



UvA-DARE (Digital Academic Repository)

Lack of Independence and Impartiality of Arbitrators

Dunoff, J.; Giorgetti, C.; Hamamoto, S.; Nottage, L.; Ratner, S.; Schill, S.; Waibel, M.

Publication date

2019

Document Version

Final published version

[Link to publication](#)

Citation for published version (APA):

Dunoff, J., Giorgetti, C., Hamamoto, S., Nottage, L., Ratner, S., Schill, S., & Waibel, M. (2019). *Lack of Independence and Impartiality of Arbitrators*. (Academic Forum on ISDS Concept Paper; No. 2019/6). PluriCourts. https://www.cids.ch/images/Documents/Academic-Forum/6_Independence_-_WG6.pdf

General rights

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <https://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

Working Group 6

Lack of Independence and Impartiality of Arbitrators

March 2019

Jeffrey Dunoff, Temple University Beasley School of Law
Chiara Giorgetti, University of Richmond School of Law
Shotaro Hamamoto, Kyoto University School of Law
Luke Nottage, University of Sydney Law School
Steven Ratner, University of Michigan Law School (*Chair*)
Stephan Schill, University of Amsterdam Faculty of Law
Michael Waibel, Lauterpacht Center for International Law, Cambridge University

I. Introduction

A. Definitions and scope of this paper

Independence and impartiality are the hallmark of any adjudicatory mechanism, whether domestic or international, that is based on the idea of the rule of law. Independence and impartiality are recognized widely as principles of national law, human rights law, and the law governing international adjudication, and therefore constitute part of the general principles of law within the meaning of Article 38(1)(c) of the Statute of the International Court of Justice.¹

Independence and impartiality aim at the objectivity and fairness of legal proceedings by ensuring that the activity of adjudicators, both in resolving a concrete dispute and in contributing to the further development of the law, is only determined by the law itself and not by extrinsic, non-legal factors, whether financial, political, ideological, or personal. In concretizing what the notions of independence and impartiality mean for investment arbitration (IA), inspiration can be drawn from comparative analysis, both in relation to domestic legal systems and international adjudication. Such a comparison is justified because there is no substantial difference between the resolution of investment disputes and of any other kind of dispute by a national or international court or tribunal. At the same time, IA has certain unique features, which counsel against any effort to transplant directly elements of another dispute resolution system to IA.

The notion of *independence* is generally used to refer to the institutional independence of the judiciary and adjudicators from the other branches of government. In addition, independence is also used to designate the absence of legally relevant relationships between the adjudicator and the parties to a dispute. The notion of *impartiality*, in turn, refers to the lack of pre-judgment of the decision-maker in relation to the case or the parties before her. It encompasses both the actual absence of pre-disposition and conflicts of interest and the perception thereof: “Not only must justice be done; it must also be seen to be done.”² In international dispute settlement,

¹ See Report of the Special Rapporteur Param Kumaraswamy, Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers, UN Doc E/CN.4/1995/39, para 34.

² See *R v Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256.

unlike in the domestic context, diversity of nationality between the parties and the adjudicator is often considered to be a specific aspect of independence and impartiality.³

In the context of the debate about IA reform, it is important to distinguish between notions of independence and impartiality in relation to 1) the parties to an individual dispute; 2) all present and potentially future parties to an investment treaty dispute; and 3) all others potentially affected by investment dispute settlement, including individuals and groups of populations. Distinguishing between these different levels explains why concerns with respect to independence and impartiality of decision-makers have been raised in the investment treaty context. It is not principally in relation to the parties to an individual dispute that the current system raises concern, but rather the systemic impact for all present and future users of the system, and other affected third-parties. While IA may address some concerns regarding independence and impartiality relatively well at the level of individuals disputes, the systemic aspects are often more elusive. And while the one-off nature of arbitration to settle private-public disputes as such may not be a problem (although this too is highly contested), the widespread mixing of roles of those active in IA as arbitrators and counsel, academics and experts and the financial, professional, and personal entanglements are central to the debate over independence and impartiality.

The scope of this paper, as with the other papers, is limited to the procedural aspects of IA, with a focus on the operation of party-appointed tribunals. Although the paper at times addresses some broader concerns about the overall structure of IA, it does so in the context of how they might affect the independence and impartiality of arbitrators (e.g., in Section II.F below). Thus, we do not offer views here about existing substantive international investment law, including the interpretations of the underlying treaties and issues of the balance of host state duties/rights with investor rights/duties.

B. Practice in major arbitral rules

As noted, concerns over how best to promote independence and impartiality are not unique to IA; thus, virtually all other international systems of dispute settlement have developed rules and mechanisms to ensure independence and impartiality. It is useful, by way of comparison, to describe some of the most relevant efforts in this regard.

Most arbitration rules address arbitrator qualifications, including specific requirements for independence and impartiality. In addition, these rules typically address disclosures designed to ensure independence and impartiality and challenges based on real or apparent lack of independence or impartiality.

The UNCITRAL Arbitration Rules (2010) require the appointing authority to “have regard” to considerations “likely to secure the appointment” of independent and impartial arbitrators. In this context, the appointing authority “shall take into account” the advisability of appointing arbitrators of nationalities other than that of the parties.”⁴ The ICSID Convention

³ See Pierre Lalive, ‘On the Neutrality of the Arbitrator and the Place of Arbitration’ in Claude Remond et al (eds), *Swiss Essays on International Arbitration* (Schulthess 1984) 23.

⁴ UNCITRAL Rules, art. 6.

(arts. 14, 40) provides that those who serve as arbitrators shall be “persons of high moral character,” possess expertise in relevant fields of law, and should “be relied upon to exercise independent judgment.” While the English-language version and the French-language version of ICSID texts do not mention “impartiality,” the Spanish-language version of the ICSID Convention does, though it does not mention “independence”. All language versions are equally authentic, and there is general consensus that both requirements apply.

Other arbitral rules contain similar provisions. For example, International Chamber of Commerce (ICC) Rules require that an arbitrator “be and remain independent of the parties,” and the London Court of International Arbitration (LCIA) requires that an arbitrator “be and remain at all times impartial and independent of the parties.” Similar provisions regarding judges are found in the statutes or rules of international courts and tribunals, and states have acknowledged that these requirements are fundamental to any rule-of-law based dispute system.⁵

The primary regulatory strategy used to ensure the independence and impartiality of arbitrators is disclosure. The UNCITRAL Rules expressly provide for the disclosure of “any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence.”⁶ The arbitrators “shall” without delay disclose any such circumstances to the parties and other arbitrators. Likewise, the ICSID Arbitration Rules require disclosure of any circumstances that might cause a party to question an arbitrator’s “reliability for independent judgment.”⁷ ICSID arbitrators have a continuing duty promptly to notify should any matter subsequently arise that might cause a party to question the arbitrator’s reliability for independent judgment. The ICC Rules (art. 11) require that a prospective arbitrator disclose “any facts or circumstances which might . . . call into question the arbitrator’s independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator’s impartiality.” This is a continuing duty.

Various soft law instruments supplement rules regarding disclosure. Guidelines prepared by the International Bar Association set out specific situations and indicate whether they should prompt disclosure or disqualification (the so-called “Red,” “Orange,” and “Green” lists).

Arbitral systems have procedures for parties to challenge arbitrators. The UNCITRAL Rules permit challenge should circumstances “give rise to justifiable doubts as to arbitrator’s impartiality or independence.” *Gallo v Canada* holds that the apprehension of bias should be to an “objective observer, reasonable.” Article 57 of the ICSID Convention authorizes parties to seek disqualification of an arbitrator for “any fact indicating a manifest lack of the qualities” required for appointment; it is not clear that, as applied, the standard varies greatly from that found in other systems. ICSID tribunals have called this standard “an ‘objective standard based on a reasonable evaluation of the evidence by a third party’ or . . . on the ‘point of view of a reasonable and informed third person.’”⁸ As these standards suggest, it is not necessary to prove

⁵ See Note by the Secretariat on Possible Reform of investor-State dispute settlement, UN. Doc. A/CN.9/WG.III/WP.151 (20 Aug 2018).

⁶ UNCITRAL Rules, art. 11.

⁷ ICSID Rules, Rule 7.

⁸ *Caratube International Oil Company v. Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch (20 March 2014).

actual dependence or bias; it is sufficient to show the appearance of dependence or bias. The burden of proof lies with the party making the challenge.

C. Perceptions, reality, and empirical research

Concerns over lack of independence and impartiality have emanated from many stakeholders in the IA process. While the reasonable perception of a lack of independence and impartiality is sufficient to call into question the legitimacy of IA, it might be asked whether any empirical findings support these concerns. Certainly many participants report anecdotes suggesting, for instance, that arbitrators are not independent of the parties that appoint them, or are motivated by the desire for reappointment. Quantitative scholarship on independence and impartiality is quite recent, and fairly limited in scope.

Within that scholarship, there is ample confirmation that a relatively small number of arbitrators play a dominant role in appointments.⁹ Double-hatting remains a practice, though its prevalence is overall not large.¹⁰ As to whether party-appointment generally or the pattern of repeat appointments affects the outcomes of individual cases, or create a systemic bias in favor of investors, studies come to different conclusions. One experimental study (i.e., a constructed protocol, not based on evidence in actual cases or interviews with participants) found a bias in favor of the party that appoints an arbitrator, using this data to support a move to blind appointments.¹¹ With respect to claims of systemic pro-investor partiality from party appointments, one study found “only very tentative evidence of the expectations of systemic bias” in favor of Northern investors on issues without claiming bias of individual arbitrators.¹²

Another concept related to lack of impartiality is cognitive bias, which is endemic to all decisionmaking, including by judges. Behavioral economists have identified elements of this phenomenon, including framing errors and groupthink. Studies have examined its manifestation in domestic judging, and one can assume that arbitrators are also susceptible to cognitive bias. No quantitative study has sought to measure it in IA, although the insights from knowledge of cognitive bias may have relevance for the design of improvements to IA.¹³

In the end, the multivariable nature of the problem of independence and impartiality, the impossibility of knowing what constitutes a biased or incorrect outcome, and the complexity of counter-factuals make it difficult, if not impossible, to prove that arbitrators lack independence or impartiality with respect to a specific case or even systemically. Yet enough empirical work

⁹ See, e.g., Sergio Puig, ‘Social Capital in the Arbitration Market’ (2014) 25 *European Journal of International Law* 387; Malcolm Langford, Daniel Behn, and Runar Lie, ‘The Revolving Door in International Investment Arbitration’ (2017) 20 *Journal of International Economic Law* 301.

¹⁰ Langford, Behn, and Lie.

¹¹ Sergio Puig and Anton Strezhnev, ‘Affiliation Bias in Arbitration: An Experimental Approach’ (2017) 46 *Journal of Legal Studies* 371; Sergio Puig, ‘Blinding International Justice’ (2016) 56 *Virginia Journal of International Law* 647.

¹² Gus Van Harten, ‘Arbitrator Behaviour in Asymmetrical Adjudication (Part Two): An Examination of Hypotheses of Bias in Investment Treaty Arbitration’ (2016) 53 *Osgoode Hall Law Journal* 540, 575-76.

¹³ Georgios Dimitropoulos, ‘Investor–State Dispute Settlement Reform and Theory of Institutional Design’ (2018) 9 *Journal of International Dispute Settlement* 535.

has shown that some of the concerns are grounded in data; the anecdotal evidence remains; and, as noted, the structure of the current system makes the perception of lack of independence and impartiality quite justifiable.

II. Key issues for consideration

A. Party appointment *per se*

The appointment of adjudicators by the parties in the dispute is one of the unique characteristics of IA and at the very core of international arbitration. Surveys strongly suggest that party appointment is one of the reasons why parties favor international arbitration over litigation.¹⁴

Critics, however, see party appointment of arbitrators as a “moral hazard” and find it unsatisfactory and problematic.¹⁵

- First, critics point to the fact that because of the key role arbitrators play in deciding the dispute in all substantive, jurisdictional, and procedural matters, parties have a clear incentive to select a person who is as sympathetic and close to its own views as possible, and that there is too fine a line between being sympathetic and becoming partial.¹⁶
- Second, critics point out that the very choice by a party to appoint an arbitrator may create an incentive by that arbitrator to favor the appointing party by, for example, voting in its favor and advocating for reduced awards or costs. This results in an intrinsically unfair process. Further, a biased arbitrator can disrupt the process in many ways (e.g. delaying meetings, refusing to participate in proceedings, and issuing damaging dissents). Critics also point to cognitive bias. For all these reasons, they note that arbitrators will inevitably side with the party that appointed them.¹⁷
- Third, criticism also revolves around party appointments as perpetrating a non-diverse system, an issue discussed in the paper of Working Group 5.

¹⁴ See, e.g., White & Case and Queen Mary University of London, *International Arbitration Survey: the Evolution of International Arbitration*, Chart 3, p. 7, <https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2018-18.pdf>.

¹⁵ Jan Paulsson, *Moral Hazard in International Dispute Resolution*, Inaugural lecture as holder of the Michael R. Klein’s Chair at the Miami University School of Law, 29 Apr. 2010, http://www.arbitration-icca.org/media/0/12773749999020/paulsson_moral_hazard.pdf. See also Jan Paulsson, *Are Unilateral Appointments Defensible?* 2 Apr. 2009, <http://kluwerarbitrationblog.com/>.

¹⁶ Albert Jan van den Berg, ‘Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration,’ in Mahnoush Arsanjani et al (eds.), *Looking to the Future: Essays on International law in Honor of W. Michael Reisman* (Nijhoff, 2011); David Branson, ‘Sympathetic Party-Appointed Arbitrators: Sophisticated Strangers and Governments Demand on Them’ (2010) 25 ICSID Review 367.

¹⁷ Paulsson 2010; Puig 2016.

Others, however, think that arguments against party appointment are overblown and that both arbitrators and parties are capable of acting within the parameters of independence and impartiality set out by the arbitration system. They cite the professionalism of the arbitrators and the self-policing nature of the system, as biased arbitrators would not be re-appointed because, if they become known as non-neutral, they will become ineffective in deliberations. Further, supporters of the status quo argue that there are sufficient procedural safeguards to ensure that arbitrators lacking independence and impartiality are weeded out and do not sit in a tribunal. These procedures include disclosure requirements, oaths, and challenge procedures. Finally, supporters of the status quo hold that party appointment is at the very core of arbitration and IA and that changing that system would undermine arbitration in an existential way. They cite surveys in support of their view and the lack of real alternatives. The “genie” of party-appointment, they said, “cannot easily be put back into the bottle.”¹⁸ Yet many of these responses address the actual independence and impartiality of arbitrators, rather than the perceptions thereof in the current system.

B. Inappropriate contact between arbitrators and parties

Contacts between the parties and arbitrators may become inappropriate and could therefore create conflict and the appearance of partiality. There is little regulation that provides a general framework, and the problem is compounded by the different attitudes on the issue across legal systems. This is especially the case for pre-appointment contacts, for example, which are considered necessary due diligence under certain legal systems and considered unethical under others.

A first-order question is to determine what constitutes an impermissible contact between parties and arbitrators. As IA is made up a small group of people, some form of contact is inevitable, such as participation in conference, workshops etc. Are casual contacts permissible? And what are casual contacts? Do they include working groups in learned societies or on certain legal questions? And how about common membership in government advising groups?

A second-order question is time-related, because the importance and relevance of contacts between parties and arbitrators may vary depending on the stage of the arbitral procedure. In the pre-appointment phase, most casual contacts are considered permissible, though the question remains as to who decides the threshold to be adopted. But is a pre-appointment conference, considered by some participants to be important, at all proper? If so, what issues can be discussed, and is there a duty to disclose to the other parties that it occurred and its content? During proceedings, any contacts between the parties and the arbitrators are generally prohibited, with the possible exception of casual contacts in the social context. If any sort of communication occurs, they should be open and disclosed. In the post-proceeding phase, the duty of confidentiality remains even when the strict prohibition of contact relaxes.

C. Multiple appointments and issue conflict

¹⁸ V.V. Veeder, *The Historical Keystone to International Arbitration: The Party-Appointed Arbitrator—From Miami to Geneva*, (2013) 107 Proceedings of the Annual Meeting (American Society of International Law) 387-405.

Concerns about independence and impartiality of arbitrators have arisen from multiple appointments by the same party or (less well studied) by the same law firm in successive or parallel IA arbitrations, or in proceedings against the same host state. There is a risk that the arbitrator will be incentivized to have, or at least be perceived as having, a tendency to decide in favor of those making such appointments.¹⁹

Moreover, one study found that in 13 challenges in ICSID arbitrations regarding repeat appointments, only one was upheld. In cases decided under UNCITRAL, ICC, and SCC Rules, disqualifications occurred more frequently for multiple appointments by one party or even a law firm.²⁰

Two approaches have emerged in decisions on challenges regarding multiple appointments by a party. One is quantitative, encouraged by the IBA Guidelines on Conflicts of Interest (ss 3.1.3 and 3.37). Yet the limits are typically non-binding and numbers mentioned in “Orange List” situations trigger disclosure by arbitrators, rather than disqualification (as with “Red List” situations). A more stringent approach would be to impose a reversed burden of proof regarding multiple appointments as well as outright prohibitions in certain situations.²¹ The second approach is qualitative, with numerical indicators as only one factor in assessing bias, which may be more compatible with the overarching “justifiable doubts” standard in the Guidelines and many arbitration rules and laws.²²

Arbitrators seeking (re-)appointments might also end up with what is termed “issue conflict” -- signaling or holding a known general opinion on the subject matter under dispute, through public awards, proceedings, publications, and conference presentations. (Judges on permanent courts are typically not subject to this criticism.) Yet only three ICSID arbitration challenges were based on (over-)familiarity with the subject matter, with no disqualifications.²³ In cases under other rules, disqualifications also have been rare regarding the arbitrator’s familiarity or views expressed concerning the subject matter generally. The IBA Guidelines allocate to the Green List (s 4.1.1) the situation where: “The arbitrator has previously expressed a legal opinion (such as in a law review article or public lecture) concerning an issue that also arises in the arbitration (but this opinion is not focused on the case).” Publicly advocating a position on the case is on the Orange List (s 3.5.2), which instead triggers disclosure duties for the arbitrator. However, it has been suggested that a situation should be considered on a case-by-case basis as possibly giving rise to justifiable doubts about impartiality where “the arbitrator has previously expressed a legal opinion concerning a specific legal issue which arises in the arbitration in an academic publication.”²⁴

D. Double-hatting or “role confusion”

¹⁹ Van den Berg 821-43; Puig and Strezhnev.

²⁰ Maria Nicole Cleis, *The Independence and Impartiality of ICSID Arbitrators: Current Case Law, Alternative Approaches, and Improvement Suggestions* (Brill 2017) 72, 153-4, 157.

²¹ *Id.* 239-240, 247.

²² Will Sheng Wilson Koh, ‘Think Quality Not Quantity: Repeat Appointments and Arbitrator Challenges’ (2017) 34 *Journal of International Arbitration* 711.

²³ Cleis 72-3.

²⁴ *Id.* 249.

Challenges for double-hatting, especially involving arbitrators simultaneously serving as counsel in other cases with similar legal issues, have proliferated over the last decade. Most can be divided into two categories: (1) an arbitrator's service as counsel for or against one of the parties in IA or other matters; and (2) an arbitrator's service as counsel in IA matters generally. The first category can involve conflicts of interest arising from the arbitrator's relationship with the parties and with the issues in the case. The second category, which also can include cases from the first category, primarily involves problems created by issue conflicts.²⁵

Yet challenges to arbitrators for double-hatting face obstacles. ICSID arbitrations involve a (somewhat fluctuating) tendency to interpret the requirement of manifest lack of qualities (Article 57) as meaning a high threshold for challenges. This is exacerbated by the unusual system of co-arbitrators attempting first to resolve challenges (discussed below in Part II.E), even in most cases under the proposed amendments to the ICSID Rules.²⁶ Challenges tend to be dismissed because double-hatting is perceived to be commonplace and inherent in the IA system. Other arbitration rules generally set lower thresholds, with variability among UNCITRAL Rules (with the double-hatting issue not clarified in 2010 amendments) and the ICC Rules and (often seemingly stricter) SCC Rules. These need to be supplemented anyway by diverse mandatory law of the seat and/or states where awards enforced.

The IBA Guidelines on Conflicts of Interest for arbitrators are usually not directly applicable (but rather referred only as guidance), and they do not specifically regulate the double-hatting issue (including in 2014 revision). The 2013 IBA Guidelines on Party Representation, which might address the issue by challenging instead counsel who are double-hatting, are also not usually directly applicable and may anyway have even weaker sanctions for violations (such as excluding the lawyer from proceedings). They do not expressly regulate the issue either.

Given the concerns about double-hatting, four types of reform have been proposed recently.²⁷ First, self-regulation, with the arbitrator declining counsel work once appointed as arbitrator, was exemplified by Philippe Sands from 2007 for ICSID cases.²⁸ But empirical studies suggest such voluntary restraint has been insufficient for double-hatting to “work itself clean.”²⁹ Second, enhanced transparency includes publicizing updated lists of the top double-

²⁵ Nathalie Bernasconi-Osterwalder, Lise Johnson and Fiona Marshall, *Arbitrator Independence and Impartiality: Examining the Dual Role of Arbitrator and Counsel* (IISD 2010) 17, https://www.iisd.org/sites/default/files/publications/dci_2010_arbitrator_independence.pdf. A related concern involves sequential appointments as arbitrator and counsel or the “revolving door.” UNCITRAL, ‘Possible Reform of Investor-State Dispute Settlement (ISDS): Ensuring Independence and Impartiality on the Part of Arbitrators and Decision Makers in ISDS’ (30 August 2018), UN Doc. A/CN.9/EG.III/WP.

²⁶ Cf ICSID Synopsis, https://icsid.worldbank.org/en/Documents/Amendments_Vol_One.pdf 5.

²⁷ See generally Malcolm Langford, Daniel Behn and Runar Hilleren Lie, ‘The Ethics and Empirics of Double Hatting’ (2017) 6 ESIL Reflection, <https://ssrn.com/abstract=3008643>.

²⁸ Philippe Sands, ‘Conflict and Conflicts in Investment Treaty Arbitration: Ethical Standards for Counsel’ in *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (Brill, 2012) 28-49.

²⁹ Langford, Behn, and Lie ‘The Revolving Door’.

hatters. But past trends suggest that even such “shaming” may be insufficient. A third reform involves more litigation or other challenges to clarify standards. But this may add to existing uncertainties, and anyway exacerbates costs and delays.

Fourth are institutional reforms, i.e., arbitration rule changes or interpretive statements; revisions to IBA Guidelines; and amendments to investment treaties. The latter seem most promising to restore consistency. Treaty (re)drafting could clarify definitions of independence, amend mechanisms to apply them in challenges, or set some ex ante restrictions such as:

- A complete and permanent ban (in treaty text or a separate code of conduct). A permanent ban, however, may be overinclusive insofar as it could restrict the entry of arbitrators from diverse backgrounds who may need other sources of income (especially after an arbitration); and under-inclusive insofar as it does not address other concerns about repeat players.
- A temporary ban on double-hatting, as found in the 2001 ICJ Practice Direction VII (preventing ad hoc judges from serving as counsel before the ICJ simultaneously and for the ensuing three years) and since 2010 in the Court for Arbitration for Sport (CAS). This could address the argument that a permanent ban is unfair for those taking on a first IA appointment; after the temporary ban, s/he could revert to counsel work in the absence of sufficient further appointments as arbitrator. There seems to be no evidence that temporary bans have caused pools of qualified adjudicators or counsel to dry up significantly in the ICJ or CAS, which might suggest the need for caution in introducing limits on double-hatting in IA.
- “Disinvolvement upon challenge,”³⁰ an approach already found in some national and international case law, is even less intrusive. However, it arguably does not address concerns that reasonable outside observers would still consider the person to have become partial.
- Specific ex ante prohibitions to limit the most egregious double-hatting. Examples are when: (a) the arbitrator serves as a counsel in a concurrent proceeding, in which one of the counsel to a party in the present dispute serves as an arbitrator; (b) the arbitrator serves as a counsel in a concurrent proceeding, in which the same legal questions are determinative.³¹

E. Challenges and disqualification standards and procedures/decisionmakers

If a party believes that an arbitrator lacks the qualities needed to sit as an arbitrator, it can challenge that appointment. A neutral and effective challenge procedure is fundamental to any perceived legitimacy of IA and of each member of the arbitral tribunal. Overall, challenges requests are increasing, often above the rate of increase of the number of cases. Yet, they are mostly unsuccessful, e.g., out of 75 disqualification proposals brought at ICSID to date, only 5

³⁰ Cleis 205-6.

³¹ Id 237-8, 247.

were upheld.³²

Provisions on challenges are found in, e.g., the ICSID Convention (art. 57), Article 13 of the UNCITRAL Rules (art. 13), the LCIA Rules (art. 10), and the ICC Rules (art. 14). These rules provide that if an arbitrator lacks any of the qualities required to serve as an arbitrator, he or she can be challenged and removed following a specific procedure. The great majority of cases allege that the arbitrator lacked impartiality and/or independence.

As for procedures, three issues are important. First, what is the procedure to follow and how does a party bring a challenge? On one side is a policy urgency to provide open and full access to the parties to exercise control; on the other side is a need for closure and to ensure a determined tribunal. In general, parties are required to file the request for disqualification to the secretariat or secretary-general of the institution administering the proceedings. Under the UNCITRAL Rules, parties must communicate the request directly to the other party and the arbitrators, and generally quickly.

Second, who decides the challenge? In general, a neutral body decides, e.g., the appointing authority or the secretariat/court administering the proceedings. For UNCITRAL, if the parties do not agree on the challenge, the decision is taken by the appointing authority. In ICC proceedings, the International Court of Arbitration decide; and in LCIA proceedings, the LCIA Court decides. ICSID is an outlier: when only one arbitrator of a panel of three is challenged, the remaining members of the tribunal decide. The Chairperson of the Administrative Council (i.e., the President of the World Bank) decides if the remaining members are equally divided or if the proposal refers to the majority or sole arbitrator. This system has been criticized because it is difficult and inappropriate for the remaining arbitrators to decide on the fate of another arbitrator. The proposed amendments to the ICSID Rules would allow the arbitrators to pass challenge decisions to the Chairperson of the Administrative Council for any reason.³³ However, the Chairperson's own background – until now always a U.S. national – has led to accusations of a lack of independence or impartiality in making disqualification decisions.

A third issue is the standard to guide the decision-maker when a challenge is brought. Under the UNCITRAL Rules, arbitrators may be challenged “if circumstances exist” that give rise to “justifiable doubts” as to the impartiality or independence of an arbitrator. A similar standard is found in the LCIA Rules. Challenges procedures under ICSID are quite unique and can be proposed by a party “on account of any fact indicating a manifest lack of the qualities” required to be nominated. In ICSID's practice, the term “manifest” had generally been strictly applied to mean “obvious” or “evident” and highly probable, not just possible. This interpretation has been criticized and considered too strict.³⁴

³² <https://icsid.worldbank.org/en/Pages/Process/Decisions-on-Disqualification.aspx>.

³³ https://icsid.worldbank.org/en/amendments/Documents/Homepage/Amendments-Vol_1_Synopsis_EN,FR,SP.pdf

³⁴ *Blue Bank Int'l & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, paras. 22–26 (Nov. 12, 2013) (Chairman upheld the challenge and applied “an objective standard based on a reasonable evaluation of the evidence by a third party” and interpreted the word “manifest” in the ICSID Convention

F. Implicit pro-investor bias due to the structure of IA

IA has an unusual party structure. Investors harmed by an alleged breach of a BIT or other relevant treaty are authorized to sue the host state. The system does not, however, generally contemplate a host state as a claimant filing an action against an investor as respondent. There is some concern that this “one-way” party structure, permitting only investors as claimants, in conjunction with other structural features of IAs, may introduce a pro-investor bias into the system, or certainly create an appearance thereof. Critics object to the asymmetry that results from a system that imposes duties only on states, but places no obligation upon investors to behave reasonably in return. Others object that this system grants greater rights to foreign investors than domestic investors, as domestic parties do not have access to a parallel dispute process on the international level in which to pursue claims in the event they think that their investment has been impeded.

Another structural feature is also said to contribute to pro-investor bias. Arbitrators are typically paid for their services on an hourly basis, with no cap on remuneration. This compensation system is thought to generate incentives for arbitrators to advantage investors and disadvantage states. For example, many IA cases involve challenges to jurisdiction and to the admissibility of claims. Some claim that arbitrators tend to interpret jurisdictional clauses widely and favor the admissibility of claims. Dismissing claims would terminate the arbitration, as well as the number of billable hours. Permitting claims to proceed to the merits allows arbitrators to sit longer and receive greater remuneration.

For much the same reasons, some claim that arbitrators tend to render final awards favorable to investors. Producing “pro-state” results may create disincentives for investors to file future claims; fewer cases would lead to fewer opportunities to serve as arbitrator. “Pro-investor” results, on the other hand, are thought to be likely to incentivize the filing of additional cases, creating the possibility of additional work for arbitrators. This logic applies equally to arbitrators appointed by states, as they share an interest in future appointments.

Finally, appointing authorities are said to face a similar incentive structure. The institutions that administer IA claims compete with each other for cases. In practice, this means that the institutions compete for claimants, as it is the claimant who determines the choice among available arbitral institutions. As claimants consider where to file their claims, they will be incentivized to file at institutions thought to appoint “pro-investor” arbitrators. This creates incentives for institutions to appear attractive to investors³⁵ by developing a reputation for appointing “pro-investor” arbitrators. The strongest version of this claim suggests that arbitral institutions face a “race to the bottom” dynamic, where each has an incentive to appear to be

“as meaning ‘evident’ and ‘obvious’ and relating to the ease with which the alleged lack of qualities can be perceived.”).

³⁵ The logic is developed in William Landes & Richard Posner, ‘Adjudication as a Private Good’ (1979) 8 *Journal of Legal Studies* 235. Historical research suggests that fee-based compensation systems induced judges to adopt a broad view of their own jurisdiction. James Pfander, ‘Judicial Compensation and the Definition of Judicial Power in the Early Republic’ (2008) 107 *Michigan Law Review* 1.

more investor-friendly than its competitors. (These considerations do not apply to the appointing authorities designated by the PCA Secretary-General under UNCITRAL Rules.)

G. Mixing of roles as arbitrator and a member of ICSID annulment committees

Another problem for independence and impartiality in IA consists in the absence of a distinction between the group of individuals who serve as arbitrators in ICSID cases and those serving on ICSID annulment committees. Instead, the same people sit at both levels of the ICSID arbitration process.³⁶ This is in contrast to both national court systems and non-ICSID IA cases, where the control mechanisms (i.e., national courts of appeals and supreme courts hearing requests for enforcement or set aside of non-ICSID awards) are staffed with individuals who do not at the same time also decide first-instance cases. The same holds true in international adjudication systems that have a two-tier structure, such as the WTO Dispute Settlement Body.

The dual role of people serving as ICSID arbitrators and ICSID annulment committee members may result in issue conflicts (for example if findings of an ICSID annulment committee can be useful as precedent for decisions of an ICSID arbitration, or vice versa); and a perception that ICSID annulment committees do not exercise control in a sufficiently strict manner, as no annulment committee member who also sits as arbitrator would be seen to be interested in a strict control and in-depth review of ICSID arbitrations. This issue could be addressed easily by separating the pool of individuals serving as ICSID arbitrators from those on annulment committees.

H. Staff and secretariat loyalties

Investor-state arbitration today is almost invariably institutional arbitration supported by a secretariat. Some tribunals also recruit additional assistants from among practicing lawyers and academics (including from the arbitrator's own institution); and arbitrators often work with their own assistants, often without disclosure to the disputing parties or their co-arbitrators.

Secretariats clearly offer some benefits to IA. First, they can assist with preparing, researching, and drafting awards, and with the logistics of the arbitration. Assistance with researching and drafting the award could increase the quality of the award and reduce the cost and duration of the arbitration, especially for those with arbitrators in great demand. Second, the secretariat may marginally compensate for the lack of diversity among arbitrators. Third, the continuity and embeddedness of a secretariat, especially in a permanent institution independent of the parties, can provide a form of legitimacy to IA tribunals.

However, secretariats and support staff pose at least two challenges to the independence and impartiality of IA. First, secretariats and assistants may unduly influence the conduct and outcome of arbitrations (the inverse of the first benefit discussed above). This practice could incentivize secretariats to make institutional appointments of arbitrators based on their openness

³⁶ On a related issue, see Joel Dahlquist, 'ICJ President Reveals that ICJ Judges Will Not Participate in Investor-State Arbitration in the Future', *Investment Arbitration Reporter*, October 27, 2018, www.iareporter.com.

to being influenced by the secretariat, thereby creating a new problem of lack of independence. Second, staff in secretariats may have conflicts of interest, including relationships with law firms where they once practiced or hope to practice in the future (a risk that could be addressed through cooling off periods); relationships with the arbitrators they support; and relationships with the parties. Principle 5(b) of the IBA Guidelines on Conflict of Interest state that the same standard of impartiality and independence applies to tribunal or administrative secretaries as to arbitrators, whether they assist the tribunal as a whole or an individual arbitrator. The extent of compliance with this principle in practice is unclear.

III. Mapping Solutions through the Four Options

Option 1: IA improved

This option may address some concerns about independence and impartiality insofar as improvements can be targeted at the most pressing perceived specific problems, such as:

- more onerous disclosure requirements and limits on contacts between parties and especially party-appointed arbitrators (II.A and II.B above);
- quantitative and/or qualitative limits on multiple appointments or disqualification for having expressed particular views on an issue now at hand (II.C);
- ex ante or ex post controls over various types of double hatting (II.D);
- clearer standards or revised procedures for challenging arbitrators (II.E);
- counter-claims by states or other changes to offset potential pro-investor tendencies (II.F); and/or
- reduced impact from annulment committees or secretariats (II.G and H).

However, even under a differentiated approach, there remain questions about where best to set out such improvements. First, the IBA Guidelines are usually not directly applicable or binding, and anyway are developed for both commercial arbitration and IA. They have also been developed mostly by lawyers from prominent law firms, and were already recently revised (2014 regarding conflicts for arbitrators) or generated (2013 regarding conflicts for counsel).

Second, as for the key extant rules, the UNCITRAL Rules were recently revised too, so further amendments would take time to complete. They are also used for commercial arbitration, not just IA, where public interests and therefore restrictions on arbitrators are generally greater. Moreover, mandatory provisions of the chosen seat may override or add glosses to any revised rules. The current draft amendments of the ICSID Rules are constrained by ICSID Convention, and they do not address many of the concerns discussed here (e.g. double hatting, multiple appointments) or only partly (e.g. co-arbitrators initially ruling on challenges). However, the

ICSID Rules could be supplemented by “Guidance” on their application.³⁷ UNCITRAL might also prepare “Recommendations” for IA-focused interpretations of its Rules, the Model Law, and the New York Convention, as it did in 2006 regarding an aspect of that convention.³⁸

Thus, the most promising approach to implement this option over the short- to medium-term may be to (re)draft provisions in specific bilateral or regional treaties. Thus, states might incorporate the improvements noted above, or, more ambitiously:

- Abolish party appointment (although this would also highlight issues above such as secretariat or ICSID annulment committee personnel, who may not be open to regulation at bilateral or even regional levels);
- Limit party appointment, for example by allowing appointment by investors as well as host states only from a roster agreed in advance by the relevant states;
- Limit appointments in other ways with reference to background or expressed views, other professional roles (e.g. double-hatting), or career (e.g. multiple appointments by the same party or law firm)
- Restrict other conduct seen as inappropriate before, during or after appointment.

As an alternative to, or in addition to, treaty revision or other binding rules, it might be possible to promote self-regulation. Yet the persistence of double-hatting mentioned in Part II.D, for example, suggests that this would need to be accompanied by recommendations from, or even commitments required of members by, professional associations (like the IBA or the Chartered Institute of Arbitrators) or arbitral institutions.

Option 2: IA with an appeals process

An appellate procedure for IA could address some criticisms of the legitimacy of IA, but appeal itself does not offer an obvious solution to the independence and impartiality problems discussed above. Rather, only certain forms of appeal might address these concerns. Generally, the greater proximity to full independence from the parties, the greater the likelihood that appeal would be seen as an improvement to the status quo. Moreover, the backgrounds of the members of the appellate body will influence perceptions of independence and impartiality. However, even a fully independent appellate body will not eliminate doubts about the independence and impartiality of the first-level arbitrators.

A. Party appointment: Appeals may allay concerns about party appointment if the members of the appellate body are themselves not appointed by parties. But institutionally appointed arbitrators may be seen as loyal to certain institutions as well.

³⁷ See generally Cleis.

³⁸ UNCITRAL, Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, 7 July 2006, <http://www.newyorkconvention.org/uncitral/recommendations>.

B. Arbitrator/party contact: An appellate body will not address this concern.

C. Multiples appointment/issue conflict: An appellate body may allay some concerns insofar as it would offer de novo review of the law and be seen as more independent of the parties. Yet even judges on an appellate body will develop views on legal issues that may cause parties to see them as partial (an unjustifiable position insofar as all judges develop such views).

D. Double-hatting: An appellate body will not allay concerns about double-hatting except to the extent stakeholders believe it will correct for partiality caused by double-hatting.

E. Challenges/disqualifications: An appellate could be structured not to allow for challenges, but the existence of the body does not assist in devising the appropriate standards for disqualifying party-appointed arbitrators.

F. Implicit pro-investor bias: An appellate body would create less of an impression of a pro-investor bias only if its caseload (and the salaries of the judges) were not linked to investor wins.

G. Panel/annulment committee: If an appellate body had completely different decisionmakers, it would avoid the problem created when certain individuals serve in these dual capacities in different cases.

H. Secretariat: The extent to which an appellate body would improve this problem would depend on how insulated the secretariat is from the parties.

Option 3: Multilateral investment court (MIC)

The MIC is a proposal rather than a reality. Hence, whether a MIC would successfully address the concerns regarding independence and impartiality will turn, in large part, on the precise features of the MIC's institutional design. That said, virtually all discussions of the proposed MIC contemplate a number of distinctive design features which depart significantly from, and thus could represent a significant improvement upon, current practices.

Notably, the proposed MIC will consist of a first instance tribunal and an appeal tribunal. The first instance tribunal would conduct hearings, undertake fact-finding, and apply applicable law to the facts. An appellate tribunal would hear appeals from the court of first instance. The appellate tribunal would review issues of law, including procedural shortcomings, and possibly manifest error in the appreciation of facts. It is intended that an appellate mechanism would ensure predictability and consistency in both doctrine and results. MIC judges will serve for a specified term of years, be appointed by the states party to the treaty creating the MIC, and be employed full-time.

These and other design features of the proposed MIC have significant implications for many of the concerns identified in this report.

A. Party appointment: The MIC will replace the current system of party appointment with a system of tenured judges. Proponents argue that tenured judges will exhibit greater independence and impartiality than ad hoc arbitrators, as they will not be beholden to the parties before them for current and future employment prospects. Critics counter that a state-controlled appointment mechanism will lead to a bench populated only by “pro-state” judges. Others respond that states will adopt a “long term perspective” when selecting judges, recognizing that from time to time they may be respondents, and from time to their citizens will be claimants. Thus states would seek neutral judges not biased towards investors or states. Thus, the precise selection criteria and processes associated with a future MIC will prove important to ensuring actual impartial and independent decisionmaking. Yet the perceived independence and impartiality emanating from a permanent court, with full-time judges accountable to states, is significantly improved from that associated with party appointment.

B. Arbitrator/party contact: Having a group of full-time adjudicators will remove the link between arbitrators (or potential arbitrators) and counsel for investors and states who are the gate-keepers to appointment. At the same time, an MIC may introduce contact at a different stage of the process, as states may engage in contact with prospective judges when they are deciding which individuals to nominate to the MIC.

C. Multiple appointment/issue conflict: The adjudicators at the proposed MIC would most likely serve for long-term, non-renewable terms of office. Non-renewable terms obviate concerns that arise from multiple appointments. That said, should judges on the future MIC have renewable terms, they may decide cases with an eye towards an upcoming re-election, particularly near the end of their term. Thus, much will turn on the precise terms of the MIC, including how judges are selected, the length of their terms, and whether terms are renewable. The ban on double-hatting, discussed below, addresses in part concerns about issue conflict.

D. Double-hatting: Under current proposals, the adjudicators at the proposed MIC would hold full-time positions. Consistent with practice at many other international courts, MIC judges would be precluded from engaging in other remunerated professional activities (with the possible exception of teaching). Thus, the MIC judges would not engage in the practice of double-hatting.

E. Challenges: Although the MIC’s move away from a system of party-appointment reduces concerns over independence and impartiality associated with current practices, they do not entirely disappear, and the presence of an appeals the presence of an appeals tribunal means that concerns over independence and impartiality will exist at two different levels of adjudication. Challenges to judges on the first level tribunal could be addressed by the appeals tribunal. Such a system could produce a system that is more regularized than current challenge mechanisms. However, it is not clear how challenges to members of the appellate tribunal would be addressed.

F. Implicit pro-investor bias: Proponents argue that a MIC would reduce or eliminate pro-investor bias. Judges’ compensation will not be fee-based; permanent judges not dependent upon litigants for future appointments will have little economic incentive to produce “pro-investor” awards. If the MIC replaces the current arbitral system, there will be no competition

for cases, meaning no need to incentivize claimants to file with the MIC as opposed to alternative fora. If the MIC exists alongside a vibrant IA system, then competition for cases may replicate whatever pro-investor bias now exists in the context of arbitrator appointments.

G. Panel/annulment committee conflict: Assuming that different individuals serve on the first-level and appellate tribunals, the issue of panel/annulment conflict should be minimized.

H. Secretariat: A new MIC would require institutional support. It is possible that an existing institution could play this role. Alternatively, the legal instrument creating the MIC could also provide for a secretariat. Regarding concerns that secretariat staff are too influential due to time pressures on arbitrators, a MIC staffed by full time adjudicators would alleviate this concern.

Option 4: No ISDS (Investor-State Dispute Settlement), i.e., domestic adjudication and inter-state dispute settlement only

Domestic litigation has some advantages over IA from the perspective of independence and impartiality. (We leave aside here the other advantages of domestic litigation, including providing the same avenues of legal recourse to domestic and foreign investors, ease of enforcement, and costs.) First, in states where the rule of law is entrenched, judges are far more likely to be truly independent of the parties. They may serve long terms and are typically prohibited from outside legal work. Their salary often does not turn on ruling for one party or the other (unless the government plays a role in their reappointment). Second, in many states judges are subject to significant mandatory ethical rules that help avoid perceptions of partiality. Those rules may be enforced through binding means like disciplinary sanctions or even removal from office.

However, there may be downsides to elimination of IA from the vantagepoint of independence and impartiality. First, even in states with a strong tradition of the rule of law, domestic courts can be biased, or perceived as such, against foreign investors or lack independence from the host state, or may interpret international law through methods that favor the interests of the state. As a result, IA may deliver better justice to the disputing parties, as party appointments of arbitrators mitigate this risk in IA. Second, many states that are parties to investment treaties have judiciaries that include judges who are not independent or impartial. They may be under strong governmental control or susceptible to bribes; they may have frequent contacts with the litigants before them. It is thus difficult to determine whether, on balance, replacing IA with domestic adjudication would result in more independence and impartiality among decisionmakers. In some cases it would, and in others it probably would not.

A second alternative to IA is for a state to bring a claim against another state, known as state-state dispute settlement (“SSDS”).³⁹ Cases can be brought in an ad hoc arbitration, through a special claims commission or claims tribunal, or a standing tribunal such as the International

³⁹ See generally Anthea Roberts, ‘State-to-state investment treaty arbitration: a hybrid theory of interdependent rights and shared interpretive authority’ (2014) 55 Harvard International Law Journal 1, 4; Jonathan Bonnitcha, Lauge Poulsen, and Michael Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford University Press, 2017) 66.

Court of Justice. Such a claim might be brought after domestic litigation if the underlying law requires exhaustion of remedies, but it might be brought during or instead of such proceedings if exhaustion were not required. There have been three types of such claims in the field of investments, namely a state bringing a diplomatic protection claim on behalf of its investors, a state seeking an authoritative interpretation of a treaty, or a state seeking a declaratory award. Because all cases are brought by states, which have the sole discretion whether to espouse a claim or bring their own, the amount of cases would likely shrink dramatically.

SSDS has some advantages from the perspective of independence and impartiality. (As with domestic litigation, we leave aside advantages and disadvantages of SSDS that do not bear on the independence and impartiality of the decisionmakers, e.g., concerning the propriety of diplomatic protection.) First, because the judges or arbitrators are appointed by states, they may be seen as less motivated to advance the cause of investors generally, as discussed above under Option 3 regarding the MIC. Second, if state-state claims are brought before standing tribunals, such as the ICJ, they will be considered by permanent judges, who often will have special ethical requirements, such as bans on double-hatting. Third, because far fewer cases would be brought under SSDS compared to IA, the concerns about lack of independence due to multiple appointments of arbitrators by the same party are less (although the same law firms may be involved).

On the other hand, to the extent state-state claims are filed before ad hoc arbitrators, they may be subject to precisely the same concerns about independence and impartiality as those IA, e.g., loyalty to the party that appoints them, inappropriate contact with the parties (as shown in the recent *Slovenia-Croatia* maritime arbitration), and double-hatting. Thus, the type of SSDS will bear a great deal on both the reality and perception of independence and impartiality. In that sense, SSDS may bring a different set of biases.

Overall, the potential for each of four reform options to address the concerns discussed above can be summarized as below:

Concern / Reform Option	1. IA improved	2. IA with appeals	3. MIC	4. No ISDS
A. Party appointment	x	~	✓	✓
B. Arbitrator/party contact	~	x	✓	~
C. Multiple appointments	~	~	✓	✓
D. Arbitrator/counsel appointments (double-hatting)	~	x	✓	~
E. Challenge procedures	~	x	~	~
F. Pro-investor bias potential	~	~	✓	✓
G. Arbitrator/annulment committee appointments	~	✓	✓	✓
H. Staff or secretariat loyalties	~	~	~	~

For option 4, (~) refers to limited potential of this option in states where there are concerns about the rule of law.