this case, arbitrator) is one of the most fundamental rules of procedure, both in domestic and international law.[313] In fact, in *EDF v. Argentina*, the committee went as far as stating that "*It is difficult to imagine a rule of procedure more fundamental than the rule that a case must be heard by an independent and impartial tribunal.*"[314] This view was later endorsed by the *Eiser* committee.[315] Thus, where there has been a serious departure from this rule in an award, there is a ground for annulment.

4.1.3. Prior disqualification

91. As stated before, it happens that in the same proceedings there is both a request for disqualification and a request for annulment on the same grounds.[316] The question is which legal consequences a committee in the annulment stage must attach to an earlier decision on disqualification. In the case law, there is disagreement among different tribunals.[317] In essence, there are two schools of thought. The first one is exemplified by the *Azurix* case and the second one by the *EDF* case.

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[310] *MINE v. Guinea*, ICSID Case No. ARB/84/4, Decision on Annulment, 22 December 1989, para. 5.05; This definition was also adopted in *Wena Hotels v. Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment, 29 June 2005.
[311] Ibid., para. 5.06.
[312] *Wena Hotels v. Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment, 29 June 2005, para. 57.
[313] *Supra* 1.
[314] *EDF v. Argentina,* Annulment Decision, *supra* note 295, para. 123.
[315] *Infra* 112.
[316] For instance, this was the case in *Suez v. Argentina*, ICSID Case No. ARB/03/19; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3; *EDF International S.A., SAUR International S.A. and Leon Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23.
[317] *RSM Production Corporation v. Saint-Lucia*, ICSID Case No. ARB/12/10, Decision on Annulment, 29 April 2019, para. 160 (hereinafter: *RSM v. Saint-Lucia*, Annulment Decision).

92. In the *Azurix* case[318] Argentina filed an application for annulment against an arbitral award for, among other reasons, lack of independence and impartiality of Dr. Rigo Sureda, one of the arbitrators on the tribunal. As legal basis Argentina invoked article 52(1)(a) of the ICSID Convention, asserting that the lack of independence and impartiality meant that the tribunal was not properly constituted as set out by that article.[319] Earlier in the proceedings, it had requested the disqualification of Dr. Sureda on the same grounds.[320] The disqualification was rejected.[321]

93. The committee deciding on the annulment held that it could not annul the award for lack of independence and impartiality if an earlier application for disqualification based on the same grounds had been rejected. Under article 52(1)(a), it stated, a tribunal is properly constituted if all the procedures in place for challenging that tribunal have been properly complied with.[322] Hence, if a party proposed the disqualification of an arbitrator, and the disqualification was rejected in accordance with the procedure provided in the ICSID Convention, that party cannot argue that the tribunal was not properly constituted.[323] In the committee's view, article 52(1)(a) does not provide parties with a *'de novo opportunity to challenge members of the tribunal'*.[324] Only in case there had been a procedural deficiency in the disqualification procedure, could annulment be granted.[325] In the present case, there had been no such deficiency, which meant the annulment had to be rejected.[326] The committee went even further and decided that if no disqualification proposal was made by a party, there could be no annulment based on article 52(1)(a). In such a case, as the procedures to challenge an arbitrator had not been applied, there could have been no procedural deficiency.[327] In this very narrow interpretation of article 52(1)(a), the committee essentially limited annulment under that article to the situation where a proposal for disqualification was made and the corresponding procedural requirements were not met, for example if the decision was not taken by the correct body.[328]

94. The decision of the *Azurix* committee is not universally accepted, however. The Committee in *EDF v. Argentina*[329] took a different approach. It decided that "*[the Azurix] approach is incompatible with the duty of an ad hoc committee to safeguard the integrity of the arbitral procedure.*"[330] Nevertheless, it stopped short

[318] *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, 1 September 2009 (hereinafter: *Azurix v. Argentina*, Annulment Decision).
[319] Ibid., para. 249.
[320] Ibid., para. 260.
[321] Ibid., para. 268.
[322] Ibid., para. 279
[323] Ibid., para. 280.
[324] Ibid.
[325] Ibid.
[326] Ibid., para. 286.
[327] Ibid., para. 281.
[328] Ibid., para. 284.
[329] *EDF v. Argentina*, Annulment Decision, *supra* note 295.
[330] Ibid., para. 141.

of accepting a complete *de novo* review of the issue of independence and impartiality at the annulment stage in the situation where disqualification has already been proposed.[331] The committee recalled that annulment proceedings are not an appeal.[332] In an interesting passage, it declared that: "*The role of an ad hoc committee is not to determine whether [...] an arbitrator possesses the requisite qualities of independence and impartiality; Articles 57 and 58 entrust that function to the remaining members of the tribunal, or to the Chairman of the Administrative Council. Only if the matter is raised for the first time after the proceedings are closed does the ad hoc committee become the primary decision-maker in respect of this issue.*"[333] If there has been a decision rejecting disqualification, there can only be annulment under either article 52(1)(a) or 52(1)(d) if that decision was '*so plainly unreasonable that no reasonable decision-maker could have come to such a decision*'.[334] Whereas the Azurix committee limited annulment to procedural deficiencies, the *EDF* committee accepts a limited review of the disqualification decision, but only to the extent that it is unreasonable. While the *EDF* decision is a bit more lenient, both standards set a rather high burden for annulment after a disqualification decision. Most other tribunals have decided to adopt the *EDF* approach.[335]

4.1.4. No prior disqualification

95. While an annulment procedure for lack of independence or impartiality is often preceded by a disqualification challenge on the same grounds, this is not always the case. In situations where there has been no prior disqualification, a proposal for annulment can be examined de novo.[336] The EDF committee has developed a three-step test which any such challenge must pass. The ad hoc committee must decide on the following questions:

[331] Ibid., para. 142.
[332] Ibid., para. 143.
[333] Ibid., para. 144.
[334] Ibid. para. 145.
[335] E.g. *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Argentina's application for annulment, 5 May 2017, para. 90 (hereinafter: *Suez v. Argentina*, Annulment Decision); *Victor Pey Casado and Foundation President Allende v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on Annulment, 8 January 2020, para 564; *Mobil Exploration and Development Argentina Inc. Suc. Argentina y Mobil Argentina S.A. v. República Argentina*, ICSID Case No. ARB/04/16, Decisión sobre la Solicitud e Anulación de la República Argentina, 8 May 2019, para 44.
[336] At least according to the *EDF* approach.

> "(a) was the right to raise this matter waived because the party concerned had not raised it sufficiently promptly?
>
> *(b) if not, has the party seeking annulment established facts the existence of which would cause a reasonable person, with knowledge of all the facts, to consider that there were reasonable grounds for doubting that an arbitrator possessed the requisite qualities of independence and impartiality? And*
>
> *(c) if so, could the lack of impartiality or independence on the part of that arbitrator – assuming for this purpose that the doubts were well-founded – have had a material effect on the award?"*[337]

96. Question (a) in essence relates to the timeliness of the argument. Under Arbitration Rule 27, a party which discovers that a procedural rule has not been complied with, but fails to promptly object hereto, is deemed to have waived its right to object.[338] Arbitration Rule 53 extends the scope of this rule to annulment proceedings.[339] What does 'sufficiently promptly' mean? In any case, a party who became aware of an irregularity before the award was rendered but failed to seek the disqualification of the arbitrator in question has waived its right to request annulment on the ground of improper constitution of the tribunal or serious departure from a fundamental rule of procedure.[340] In other words, this comes down to an 'exhaustion of remedies' requirement. When the irregularity was discovered only after the award was rendered or when a proposal for disqualification was made, the question whether an objection was raised sufficiently promptly will have to be decided on a case-by-case basis by each committee.

97. The second limb of the test requires a party to establish facts casting a reasonable doubt on an arbitrator's independence or impartiality. As such, this requirement is similar to the standard adopted for disqualification procedures in *Vivendi v. Argentina*[341] and therefore does not need to be discussed in detail. In *Eiser v. Spain,* the committee applied this test by examining "*whether a third party would find an evident or obvious appearance of bias on the part of [the arbitrator] on an objective assessment of the facts in this case.*"[342] Note that an appearance is sufficient, no actual bias must be proven.

98. Finally, if a committee sees reason to doubt an arbitrator's independence or impartiality, it must still assess whether the potential lack of independence or impartiality could have had 'a material effect' on the award. It is not enough for reasonable doubts to exist, the committee must be convinced that the award may

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[337] *EDF v. Argentina*, Annulment Decision, *supra* note 295, para. 136.
[338] Arbitration Rule 27; SCHREUER et al., *The ICSID Convention, supra* note 24, 920-921.
[339] Ibid.; Arbitration Rule 53.
[340] Or on the ground of manifest excess of powers, but this is not relevant in case of a lack of independence or impartiality; SCHREUER et al., *The ICSID Convention, supra* note 24, 920-921.
[341] *Supra* 37.
[342] *Eiser v. Argentina*, Annulment Decision, *supra* note 304, para. 207.

have been affected. In *Eiser v. Spain*, the committee decided that this was the case[343] and quoted the *Caratube* annulment decision: "*A departure is serious if the violation of the fundamental rule of procedure produced a material impact on the award. The applicant however is not required to prove that the violation of the rule of procedure was decisive for the outcome, or that the applicant would have won the case if the rule had been applied. As the Wena committee stated, what the applicant must simply demonstrate is the impact that the issue may have had on the award.*"[344] The lack of independence or impartiality need not have been decisive, as long as it may have impacted the award.

99. If all three steps of the *EDF* test are passed, then the committee must annul the award. It has no discretion not to annul.[345] Of course, the *EDF* test is not binding whatsoever; each committee retains the absolute liberty to decide whether or not to apply it.[346] Nevertheless, it may serve as a useful standard for future committees and was adopted in the influential *Eiser v. Spain* decision.[347]

4.1.5. Disclosure

100. The observations made in Chapter 3 regarding disclosure duties apply here as well.[348] As disqualification and annulment are consequential and contingent phases in the same proceedings, there is but one standard for disclosure. Nevertheless, the consequences attached to the non-respect of that standard may be different in the different challenge procedures.[349] Thus far, non-disclosure of relations implicating an arbitrator in itself has never been accepted as a sufficient ground for annulment. It has, however, been held in *Eiser v. Spain* that an arbitrator violated his duty to disclose.[350] In that same case, the committee annulled the award because there was an appearance of bias. It is not entirely clear if the violation of the disclosure duty independently would have been sufficient to warrant annulment. Hence, in the absence of a conclusive decision on this matter, the legal consequences of non-disclosure in the annulment procedure remain uncertain.

4.2. CASE LAW ANALYSIS

101. Below, I discuss the selected annulment cases. They are again clustered according to the circumstances leading to annulment: one case concerns personal opinions expressed by an arbitrator, the other four cases involve the professional and social relations of an arbitrator. Four of the five annulment cases occurred in a dispute which already gave rise to a proposal for disqualification, discussed above.

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[343] *Infra* 112.
[344] *Eiser v. Argentina*, Annulment Decision, *supra* note 304, para. 252.
[345] Ibid., para. 254.
[346] Since there is no rule of precedent forcing tribunals to respect earlier decisions.
[347] *Infra* 110-112.
[348] *Supra* 39-42.
[349] Depending on how the tribunals choose to apply the requirement in the respective procedures.
[350] *Infra* 110-112.

102. In *RSM v. Saint-Lucia*, one of the reasons why RSM filed for annulment was the alleged lack of independence and impartiality of Dr. Griffith, one of the arbitrators.[351] RSM invoked both article 52(1)(a) and 52(1)(d).[352] The facts were the same as in the disqualification case mentioned earlier:[353] in an assenting opinion, Dr. Griffith had used strong wording against third party funding. Being funded by a third party herself, RSM believed that Dr. Griffith could no longer objectively decide on the case and that accordingly, the award pronounced by the tribunal of which he was a member had to be annulled.[354]

103. The Committee fully agreed with the finding of the arbitrators deciding on disqualification that the statements made by Dr. Griffith did not meet the threshold of calling into question his independence and impartiality. In the committee's view, "*Dr. Griffith used some evocative language, but evocative language emphasizes a point rather than evidencing bias.*"[355] Once again, the use of strong negative wording on a topic relevant to one of the parties was deemed insufficient to conclude there was a manifest lack of independence or impartiality.

4.2.1. Personal and social relations

a. Membership of a Board of Directors

104. As written above, in the case of *Suez/Vivendi,*[356] Argentina sought to disqualify Professor Kaufmann-Kohler because of her membership of an earlier tribunal which had decided against Argentina. Later, in a situation very similar to the one in the *EDF v. Argentina* case,[357] Argentina sought the disqualification of Professor Kaufmann-Kohler because of her membership of the board of UBS, which held shares in two claimant companies, Suez and Vivendi. The disqualification was rejected and Professor Kaufmann-Kohler remained a member of the tribunal.[358] In a later stage of the proceedings, Argentina submitted a request for annulment of the decision reached by the tribunal.[359] One of the grounds for annulment invoked by Argentina was, once again, the lack of independence and impartiality of Professor Kaufmann-Kohler due to her position on the board of UBS and her failure to disclose this relationship.[360]

105. The committee considered itself limited in assessing the existence of a lack of independence or impartiality by the findings in the disqualification decision. If a ground has already been invoked and rejected in a disqualification decision,

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[351] *RSM v. Saint-Lucia,* Annulment Decision, *supra* note 322; see *supra* 58 for the corresponding disqualification case.
[352] *RSM v. Saint-Lucia,* Annulment Decision, *supra* note 322, para. 69.
[353] *Supra* 58.
[354] *RSM v. Saint-Lucia*, Annulment Decision, *supra* note 322, para. 81.
[355] Ibid., para 165.
[356] *Suez v. Argentina*, Disqualification Decision, *supra* note 340*; supra* 45-46.
[357] *EDF v. Argentina,* Disqualification Decision, *supra* note 295*; supra* 62-67.
[358] *Suez v. Argentina*, Disqualification Decision, *supra* note 340; *supra* 45-46.
[359] *Suez v. Argentina*, Disqualification Decision, *supra* note 340.
[360] Ibid., para. 40.

it ruled, then that ground can only be accepted as a ground for annulment if the disqualification decision was plainly unreasonable.[361] The committee gives two examples of what would constitute a plainly unreasonable decision: rejecting disqualification where a challenged arbitrator was a director on one of the parties' board and where a challenged arbitrator provided legal advice on the subject matter of the case to a party.[362]

106. In this case, the committee did not find the dismissal of disqualification to be plainly unreasonable. In today's globalised world, it stated, one cannot expect an arbitrator to have no connections or to be aware of every potential connection to a business who later may appear as party in arbitral proceedings.[363] While Professor Kaufmann-Kohler did step down from the board of UBS after the disqualification decision, the committee did not regard this as an admission of a conflict of interest but rather as an effort to reduce the controversy regarding her position. Furthermore, due to her resignation, Professor Kaufmann-Kohler was a member of the UBS board for only three out of a total of 12 years of proceedings.[364] While the committee conceded it may not have shared all the views of the tribunal, under the 'plainly unreasonable'-test it is not for the committee to substitute its views for those of the tribunal.[365] Thus, the committee did not annul the award.[366]

107. Professor Kaufmann-Kohler's position on the board of UBS kept stirring controversy in other cases, this time due to shares held by UBS in Vivendi, claimant in *Vivendi II v. Argentina*.[367] The facts were largely similar as those in the earlier cases involving Professor Kaufmann-Kohler. Once again, Argentina proposed her disqualification for lack of independence and impartiality.[368] The ad hoc committee did not go lightly over these allegations. In the committee's words, the fiduciary duty towards the shareholders of a bank director is fundamentally at variance with the duty of independence of an arbitrator.[369] Therefore, "*any arbitrator who still seeks to combine both functions must make a special effort that the conflicts that may so arise are managed properly and handled with the greatest care.*"[370] For the committee, this entails a continuous duty of investigation, which obliges the arbitrator to investigate whether any connection between the bank and one of the parties exists but also to notify the parties of such connections.[371] In this case, Professor Kaufmann-Kohler did not conduct such an investigation. When a connection with a party arises, it is for

[361] Ibid., para. 188.
[362] Ibid., para. 189.
[363] Ibid., para. 191.
[364] Ibid., para. 193.
[365] Ibid., para. 201.
[366] Ibid., para. 435.
[367] *Compañia de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for Annulment of the Award rendered on 20 August 2007, 10 August 2010 (hereinafter: Vivendi II v. Argentina, Annulment Decision); see *supra* 68-70 for the corresponding disqualification case.
[368] Vivendi II v. Argentina, *supra* note 372, para. 19.
[369] Ibid., paras. 217-218.
[370] Ibid., para. 221.
[371] Ibid., para. 222.

the arbitrator to decide whether he or she can remain in position. If the arbitrator decides not to resign, at the very least the connection must be disclosed to the parties, together with an updated curriculum vitae of the arbitrator.[372] The committee found it difficult to understand why the parties were not informed of Professor Kaufmann-Kohler's directorship at UBS.[373] Thus, the committee stated that it "*understands the argument that the Second Tribunal was no longer properly constituted after the board appointment of Professor Kaufmann-Kohler, and that there was a serious departure from a fundamental rule of procedure and considers that this could lead to annulment whenever justified within the context of the case under consideration.*"[374] Nevertheless, somewhat surprisingly after all the criticism directed at Professor Kaufmann-Kohler, the committee saw no reason to accept the annulment, as it believed Professor Kaufmann-Kohler had no knowledge of the connection between UBS and Vivendi until after the award was rendered. Accordingly, the committee reasoned that the connection could not have had a material effect on the decision of the tribunal and did not warrant annulment.[375]

108. The Kaufmann-Kohler saga continues with the *EDF v. Argentina* annulment case.[376] The grounds for annulment were identical to the grounds for disqualification in this case: connections between Professor Kaufmann-Kohler and UBS on the one hand, and between UBS and EDF on the other hand.[377] The ad hoc committee noted that in *Vivendi II,*[378] the committee had been critical of Professor Kaufmann-Kohler and her role as director on the UBS board. However, the EDF committee saw differences between the present case and *Vivendi II*. UBS held a share of no more than 1,5% in EDF, for the benefit of Swiss pension funds, while it was the largest shareholder in Vivendi.[379] Thus, the connection between UBS and EDF was much less significant. Also, the EDF committee did not agree with the Vivendi II committee's statement that a bank director is under a fiduciary duty towards the shareholders, which leads to a conflict of interest if the director takes on the role of arbitrator in a case involving a party in which the bank has an interest.[380] In the EDF committee's view, "*if a non-executive director of a bank sits as an arbitrator, they are not acting in the exercise of their function as a director when they exercise the quite different function of arbitrator.*"[381] The committee also relied on the decision in the *Suez v. Argentina* disqualification case[382], which stated that, given UBS's enormous range of investments, its interests in Suez and Vivendi were not of such a nature that they raised any conflicts of interest.[383] In short, the committee validated the

[372] Ibid., para. 226-227.
[373] Ibid., para. 229.
[374] Ibid., para. 232.
[375] Ibid., paras. 233-235.
[376] *EDF v. Argentina,* Annulment Decision, *supra* note 295; see *supra* 62-67 for the corresponding disqualification case.
[377] *Supra* 62-67.
[378] *Supra* 107.
[379] *EDF v. Argentina*, Annulment Decision, supra note 295, para. 155.
[380] Ibid., para. 156.
[381] Ibid., para. 157.
[382] *Supra* 45-46.
[383] *EDF v. Argentina*, Annulment Decision, supra note 295, para. 159.

findings of the unchallenged arbitrators in the disqualification case and refused annulment.

109. Professor Kaufmann-Kohler was not the only challenged arbitrator in this case. Argentina also requested the annulment of her colleague Professor Remón. The challenge was raised for the first time in the annulment phase. The issue here was the fact that Argentina had expropriated the Spanish company Repsol's 51% stake in Argentinian company Ypf. Professor Remón was a partner of the law firm Uría Menéndez, which had on a regular basis provided legal services to Repsol. As Professor Remón himself indicated, it was likely that Repsol would seek advice from Uría Menéndez on the expropriation. While he maintained that this would not affect his independence and impartiality in the present arbitration, for Argentina the prospect of adverse relations between Professor Remón's law firm and Argentina was enough to challenge his position. However, the committee rejected the proposal, saying that the possibility of Uría Menéndez being asked to advise Repsol in a manner adverse to Argentina in a future stage "*does not, in itself create, a conflict of interests.*"[384]

b. Law firms

110. The *Eiser* annulment case[385] revolves around Dr. Alexandrov, an arbitrator on the tribunal which rendered the original award in May 2017, and his relations with Mr. Lapuerta and the Brattle Group. The facts were the following. Dr. Alexandrov, appointed by Eiser (the claimant), was a partner at law firm Sidley Austin between May 2002 and August 2017 and co-chaired its international arbitration practice. Mr. Lapuerta worked for the Brattle Group, an American company providing financial assessments and expert testimony in complex cases. In *Eiser v. Spain*, Mr. Lapuerta and other experts of the Brattle Group were selected as damages experts, offering guidance to the tribunal on the estimation of damages in this case. Before and during the *Eiser* case, Dr. Alexandrov, Mr. Lapuerta and Brattle worked together in different capacities. In four cases, Dr. Alexandrov was appointed as arbitrator while the same party that appointed him had solicited the advice of the Brattle Group. In eight other cases, Dr. Alexandrov was engaged as counsel by the party that engaged the Brattle Group as its expert, sometimes simultaneously to the present case.[386] In some of these cases, Mr. Lapuerta was the testifying expert, in other cases other employees of the Brattle Group. This information was not disclosed by Dr. Alexandrov. Spain only became aware of this information after the award was rendered, and therefore did not have the opportunity to challenge Dr. Alexandrov through disqualification. Instead, Spain decided to file for annulment.[387]

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[384] Ibid., para. 168.
[385] *Eiser v. Spain,* Annulment Decision, *supra* note 304.
[386] Ibid., para. 205.
[387] Ibid., para. 49

111. Spain invoked two legal grounds: improper constitution of the tribunal[388] and serious departure of a fundamental rule of procedure.[389] The Committee first considered the improper constitution of the tribunal. While it conceded that some interaction between arbitrators, lawyers and experts is inevitable, it also warned that the more connections there are, across cases and in different roles, the higher the chances that a conflict of interest may arise.[390] In any case, these connections must be disclosed. The Committee ruled that in this case the degree of connectivity between Dr. Alexandrov and Mr. Lapuerta was intense. It especially took notice of the four cases in which they were engaged by the same party, as counsel and expert respectively, two of which took place while Dr. Alexandrov was interacting as arbitrator with Mr. Lapuerta in the *Eiser* case.[391] The close working relationship between Dr. Alexandrov and Mr. Lapuerta led the committee to conclude that "*an independent observer, on an objective assessment of all the facts, would conclude that there was a manifest appearance of bias on the part of Dr. Alexandrov*",[392] even if Dr. Alexandrov may not have been aware of the problematic nature of this relationship. Furthermore, Dr. Alexandrov should have disclosed his relationship with Mr. Lapuerta.[393]

112. The committee then turned to the serious departure of a fundamental rule of procedure. As stated above, the committee had observed a manifest appearance of lack of impartiality on the part of Dr. Alexandrov. Furthermore, it subscribed to the EDF committee's view that there is no rule more fundamental "*than the rule that a case must be heard by an independent and impartial tribunal.*"[394] To assess whether the departure from the fundamental rule was serious, the committee had to examine if the apparent manifest lack of impartiality had a material effect on the award under article 52(1)(a). As deliberations between arbitrators are secret, it could not be excluded that Dr. Alexandrov's views influenced the opinions of the other arbitrators and as such the outcome of the case. The most significant effect was found in the damages section of the award, as the tribunal adopted Mr. Lapuerta's model for damages in its entirety.[395] Thus, the committee concluded there had been a serious departure from a fundamental rule of procedure and annulled the award.[396]

4.3. INTERMEDIARY CONCLUSION

113. A first conclusion to be drawn from examining these cases is that lack of independence and impartiality is invoked less often in annulment cases compared to disqualification cases. Also, very few annulment cases on the ground of lack of independence or impartiality are successful: thus far, *Eiser v.*

[388] Art. 52(1)(a) ICSID Convention.
[389] Art. 52(1)(d) ICSID Convention.
[390] *Eiser v. Spain*, Annulment Decision, *supra* note 304, para. 217.
[391] Ibid. para. 218.
[392] Ibid., para. 240.
[393] Ibid., para. 228.
[394] Ibid., para. 239.
[395] Ibid., para 247.
[396] Ibid., para. 273.

Spain is the only decision in which an award was annulled because an arbitrator was deemed to lack independence or impartiality.[397]

114. In *Suez v. Argentina*,[398] annulment was rejected because the committee considered that the disqualification decision regarding Professor Kaufmann-Kohler was not plainly unreasonable. It held that one cannot expect an arbitrator to have no connections to any business which may later appear as a party in arbitral proceedings. Furthermore, Professor Kaufmann-Kohler held the contentious position for only three out of 12 years of proceedings. In *Vivendi II v. Argentina*,[399] the committee was much more critical of Professor Kaufmann-Kohler. In its view, a bank director has a fiduciary duty to the shareholders of the bank, which is fundamentally at variance with the independence required from an arbitrator. Furthermore, an arbitrator has a continuous duty of investigation and must examine whether there are any circumstances which may rise doubts as to his or her independence or impartiality. If the answer to that question is positive, at the very least the arbitrator must disclose this information. However, because Professor Kaufmann-Kohler had no knowledge of the connections between UBS and Vivendi, the award was not annulled. At this point the decision seems contradictory, because one would expect that under the duty of investigation Professor Kaufmann-Kohler was obliged to make a reasonable effort to gain knowledge of these facts. In *EDF v. Argentina*,[400] the committee took notice of the *Vivendi II* committee's critical approach but did not agree that a position as bank director is at variance with a position as an arbitrator. As UBS held an interest of only 1,5% in EDF, the connection was not so significant as to form a conflict of interest. Neither was, regarding Professor Remón, the fact that his law firm may have been asked to represent Argentina's opponent in the future. In *RSM v. Saint-Lucia*,[401] an assenting opinion criticising third-party funding was held to be no manifestation of bias.

115. The most interesting case in the annulment analysis is *Eiser v. Spain*.[402] Being the only case in which an award was annulled for lack of independence, it may serve as a point of reference for future case law. The fact that the committee considered an arbitrator to present 'an appearance of bias' because of his connections to a damages expert should convince arbitrators to reflect on their relations not only directly with the parties, but also more indirectly with anyone involved in the proceedings. Perhaps the *Eiser* committee saw this case as an opportunity to respond to the criticism that ICSID does not adequately handle

[397] J. GÁLVEZ, M. O'DRISCOLL, A.G. URIARTE, 'Dangerous Liaisons in International Investment Arbitration: The Annulment of the Eiser V Spain ICSID Award', *Kluwer Arbitration Blog*, 12 July 2020.
[398] Supra 104-106.
[399] Supra 107.
[400] *Supra* 108-109.
[401] *Supra* 102-103.
[402] *Supra* 110-112.

arbitrator bias.[403] In any case, the decision was welcomed in the literature,[404] especially because it demands a high degree of transparency of arbitrators, leaving less room for professional relationships with parties or experts.[405] The hope is that this strict standard set by the committee will persuade arbitrators to be more rigorous in the disclosure of their relations, leading to less conflicts of interest.[406] However, it was also pointed out that, while many rules and guidelines contain a disclosure duty, most of them provide no sanctions for non-disclosure.[407] Thus, the consequences of an arbitrator failing to disclose relevant information are left entirely to the discretion of the arbitral tribunals.

116. The main critique directed at the disqualification case law also applies here: there is a lack of uniformity in decisions.[408] Regarding the legal consequences of a proposal for disqualification (or the absence of it) in relation to a request for annulment, two seemingly irreconcilable schools of thought have emerged.[409] As to the threshold for annulment itself, each committee seems to have its own views on this, without necessarily taking into account earlier case law. For applicants, this makes it difficult to estimate their chances of success when filing a proposal for annulment, leading to frustrations and a waste of resources. This of course does not enhance the legitimacy of ICSID arbitration. From a legal perspective, this lack of legal certainty is also highly undesirable, as it may leave committees doubting about which approach to follow.

5. STANDARD OF CONDUCT

117. One of the research objectives of this paper is to establish a standard of conduct which arbitrators must follow to avoid a disqualification or annulment challenge for lack of independence or impartiality.[410] Based on the cases analysed, can such a standard be discerned? The lack of uniformity in decisions makes it difficult to establish a conclusive behavioural standard. Nevertheless, there are some general recommendations which arbitrators ought to observe.

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[403] A criticism voiced by Sornarajah, among others; see M. SORNARAJAH, I*nternational Investment Law as Development Law: The Obsolescence of a Fraudulent System*, *supra* note 2, 209-231.

[404] Although not unanimously; see S. A PAUKER, B. WINSTON, "Eiser v Spain – Unprecedented Annulment of an ICSID Award for Improper Constitution of the Tribunal", *Journal of World Investment and Trade* 2021, vol. 22, no. 2, 313-328.

[405] J. GÁLVEZ, M. O'DRISCOLL, A.G. URIARTE, "Dangerous Liaisons in International Investment Arbitration: The Annulment of the Eiser V Spain ICSID Award", *Kluwer Arbitration Blog*, 12 July 2020.

[406] Ibid.

[407] D. PROKIC, 'The Annulment of Eiser v. Spain: A call for improvements to the system?', *Kluwer Arbitration Blog*, 6 May 2021.

[408] Ibid.

[409] *Azurix* versus *EDF*, supra 91-94.

[410] *Supra* 5.

118. First: transparency. Both the disqualification and the annulment case law firmly established a duty of disclosure, based upon Arbitration Rule 6(2).[411] As a precautionary measure, diligent arbitrators who are appointed to a tribunal would do well to disclose all of their relations with the parties, their counsels and even with experts[412] or any other circumstance which might lead a reasonable observer to question their independence or impartiality. The scope of the duty to disclose is larger than that of a challenge.[413] Even if an arbitrator is convinced that a particular situation could never lead to disqualification or annulment, as soon as there is even the slightest doubt, disclosure is the safest option. Although there has been no disqualification or annulment solely on the basis of non-disclosure, in multiple cases arbitrators have been criticised for not sharing relevant information about their backgrounds.[414] It therefore cannot be excluded that in the future a tribunal might decide that a lack of disclosure constitutes a manifest appearance of bias. In addition, the IBA Guidelines serve as useful guidance, especially the red, orange, and green lists on conflicts of interest, indicating the concrete situations in which arbitrators ought to disclose.[415] The Guidelines have no binding force for ICSID arbitrators but are often referred to by tribunals and as such may influence their judgments.[416]

119. The central question is of course which situations an arbitrator must avoid, to remain fully independent and impartial. Here, unfortunately, the case law is more ambiguous. In the following circumstances, disqualification or annulment was deemed necessary: where an arbitrator had obtained information in an earlier case which was also relevant to the case at hand,[417] where an arbitrator questioned the ethics of a party's counsel,[418] where an arbitrator's law firm had represented a party's opponent in a different case[419] and where an arbitrator had close ties to an expert.[420] Other situations which were considered problematic by tribunals are an arbitrator serving as director on the board of a party,[421] having an attorney-client relationship with a party[422] or possessing significant financial interests in a party.[423] Circumstances, such as shared educational history of an arbitrator and a counsel,[424] opinions expressed in academic writing,[425] having decided against a party in a previous case...[426] did not amount to a lack of

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[411] *Supra* 39-42, 100.
[412] As in *Eiser v. Spain* an award was annulled due to relations between an arbitrator and an expert; *supra* 110-112.
[413] *Supra* 39-42.
[414] E.g. *Vivendi II v. Argentina*, Annulment Decision, *supra* note 372, *supra* 107; *Eiser v. Spain*, Annulment Decision, *supra* note 304, supra 110-112.
[415] IBA Guidelines, 20-27; *supra* 41.
[416] See e.g. *Alpha v. Ukraine,* Disqualification Decision, *supra* note 133, *supra* 59-61.
[417] *Caratube v. Kazakhstan,* Disqualification Decision, *supra* note 166; *supra* 48-52.
[418] *Burlington v. Ecuador,* Disqualification Decision, *supra* note 194*; supra* 57.
[419] *Blue Bank v. Venezuela,* Disqualification Decision, *supra* note 247; *supra* 71-72.
[420] *Eiser v. Spain,* Annulment Decision, *supra* note 304*; supra* 110-112.
[421] *EDF v. Argentina,* Disqualification Decision, *supra* note 222*; supra* 62-67.
[422] CLEIS, *The Independence and Impartiality of ICSID Arbitrators*, *supra* note 27, 201.
[423] *EDF v. Argentina,* Disqualification Decision, *supra* note 222; supra 62-67.
[424] *Alpha v. Ukraine*, Disqualification Decision, *supra* note 133; *supra* 59-61.
[425] *Urbaser v. Argentina*, Disqualification Decision, *supra* note 182; *supra* 53-56.
[426] *Suez v. Argentina*, Disqualification Decision, *supra* note; *supra* 45-46, *PIP SARL v. Gabon*, Disqualification Decision, *supra* note 162; *supra* 47.

independence or impartiality. In general, 'problematic relations' are assessed by referral to the proximity, duration, and financial impact of the relationship.[427]

120. In the absence of an unequivocal and consistently applied standard of independence and impartiality, the assessment of arbitrator challenges will to some extent remain casuistic and unpredictable. Nonetheless, in two situations arbitrators should exercise special caution. First: where they have dual functions.[428] This means that, besides their position as an arbitrator, they engage in other professional activities,[429] whether it be as legal counsel, in academia or as a director. Especially as counsel in the field of international investment arbitration, it is inevitable that one encounters the large corporations and host states which frequently appear in arbitral proceedings. These encounters, however informal they may be, may raise questions when the same person later takes on the role of arbitrator. Therefore, before accepting an appointment, an arbitrator should always assess whether any past professional (or personal, for that matter) collaborations may create an appearance of bias in the case which he is asked to decide.[430] In case of doubt, the appointment must be rejected. The same holds true for opinions expressed in academic writing or a position on a board. Secondly, arbitrators should be wary of repeat appointments by the same party.[431] If a party chooses to repeatedly appoint the same arbitrator in proceedings with similar factual circumstances or on similar legal grounds, it is highly likely that it does so not for the arbitrator's expertise, but because the party was pleased with the arbitrator's past decisions and expects him or her to decide in the party's favour. A certain loyalty of the arbitrator towards the appointing party may emerge, knowingly or unknowingly.[432] In these situations there is an increased risk of bias. Therefore, arbitrators would do well to reflect on whether it is a good idea to accept an appointment in such a case.

121. A promising project which may help to bring some clarity to the standard of independence and impartiality in ICSID arbitration is the Code of Conduct for Adjudicators in International Investment Disputes. This Code is currently being drafted by the ICSID and UNCITRAL Secretariats and covers all international investment disputes, including ICSID arbitration.[433] The purpose of the code is to ensure a uniform approach to the requirements applicable to investment arbitrators and to concretise the standards enshrined in the legal

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[427] UNCITRAL, *Possible reform of investor-State dispute settlement (ISDS), Ensuring independence and impartiality on the part of arbitrators and decision makers in ISDS*, Note by the Secretariat, 30 August 2018, A/CN.9/WG.III/WP.151, 15.

[428] As to why dual functions warrant extra caution, see CLEIS, *The Independence and Impartiality of ICSID Arbitrators*, *supra* note 27, 201-206.

[429] As is the case for almost all ICSID arbitrators, see *supra* 23-28.

[430] Whether the professional or personal relations may effectively influence the arbitrator's decision should not even be relevant, at this stage.

[431] CLEIS, *The Independence and Impartiality of ICSID Arbitrators*, supra n.27, 190-201.

[432] *Infra* 130.

[433] C. GIORGETTI, "The Second Draft of the Code of Conduct for Adjudicators in International Investment Disputes: Towards a Likely Agreement*?", Kluwer Arbitration Blog*, 29 May 2021.

documents regulating investment arbitration proceedings.[434] More specifically, as the background note puts it, to Code aims at "*(i) clarifying the content of the standards, thereby furthering harmonisation and clarification of the different existing requirements; (ii) ensuring that all stakeholders understand the thresholds for when independence, impartiality and integrity would be impaired; (iii) developing requirements for qualification; (iv) determining the mechanisms for disclosure, and the sanctions in case of non-compliance; (v) as far as arbitrators are concerned, providing clarity on their roles, in particular regarding the question of double-hatting and repeat appointments [...].*"[435] The background note especially targets three issues which should be addressed in the Code: repeat appointments, issue conflicts and double-hatting. Repeat appointments have been discussed above. Issue conflicts occur where an arbitrator is said to pre-judge a point of law by relying on views or opinions he or she expressed earlier, for example in scholarly writing.[436] Double hatting is the situation where an arbitrator and a counsel in one case switch roles in another case: the arbitrator becomes counsel and vice versa. In such a situation, an arbitrator must review arguments of a counsel who he knows will later have to review his own arguments, which constitutes a clear conflict of interest.[437]

122. The latest draft of the Code contains 11 articles. Article 3 contains a general obligation of independence and impartiality and a prohibition of undue influences.[438] Article 4 is titled: 'Limits on Multiple Roles' and deals with double hatting. The draft contains three possible versions of this article. The first version prohibits double hatting unless the parties agree otherwise. The second version only prohibits double hatting in cases involving (a) the same measures, (b) the same legal issues (c) one of the same disputing parties or (d) the same treaty. The third version merely requires arbitrators to disclose instances of double hatting.[439] Also interesting is article 10, which spells out disclosure obligations. Any circumstance giving rise to doubts as to an arbitrator's independence or impartiality must be disclosed. Furthermore, arbitrators must share the following information:

a. *Any financial, business, professional, or personal relationship within the past five/ten years with:*

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[434] UNCITRAL, *Possible reform of investor-State dispute settlement (ISDS), Background information on a code of conduct*, Note by the Secretariat, 31 July 2019, A/CN.9/WG.III/WP.167, para. 12.
[435] *Ibid.* para. 13.
[436] UNCITRAL, *Possible reform of investor-State dispute settlement (ISDS), Background information on a code of conduct*, Note by the Secretariat, 31 July 2019, A/CN.9/WG.III/WP.167, para. 24; see e.g. *Urbaser v. Argentina*, Disqualification Decision, *supra* note 182, *supra* 53-56.
[437] UNCITRAL, *Possible reform of investor-State dispute settlement (ISDS), Background information on a code of conduct*, Note by the Secretariat, 31 July 2019, A/CN.9/WG.III/WP.167, para. 25.
[438] Art. 3 Draft Code of Conduct for Adjudicators in International Investment Disputes, Version Three, September 2021.
[439] Art. 4 Draft Code of Conduct for Adjudicators in International Investment Disputes, Version Three, September 2021.

i. *the disputing parties, and any subsidiary, affiliate, or parent entity, State agency or State-owned enterprise identified by the disputing parties;*

ii. *the legal representatives of either disputing party*

iii. *the other Adjudicators and expert witnesses in the IID*[440]*; and*

iv. *any third-party funder with a financial interest in the outcome of the IID and identified by a disputing party;*

b. *Any financial or personal interest in:*

i. *the IID or its outcome;*

ii. *any other proceeding involving substantially the same measures as the IID; and*

iii. *any other proceeding involving at least one of the same disputing parties or entities identified pursuant to Article 10(2)(a)(i);and*

c. *All IID and all related proceedings in which the Candidate or Adjudicator has been involved in the past five/ten years or is currently involved in as a legal representative, expert witness, or Adjudicator; and*

d. *Their appointments as legal representative, expert witness, or Adjudicator made by either disputing party or its legal representative in an IID [and non-IID] in the past five/ten years.*[441]

This obligation goes further than the current disclosure obligation under the ICSID Convention.

123. While the objectives of the Draft Code as set out in the Background Note are certainly laudable, the question is whether they will be attained given the limited scope of the current version of the Code. Apart from the prohibition of double hatting and the extended disclosure obligation, the articles seem to contain few innovations.[442] Most unfortunate is the lack of choice for a clear

[440] The International Investment Dispute.
[441] Art. 10 Draft Code of Conduct for Adjudicators in International Investment Disputes, Version Three, September 2021.
[442] International Institute for Sustainable Development, *The UNCITRAL Code of Conduct: Breakthrough or diversion?*, 10 November 2021, https://www.iisd.org/itn/en/2021/11/10/the-uncitral-code-of-conduct-breakthrough-or-diversion/, accessed 3 June 2022.

standard of independence and impartiality challenges. Had the Code adopted the reasonable doubts standard,[443] for example, this would have significantly improved legal certainty. Under the current version of the Code, however, it appears that the different standards applied by tribunals would continue to coexist. This is a missed opportunity, in my opinion. Of course, the Code is still a draft, and given that some authors reacted somewhat disappointed to its most recent version,[444] improvements might still be made.

6. EVALUATING CLAIMS OF BIAS

124. This paper departed from the observation that investment arbitrators in general, and ICSID arbitrators in particular, are sometimes perceived as biased. How to evaluate these claims of bias? To what extent are they justified? Based on the findings above, this chapter makes a modest attempt to answer this question.

125. The ICSID arbitrator community certainly does not stand out for its diversity. The pool of arbitrators is small and interconnected and stems from largely similar backgrounds. Furthermore, the majority of arbitrators are somehow affiliated with prestigious universities and a select group of elite law firms.[445] In itself, this does not prove bias. Still, in a situation where everyone seems connected to one another, there is an increased risk of conflicts of interest.[446] For some authors, the closed character of the arbitral community even implies an unwillingness of arbitrators to disqualify their peers, which, if substantiated, is a manifestation of a conflict of interest.[447]

126. As regards arbitrator challenges, I noted that they appear to be rarely successful. The success ratio is not necessarily indicative of the existence of bias, however. In the challenges that were successful, the proposal for disqualification or annulment was upheld because of an appearance of bias, not because actual bias was proven.[448] On the other hand, in the unsuccessful challenges there were some factual circumstances which, in my opinion, did raise legitimate questions

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[443] *Supra* 37.

[444] International Institute for Sustainable Development, *The UNCITRAL Code of Conduct: Breakthrough or diversion?*, 10 November 2021, https://www.iisd.org/itn/en/2021/11/10/the-uncitral-code-of-conduct-breakthrough-or-diversion/, accessed 3 June 2022; see also Norton Rose Fulbright, *New draft ICSID Code of Conduct for Adjudicators in International Investment Disputes: An overview of key changes*, December 2021, https://www.nortonrosefulbright.com/en/knowledge/publications/fd9bfd31/new-draft-icsid-code-of-conduct-for-adjudicators-in-international-investment-disputes, accessed 3 June 2022.

[445] *Supra* 23-28.

[446] *Ibid.*

[447] L. MARKERT, "Challenging Arbitrators in Investment Arbitration: The Challenging Search for Relevant Standards and Ethical Guidelines", *Contemporary Asia Arbitration Journal* 2010, 3(2), 248-250.

[448] *Caratube v. Kazakhstan, Burlington v. Ecuador, Blue Bank v. Venezuela, Eiser v. Spain.*

as to independence and impartiality.[449] The tribunals sometimes explicitly acknowledged this, while at the same time rejecting the challenge.[450] Because of the inconsistency of decisions and the lack of uniform standards, the grounds for rejecting a challenge are often unclear or can seem arbitrary. Sometimes they are procedural,[451] sometimes a conflict of interest is recognised but deemed not sufficiently grave,[452] sometimes there seems to be no good reason to reject the challenge.[453] In any event, the facts behind the cases once again confirm the, in my view, problematic degree of connectedness between arbitrators, law firms, and the academic and business worlds.

127. The issue of bias in ICSID arbitration has been studied empirically. Franck examined pre-2007 ICSID awards and assessed whether they were substantially different from awards rendered in other forums.[454] She concluded that the outcomes were not statistically different: for the amounts claimed and the outcome of the award, whether a case was handled by ICSID or by another forum had no impact. Furthermore, whether the case was brought against a developed or a developing country made no difference.[455] In another study, Kapeliuk saw no empirical evidence for the claim that arbitrators who are repeatedly appointed by the same party tend to favour that party. She explains this by the importance arbitrators attach to their reputation, which might suffer should they put their impartiality at stake.[456]

128. Does that mean that there is no problem regarding independence and impartiality in ICSID arbitration? I refer to the title of this paper: "*Justice must not only be done, but also seen to be done.*"[457] While there might be no conclusive evidence that ICSID arbitration is actually biased, a perception of bias certainly exists.[458] In my opinion, given the multiple connections between arbitrators and the unpredictability of the challenge procedures, this perception is justified. Thus, while justice may be done, it is not seen to be done. I find that equally concerning. As long as this perception persists, ICSID arbitration shall not be regarded as legitimate by many stakeholders. Given the economic

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[449] E.g. the position of ms. Kaufmann-Kohler on the board of UBS in the *Vivendi v. Argentina* annulment case, *supra* 107.
[450] *Vivendi v. Argentina*, Annulment Decision, *supra* note 372; *supra* 107.
[451] As in *Azurix v. Argentina*, supra 92-93.
[452] *EDF v. Argentina*, Disqualification Decision, *supra* note 222; *supra* 62-67.
[453] *Vivendi v. Argentina,* Annulment Decision*, supra* note 372*; supra* 107.
[454] S. D. FRANCK, "The ICSID Effect? Considering Potential Variations in Arbitration Awards", *Virginia Journal of International Law* 2011, vol. 51, no. 4., 825-914.
[455] *Ibid.*
[456] D. KAPELIUK, "The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators", *Cornell Law Review* 2010, vol. 96, no. 1, 49-89.
[457] Quote from English Chief Justice Lord Hewart in the case of Rex v. Sussex Justices, [1924] 1 KB 256. He meant that even the appearance of something improper can be sufficient to set aside a judgment. The full quote is: "*It is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done*". See A. DATAR, *The origins of "Justice must be seen to be done"*, 18 April 2020, https://www.barandbench.com/columns/the-origins-of-justice-must-be-seen-to-be-done, accessed 28 May 2022.
[458] *Supra* 3.

importance of foreign investment and investment protection,[459] this issue must be addressed. Therefore, the following chapter presents some proposals for improvements and reform of ICSID arbitration.

7. IMPROVEMENTS AND REFORM

129. Among certain stakeholders, there is a perception that not all ICSID arbitrators possess the requisite qualities of independence and impartiality. In this paper, another source of critique was detected: as regards independence and impartiality of arbitrators, there is no uniformity or coherence in ICSID decisions, which are sometimes even contradictory.[460] This leads to legal uncertainty. To address these problems, numerous proposals for reform and improvements to the system have been made in recent years. Some of the most significant ones are critically assessed below.

7.1. PARTY APPOINTMENTS

130. It is often argued that parties choose arbitrators not for their expertise, but for their ideology, previous decisions, and the expectation that they will rule in their favour.[461] Furthermore, in order to secure their reappointment, arbitrators would have an incentive to favour their appointing parties.[462] Thus, in a tribunal made up of three arbitrators, two of which are appointed by the parties, only the chairperson would be truly independent and impartial.[463] Therefore, some authors propose to abolish the system of party-appointments.[464] One alternative would be to have the arbitrators appointed by a neutral body.[465] The most logical body would be the ICSID Chairman,[466] who is already in charge of appointing arbitrators in some situations.[467] However, this would consolidate a lot of power in the hands of one person.[468] Moreover, appointments by the Chairman would be subject to the criticism of being politically motivated.[469] Also, it is likely that

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[459] *Supra* 15.
[460] *Supra* 35-38, 91-94.
[461] As was implicitly recognised in the case of *OPIC v. Venezuela*, para. 47; supra 52; see also J. PAULSSON, *The Idea of Arbitration*, Oxford, Oxford University Press, 2013, 155; K. DAELE, *Challenge and disqualification of arbitrators in international arbitration*, Kluwer Law International, 2012, 367.
[462] CLEIS, *The Independence and Impartiality of ICSID Arbitrators*, *supra* note 27, 190-201.
[463] *Ibid.*
[464] *Ibid.*, J. PAULSSON, *The Idea of Arbitration*, Oxford, Oxford University Press, 156; H. SMIT, "The pernicious institution of the party-appointed arbitrator", *Columbia FDI Perspectives* 2010, 33. Some authors defend the system of party-appointments, however. See C. N. BROWER, C. B. ROSENBERG, "The Death of the Two-Headed Nightingale: Why the Paulsson-Van Den Berg Presumption That Party-Appointed Arbitrators Are Untrustworthy Is Wrongheaded", *Arbitration International* 2013, vol. 29, no.1, 7–44.
[465] J. PAULSSON, "Moral Hazard in International Dispute Resolution." *ICSID Review* 2010, vol. 25, no. 2, 339–355.
[466] CLEIS, The Independence and Impartiality of ICSID Arbitrators, *supra* note 27, 194.
[467] *Supra* 31.
[468] CLEIS, The Independence and Impartiality of ICSID Arbitrators, *supra* note 27, 194.
[469] *Ibid.*, 195.

the current household names in the field of investment arbitration would still be appointed, due to the fact that few can match their level of expertise.[470] An alternative would be to oblige parties to choose an arbitrator from a limited, exhaustive roster.[471] This proposal is also not without its demerits, however. How large should a roster be, for example? A large roster would ensure competition between arbitrators. When presented with a large choice, however, parties would still be likely to prefer arbitrators they expect to decide in their favour. The incentive for reappointment thus remains.[472] A small roster would curtail diversity among arbitrators, perpetuate the exclusivity of the arbitral community and increase the chances of repeat appointments.[473] It is also questionable whether a roster would bring about much change, as the arbitrators nominated to such a roster would presumably be the same ones who are being appointed today, for their expertise and their ideology. Furthermore, if nominations to the roster are made by states, to be nominated an arbitrator would need to have connections to state officials, rendering the process political.[474]

131. Another idea to neutralise the effect of party appointments, proposed by Cleis, is to reinforce the role of the chairperson.[475] By ensuring the neutrality and experience of the chairperson, the lack of neutrality of the party-appointed arbitrators can be mitigated. Therefore, Cleis suggests that the chairperson be appointed from an exhaustive roster. Only those arbitrators who have not been predominantly appointed by either investors or states in the past but who show a balanced appointment pattern and no indication of bias should be included in the roster.[476] For nominating arbitrators to the roster, a special "Appointment and Confirmation Committee" should be established within the ICSID Administrative Council to avoid politically motivated nominations by states.[477] States do retain some control over the appointment process, however, as they or their appointed co-arbitrators still get to choose the chairperson they prefer in a specific arbitration proceeding.[478] The only difference with the current system would be that the choice is limited to arbitrators included in the roster.[479]

132. The Appointment and Confirmation Committee as envisaged by Cleis also gets the task of confirming party-appointed arbitrators.[480] This would entail that

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[470] *Ibid.*, 196.
[471] J. PAULSSON, "Moral Hazard in International Dispute Resolution." *ICSID Review* 2010, vol. 25, no. 2, 352; J. WOUTERS, N. HACHEZ, "The Institutionalization of Investment Arbitration and Sustainable Development" in M.-C. CORDONNIER SEGGER, A.P. NEWCOMBE, *Sustainable development in world investment law*, Kluwer Law International, 2011, 637.
[472] A. SANTENS, "The Move Away from Closed-List Arbitrator Appointments: Happy Ending or a Trend to Be Reversed?", *Kluwer Arbitration Blog*, 28 June 2011; CLEIS, *The Independence and Impartiality of ICSID Arbitrators*, *supra* note 27, 190-201.
[473] *Ibid.*
[474] *Ibid.*
[475] CLEIS, *The Independence and Impartiality of ICSID Arbitrators*, Leiden, *supra* note 27, 224-228.
[476] *Ibid.*
[477] *Ibid.*
[478] As is currently the case under the ICSID Convention.
[479] CLEIS, *The Independence and Impartiality of ICSID Arbitrators*, Leiden, *supra* note 27, 224-228.
[480] *Ibid.*, .228-231.

any appointment made by a party needs to be confirmed by the Committee to be fully effective. On the basis of a set of compulsory disqualification grounds, the Committee would be able to examine potential conflicts of interest at the outset of the proceedings and to refuse the appointment of any arbitrator not meeting the threshold of independence and impartiality, thus avoiding dilatory challenges in a later stage.[481]

7.2. DUAL POSITIONS

133. A further source of critique results from arbitrator's dual positions: apart from being arbitrators, they often act as legal advisor or counsel as well.[482] The most drastic response to this issue would be to completely prohibit the combination of a position as arbitrator with the function of legal advisor or counsel.[483] Doubts have been raised as to the desirability of such a proposal, however. As in the majority of cases the dual function of counsel and arbitrator does not pose any problems, the prohibition would be disproportionate.[484] It might even be counterproductive. For many arbitrators, counsel fees are the main source of income. Living solely off of arbitrator fees is not financially viable for most arbitrators, so one can assume that the majority of them would choose counsel work over arbitration. The remaining arbitrators would be even more dependent on their reappointment, as arbitration is now their only source of income. Only the most experienced arbitrators would be able to gain sufficient income from their arbitration practice, further consolidating their dominance.[485]

7.3. JURISDICTION FOR DISQUALIFICATION CHALLENGES

134. The fact that proposals for disqualification are decided by the unchallenged co-arbitrators, is criticised by some authors.[486] It is sometimes suggested that the task of deciding disqualification challenges should be transferred to a different institutional body. This would respond to the accusations of unchallenged arbitrators not wanting to compromise their colleagues, enhance consistency of decisions and improve procedural efficiency.[487] Cleis supports this idea and proposes that the Appointment and Confirmation Committee take on this task.[488] It is unclear whether she intends the committee to also handle annulment proceedings. In that case, the Committee would start to resemble an appellate body.

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[481] *Ibid.*
[482] *Ibid.*, 201.
[483] As has been advocated by N. BERNASCONI-OSTERWALDER, L. JOHNSON, F. MARSHALL, "Arbitrator Independence and Impartiality: Examining the dual role of arbitrator and counsel", *IV Annual Form for Developing Country Investment Negotiators, Background paper*, 27-29 October 2010; G.J HORVATH, R. BEZERO, "Arbitrator and Counsel: the Double-Hat Dilemma", *Transnational Dispute Management* 2013, vol. 10, 18.
[484] CLEIS, *The Independence and Impartiality of ICSID Arbitrators*, *supra* note 27, 202-204.
[485] *Ibid.*
[486] *Supra* 75.
[487] CLEIS, *The Independence and Impartiality of ICSID Arbitrators*, supra note 27, 231.
[488] *Ibid.*

7.4. APPLICABLE STANDARD

135. The lack of consistent application of the ICSID Convention further complicates the picture. As described above, tribunals have adopted different, sometimes contradictory standards.[489] The consequence is legal uncertainty for applicants and waste of time and resources for all those involved.[490] A uniform application of the rules on independence and impartiality would go a long way in enhancing ICSID legitimacy. Different methods have been proposed to achieve this.

136. A scholarly initiative such as the CISG Advisory Council could foster uniform interpretation.[491] This is a private initiative which issues opinions on subjects relating to the UN Convention on the International Sale of Goods. The Council is completely independent and critically assesses arbitral and judicial decisions.[492] Its opinions are not binding, but the hope is that they will convince adjudicators to apply the Convention in a uniform way. If a group of experts were to embark upon a similar endeavour with regard to the ICSID Convention, this could be a first step towards a more consistent interpretation.

137. There even was a proposal to go further and introduce a system of preliminary references similar to that of the Court of Justice of the European Union. Translated to ICSID, this would mean that members of the ICSID panel could provide (legally binding) opinions to tribunals and committees on the specific questions of law submitted to them.[493] This proposal seems a bit far-fetched, however, especially since the ICSID panel is far from an institutionalised body comparable to the CJEU.[494]

138. Perhaps the most concrete proposal to achieve consistency is by creating quantitative standards, similar to those contained in the IBA Guidelines.[495] Like the Guidelines' red, orange and green lists, Cleis suggests formulating three categories: compulsory grounds for disqualification,[496] potential grounds for disqualification and a list of innocuous circumstances.[497] The compulsory grounds must always lead to disqualification, with no possibility of a waiver and include the most significant conflicts of interest such as attorney-client relationships between an arbitrator and a party, repeat appointments in

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[489] *Supra* 79, 116.
[490] *Ibid.*
[491] D. PROKIC, "The Annulment of Eiser v. Spain: A call for improvements to the system?", *Kluwer Arbitration Blog*, 6 May 2021.
[492] CISG Advisory Council, *Internationality and Uniformity*, https://www.cisgac.com, accessed on 28 May 2022.
[493] D. PROKIC, "The Annulment of Eiser v. Spain: A call for improvements to the system?", *Kluwer Arbitration Blog*, 6 May 2021. A similar proposal was made in K. DIEL-GLIGOR, *Towards Consistency in International Investment Jurisprudence: A Preliminary Ruling System for ICSID Arbitration*, Leiden, Brill Nijhof, 2017.
[494] SCHREUER et al., *The ICSID Convention*, *supra* note 24, 43-44.
[495] *Supra* 51.
[496] The proposal only concerns disqualification challenges, but the same standards could of course be applied to annulment proceedings.
[497] CLEIS, *The Independence and Impartiality of ICSID Arbitrators*, *supra* note 27, 232-252.

proceedings concerning similar facts and role switching between an arbitrator and a counsel in concurrent proceedings ('double hatting').[498] The potential grounds can be divided into two subcategories: situations in which justifiable doubts as to an arbitrator's independence or impartiality are presumed, unless refuted by the arbitrator; and situations in which the challenging party must demonstrate justifiable doubts.[499] The innocuous circumstances cover those situations which do not require disqualification.[500] Cleis remains silent as to the impact of these standards on annulment challenges.[501] In any case, quantitative standards would bring a lot of clarity to ICSID case law on independence and impartiality, but whether such a list will ever see the light of day remains to be seen.

7.5. INVESTMENT COURT SYSTEM AND MULTILATERAL INVESTMENT COURT

139. In recent times, public opinion in the EU has somewhat turned against investment arbitration.[502] Therefore, the EU has made several proposals for reform of the system. Two of them will be examined below: the Investment Court System in CETA and the Multilateral Investment Court.

7.5.1. Investment Court System and Multilateral Investment Court

140. Comprehensive and Economic Trade Agreement (CETA) between Canada and the European Union does not provide for ICSID jurisdiction but contains a *sui generis* system for the settlement of investment disputes: the Investment Court System (ICS).[503] Investment disputes arising under CETA are submitted to a tribunal consisting of fifteen members appointed by the CETA Joint Committee, five of which are EU nationals, five Canadian nationals and five third country nationals.[504] Three members, one of each category, are randomly assigned to each case, thereby abolishing party-appointments.[505] Tribunal members do not receive a fixed salary but a monthly retainer fee[506] plus a fee for each time they hear a case.[507] Interestingly, CETA article 8.30(1) prohibits tribunal members to act as counsel, expert or witness in other investment disputes.[508] Thus, unlike the ICSID Convention, CETA forbids dual

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[498] *Ibid.*
[499] *Ibid.*
[500] *Ibid.*
[501] One could ask the question if a compulsory ground for disqualification should also automatically lead to annulment, for example.
[502] M.L. MARCEDDU, P. ORTOLANI, "What Is Wrong with Investment Arbitration? Evidence from a Set of Behavioural Experiments", *European Journal of International Law* 2020, vol. 31, no. 2, 406-407.
[503] ICS was also included in other recent trade agreements concluded by the EU, such as the EU-Vietnam Investment Protection Agreement and the EU-Singapore IPA.
[504] Art. 8.27 par. 2 Comprehensive and Economic Trade Agreement between Canada and the European Union (hereinafter: CETA).
[505] Art. 8.27 par. 4 and 5 CETA.
[506] Art. 8.27 par. 12. CETA.
[507] Art. 8.27 par. 14 CETA.
[508] Art. 8.30 par. 1 *in fine* CETA.

functions. Another point of divergence is that under CETA, challenges to a tribunal member are not decided by the co-members but by the President of the International Court of Justice.[509] Perhaps the most drastic reform of ICS is that it incorporates an appellate body, which may reverse awards for errors in law or in fact but also for the grounds set out in article 52(1) (a) through (e) of the ICSID Convention.[510]

141. The inclusion of an appellate body is definitely an improvement when it comes to case law consistency. However, whereas ICS was presented as a radical departure from traditional investment arbitration,[511] it may not be the ultimate solution to the problems the system is facing. Certainly, the move away from party-appointments caters to some of the criticism described above. Yet, the risk is that the joint committee nominating members to the tribunals shall make its decisions based on the ideology of the arbitrators, thereby politicising the system.[512] Furthermore, given the limitation of the tribunal to fifteen members, diversity among arbitrators shall be even more reduced.[513] In addition, the lack of a salary means that tribunal members must find other sources of revenue. However, they are prevented from relying on the most easily available source of revenue, counsel fees. With that in mind, enthusiasm to join the tribunal may be limited, and the question is whether there will be enough qualified candidates.[514] Despite its name, doubts have been raised as to whether ICS is truly a court. Some argue the proposed system is more akin to an arbitration panel with an exhaustive roster.[515] Others qualify it as a hybrid system somewhere in between arbitration and a court, a "*further- institutionalised form of investment arbitration.*"[516] Thus, whether the ICS as established by CETA is a step in the right direction, is up for debate.

7.5.2. Investment Court System and Multilateral Investment Court

142. For some, the ICS is but a first step towards a complete overhaul of the current ISDS system through the creation of a 'Multilateral Investment Court' (MIC). The EU has endorsed the establishment of a MIC.[517] As the proposals to create such a court are still in the early phases, it is not entirely clear how a MIC would function. Under a first proposal, the MIC would consist of a stand-alone

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[509] Art. 8.30 par. 2 CETA.
[510] Art. 8.28 par. 2 CETA.
[511] Former EU Commissioner Cecilia Malmström called ICS "a very different animal" compared to current ISDS systems, see C. LEVESQUE, "The European Commission Proposal for an Investment Court System: Out with the Old, In with the New?" in A. DE MESTRAL (ed.), *Second Thoughts: Investor-State Arbitration between Developed Democracies*, Centre for International Governance Innovation, 2017, 60.
[512] CLEIS, *The Independence and Impartiality of ICSID Arbitrators*, *supra* note 27, 219.
[513] *Ibid*, 220.
[514] *Ibid.*
[515] *Ibid.*, 222-223.
[516] A.K. BJORKLUND, J. BROSSEAU, "L'accord commercial entre le Canada et l'Union Européenne prévoit-il une résolution des différends par arbitrage ou règlement judiciaire?", *Revue québécoise de droit international* 2018, vol. 31, no. 1, 1-36.
[517] See e.g. EUROPEAN COMMISSION, Recommendation for a Council decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes, 13 September 2017, EUR-Lex 52017PC0493.

appellate body, which could be integrated in the institutional structure of ICSID.[518] A case would then still be heard by an ad-hoc ICSID tribunal in first instance, but parties would have the possibility to have their award reviewed by the appellate body of the MIC. It would be a full-fledged appeal, not only for procedural deficiencies but also on substantive legal grounds, possibly rendering the annulment procedure redundant.[519] Without looking into its feasibility, such an appellate mechanism would have the advantage of ensuring the consistency of ICSID awards and enhancing legal certainty. Whether it would also address the criticism concerning bias in investment arbitration, depends on its concrete institutional structure. A second proposal envisages a more drastic reform of ISDS mechanisms, including ICSID. Here, the MIC would comprise a two-tier adjudication system handling cases both in first and second instance.[520] In this scenario, investment arbitration would be replaced by a proper court, presumably with permanent, full-time judges. It would have jurisdiction over all investment disputes worldwide (or at least those involving states who signed up to the MIC).[521] Given the hostility which exists towards international courts,[522] however, whether states would ever accept a court with such far-reaching powers, is doubtful.

7.6. INTERNATIONAL COMMERCIAL COURTS

143. Finally, an interesting development is the emergence of International Commercial Courts ('ICCs') in recent years.[523] These are specialised (national) courts established by states for handling international commercial disputes.[524] ICCs come in many different forms and their purpose is to provide investors with an alternative to 'unattractive' national courts.[525] They usually allow the use of English, either for the entirety of the proceedings or at least for the submission of evidence. In most cases, the national rules of civil procedure are applied by these courts, although some ICCs have a specific, deviant regulatory framework. Judges on ICC panels are mostly English-speaking and experienced in handling international commercial disputes.[526] Some ICCs even allow international judges from other jurisdictions to sit on their panels,[527] often applying foreign law and thereby emphasising the cross-border character of the ICC. Some scholars have suggested that ICCs might, in the long term, form an alternative for international

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[518] S.-W. LEE, "ISDS Reform: Analysis on establishing a Multilateral Investment Court System", *Arbitration: The Int'l J. of Arb., Med. & Dispute Mgmt* 2021, vol. 87, no. 4, 484–506.
[519] *Ibid.*
[520] *Ibid.*
[521] *Ibid.*
[522] E.g. the saga revolving around the WTO Dispute Settlement Body.
[523] Among the countries that have recently established some form of International Commercial Courts are Singapore, Dubai, China, Germany, France and the Netherlands.
[524] D. RUCKTESCHLER, T. STOOSS, "International Commercial Courts: A Superior Alternative to Arbitration?", *Journal of International Arbitration 2019*, vol. 36, no. 4, 431-450.
[525] *Ibid.*
[526] *Ibid.*
[527] *Ibid*; A.S. KING, P. K. BOOKMAN, "Travelling Judges", Pre-publication manuscript accepted by the *American Journal of International Law*, Published online by Cambridge University Press.

(investment) arbitration.[528] After all, why resort to costly arbitration procedures when specialised, English-speaking courts are available? From the perspective of independence and impartiality, ICCs certainly offer substantial guarantees, as the parties have no influence over the appointment of judges, who must respect the national prohibitions on combining functions.[529] However, it is precisely this liberty of appointing the arbitrator of one's own choice that is one of the main attractions of investment arbitration,[530] so abolishing this prerogative might be too drastic a reform for many investors to digest. Other perks of arbitration, such as procedural flexibility and confidentiality, would also be lost. Therefore, I doubt whether ICCs will ever be in a position to replace investment arbitration.

7.7. THE ROAD AHEAD – IN MY OPINION

144. Personally, I believe reform of ICSID arbitration is a necessity. I would plead for two measures: the introduction of an appellate mechanism and a clarification of the standards for independence and impartiality. As was said above,[531] having an appeals procedure would ensure the consistency of the case law and improve legal certainty. The downside is that introducing an appeals procedure would be a profound overhaul of the existing ICSID system. An appellate body would have to be instituted, either integrated in ICSID or as a stand-alone body. To be effective, the number of arbitrators appointed to that body would have to be limited. Also, to have an appellate body would curtail the power of the parties to appoint the arbitrators of their own choice, thereby eliminating part of the attractiveness of ICSID arbitration. While I believe the benefits would outweigh the disadvantages, I doubt whether it is realistic that, under the current geopolitical circumstances, ICSID members will agree to such a drastic reform any time soon. Thus, it might be a good idea to tackle the problem of inconsistency at its roots: the lack of a clear standard of independence and impartiality. Both on the procedural and on the substantial level, a plethora of conflicting decisions have been adopted.[532] Therefore, I endorse Cleis' proposal for establishing Guidelines which concretise the requirement of independence and impartiality.[533] These Guidelines should clarify the preconditions for challenging an arbitrator (such as the consequences of disqualification before annulment), but should also describe, in an abstract manner, which situations must lead to disqualification or annulment, which situations may do so and which situations must not, in line with the IBA Guidelines. Ideally, of course, these Guidelines should be more than mere soft law and have binding force (in which case perhaps they should no longer be

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[528] D. RUCKTESCHLER, T. STOOSS, "International Commercial Courts: A Superior Alternative to Arbitration?", *Journal of International Arbitration* 2019, vol. 36, no. 4, p.431-450; W. THEUS, "There and Back Again: From Consular Courts through Mixed Arbitral Tribunals to International Commercial Courts" in *Mixed Arbitral Tribunals, 1919–1930: An Experiment in the International Adjudication of Private Rights*, Nomos, 2021.

[529] D. RUCKTESCHLER, T. STOOSS, "International Commercial Courts: A Superior Alternative to Arbitration?", *Journal of International Arbitration* 2019, vol. 36, no. 4, p.431-450

[530] *Supra* 131-132.

[531] Supra 142.

[532] *Amco Asia* versus *Vivendi*, *supra* 35-38; *Azurix* versus *EDF*, *supra* 91-94.

[533] *Supra* 138.

called Guidelines). Admittedly, these reforms do not address the allegations of arbitrators being biased. However, they do enhance the predictability of arbitrator challenges and legal certainty, thereby rendering the challenge procedures more accessible for parties confronted with an arbitrator who has demonstrated bias. They may also help reduce the number of idle cases.

8. CONCLUSION

145. ICSID finds itself in a legitimacy crisis. Member states have withdrawn, scholars are voicing their criticism and proposals are being made to replace the system. One of the main sources of critique is the alleged lack of independence and impartiality of ICSID arbitrators. Both the institutional organisation of ICSID, with party appointments, and the characteristics of its arbitrator community sustain the perception that the arbitrators are biased in favour of one or the other party, as I have shown. The ICSID Convention provides for two procedures which allow to challenge a biased arbitrator: disqualification and annulment. Both procedures have been examined.

146. The research question of this paper was "*Under which circumstances can an ICSID arbitrator be disqualified or an ICSID award be annulled for lack of independence or impartiality*?". The answer is somewhat ambiguous. An analysis of the ICSID case law led to the following observations. In four cases, an arbitrator was disqualified or an award annulled for lack of independence or impartiality: where an arbitrator had obtained information in an earlier case which was also relevant to the case at hand, where an arbitrator questioned the ethics of a party's counsel, where an arbitrator's law firm had represented a party's opponent in a different case and where an arbitrator had close ties to an expert. In the other cases, conflicts of interest were deemed insufficiently grave to justify a challenge. Nevertheless, the case law analysis revealed inconsistency and a lack of clarity as to the applicable standard. Conflicting decisions have been adopted, with some tribunals being more lenient while others were stricter. Both on the procedural and on the substantial level, there is no unanimity among arbitrators on the conditions which must be fulfilled to challenge an arbitrator or the circumstances which must lead to disqualification or annulment. A lack of procedural mechanisms to ensure uniformity in decisions leaves each tribunal with the absolute discretion to adopt its own standards. This is problematic, because it impedes legal certainty and has made it impossible to establish a conclusive standard of conduct for arbitrators.

147. While empirical evidence for the claim that ICSID arbitrators are biased is lacking, there certainly is a perception of bias among stakeholders. This perception is fuelled by the abovementioned elements: institutional features such as party appointments, the closed character of the arbitrator community and the unequal treatment of challenging parties due to inconsistency in decisions. The legitimacy crisis can only be addressed when this perception is altered. Therefore, reform is necessary. Proposals for reform range from modest amendments such as reinforcing the role of the chairperson to a

complete overhaul of ICSID through the institution of a Multilateral Investment Court. Personally, I support the adoption of quantitative standards to clarify and concretise the requirement of independence and impartiality and, perhaps a bit more utopian, the introduction of an appellate body. As always, of course, the future is uncertain and depends on various factors. Whether these reforms will ever be implemented is far from assured. Having studied this topic for quite some time now, however, I am convinced that the issue of independence and impartiality of arbitrators shall continue to impair ICSID legitimacy until changes are made or the ICSID system disappears altogether. In other words, to end with a quote from Maurice Levy: "*We have to keep transforming ourselves to stay relevant for the future*."