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Peculiarities of Investment Arbitration and Differences from Commercial Arbitration: Independence and Impartiality Perspective

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ABSTRACT AND KEY WORDS

This work provides a comparison between investment arbitration and commercial arbitration and further analyses how these differences affect the independence and impartiality of arbitrators in investment arbitration. The standard of independence and impartiality in investment arbitration is evaluated along with the current level of protection that is provided to it by comparing and analysing the applicable rules and guidelines along with particular problems that plague investment arbitration.

Keywords: conflict of interest, challenge of arbitrator, qualification, disqualification, duty to disclose.

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Introduction

Relevance of the topic. Investment arbitration has been on the rise since the 1990s as it has been indicated as the preferred choice of dispute settlement in many bilateral investment treaties. The rise of investment arbitration could be attributed to globalisation. In today's world, foreign investment occupies a large part of most countries' economies. The sheer size of the total global foreign investment in 2021 was around $1.6 trillion (USD), which is a 64% growth from the previous year. Given the increase in foreign investment being made, it is natural that the number of disputes between such foreign investors and the host state is also on the rise. These disputes could have very serious implications as they can affect the public of the state. Due to such far-reaching implications of investment arbitration, it becomes necessary to ensure that the proceedings are just and neutral. In order to maintain such neutrality in the proceedings, it is essential that the arbitrators are unbiased. While the independence and impartiality of adjudicators has been internationally recognised, most of the scholarly work on the subject is limited to guarantees in domestic courts.

In the opinion of the author, the far reaching implications of investment arbitration along with the lack of scholarly attention given to it, among other factors, makes it a relevant topic for academic consideration and discussion on its unique characteristics and differences from commercial arbitration with a focus on the independence and impartiality of arbitrators.

The aim of the thesis is to determine how investment arbitration differs from commercial arbitration and how these differences or peculiarities of investment arbitration affect the independence and impartiality of arbitrators in it.

Tasks and objectives- in order to achieve coherent results, this thesis will be dealing with three tasks. i.e., 1) Determining the peculiar characteristics of investment arbitration and setting it apart from commercial arbitration. 2) Analysing whether the independence and impartiality of arbitrators is sufficiently protected in investment arbitration. 3)To analyse whether the standard of independence and impartiality in investment arbitration needs to be altered due to its differences from commercial arbitration in light of the problems that plague it.

The thesis mainly focuses on the independence and impartiality of arbitrators in investment arbitration rather than considering a larger number of issues in comparison between investment arbitration and commercial arbitration. Due to the limitations on the size of the

work, it is appropriate to focus on one issue and expand on it. Since the unbiased nature of the adjudicator forms an essential part of any dispute settlement mechanism, this work will seek to consider the question of its standard and implementation in investment arbitration in comparison with commercial arbitration in light of the currently available rules/ guidelines and the problems that are characteristic of investment arbitration.

Methods of research. One of the main methods used in the work is the comparative method. The information is mainly collected from case laws, international institutional rules, and scientific articles in order to draw a comparison between investment arbitration and commercial arbitration. This method was used to compare various rules and guidelines on arbitration. The use of this method, along with analysis and systemization of acquired information logically led to the identification of the problematic aspects of the issues under consideration and their effect on the implementation of the existing rules and guidelines- particularly in the independence and impartiality of arbitrators. Additionally, the linguistic method has been used to determine the meaning of several concepts while analysing the concept of investment arbitration.

Originality. Despite the recent development and increased relevance of investment arbitration, it still does not receive a great amount of attention in terms of research as is evidenced by a number of problems that are left unanswered or unresolved. While there have been works that expand on the nature of investment arbitration, they do not delve into its possible effects on the behaviour of the arbitrators. This will be one of the goals of the work. Additionally, there have been works that deal with the independence and impartiality of arbitrators. However, the scope of these works was generally limited to either commercial arbitration or ICSID arbitrations. In this work, there will be a discussion on the need for a possible alteration to the standard for implementation of the institutional rules on independence and impartiality of arbitrators in investment arbitration, in light of some problematic aspects and modern trends such as increased transparency. The originality of the work is determined by its general focus on the essential unbiased nature of arbitrators in investment arbitration and problems in its implementation.

Main sources. The main sources used in this work are international arbitration rules and guidelines for arbitration. Among these ICSID arbitration rules have enjoyed the most focus as they deal specifically with investment arbitration. UNCITRAL arbitration rules also enjoy a fair deal of attention given their popularity. The IBA guidelines on conflict of interest in international arbitration is another important source that has been relied upon

due to its contribution to establishing a uniform standard for determining the independence and impartiality of arbitrators.

Additionally, documents/reports such as the 'report of ASIL-ICCA joint task force on issue conflict in investor-state arbitration' and the reports of the UNCITRAL working group III on code of conduct in investor-state dispute have been relied upon as they provide a different perspective with regards to arbitration and an ever-evolving discussion on the topic. Several cases and scientific articles such as 'Independence and Impartiality of Arbitrators' by Carlos A. Matheus López (2020) and 'The Independence of International Arbitrators and Judges: Tampered With or Well Tempered?' by Fabien Gélinas (2011) along with books such as 'International arbitration: law and practice' by Gary B. Born have been relied upon to form the literature base of work and give an overview of concepts.

1. General overview of arbitration and the basic differences between investment and commercial arbitration

Arbitration is the preferred method of dispute resolution for millions of individuals and entities around the world. Settling any dispute through court can usually be a very complicated and time-consuming process. Arbitration is the alternative to court proceedings that is more straightforward and less time confusing and hence desirable for many. Arbitration has been around for quite a while and has served as the preferred alternative to court for centuries. It has been able to speed up the proceedings and allow numerous other advantages to the parties. Many efforts have been made to define arbitration over the years. This part will begin by providing a general overview of arbitration and then it will proceed to consider the concept of investment arbitration. An effort will be made to determine the peculiarities of investment arbitration and differentiate it from commercial arbitration. This part is crucial to forming the base of the thesis as it allows for a further analysis of the independence and impartiality of arbitrators based on the differences between the two types of arbitrations.

1.1 Concept of arbitration

In order to delve deeper into the topic and investigate the differences between investment and commercial arbitration, it is essential that the meaning and concept of arbitration would also become clear.

Arbitration is the process of settling a dispute between disputing parties without needing to go to court. It is generally the cheaper and quicker alternative to litigation and this quality makes it rather desirable for quicker settlement of disputes. The decisions in such proceedings are called ‘awards' and such awards are final and binding (Merrils, 2017, p.88).

As for the definition of Arbitration, there have been attempts made by authorities around the world and these differ slightly in their wording. However, it was observed in Thai-Lao Lignite case that most of them seem to have many commonalities (Judgement of the federal court of Malaysia of 17th August 2017, para 149). The court, while trying to

provide the core principles of arbitration, expressed; “There is no universal definition of arbitration… each jurisdiction may apply its own ‘spin’ in deciding what may and what may not be arbitrated, and how the arbitral process is to be conducted… Different commentators have defined arbitration differently. However, there are core principles that can be found in all the definitions. The core principles include: the need for an arbitral agreement; a dispute, a reference to a third party for its determination; and an award by the third party”

This view is further strengthened by the attempts that have been made in other judgements in order to define arbitration, for instance, in a judgement of the Auckland High court, the judges have settled on the definition of arbitration (Motunui Ltd v. Methanex Spellman, 2004, para 41), which states “Arbitration is a contractual method of resolving disputes. By their contract, the parties agree to entrust the differences between them to the decision of an arbitrator or panel of arbitrators, to the exclusion of the Courts, and they bind themselves to accept that decision, once made, whether or not they think it right.”

This definition from the Judgement of Auckland High court, much like most other definitions of arbitration around the world, has incorporated all the core elements of arbitration that were provided in Thai-Lao lignite Vs Laos Judgement.

Similarly, The United Nations have put forward the following **principal characteristics of arbitration** (UN conference on trade and development, 2005):

1) **Arbitration is a mechanism for the settlement of disputes**: This characteristic is rather self-explanatory and is a formal method of settling disputes along with litigation. As a result of it being a procedure for settlement of dispute, it would simply cease to exist if the parties settle their disputes. [1]

2) **Arbitration is consensual**: No party can be forced to undergo the process of arbitration without their consent. A written clause/agreement to submit dispute for arbitration is a must and should be signed by both parties. Another noteworthy point is that the authority of the arbitral tribunal is limited to the extent that the parties might have agreed between them.

3) **Arbitration is a private procedure**: As it suggests, the procedure is entirely private in itself regardless of whether a public entity such as a state might be involved in

[1] E.g. Article 30 of Uncitral model law on international commercial arbitration., 1985.

the proceedings as a party. It is not connected to the state's courts, however, its decisions are enforced by these courts in the same manner as the usual court decisions.

4) **Arbitration leads to a final and binding determination of the rights and obligations of the parties:** As a result of arbitration being a formal dispute resolution procedure, the outcome of it is binding on all the parties. This is generally reflected in arbitration rules such as Rule 35(6) of ICC arbitration rules 2021, which states 'Every award shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay'. If a procedure does not lead to a final and binding award, it simply would not constitute an arbitration procedure, regardless of whether such final award is provided for in the arbitration rules.

From the above information and from the opinions of authorities and commentators around the world, it appears that there is a general consensus about the term "arbitration". They all essentially agree that arbitration is a process which allows parties to submit their disputes to an arbitrator (a decision-making individual that conducts the proceeding). This arbitrator is non-governmental and the parties have the liberty of selecting the arbiter. The arbitrator has the power to issue a binding award (decision) whose intended purpose is to resolve the disputes which have been submitted. The decision has to be taken in accordance with neutral dispute resolution procedures which would provide each party with an opportunity to present their case (Born, 2012, p. 33).

1.2. The concept of Investment Arbitration

The emergence of investment arbitration has proved to be crucial for the protection of foreign investors. In today's economy, foreign investments form a large part of it. Given the importance of such foreign investment, it becomes important to guarantee some safety and protection to the foreign investors from the host state in order to facilitate such investment. However, despite having been used in history to settle disputes such as the dispute over an island between Athens and Megara (600 B.C.) (Emerson, 1970, p.2), investment arbitration did not develop as a formal means of settling disputes until the late 1700s. The year 1966 saw the establishment of the International Centre for Settlement of Investment Disputes at the Washington convention on settlement of investment disputes (Lew, 2021) which, as the name suggests, is aimed at settlement of investment disputes. However, it wasn't until the 1990s that investment arbitration had truly become a worldwide feature as around 1500 bilateral investment treaties (BITs) were signed in this time (Lew, 2021).

At this stage in the work, it becomes imperative that an effort is made to expand on the concept of investment arbitration in order to analyse the unique features of investment arbitration that set it apart from commercial arbitration.

One could examine the ICSID convention to better understand investment arbitration. One of the essential features of investment arbitration is that there should be a legal dispute regarding an investment. ICSID Convention, in providing the jurisdictional scope of the centre, states that the jurisdiction extends to a legal dispute arising out of an investment (Convention on the Settlement of Investment Disputes…, 1965, art. 25). For the dispute to be an investment dispute, it is essential that some sort of investment was previously made and is the cause of the dispute. However, the convention has failed to provide a definition of 'investment'. In order to understand the full extent of what might constitute investment, we have recourse to a judgement which has tried to provide the necessary elements of investment. In the case, it was observed that an investment has 3 requirements i.e.- contributions, a certain duration of performance of contract, participation in the risk of transaction (Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, 2001, para. 52).

-Contributions: in essence, for the existence of an investment dispute, there has to be some contribution made by the foreign investor in the state that is party to the dispute.

-Certain duration of performance of contract: the wordings are rather self-explanatory. It implies the need for a contract which is to be performed in a specified timeframe.

-Participation in the risk of transaction: the idea is that without risk there is no investment. Investments are meant to be speculative by nature. If there is a definitive return or benefit to be gained, it cannot be considered an investment.

Upon further inspection of the ICSID Convention, it becomes possible to determine another key element of investment arbitration, i.e., the parties involved. Article 1(1) provides:

'The purpose of the Centre shall be 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.' (Convention on settlement of investment disputes…, 1965)

Similarly, Article 25, while talking about jurisdiction, states that Centres jurisdiction applies to disputes between a contracting state and a foreign investor. It further states that such a 'state' will also include any subdivisions and agencies of the same state. Further, a 'foreign investor' is a person who does not have the nationality of the state which is a party to the dispute. Such an investor should have the nationality of another state on the day when the parties agree to submit the dispute to arbitration. Such a 'foreign investor' can be a natural person, as well as a legal person (Convention on settlement of investment disputes…, 1965). In comparison, the parties in commercial arbitration would be any signatories of the contract out of which the dispute has arisen.

As a result of the above information, it becomes possible to understand the concept of investment arbitration as a mechanism for resolving disputes arising from investment between a host state that could be represented by its bodies and a person from a foreign country that has invested in the host state. As it is a form of arbitration, it shares the private adjudication method with commercial arbitration. however, the existence of such unique parties and the specific subject matter point towards a need to investigate its standout features.

1.2.1. **Peculiar Features of Investment Arbitration**

Investment arbitration, despite being a sub-type of arbitration, has several elements which make it unique. Commercial arbitration, having received a great deal of attention, is well-established and understood by the masses. However, investment arbitration is bound to be different due to its nature. At this point in the work, it would be appropriate to discuss the features of investment arbitration which give it a peculiar character in an effort to set it apart from commercial arbitration.

1- **Individual claims against the state**: This is possibly the most unique feature of investment arbitration. Essentially, the idea of investment arbitration is that a person with the nationality of another state can bring a claim against the host state with regard to a dispute which arises from the state's use of its public authority. When one takes into consideration the consent that is given by the state to submit such disputes to arbitration, one understands that such consent is of a general character (Paulsson, 1995, p.233). The consent given by a state is not limited to a specific investor or a specific type of dispute or even a specific investment, instead, this consent extends to all kinds of investment disputes with all the persons who invest in the state while being nationals of any other state which is a contracting party to the investment treaty. This has the effect of giving the arbitration tribunal a general jurisdiction over the state's disputes with a large number of future potential investors.

When a state gives its consent to such arbitral proceedings, it foregoes its customary immunity before the international tribunal and the domestic courts (for enforcement of the awards). In the absence of such an investment treaty, the individuals/ foreign investors would be in a precarious position as the customary international law suggests that such regulatory issues dealing with foreign investors are to be dealt with by the domestic law of the host state (France v. Kingdom of the Serbs…,1921, para 41, 164,174). There is, however, the option of diplomatic protection which can be triggered by the investor's home nation. Unfortunately, for the diplomatic protection to be triggered, it is required that the investor has exhausted all the local remedies that are available to him (Amerasinghe et al.…2008, p.142). Even then, it only becomes possible to submit the dispute to international bodies for settlement if the host state agrees to it. Basically, without investment arbitration, it becomes extremely difficult to authorize individual claims against a state.

2- **Damages as a remedy for individuals in public international law**- The foreign investors, when they are treated in an unlawful manner with respect to the treaty standard for the protection of investors, have the right to bring a claim for the harm caused by the state's use of its public authority. In such an instance, the arbitration tribunal may award damages to the investors as compensation for the harm caused by the state in the exercise of its public authority if it finds the state guilty. As a result of this, the tribunal essentially has the power to award damages to the investors as a public law remedy.

In the broader field of international law, this phenomenon of awarding damages as a remedy to individuals against a state is extremely rare. In areas such as environmental law and humanitarian law, the states have often avoided the adjudication process altogether for compensation to those who were harmed by the use of state authority (Harten, et al., 2006, p.131). Similarly, in the field of human rights, an individual's claims for damages are not entertained, with the exception of the European convention on human rights[2] and the American convention on human rights[3]. Even in the two conventions, an individual claim for damages is much more restricted than investment treaty arbitration. As for the European court of human rights, the court has the power to give 'just satisfaction' to individuals whose rights were violated by the state (European Convention on Human Rights, 1950, art.41). However, in most cases, the court has historically refused to grant damages on several occasions especially when it deems that non-monetary remedies are adequate enough in the situation (Harten et al., 2006, p.132). Similarly, in the American Convention, an individual's claim has to be brought before the inter-American court by the inter-American commission for the individual to be able to be awarded damages as a remedy (American convention on Human rights, 1969, art. 61-62). The commission has refused to bring such claims by corporations before the court on a few occasions (Weiss, 2002, p.810). Additionally, both of these conventions impose an additional requirement that all local remedies must be exhausted before such a claim can be brought before the court.[4]

[2] Art. 34 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (1950) provides that the court can receive applications from individuals claiming a violation of their rights from the convention by any of the high contracting parties to the convention.
[3] Art. 44 of the American Convention on Human Rights, 1969, provides that the commission can receive petitions from any individual who complains of violation of the convention by any state party.
[4] i.e., Art 35 of the European Convention on Human Rights (1950) and Art 46 of the American Convention of Human Rights (1969).

In essence, it is incredibly difficult to see examples of an individual claim for damages with a few exceptions such as the European Union[5] and the abovementioned conventions. But even in such cases, there could be several restrictions on such claims.

3- **The enforceability of awards**- Generally, foreign investors face several difficulties in having their disputes against states adjudicated and the awards enforced in domestic courts. The domestic courts are reluctant to rule on the sovereign acts of any foreign state (Harten et al., 2006, p. 134). The situation is much different in the case of investment arbitration. The provisions of ICSID convention and the New York convention, through their enforcement procedure/structure, can allow the foreign investors to claim enforcement of the award against the assets of the responded state (Leahy et al.,1985, p.15). This enforcement can take place in the domestic courts of any of the states that are party to the two above-mentioned treaties.

In most cases, the foreign investor will not need to resort to such domestic courts for the enforcement of the award (Delupis, 1973, p.3). The states are more likely than not to comply with the tribunal's decision and enforce the award of their own accord. The reason for such voluntary compliance is that if they fail to do so, they will be under pressure from several international sources, including the investor's home state and other international financial institutions (Delupis, 1973, p.3).

Even though a state is likely to comply voluntarily, the investment treaty arbitration is well-equipped in case the state chooses not to comply with the tribunal's decision against it. The foreign investor will have two options with him in such a situation. In case the investment treaty itself provides for the recognition and enforcement of the awards of the tribunal, the investor can have the award enforced in the domestic court of any state that is a party to the investment treaty. However, some investment treaties may just rely on ICSID convention or the New York convention for enforcement of awards. In such cases, the foreign investor can have the awards enforced in the domestic court of any state that is a party to the convention.

The investment treaty arbitration has a much more effective means of enforcement of awards against a state than in any other international adjudication procedure. In the human rights field, it is quite rare to see that a treaty that provides for individual claim

[5] i.e., Treaty on European Union, (1992) and the Treaty on the Functioning of the European Union (2007), Art 340 provide for an individual's claim against member state and damages.

against a state, would also provide for enforcement of such awards against the state in domestic courts (Harten et al., 2006, p. 135). Further, the decisions of the ICJ, despite being binding, cannot be enforced by the domestic court of any state. The enforcement can only be done via the Security Council of the United Nations (Charter of the United Nations, 1945, art. 94(2)). This procedure with the Security Council includes the support of the member states of the security council and hence is not nearly as effective as the enforcement procedure in Investment arbitration.

In essence, investment arbitration is a unique system that is created with the idea of protecting foreign investors against the state. The state can be held accountable to the individual in a way that was not previously possible. The recognition of individual claims, along with the damages and enforcement of awards against the state proves that the award of an investment arbitration can have quite heavy implications for the state and, by extension, the people of the state. This could potentially affect the standards of independence and impartiality of arbitrators and will be dealt with in the parts ahead.

1.2.2. Differences between investment arbitration and commercial arbitration

As seen previously in the work, investment arbitration appears to be a unique system, and while it has some commonalities with commercial arbitration, such as the usage of private procedure to solve disputes between the parties, there seem to naturally be quite a few differences between the two. At this stage in the work, it becomes acceptable to compare investment arbitration with commercial arbitration in order to set them apart.

1- **The nature of arbitration**- In the case of commercial arbitration, both parties agree to arbitrate their dispute as an alternative to court and this is governed by the principles of private law (UN Secretary-General,1981, p. 78). The individuals on either side of the dispute have the ability to agree on the rules that will govern their disputes (Fortier, 2001, p.147). The concept of commercial arbitration is generally considered to be a cheaper and much faster alternative to court and the states generally endorse commercial arbitration to help develop cross-border trade and quick settlement of any disputes that may arise in such trade (Harten et al., 2006, p.141).

The concept of party autonomy means that the state has to accept and respect the decision of the individuals to settle the disputes arising between them out of a business dealing (UN Secretary-General,1981, p. 78). Essentially, as long the dispute between the party is within the private sphere and does not affect the public at large, the states will not interfere with the terms of the arbitration and also allow the parties to select any forum that they deem fit for settlement of their disputes. The domestic courts of the state will recognise such ‘arbitration agreements’ and enforce the awards of the arbitration (UN Secretary-General,1981, p. 78). This decision of the parties to submit their disputes to arbitration is established via the ‘agreement to arbitrate’ which is signed by both parties and hence one can say that commercial arbitration derives its authority from a contract.

In the case of investment arbitration, the situation is much different. As we know, there are procedural similarities between investment and commercial arbitration but the way each derives its authority is quite different. Investment arbitration is essentially birthed from the consent of the state itself and derives all of its authority from it. The state, being sovereign, consents to the investment treaty and foregoes its sovereign immunity in an effort to keep a check on the conduct of the state (Harten et al., 2006, p.142). The state

consents to investment arbitration in two ways i.e., by enacting a law that provides for compulsory investment arbitration in case the foreign investors have a dispute with the state or alternatively, the state can enter into an investment treaty with other states that provide for compulsory investment arbitration of their disputes with the investors from those foreign states, or by concluding an arbitration agreement (Chaeva, 2022). Without such an effort by the state, it would be extremely difficult to protect and give assurance to any foreign investors in order to facilitate investments in the state. As one can understand, this action of the state to consent to adjudication for its actions is different from the upholding of agreement to settle disputes between individuals in the private sphere. One can safely say that investment arbitration is a product of a state's exercise of its sovereign powers. This consent of the state has the effect of making the state and individual equal parties to the proceedings. This equality between the parties of such a differing status and size can potentially lead to problems with the availability of arbitrators with regard to their independence and impartiality. This will be further explored in the thesis.

2- **Arbitrator selection**- the option to select your arbitrator is perhaps what makes arbitration be looked at in a favourable light by many. The arbitrator selection is a very important decision for all the parties involved in the arbitration. However, the areas of expertise of the arbitrators in both of these fields can be quite different. In commercial arbitration, the arbitrator would be expected to be well-versed in fields such as finance and trade, whereas, in investment arbitration, the arbitrator is needed to have expertise in a more protective sphere as the goal of investment arbitration is to protect foreign individuals from actions of the state (Gaukrodger, 2018, p.68). This could include expropriation, discrimination etc. Consequently, most commercial arbitration experts find themselves unable to pursue a career in investment arbitration and this leaves the pool of arbitrators in investment arbitration to be quite small (Böckstiegel, 2014, p.582). This small pool of arbitrators can become relevant when questions are raised regarding an arbitrator's conflict of interest, especially when the conflict is claimed due to him holding two roles, particularly as arbitrator and counsel, while generally dealing with the same issue. This will be dealt with in more detail in further parts.

3- **Confidentiality and transparency** - One of the key features of commercial arbitration and also the reason for its popularity among many individuals and enterprises is its confidentiality (Bernardo et al., 2013, p.26). Several arbitration institutions around the world explicitly provide for confidentiality and in the field of commercial arbitration, it is considered to be of imperative importance in order to protect commercial secrets and/or

confidential information (Bernardo et al., 2013, p.32). The awards or the proceedings of ICC's international court of arbitration are not open to the public, similarly, the LCIA also provides that all of its proceedings will be closed to the public unless the parties agree to open meetings or the tribunal decides that they should be open to the public (LCIA arbitration rules, 2020, art. 19.4). The UNCITRAL rules also provide that hearings of arbitration should only be open if it is so agreed by the parties (UNCITRAL arbitration rules, 2021, art. 28).

However, this key feature does not seem to apply as much in the field of investment arbitration. If we refer to the ICSID convention or most of the other BITs, they do not shed much light on whether such proceedings will be confidential (Böckstiegel, 2014, p. 586). However, ICSID does prohibit the publication of awards without consent of the parties (Bernardo et al., 2013, p. 33).

In ICSID proceedings, the parties are asked for their permission in order to publish the award of the proceedings, however, regardless of the wishes of the parties, the awards of such proceedings are published anyway in most cases (Böckstiegel, 2014, p. 586). The situation is the same in other institutions as well. Generally, the information regarding these proceedings is available quite easily over the internet and quite often from unknown sources (Böckstiegel, 2014, p. 586).

The idea that the investment arbitration proceedings aren't completely confidential isn't necessarily a bad one. When a state is involved in a proceeding, as is the case in investment arbitration, the interest of the people is represented by the state. In such circumstance, it is only fair that there is a fair amount of transparency in the proceedings and that the people and the society at large is well informed on the matter. In early days of investment arbitration, it was uncommon for parties to agree to such transparency, however, in more modern instruments such as CAFTA[6], it is generally provided that there would be much greater transparency.

The increased transparency also has the effect of making the award more predictable in investment arbitration and this lack of predictability in commercial arbitration can lead to it being not recommended as much by lawyers (Harvard Law Review Association, 1948, p. 1023).

[6] Chapter 18 of The Dominican Republic-Central America-United States Free Trade Agreement (2004) is dedicated to transparency.

Perhaps this is the biggest difference between the two forms of arbitration. However, we do have to keep in mind that when the proceedings are open to the public, the conduct of not only the parties but also the arbitrators can be affected. The outside factors could potentially impact their decision-making abilities.

4- **The role of national law**- the national law of a state also plays a much different part in both types of arbitrations and has a differing amount of significance. Taking commercial arbitration into consideration, it is the procedural law of the place of arbitration that applies to the arbitration proceedings and the national substantive law is generally what the arbitrators are required to apply (Böckstiegel, 2014, p.579). There can, however, be deviations from this trend as, in practice, some parties may decide that the national law should not be applied to the arbitration and, instead, some general principles like the UNIDROIT principles should be applied (Böckstiegel, 2014, p.579). Such an approach is generally beneficial when the parties have a different legal background.

In the case of investment arbitration, the situation is rather different. In most cases, investment arbitration is ruled by ICSID rules (Cleis, 2017, p.3), however, in some cases, the parties may agree that the arbitration should be ruled by institutions such as the ICC or LCIA. These institutions have to rely on and apply the mandatory national law at the place of arbitration (Böckstiegel, 2014, p.580). Due to their reliance on national law, the national approach towards certain essential features of arbitration, such as the independence and impartiality of arbitrators, becomes relevant. Additionally, it is also worth noting that due to a lack of substantive property rules in international law, the national law of host state usually determines whether the right in rem exists and in whom/to what extent (Douglas, 2004, p. 198). The investment treaty identifies whether such right in rem determined by municipal law should be protected.

While commercial arbitration has a higher level of national law application in a general sense, it is highly possible that national law can be applied in investment arbitration, especially when non-governmental arbitral institutions are chosen. However, it remains to be seen whether such national rules would be adequate for certain aspects of investment arbitration such as the independence and impartiality of arbitrators.

To conclude the first part, it should be pointed out that, over the year, attempts have been made to remedy the troubles of foreign investors in order for cross-border investments

to be prosperous. This has led to the development of 'investment arbitration' and this form of arbitration is quite different from 'commercial arbitration' despite borrowing its procedural structure to an extent. It's much different from 'commercial arbitration' in the sense that it deviates from the standard elements of commercial arbitration and could essentially be considered its own separate system. In fact, investment arbitration is quite a unique phenomenon in the field of international law and is a major way of holding a state accountable to non-state entities in an effective manner. It is essentially an instrument that can be used to keep the public authority of the state in check while the reach of commercial arbitration usually could not extend beyond a commercial relationship between parties. Being as different as it is, it becomes ideal for the purpose of this work to determine how these differences affect the independence and impartiality of arbitrators.

2. Independence and Impartiality of Arbitrators in Investment Arbitration

A key feature of any judge or tribunal around the world has to be its independence and impartiality. This idea has generally been accepted throughout the world and, arbitration being a formal mode of dispute resolution, it naturally extends to it as well. This has led to the development of many arbitration rules and guidelines that are tailored to the needs of arbitration for the implementation of independence and impartiality of arbitrators. However, as discussed in the previous chapter, investment arbitration, despite having the same basic structure, is much different from commercial arbitration. The different nature of parties involved and their status, the level of transparency, its far-reaching implications and other such features that set investment arbitration apart from commercial arbitration raise the question- Are independence and impartiality being implemented adequately in investment arbitration by the currently existing rules?

This part will begin by providing an overview and analysing the concepts of independence and impartiality. Further, the currently existing rules and guidelines in arbitration will be analysed to determine whether the independence and impartiality of arbitrator is being implemented efficiently in investment arbitration. Finally, national jurisdictional approaches from around the world towards independence and impartiality will be explored.

2.1. General Overview of Independence and Impartiality

As mentioned above, independence and impartiality are absolutely crucial for any dispute resolution system. Without fulfilling these two conditions, i.e.- independence and impartiality, it would be incredibly difficult to obtain a fair decision from any decision-making authority (Gelinas, 2011, p. 10). One must consider 'Nemo iudex sua causa' which translates to 'nobody should be a judge in his own case', a maxim that applies in the litigation process and, arbitration being a dispute resolution process, it applies to it as well (Hess, 2018, p. 1431-1432). Essentially, the idea is that no person should be the judge if he himself is also a party to the dispute or has a connection to/interest in the parties which could potentially affect the decision of the judge (Hess, 2018, p. 1432).

The concept of independence and impartiality of a judge/tribunal has received recognition on the international stage. It could even be said that it amounts to the general principles of law. There have been several human rights instruments that have granted it the status of a human right. For instance:

'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him' (The Universal Declaration of Human Rights, 1948, art. 10)

'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law' (The European Convention on Human Rights, 1950, art. 6.1)

'Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law' (The American Convention on Human Rights, 1969, art. 8.1)

These provisions demonstrate how important these principles are in the due process for arbitration. The idea is that the parties should be treated equally in a dispute (Fortese et al., 2015, p.111-112) and it would be near impossible to achieve such a goal without having an arbitrator who is just and truly neutral. As a result of these principles being as important and essential as they are, the parties in an arbitration procedure generally have a recourse to challenge the arbitrator on the grounds that he is not impartial or independent.

However, we must also take into consideration that such a pure form of true neutrality is seemingly impossible to achieve. Every individual, at some point in their life, attaches themselves to certain beliefs or ideas which in turn leads to them having certain biases and such biases might not be apparent to them or to anyone else but it is generally of a permanent character and affects the decision-making process (Lopez, 2020, p.13).

At this point in the work, It would be appropriate to expand on the concepts of independence and impartiality in order to proceed with the paper. looking at most of the sources for arbitration rules on a global scale (such as conventions), it appears that the rules regarding the impartiality and independence of arbitrators do differ by a slight amount (Bishop, 2014, p.397). It would be appropriate to analyse both these concepts in how they have appeared traditionally.

1- **Independence:** generally, while assessing the independence of an arbitrator, it is necessary to identify any factual links that the arbitrator might have. It concerns the position of the arbitrator in the sense that it refers to any connections that the arbitrator might have with the parties which could mean that the arbitrator is dependent on such party (Lopez, 2020, p.13). Essentially, the idea is that an independent arbitrator is one that does not have any financial, personal or any other such close links with any of the parties involved.

It is to be noted that if the arbitrator has been employed by one of the parties to the dispute, in any capacity, including a counsellor, then it would constitute a professional link between the parties. Further, even owning some shares in any company that is a party to the conflict or whose interest is affected by such conflict would imply a lack of independence of the arbitrator. In determining whether the arbitrator is truly independent, the closeness of the relationship between parties and arbitrators is inspected (Lopez, 2020, p.13). The idea seems to be that a certain degree of relationship would be permissible and wouldn't amount to the arbitrator being dependent on the party.

2- **Impartiality**: When referring to the impartiality of arbitrators, one refers to their state of mind or attitude towards the subject matter of the dispute. Essentially, the idea is that an arbitrator should not have any preconceived bias that could potentially affect his decision-making ability in the arbitration procedure (Feehily, 2019, p. 94). The main difference between independence and impartiality of the arbitrators would be that the independence of the arbitrator deals with the arbitrator's links with the parties while impartiality deals with the arbitrator's links with the subject matter of the dispute.

In order for an arbitrator to be identified as not being impartial, it is essential that there is evidence of his bias. This is generally shown through his behaviour. If an arbitrator shows a preference for any party to the proceeding or if a neutral third party determines that such preference is being shown by the arbitrator to one of the parties, it can be concluded that such arbitrator is partial and holds bias. In order to determine whether an arbitrator has a bias, we could take into account certain factors such as his relationships that would reasonably point towards the existence of bias or any behaviour such as a derogatory statement made towards a party (Feehily, 2019, p. 94-95). One major difference between independence and impartiality is the time at which they come into play. In the case of impartiality, it would only exist at the time the award is being rendered by the arbitrator. However, the independence of the arbitrator would generally exist throughout the entire proceeding.

When talking about the impartiality of arbitrators, we essentially deal with providing the parties with equal opportunity to persuade the tribunal towards an opinion that the parties hold. However, upon comparing with litigation, it appears that the pure neutrality of the judges towards a particular issue does not get called into question as it is not considered an essential component for providing equal justice. (ICCA REPORT NO.3, 2016, p. 10). However, this is what sets arbitration apart from national courts and perhaps makes it more favourable for some parties.

Essentially, the independence and impartiality of arbitrators are determined by any connection that the arbitrator holds to the party or to the subject matter of the dispute, whether positive or negative, which would render him unable to make an unbiased decision. However, depending on the degree, certain connections would be permissible as they would be too insignificant to have an effect on the arbitrator's decision-making ability.

2.2. **Current international rules and guidelines on independence and impartiality of arbitrators**

As the concepts of independence and impartiality become clear, it is appropriate to delve into the rules and guidelines in their current state in order to determine whether they effectively enforce the independence and impartiality of arbitrators in investment arbitration. The ICSID guidelines were developed specifically for investment arbitration so it would be ideal to consider them in comparison with the other arbitration rules that are generally relied upon in investment arbitration such as arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL), Rules of the International Chamber of Commerce (ICC) etc. Additionally, guidelines such as the IBA guidelines on conflict of interest in international arbitration have been introduced in order to assist the arbitrators in their duty to disclose, which forms an essential component in fulfilling the conditions of independence and impartiality. Due to the unique nature and highly politicized environment of investment arbitration, it becomes ideal to consider whether these guidelines can be suitable for investment arbitration.

2.2.1. Applicable rules on arbitrator's independence and impartiality

The available international arbitration rules generally provide rules regarding the qualification of arbitrators and these rules, in most cases, contain provisions that impose independence and impartiality. For instance, the UNCITRAL arbitration rules provide that any potential arbitrator has a duty to disclose any circumstances that could potentially lead to any doubts regarding his independence or impartiality. Additionally, throughout the process of arbitration, he is required to disclose any such abovementioned circumstances which have come to light, unless already previously disclosed (UNCITRAL arbitration rules, 2021, art 11). Similarly, the SCC rules of arbitration also provide that the arbitrator must be impartial and independent and has to disclose any such circumstances which can raise doubts regarding the same (SCC rules of arbitration, 2017, art.18). The provisions are very similar to the UNCITRAL rules. The ICC also expressly requires the arbitrators to

remain independent and impartial (ICC arbitration rules, 2021, art 11). Such provisions are also being incorporated into national laws around the world.[7]

As we can determine from this work, most of the rules among the leading institutions regarding the conflict of interest of arbitrations and their appointment are very similar. The situation remains the same when dealing with the challenges of arbitrators. Most of the leading arbitration rules provide that when a party becomes aware of any circumstances that might give rise to 'justifiable doubts' regarding the impartiality or independence of the arbitrators, the party can challenge such arbitrator- but only when the circumstances come to light after the appointment. [8]

While these rules were made to be suitable for commercial arbitration, the ICSID convention has been able to provide arbitration rules meant specifically for investment arbitration (Convention on settlement of investment disputes…, 1965). Investment arbitration itself derives its force from bilateral or multilateral treaties, which generally offer investors the option to choose between procedural rules for the arbitration process. In most cases, the ICSID arbitration rules are chosen (Cleis, 2017, p.111). Apart from this, commercial arbitration rules can also be chosen, such as the UNCITRAL arbitration rules or the ICC rules and the SCC rules (Cleis, 2017, p.111). This makes it ideal to compare and determine the efficiency of such rules. As for the qualification of arbitrators and their independence and impartiality, generally, not much information is provided in the investment treaty itself, apart from the general rule in some cases that such an arbitrator should be a third-party national (Knahr, 2010, p. 157).

Since independence and impartiality are generally provided for in the qualification of arbitrators, it would be appropriate to consider certain provisions dealing with the same in the ICSID Convention for the purpose of this work. Upon reference to article 14 of the ICSID Convention, we find that it deals with the basic qualifications of an arbitrator to the dispute. It states that an arbitrator must be an individual who shows a high moral character and competence in fields such as law, finance, commerce, or industry. It further states that the arbitrator must be able to exercise independent judgement (Convention on the Settlement of Investment Disputes…, 1965).

[7] E.g. Art 12 of The Arbitration and Conciliation act of the Republic of India (1996)
[8] E.g. Art 19(1)&(2), SCC arbitration rules (2017) AND Art 12(1)&(2), UNCITRAL arbitration rules (2021)

On first inspection of the article, it appears that the arbitrators are only required to be independent, as there is no mention of impartiality. However, in the judgement of Getma International and others v. Republic of Guinea, it was held that the phrasing of the article is supposed to comprise independence as well as impartiality (Decision on proposal to disqualify Mr. Bernardo Cremades, Arbitrator of 28th[th] June 2012). [9]

As there are many versions of the ICSID convention texts in different languages. The case seems to be that the wording of these texts can be quite different to express a more stringent need for impartiality and independence of arbitrators to the dispute, such as the French texts (Fry et al., 2014, p.207). Similarly, the Spanish texts require 'full faith in the impartiality of judgement' (Fry et al., 2014, p.207). Essentially, the fault lies in the wording of the document's English version. Through the judgements and other versions of the texts, one can identify that the ICSID convention necessitates independence and impartiality equally.

Further, as per Rule 19 (3) (b) of ICSID arbitration rules, an arbitrator is required to sign a declaration which addresses his independence and impartiality. Along with this declaration, the arbitrators are also required to attach a statement of their relationship history with the parties, if any, and any other relevant circumstances that might affect their judgement. The declaration further states that the arbitrators are obligated to reveal any such circumstances or relationships that may arise in the future. (ICSID arbitration rules, 2022, Rule 19(6)).

Despite the differences between investment arbitration and commercial arbitration, the ICSID arbitration rules for the qualification of arbitrators seem to impose independence and impartiality upon them in a manner similar to the other rules such as the UNCITRAL arbitration rules, ICC arbitration rules and other such arbitration rules that can be relied upon for arbitration. However, it remains to be seen whether these rules are also implemented with the same standard.

[9] In Getma International and others v. Republic of Guinea, Decision on the Proposal for Disqualification of Arbitrator Bernardo M. Cremades (June 28, 2012), it was opined in para 59 that the notion of independence in article 14(1) of the ICSID convention refers to a duty of independence and impartiality.

2.2.2. Challenge of arbitrators under the applicable rules

The process of challenging an arbitrator is crucial for the effective implementation of independence and impartiality. The rules for the challenge of the arbitrator and the procedure can easily indicate how effectively the independence and impartiality of arbitrators is being implemented.

As for the procedure for challenging the arbitrator in ICSID arbitration, a reference has to be made to article 57 of the ICSID convention. It deals with the disqualifications of an arbitrator and states:

'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.'(Convention on the Settlement of Investment Disputes…, 1965).

As the article suggests, the requirements under article 14(1) can be relied upon to propose the disqualification of the arbitrator. As established earlier, the independence and impartiality of arbitrators form a part of these 'qualifications' of an arbitrator and hence a proposal for his disqualification can be made if he is found to be lacking the same.

At first, the requirements may seem similar to the other arbitration rules. However, the wording of the article is much different. It states that the disqualification of the arbitrator can be proposed if they 'manifestly lack' a quality provided in article 14(1). From the wording of the article, it becomes evident that a high amount of significance is given to the evidentiary facts that display the impartiality and independence of the arbitrator. The arbitrator should be 'manifestly' lacking in the quality on the basis of which he is challenged. In essence, factual evidence is necessary and not just inference for the challenge to be sustained.

As for the disqualification procedure, Article 58 provides that the decision rests with the other members of the tribunal, except in exceptional circumstances, where the decision lies with the chairman (Convention on the Settlement of Investment Disputes…, 1965). There could a problem with this approach which obstructs the independence and

impartiality of the arbitrators. The question should be raised whether such other members of the tribunals are in an ideal position to be making a decision on such a matter. In most cases, the members of the tribunal might be interested in keeping collegiality in the tribunal and this could interfere with their decision-making ability on the matter, especially as they might speculate the challenge ending in failure, which tends to be the case in the majority of the disputes.

The ICSID rules, as they are meant for a sub-type of arbitration, share some general similarities with the commercial arbitration rules, such as UNCITRAL rules, as they both require the arbitrators to disclose any circumstances that may arise in the future which might lead to a conflict of interest. However, there appear to be several differences between these rules, given the different nature of the two types of arbitration. For instance, the ICSID rules are much more stringent for the disqualification of the arbitrators as compared to the UNCITRAL rules. As discussed above, there should be factual evidence that suggests that the arbitrator manifestly lacks the qualities on the basis for which he is challenged, however, under the UNCITRAL rules, the arbitrator can be challenged over even 'justifiable doubts' over a potential conflict of interests (UNCITRAL arbitration rules, 2021, art 12(1)), which is also the case in SCC arbitration (SCC arbitration rules, 2017, Art 19(1)).

Additionally, the challenge of an arbitrator is dealt with in a much different manner which could potentially affect the effectiveness of such a challenge in the first place. In the UNCITRAL rules, the decision over the challenge lies with the appointing institution (UNCITRAL arbitration rules,2021, Art 13(4)), whereas, under ICSID rules, the decision resides with other members of the tribunal.

For the purpose of illustrating the stringent nature of ICSID rules, it would be appropriate to analyse some cases where the independence or impartiality of the arbitrator was challenged, for example:

Amco Asia Vs Republic of Indonesia (1983)

In this case with ICSID rules, the arbitrator was challenged by Republic of Indonesia on the ground that he had a previous connection (gave tax advice) to the person who controlled AMCO Asia. Additionally, it was also argued that the arbitrator's law firm had previously shared a financial relationship (profit sharing) with AMCO Asia's counsel and they even had a joint office, however, this relationship had ceased to exist at the time

when proceedings began. Given the circumstances, it was deemed that there was not enough evidence to suggest that the arbitrator manifestly lacked the qualities that make him independent. It was held that facts showing a higher degree of closeness in the relationship were necessary and just indicating the appearance of such relationship was not adequate.

Vivendi Universal vs Argentina Republic (2001)

In this case, the president of a committee that had been appointed to rule over the matter of annulment of the ICSID award was challenged. The main argument on behalf of Argentina Republic was that the president had been involved with Vivendi universal as its predecessor company had obtained taxation advice for the Quebec region from the arbitrator's law firm. In the opinion of the other member, there were no proper grounds for challenge on independence and impartiality as the work had been concluded before the proceedings had begun and the arbitrator himself did not have an involvement in the work, which did not have any connection with the dispute between the parties.

There seems to be a pattern among these decisions on challenges to arbitrators. For the challenge to be successful, the mere existence of a professional relationship would be inadequate. The decision will be made in light of all the circumstances, and such circumstances should lead to a high degree of relationship for it to be significant enough to be considered as hampering the arbitrator's independence or impartiality. The members tend to consider whether a full disclosure of the circumstances has been made and the timeline of such disclosure in order to determine whether transparency has been maintained.

Vito G. Gallo v. The Government of Canada (2009)

This case was based on the 'North American Free Trade Agreement', hereinafter referred to as NAFTA. The dispute revolved around chapter 11 of NAFTA and was brought before the tribunal by an American citizen. UNCITRAL rules had been chosen by the parties as the applicable rules. The claimant argued that the arbitrator appointed by CANADA had been engaged by MEXICO (a party to NAFTA) to give advice on issues completely unrelated to the matter of dispute (chapter 11). It was observed that, since the arbitrator was advising the Mexican government, which was a contracting NAFTA party, one could reasonably assume doubts over the impartiality and independence of such

arbitrator. It was opined that the amount of work actually done was irrelevant in determining such question. However, the arbitrator was not disqualified with immediate effect. An option was given to the Arbitrator to choose to resign from his place as an arbitrator or to resign from his work for the Mexican government.

These cases clearly show how different the UNCITRAL arbitration rules seem to be in comparison to ICSID arbitration rules in terms of disqualification of the arbitrators. The arbitrator was disqualified under UNCITRAL rules for merely having given advice to a state that is not even party to the arbitration proceedings but is a party to the treaty. It is also to be noted that the advice was given on a matter that is not related to the case. On the other hand, the ICSID rules have been implemented in a way that rejects a challenge to arbitrators even though they had previously given advice to one of the parties to the dispute.

While commercial arbitration rules such as the UNCITRAL arbitration rules seem to have quite a lot in common with ICSID arbitration rules with regard to the independence and impartiality of arbitrators, one is able to determine from a careful inspection of its provisions and from the available judgements that ICSID arbitration rules are much more stringent. An argument can be made that the nature of investment arbitration necessitates such rules. However, questions can be raised about the effectiveness of such a disqualification procedure. Should the colleagues of the arbitrator in the same tribunal be relied upon to pass a fair judgement regarding his disqualification? The strict nature of the rules would suggest that the arbitrators should not be relied upon to pass such judgements as the rules are already strict enough and if the arbitrators seek to preserve their professional connection with their colleague, it could become nearly impossible to remove such an arbitrator. It is also quite unlikely that other members of the tribunal would be as concerned regarding the lack of independence or impartiality of the arbitrator as the arbitral institution itself due to the reputational concerns it can raise for it.

2.2.3. The duty to disclose and the IBA guidelines

As discussed above in the work, the duty to disclose any circumstances that can lead to doubts regarding the arbitrator's independence and impartiality is absolutely crucial to the process of arbitration. [10]However, there can be confusion as to the circumstances that need to be disclosed by the arbitrators. In some cases, the arbitrators might not be certain about which circumstances they might have to disclose. In recent years, there has been an increased complexity in disclosures that have to be made by the arbitrators due to the expanding businesses and international law firms. In such cases, the parties are generally able to exploit these circumstances in order to challenge the arbitrators (IBA guidelines on conflict of interest…, 2014, p.1). To avoid such situations and to assist such arbitrators and even the parties, the IBA council have developed the 'IBA guidelines on conflicts of interest in international arbitration'.

There have been several instances where authorities around the world have upheld the IBA guidelines as a tool in deciding whether the arbitrators have made the necessary disclosure regarding the circumstances that might be relevant to the dispute. We can refer to a judgement which observes:

' In order to verify the independence of the arbitrators, the Parties may also refer to the IBA Guidelines on Conflicts of Interest in International Arbitration approved on May 22, 2004. Such guidelines admittedly have no statutory value; yet they are a precious instrument, capable of contributing to the harmonization and unification of the standards applied in the field of international arbitration to dispose of conflict of interests and such an instrument should not fail to influence the practice of arbitral institutions and tribunals.' (Judgement of the Swiss Federal Supreme Court of 20 March 2008).

Further, the IBA guidelines seem to be relied upon by domestic courts on many occasions when the independence and impartiality of arbitrators is under question. It seems that this has resulted in the arbitrators being more reliant on the IBA guidelines than ever before (The IBA Conflicts of Interest Subcommittee, 2010, p.44).

[10] This idea is also reflected in general standard 3(a) of the IBA guidelines on conflict of interest in international arbitration, 2014.

Since there seems to be an indication that these guidelines play an important part in maintaining independence and impartiality in arbitration, it would be ideal to analyse whether they can be efficiently used in investment arbitration due to its unique characteristics in comparison with commercial arbitration.

The IBA guidelines have two parts, the first part provides the general standards which guide the parties, arbitrators and arbitral institutions in dealing with bias, whereas the second part contains three separate lists which determine the degree of dependency and partiality of arbitrators and identify whether such circumstances need to be disclosed by the arbitrators (IBA guidelines on conflict of interest…, 2014, p.17-19). First, the green list contains the list of non-exhaustive circumstances which are unlikely to lead to the arbitrators being perceived as dependent or biased and hence such circumstances do not need to be disclosed. This list includes circumstances such as having a social media connection with one of the parties, holding an insignificant amount of shares in a party or its affiliate companies, having previously expressed an opinion on a similar matter, arbitrator and counsel having previously served together as arbitrators etc (IBA guidelines on conflict of interest…, 2014, p.25-27). However, they don't seem to be fully compatible with investment arbitration.

We can, for instance, consider Article 4.1.1 of the green list, which provides that an arbitrator does not have to disclose that he has a previously expressed legal opinion (such as review or lecture) on the issue of the dispute as long as it is not focused on the case (IBA guidelines on conflict of interest…, 2014). In commercial arbitration, such previously expressed legal opinion does not hold much importance as the arbitrators are generally in a position where they have to apply the laws as agreed in the contract between the parties. However, the situation in investment arbitration can be drastically different. In investment arbitration, the arbitrators generally deal with issues of international law and they can be tasked with determining rules as a matter of first impression (knahr, 2010, p. 164). In such conditions, having a predisposition on the matter at issue could lead to the arbitrator being uninterested in certain arguments and hence be unable to pass unbiased and independent judgement.

This can be supported by a judgement- CC/Devas (Mauritius) Ltd. et al. v. India, judge Tomka, while accepting the challenge to the arbitrator, observed:

'to sustain any challenge brought on such a basis…, I must find, on the basis of the prior view and any other relevant circumstances, that there is an appearance of pre-judgment of an issue likely to be relevant to the dispute on which the parties have a reasonable expectation of an open mind.'

This observation points towards a need to take the previous view of the arbitrator to be taken into consideration along with any other circumstances that may lead to doubts regarding the arbitrator's independence and impartiality. While it is true that disqualifying arbitrators merely for their previously expressed legal opinion would have the effect of suppressing their freedom of expression (Urbaser SA v. Argentine Republic), such previously expressed opinions should always be disclosed in investment arbitration proceedings as they can become relevant in light of other circumstances.

Secondly, the orange list, which provides certain non-exhaustive circumstances which could potentially lead to the perception that the arbitrator is dependent or biased and hence, such circumstances should be disclosed by the arbitrator in order to avoid any further problems and give an opportunity to the parties to decide whether it would be appropriate to appoint the arbitrator. If the parties don't expressly reject the appointment, then the appointment is confirmed. The circumstances could include having previously had a professional relationship with a party, an arbitrator's law firm or its affiliates providing its services to the party, having a relationship with another arbitrator or a friendship/enmity with counsel of a party etc (IBA guidelines on conflict of interest…, 2014, p.22-25).

However, this list does not seem to be made with investment arbitration in mind as it mainly deals with the arbitrator and the parties to the dispute. A major stakeholder of such investment dispute seems to be ignored completely i.e.- the population of the respondent state. Investment arbitration is generally an extremely politically charged event and is open to the public (Tollefson, 2002, p. 184). There is a distinct lack of guidelines regarding the impact that such Populus can have on the arbitrator and the award.

Another potential issue with the orange list comes from Art 3.1.5. It provides that the arbitrator must disclose to the parties if he has served as an arbitrator on a related issue involving one of the parties or their affiliates (IBA guidelines on conflict of interest…, 2014, p. 23), however, this article would put added pressure on the arbitrator as he is expected to know the 'related issues' without reading the pleading of the parties. This kind of requirement can force the need for an interview regarding the issues of a case. In the

view of some writers, issue-based interviews are unethical and go against the practice of fair arbitration (THE ICCA REPORTS NO. 3, 2016, p. 19). Hence, this sort of provision can create a fair amount of confusion in terms of the timing of the disclosure and/or the added pressure on the arbitrators and the appointing party to conduct the interview.

And lastly, the Red list, which is split into two separate sub-lists i.e.- waivable and non-waivable. The waivable list deals with a list of non-exhaustive circumstances that might be sufficiently severe enough to require that they should be disclosed and the appointment of such arbitrator can only take place if the parties accept such circumstances and proceed with the appointment. The circumstances in this list include having given legal advice on the dispute to a party, having a direct or indirect interest in the dispute, currently representing one of the involved parties or their affiliates etc. (IBA guidelines on conflict of interest…, 2014, p.20-22).

The non-waivable list deals with circumstances that are considered extremely close to the parties and hence they rule out the acceptance of the arbitrator completely as no one can be a judge in his own case. These circumstances include being an employee of a party, being a board member of an entity that has an interest in the dispute, having financial or personal interest, deriving significant financial income from regular advice to the party (IBA guidelines on conflict of interest…, 2014, p.20).

The red list of the IBA guidelines also seems to be somewhat incompatible with investment arbitration. For instance, section 1.1 of the non-waivable red list provides that an arbitrator cannot be an employee of an entity that is a party to the dispute (IBA guidelines on conflict of interest…, 2014 p. 20). However, in investment arbitration, as the government of a state would be involved, it would disqualify a large number of arbitrators who are employed within its jurisdiction. This occurs as quite a big number of arbitrators could be employed as civil servants by higher education institutions in the country, which means that they are employed by a party to the dispute and hence are disqualified.

The IBA guidelines are generally very helpful in the context of commercial arbitration. However, it appears that there has been a failure to account for the different nature of investment arbitration. It becomes evident that the guidelines were designed for commercial arbitration and some of its provisions remain incompatible with investment arbitration. Relying on the IBA guidelines for determining the independence and impartiality of arbitrators could result in confusion and unfair results.

2.3. National Jurisdictions on independence and impartiality

Having looked at the international rules and guidelines, it would be beneficial for the purpose of this work to look at how jurisdictions around the world approach the concept of independence and impartiality of arbitrators. There are several arbitration rules, such as UNCITRAL, SCC or ICC rules, that can be used for the investment arbitration procedure and the challenge for arbitrators is decided using these rules. However, there are some national arbitration laws around the world that allow such decisions on the challenge of arbitrators to be reversed in their national courts. Whether such a decision can be reversed depends on the place of arbitration and its national laws. The likes of France and Switzerland tend to reject such petitions to reverse/review any decisions on the challenge to the arbitrator by the appointing authority, however, the Netherlands has been known to allow such review (Knahr, 2010, p. 162). Additionally, most of the arbitration institutes have their base in a particular country where the proceedings would be held.[11] It is natural that in such cases, tests to determine independence and impartiality would be adopted from the national laws of the place.

The common law jurisdictions rely on inductive reasoning and hence they mostly develop a test which is applicable to all possible situations. It is natural that there would be a divide between civil law and common law jurisdictions in this regard. Since the common law originated in England, it would be appropriate to consider it first.

1- England

English law has been evolving over time and in 1924, the 'reasonable apprehension' test to determine the existence of bias was introduced (Knahr, 2010, p.185). Other similar tests were also used during this time with nearly identical wording. However, in 1993, Lord Goff put forward the Gough test. This test did not just try to determine whether there was a real likelihood of bias, it was aimed at determining whether there was a 'real danger' of actual unconscious bias towards one of the parties to the dispute (Knahr, 2010, p.186). The goal of this test was to ensure that the court acts on possibility and not just probability.

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[11] E.g.- The London Court of International Arbitration (LCIA) is based in England & The Arbitration Institute of the Stockholm Chamber of Commerce (SCC) is based in Sweden.

The test was put to use in several cases, including ‘AT&T Corporation and Lucent Technologies Inc v. Saudi Cable Co’, where AT&T corporation had a successful tender with the Saudi government but eventually, some dispute arose between AT&T and the Saudi cable co. During the arbitration procedure between the two parties, it came to the knowledge of AT&T that the arbitrator was a non-executive director of another company which was one of the unsuccessful tenderers. AT&T challenged the arbitrator before the English court and argued that the ‘reasonable apprehension’ test should be applied instead of the “real danger’ test. The court held that a lower standard for the test than the one used in litigation cannot be applied in the arbitration proceedings as the arbitrators are appointed by the parties themselves. The challenge was unsuccessful. The Gough test was applied, and the court observed that it considers all the material evidence before it to determine whether there is a real danger of unconscious bias on behalf of the decision maker and such would be the case regardless of whether the decision maker is an arbitrator or a judge.

In some of the later cases, the Gough test was altered a fair amount. The court was of the opinion that there should be an ‘informed and fair-minded observer’ from whose perspective the bias should be assessed. This is different from the previous version of the Gough test where the court itself is the personification of a ‘reasonable man’ and can determine bias from its own perspective (Yu et al., 2003, p. 943).

2- The United States of America

The United States deal with the problem of impartiality and independence of arbitrators in a similar manner to England. In the USA, the ‘actual bias’ standard was considered too high and could be impossible to prove, whereas, the ‘appearance of bias’ standard was considered to be too low (Yu et al., 2003, p. 948).

The test used is the “evident partiality’ test. In order to come to the conclusion that there has been bias, speculation of bias is not enough. The bias should be ‘direct, definite and capable of demonstration’ (Nationwide Mutual Insurance Company v. Home Insurance Company, 2005). Essentially, the idea is that there can be no bias without factual evidence of such bias. The mere appearance of it is inadequate. The challenging party is tasked with providing such facts that demonstrate that the arbitrator of the dispute could be presumed to have improper motives. A reasonable person must be in a position where he can deduct that there has been partiality from the arbitrator towards one of the parties (Yu et al., 2003,

p. 948). When compared to the English test of determining the 'real danger' of bias, the American 'evident partiality' seems very similar in practice.

3- Germany

As provided in Art 12(2) of UNCITRAL model law, there must be justifiable doubts regarding an arbitrator's independence or impartiality if the arbitrators is to be challenged. There are many jurisdictions around the world, such as Germany, which have adopted this model law and they have enacted provisions with similar, if not identical, wording (Gu, 2018, p. 12). Germany, much like most other jurisdictions around the world, applies the same criteria to judges and arbitrators to determine their independence and impartiality. The German Arbitration Act provides that an arbitrator can be challenged if there are any justifiable doubts as to his independence and impartiality (Zivilprozessordnung, 1998, Art 1036(2)).[12] In this case, it has been described as requiring very serious doubt regarding the bias of the arbitrator and such doubts should be supported by factual evidence. However, it is to be noted that most of the commentaries in Germany recommend that the approach to any challenge of arbitrator should be liberal (Knahr, 2010, p.191-192).

Civil law jurisdictions are much different in dealing with the Independence and impartiality of arbitrators than their common law counterparts. Common law jurisdictions have the liberty to formulate their own tests and the above two examples of England and USA appear to show quite a high standard as they seek to determine 'real danger' based on evidence. As for the civil law jurisdictions, they tend to rely fully on the language that has been used in the statutes to formulate their test for bias. In several cases, "justifiable doubts" [13]is the wording in the statutes (as suggested in UNCITRAL model law) so the test will require that the circumstances should have raised 'justifiable doubts' regarding bias from the perspective of a reasonable third person. For instance, in Germany, the objective grounds regarding bias are compared with the situation of an unbiased arbitrator in order to determine whether they raise justifiable doubts regarding the arbitrator's independence and impartiality.

From analysing the national jurisdictions, it appears that most jurisdictions around the world have been able to apply different standards of independence and impartiality

[12] Zivilprozessordnung is the Code of Civil Procedure of the Federal Republic of Germany and it is the source for the Arbitration Law in Germany.
[13] The 'diminishing confidence in arbitrators imaprtiality' in section 8 of the Swedish Arbitration Act is meant to have the same effect as the wordings 'justifiable doubts'. (Löttiger et al., 2022)

through their tests. It seems that there has been reliance on the wordings ‘justifiable doubts’ as to the independence and impartiality of arbitrators, especially in civil law jurisdictions. This reliance seems to be in compliance with the UNCITRAL model law which is designed specifically for commercial arbitration. While this approach could be appropriate for commercial arbitration, the peculiarities of investment arbitration could raise questions regarding its effectiveness in investment arbitration.

3. Key problems that affect the standard of independence and impartiality in investment arbitration

As has been discussed in the work, investment arbitration is quite unique and different from commercial arbitration and tends to be much more transparent and open to the public. The highly politically charged event is quite naturally accompanied by certain problems that are characteristic of it. Given the importance and implications of investment arbitration, it would be ideal to analyse how the independence and impartiality of arbitrators is affected by these problems. Since a state is involved as one of the parties in the arbitration process, the chapter begins by analysing the impact of public interest and transparency on the arbitrator. Further, the omnipresence of a state and its effect on the eligibility of arbitrators is considered. Lastly, the prospect of an individual holding two positions, specifically as arbitrator and counsel, is looked into. It becomes ideal for the purpose of the work to determine how these 3 issues can affect the standard of independence and impartiality in investment arbitration.

3.1. Effect of increased transparency on independence and impartiality

Investment arbitration generally garners attention from the public of the host state. There can be many ways in which the public interest can arise in investment arbitration. The involvement of the state itself would point towards this as the state is responsible for its citizens and their well-being. However, the accountability of the state to its citizens might differ depending on the form of government.

In most cases of investment arbitration, the subject matter can be natural resources like minerals and oil or some form of infrastructure built for the sake of public well-being, such as dams and roads. In some cases, there could even exist a challenge to regulations that affect the public such as health, environment etc. In most cases, an incredibly large amount of money could be at stake and consequently could affect the public interest in a major sense. It is essentially the money of taxpayers of the country that is at stake. Additionally, Gary Born has opined that ‘tribunals are essentially creators of law as their decisions carry a persuasive authority’(Heppner, 2015 quoted Rogers et al., 2009, p. 39).

This leads to the outcome of investment arbitration serving as a de facto precedent and this can only have the effect of increased public interest in the matter(Schultz, 2013, p. 302). This interest of public naturally points towards a high degree of transparency being key in investment arbitration.

This movement for increased transparency in the field of investment arbitration was led by NGOs (Teitelbaum, 2010, p. 54) and has picked up a lot of momentum in recent years through the treaties, such as the United States- Singapore Free Trade Agreement (2003) and Trans-pacific Partnership (2016), that provide for hearings open to the public.[14]

Since it appears likely that the transparency and public access in investment tribunals are going to increase manifolds imminently, it becomes essential to consider the effect of such transparency and public participation on the arbitrator's ability to make decisions.

The public, despite not being a direct party to the dispute, would have the ability to affect the proceedings, given the trend of increasing transparency in investment arbitration. The actions of members of the public, such as a journalist or members of social groups, could potentially create heavy public pressure (Nowrot et al., 2018, p. 188). This kind of pressure would have the ability to affect the entire process of arbitration. Most importantly, the arbitrators could feel the pressure of the public and it could potentially affect their decision-making ability as they fear the added public scrutiny.

The Public pressure could further lead to an unsafe environment for all the participants of the arbitration, including the arbitrators themselves. This may not be considered a common occurrence as of now but the trend towards higher transparency suggests that it could be on the rise. In a dispute between City Oriente ltd and Ecuador, when a question of place of proceedings arose, the claimants pointed out that settling on Quito as the place of proceeding could be problematic as it lacks 'minimum safety conditions' and that the presence of pressure from media and the society at large could be detrimental to the regular course of proceedings (City Oriente Ltd. v. Republic of Ecuador…, of 13 May 2008). Similarly, an arbitrator who was appointed by the state itself had notified the chairman of his intention to withdraw reasoning that his involvement could lead to him being branded as a traitor in his home country. He was killed shortly after and

[14] Art. 15.20(2) of US-Singapore Free Trade Agreement (2003) & Art. 9.24 of Trans-Pacific Partnership provide for tribunal hearings to be open to be public unless either party intends to present protected information during the hearings.

the timing of the attack suggests that the state itself or the populace of the state might be involved (Nowrot et al., 2018, p. 182). Such situations can have the effect of intimidating an arbitrator to the extent that it their ability to make unbiased decisions could be questioned.

Many arbitrators would fear media scrutiny, which could have a drastic effect on their careers as arbitrators. The Media from the respondent nation could be especially ruthless and, in most cases, they tend to naturally be biased. The biased reporting from Media could severely hurt the reputation of an arbitrator and it is extremely likely that this thought would subconsciously create a bias in their mind favouring one of the parties. This is especially true in cases where an arbitrator has the same nationality as the state itself. The arbitrators could want to avoid offending the public at large or, in the case of stricter regimes, avoid the post-proceeding consequences from the state itself, which, in some cases, could even lead to imprisonment. [15]

It would also be fair to consider that the public would most likely have a view that is much different from the view of a court or a well-informed individual. Arbitrators in investment arbitrators are generally highly qualified and have great experience, as is required to arbitrate a multi-million-dollar dispute. The authorities dealing with challenge to the arbitrators are similarly well-informed and capable of taking decisions. however, this may not be the case with the wider public and they could see the issues very differently.

This could be better explained with a case – (EDF and others vs Argentina Republic, Decision of 25th June 2008), where Professor Gabrielle Kaufman-Kohler was appointed by the claimants in an investor-state dispute as arbitrator. Professor Kohler was on the board of directors of UBS (a Swiss banking establishment). It was revealed that UBS recommend their customers invest in the parent company of EDF international (claimant) and also holds some shares (3.2%) in another company which is essentially controlled by EDF through an intermediary. Due to these connections with the claimant, his appointment was challenged by Argentina claiming that he would stand to benefit financially from the outcome of the arbitration. It was finally held that Professor Kohler has an insignificant interest in the outcome and could not be disqualified. The interest was ‘de minimis’ and its impact on the decision-making ability of Professor Kohler would be absolutely negligible.

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[15] In a China International Economic Trade Arbitration Commission (CIETAG) arbitration, the arbitrator rendered an award against the state. Following the award, the arbitrator was imprisoned by the state with accusations of non-disclosed earnings. However, the arbitrator believes that the state has acted in retaliation to the award against it.

The above decision on the challenge to Professor Kohler seems to be fair as it protects the arbitrators from unjust disqualification as a result of having ties with economic entities in an ever-growing society. If arbitrators were disqualified over the most insignificant of 'interests' that they could have in a proceeding, there would not be too many qualified candidates left and the upcoming arbitrators would be discouraged by the strict nature of arbitration that requires them to not have ties with big corporations which could potentially be involved in such disputes. However, the public at large may view this affair very differently. In the eyes of the public, it could seem that an individual who has a business relationship with the claimants and would stand to gain from a decision in their favour is being appointed as the decision maker in a dispute against their state. the concept of 'de minimis' could be viewed completely differently by the public in such cases because their hard-earned taxpayer money would be at stake and, in the mind of the public, the arbitrator is a biased individual looking to make personal gains from the award.

Given the presence of public interest in investment arbitration, the trend towards higher transparency seems fair. However, this trend could potentially bring with it a higher level of scrutiny of the arbitrators from outside forces. The increased scrutiny and pressure from the outer sources could eventually lead to individuals simply passing up the opportunity to become full-time arbitrators as they might feel the risk may not be worth the reward.

While the scrutiny could protect the state against bias, it would fail to protect foreign investors from the same. In order for the parties to be equal, it is necessary that both parties receive the same level of protection against a potential lack of independence and impartiality of the arbitrators.

3.2. The effect of state presence on independence and impartiality

The presence of a state as a party to an arbitration proceeding could, in theory, cause problems with regard to the independence and impartiality of arbitrators. The state is an omnipresent entity of sorts. A state has quite a lot of connections or relationships that an individual usually would not have. In such cases, it could become tricky to maintain the equality of the parties. This section of the work seeks to explore such a potential problem.

Every party tends to have an expectation that the arbitrator should be completely unbiased and that their arguments should be given equal weightage by such arbitrators. This expectation also forms the core element of arbitration or any form of dispute resolution mechanism. However, there appears to be a clash between this expectation of a neutral arbitrator and another essential element of arbitration i.e. party autonomy.

Party autonomy implies that the procedure of arbitration, including the constitution of the tribunal, must be governed as per the wishes of the involved parties (ICCA report no.3, 2016, p. 9). This forms an essential part of the arbitration, especially in an international sense, and doing away with it would jeopardize the sanctity of the arbitral process.

Any party involved in a dispute would be intent on winning it and gaining any possible advantage that it can possibly get, let alone in investment arbitration where the interest of the populous is at stake. Given that the parties are allowed to choose one of the three decision-makers (arbitrators) for the investment dispute, it is quite natural that they would be inclined to choose someone who, as per their judgement, would represent their views and thoughts and would be more understanding of their arguments during the proceedings while still being unbiased.

As the parties seek to appoint an arbitrator that gives them confidence, they generally lean towards interviewing the candidates to be arbitrators. The parties tend to choose candidates who hold doctrinal views or a legal/cultural background that is likely to favour the party (The interviewing of prospective arbitrators…, 2008). When a state is involved, the selection of arbitrators becomes even more complicated. When the state has to select an individual who would be in line with its legal/cultural background and would

be more receptive to its views, the ideal candidate would likely be a national of the state itself, including academic experts.

The states can differ in the amount of influence they have over the different economic and social fields within their jurisdiction. There are several jurisdictions around that seem to have a potent influence over most, especially in the education sector. For instance, the 'most elite' university in Russia, the Moscow State Institute of International relations, is a subsidiary of the Russian foreign affairs ministry (MIGMO university website). Since the university is a subsidiary of the Foreign affairs ministry, the link extends to its faculty of international law as well.

Essentially, most of the major institutes within such jurisdictions are dependent on the government in some way. They generally form a part of the government structure itself, in the sense that they're owned directly by a ministry of the state or, in other cases, through some government agency.

In such cases, the arbitrator selection based on their academic experience and reputation becomes much more difficult. The arbitrators would be considered to be financially dependent on the state as their salaries come from the subdivision of a party to the dispute and hence would face disqualification.

Such a situation disrupts the balance of the arbitration process. The state would see its pool of potential arbitrators depleted due to the financial connection it has with them. However, this completely goes against the notion that both parties should be treated equally. The foreign investor would not face issues of such a drastically depleting pool of arbitrators and would have a much wider variety of options to choose from.

None of the arbitration rules have directly dealt with the issue, however, the ICSID arbitration rules prohibit the appointment of an arbitrator who is a national of the respondent state or has the nationality of the claimant's state without the agreement of the other party (ICSID arbitration rules, 2022, Rule 13(3)). However, other arbitration rules do not follow the same approach in the appointment of arbitrators. There seem to be no provisions restricting the appointment of arbitrators with any particular nationality in UNCITRAL arbitration rules. The SCC rules only provide a restriction on nationality with regard to the sole arbitrator or chairperson of arbitration i.e.- should not be the same nationality as any party if they are of different nationalities (SCC arbitration rules, 2017, Art 17(6)).

In these circumstances, the question arises whether such a degree of a financial relationship between the state and the arbitrator should lead to question of arbitrators independence and impartiality.

It would be ideal to examine **Vladimir Berschader and Moïse Berschader v. Russian Federation of 21 April 2006**, an SCC case dealing with challenge to an arbitrator.

A Belgian company was contracted by the Russian Federation for the construction of the Supreme Court building in Moscow. The dispute arose as the company had failed to complete the work to the satisfaction of the respondent but had cited the delayed payments by the respondent as the main cause. The dispute led to SCC arbitration between the parties.

Professor Lebedev was selected by the respondents as their arbitrator. Professor Lebedev was a national of the Russian Federation and also a professor at the Moscow state institute of international relations, which is owned and operated by the foreign affairs ministry of the Russian Federation. Additionally, prof. Lebedev was an advisor for the respondent state.

Given the circumstances, the claimants challenged the appointment of Prof Lebedev on the grounds that he is financially reliant on the respondent and hence there would be reasonable doubts regarding his independence. However, the challenge was unsuccessful.

This decision on the challenge is particularly interesting because it goes directly against the IBA guidelines on conflict of interest in international arbitration. The non-waivable red list provides that an arbitrator shouldn't be an employee of a party and also shouldn't be an advisor to the party and derive significant income from them (IBA guidelines on conflict of interest…,2014). It is to be stressed that even though the guidelines are not binding, they are generally considered reliable in dealing with appointment and challenge to arbitrators (Moses, 2017). If these guidelines were relied upon by the judges, Professor Lebedev would have been disqualified. However, the challenge was rejected by the board, and it becomes clear that an effort was made by the board to set investment arbitration apart from commercial arbitration as they had previously disqualified arbitrators in commercial arbitration for challenges which would lead to much less severity of conflicting interest. Even after the present case, SCC proceeded to sustain challenges in commercial arbitration which were less severe (Knahr, 2010, p. 171).

In view of some, this might appear to be a confusing judgement as it goes completely against the idea that there should be an international standard for conflict of interest in the arbitrator selection process. However, this is not the case and the writer would like to argue that investment arbitration deserves its own standard in this field that is separate from commercial arbitration. in the judgement, it becomes clear that Professor Lebedev would be disqualified if the arbitration was a commercial one. However, the rejection of the challenge points towards a view that the board might have identified that sustaining the challenge would lead to severe depletion of the arbitrator pool to choose from for the respondent state.

The presence of the state in the arbitration proceedings seems to create a conflict with the principle of equality of parties. The idea of an international standard for arbitrator selection, with regard to their independence and impartiality, seems incompatible with investment arbitration. In order to maintain the equality of parties and prevent the depletion of the pool of qualified arbitrators, it appears that the standard of independence and impartiality of arbitrators needs to be relaxed in certain situations.

3.3. Effect of double hatting on independence and impartiality

An important problem in investment arbitration that should be considered is the potential conflict of interest due to double hatting. The process of investment arbitration has historically been brought under fire repeatedly for 'double hatting' by NGOs and other organizations. The practice of double hatting involves an individual who performs two separate roles (ICSID Code of Conduct background papers…, 2021, p.1). The roles in question would generally be that of an arbitrator and a counsel. This, quite naturally, has the potential to be a situation where a conflict of interest could arise. This section seeks to analyse how this problem can be dealt with while maintaining the independence and impartiality of arbitrators.

There are several issues that can arise as a result of double hatting. It would be worth mentioning that it generally would lead to the appointment of the same individuals as arbitrators in most proceedings and, as a result, would hamper diversity in tribunals (Nerea et al., 2019, p.1).

Further, double hatting can have quite a devastating effect on questions of international law and treaty interpretation. When an individual works as a counsel in a proceeding, he will make arguments for a particular interpretation of treaties and this same argument could then be relied upon by him in his capacity as an arbitrator, which essentially creates a cycle of the same person setting a precedent, despite them not having binding authority but still historically showing a reliance, and then relying on it to advance their arguments.

This point can be further elaborated on in **Telekom Malaysia Berhad V. Republic of Ghana.** (12th July 2004)

In this case, Professor Gaillard was appointed as an arbitrator by the claimant, however, he was also acting as counsel in RFCC v. Morocco in its annulment proceedings for the petitioners.

In RFCC vs. Morocco, the tribunal had given a decision in favour of the state. The petitioners believed that the decision was a result of improper application of law and hence sought annulment of the award. however, the Republic of Ghana had relied on the award of RFCC v. Morocco by constructing a similar argument in their defence but Professor

Gaillard, who was challenging the award in RFCC vs. Morocco, was appointed as arbitrator by the claimants in the proceedings and this led to Ghana claiming that there would be a conflict of interest on part of Professor Gaillard.

Since Professor Gaillard had an obvious interest in the resolution of the issue, his impartiality was called into question, and he was asked to resign by the Republic of Ghana. Professor Gaillard refused and this led to the Republic of Ghana seeking a decision disqualifying professor Gaillard and this eventually reached the district court of Hague.

The claimants argued that Professor Gaillard's situation fell within the green list of IBA guidelines, particularly under article 4.1.1. In response, Ghana claimed that from the view of an informed third person, it would not appear that Professor Gaillard can be unbiased in his judgement due to him having opposed the notion in question as a counsel in another proceeding.

The judge, in applying the Dutch civil procedure code, held that it would be virtually impossible for Professor Gaillard to maintain an appearance of keeping both of his roles separated, even if he is in reality capable of keeping them both separate. There would always be justifiable doubts regarding his impartiality simply because of the appearance that he might not be able to separate the two roles, should he not resign from his position in RFCC vs. Morocco case. Accordingly, Professor Gaillard resigned from his role as the counsel in RFCC vs Morocco in order to remain as the arbitrator in Telekom Malaysia Berhad Vs Ghana.

As seen from the above case, an individual cannot be expected to keep the two of his roles separately when they inadvertently affect each other. Such an individual could be perfectly capable of such a separation but there will always remain doubts regarding his ability to do so in the eyes of an informed observer.

Despite double hatting being such a problematic issue, the arbitration rules such as UNCITRAL, ICSID, ICC etc or the IBA guidelines on conflict of interest have failed to restrict the practice in an explicit manner. However, it is still capable of creating disastrous consequences and this has been recognised in recent times as the ICSID and UNCITRAL are working together towards 'Draft code of conduct for adjudicators in international investment disputes' which seeks to combat the issues such as double hatting. (Possible reform of investor-State dispute…, 2022). As of now, the draft seems to suggest that arbitrators will be prohibited from acting as counsel or expert witness concurrently and for

a cooling period of 3 years after the closing of proceedings in another investor-state dispute that deals with the same measures, parties or provisions (Possible reform of investor-State dispute…, 2022, Art A4). However, these provisions are likely to be changed following discussions, especially the cooling-off period for arbitrators.

Additionally, the international community seems to be becoming more aware of this phenomenon. This is evidenced by a number of international investment agreements of recent times that prohibit double hatting, for example – the Comprehensive and Progressive Agreement for Trans-Pacific Partnership provides:

'*Upon selection, an arbitrator shall refrain, for the duration of the proceeding, from acting as counsel or party-appointed expert or witness in any pending or new investment dispute under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership or any other international agreement.*' (CPTPP, 2019, p. 3(d))[16].

From the provision, it appears to be a rather broad restriction as it extends to even those proceedings which may not involve the same claimants and respondents. The aim here seems to be to avoid a conflict of interest that may arise if the arbitrator might be involved in pushing for a particular interpretation of the treaty in any of his other roles. This is the same approach that was taken in the Telekom Malaysia case mentioned previously in the work. Similar provisions are also found in the Comprehensive Economic Trade Agreement between Canada and the European Union. (CETA, 2016, ch. 8 art 8.30)

The main idea in most of the above-mentioned provisions seem to prohibit an individual from serving as a counsel for a particular amount of time if they had previously served as an arbitrator in an investor-state dispute in connection with the same/ similar provisions or interpretation. However, this approach fails to consider the potential bias that may arise as a result of an arbitrator having previously acted as a counsel on the same issues/provisions. The Netherlands Model BIT has been able to account for this problem. It provides 'Members of the Tribunal shall not act as legal counsel or shall not have acted as legal counsel for the last five years in investment disputes under this or any other international agreement.' (Netherlands Model Investment Agreement, 2019, art 20.5). This approach prevents the appointment of arbitrators who have previously acted as counsel in order to prevent any appearance of conflict of interest.

[16] Annex to CPTPP/COM/2019/D004, Code of conduct for Investor-State Dispute Settlement under chapter 9 section B (investor-state dispute settlement) of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership.

This approach could be opposed by some as it goes against the concept of party autonomy- an essential feature of arbitration. The parties would prefer to appoint the same individual that they can rely upon as they might have become familiar with their views and approach and this tendency of the parties to appoint such arbitrators leads to Double hatting. However, the party autonomy in arbitration cannot be absolute. The prohibition on double hatting would put a much-needed check on such appointments in order to maintain the standard of the arbitral process. It would lead to a much-needed diversity in the tribunals instead of having the same individuals being juggled around in different roles.

Some might argue that banning the practice of double hatting would lead to a further depletion of the pool of qualified arbitrators to choose from in investment arbitration as it is already quite small. (Nerea et al., 2019, quotes Langford et al.,2017, p.2). This argument seems to be a valid one. It would be likely that legal practitioners would hesitate to become full-time arbitrators as it would lead to them quitting their counsel work with no guarantee of repeated future appointments as arbitrators.

In order to maintain the independence and impartiality of the arbitral process, it is absolutely essential that double hatting is not allowed to continue in its present state. However, it would be unwise to prohibit arbitrators from acting as counsel in all investor-state disputes. The best way around the issue would be to only prohibit the appointment of arbitrators for double hatting if they had acted as counsel in cases with the same/similar issue/interpretation. This seems like the most sensible approach to put a limit on party autonomy to avoid its exploitation and maintain the independence and impartiality of arbitrators while also maintaining the arbitrator pool and allowing aspiring arbitrators more security and backup. An absolute prohibition on the other hand would undoubtedly limit the future availability of qualified arbitrators severely and could prove to be very dangerous for the practice.

Conclusions:

1. Investment arbitration and commercial arbitration, despite their basic similarities, are two completely different systems. The unique nature and characteristics of investment arbitration enable it to protect the interest of a non-sovereign foreign party and can have extremely far-reaching implications in doing so. Commercial arbitration, on the other hand, is generally a lot more limited in terms of its implications. As a result of all the major deviations of investment arbitration from the elements of commercial arbitration, a highly political environment is created around the process. This points towards a need for further attention to be given to investment arbitration, especially in terms of the independence and impartiality of arbitrators.

2. Investment arbitration, despite being crucial for economic development and foreign investment, has not yet received adequate attention from the international community with regard to the independence and impartiality of arbitrators. The unique nature of investment arbitration and its much wider implications suggest that rules should be tailored to its requirements. The IBA guidelines, along with most of the institutional rules on arbitration and the national approaches for determining bias seem to be ill-suited for operation outside the limits of commercial arbitration. While the ICSID convention has been able to provide arbitration rules which specifically deal with investment arbitration, these are not able to guarantee the proper implementation of independence and impartiality of arbitrators due to their strict approach towards the process of questioning an arbitrator's independence and impartiality and the extremely heavy burden of proof on the challenging party.

3. Due to the unique nature of investment arbitration and a lack of adequate rules to deal with it, there are several problems that arise in investment arbitration. These issues threaten the future of investment arbitration as a whole as they could lead to the depletion of the pool of qualified arbitrators. While the presence of public interest and higher transparency and scrutiny point towards a need for a higher standard of independence and impartiality, the omnipresence of the state, in light of the equality of parties, suggests a relaxation of the same. The practice of double-hatting on the other hand shows the need for finding the right balance between a permissible conflict of interest and

the standard of independence and impartiality. Further discussions are needed on the topic at an international level in order to determine the precise standard, but it has become evident from the work that the presently applied standards are not compatible with investment arbitration and can lead to some serious consequences.

4. Investment arbitration tends to be a politically charged event and significantly more impactful on society as a whole than commercial arbitration. The lack of institutional arbitration rules that are tailored to the needs of investment arbitration is unacceptable, given its influence in the international sphere. Commercial arbitration, with its reach generally limited to a commercial relationship between parties, has enjoyed much greater attention and specialised rules. Due to the vast differences between the two forms of arbitration, the implementation of essential principles of arbitration such as independence and impartiality requires a standard of its own for investment arbitration which is well balanced out to avoid conflicts with the other essential principles such as equality of parties and party autonomy.

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SUMMARY

Peculiarities of Investment arbitration and its differences from commercial arbitration: Independence and Impartiality Perspective

Gaurav Naik

This Master thesis provides a comparison between investment arbitration and commercial arbitration along with a closer look at how the independence and impartiality of arbitrators in investment arbitration is affected by such differences. The thesis is able to provide the unique features of investment arbitration while comparing it with commercial arbitration. It is determined that investment arbitration is a unique system of its own due to its deviations from the elements of commercial arbitration. Given these unique features of investment arbitration, an effort is made to analyse whether the rules and guidelines that are currently in use are sufficient to impose independence and impartiality of arbitrators in investment arbitration. Upon analysis of the IBA guidelines, the commercial arbitration rules and the national approaches on independence and impartiality, it was concluded that they are not fit for operation outside of the boundaries of commercial arbitration. The ICSID arbitration rules, which are made specifically with investment arbitration in mind, also appeared to be inadequate due to their stringent approach towards challenges to arbitrators. Further, the thesis sought to analyse whether there is a need for a different standard of independence and impartiality of arbitrators in investment arbitration. Upon analysing some problems that plague investment arbitration such as double-hatting and potential conflict with equality of parties, it was concluded that investment arbitration requires an alteration to the implementation standard of independence and impartiality. However, the thesis does not give a specific standard which should be applied as further discussions at an international level are necessary to provide such precise answers.