

CHALLENGES TO TRANSPARENCY AND ETHICS IN ALTERNATIVES TO
ARBITRATION IN THE REALM OF INTERNATIONAL INVESTMENTS*

DESAFIOS À TRANSPARÊNCIA E ÉTICA NAS ALTERNATIVAS À
ARBITRAGEM NO CAMPO DOS INVESTIMENTOS INTERNACIONAIS

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ABSTRACT: Arbitration has traditionally been considered the best way of resolving disputes on international investment. Yet, some parties involved in investment disputes, notably developing countries, have raised concerns about the effectiveness of arbitration. Alternatives to arbitration have been developed with a view to providing the international investment dispute system with more credibility. These alternatives are characterized by informality and tend to be less time-consuming than arbitration. Nonetheless, they also face challenges, especially a lack of transparency and legitimacy. This paper analyzes why arbitration has been criticized and investigates the main challenges to transparency and ethics in alternatives to arbitration in the field of international investment disputes.

Keywords: International investments, alternatives to arbitration, transparency, registration of disputes, public hearings, publication of party submissions, publication of awards, *amicus curiae*, ethics, impartiality and independence, party-nominated adjudicators, obligation of disclosure.

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RESUMO: Tradicionalmente, a arbitragem foi considerada a melhor forma de resolver disputas sobre investimento internacional. No entanto, algumas partes envolvidas em disputas de investimento, especialmente países em desenvolvimento, têm levantado preocupações sobre a eficácia da arbitragem. Foram desenvolvidas alternativas à arbitragem com vista a conferir maior credibilidade ao sistema internacional de litígios sobre o investimento. Essas alternativas são caracterizadas pela informalidade e tendem a ser menos demoradas do que a arbitragem. No entanto, eles também enfrentam desafios, especialmente uma falta de transparência e legitimidade. Este artigo analisa por que a arbitragem foi criticada e investiga os principais desafios à transparência e à ética em alternativas à arbitragem no campo dos litígios internacionais de investimento.

Palavras-chave: Investimentos internacionais, alternativas à arbitragem, transparência, registro de controvérsias, audiências públicas, publicação de petições do litigante, publicação de laudos arbitrais, *amicus curiae*, ética, imparcialidade e independência, árbitros indicados pelas partes, obrigação de divulgação.

1. Introduction

The traditional way of resolving disputes in the field of international investments through arbitration has given rise to dissenting voices over the last few years. Bolivia and Ecuador, for instance, have already decided to leave the jurisdiction of the International Centre for Settlement of Investment Disputes (ICSID). With regard to this, the members of UNASUR, the Union of South American Countries, have launched a series of negotiations so as to create a centre of mediation and conciliation to settle investment disputes.

Another significant event which resulted in a move away from traditional arbitration in investment dispute was the fact that Brazil began to negotiate a new type of Bilateral Investment Treaty (BIT) in which there was no compulsory adjudication clause and where parties could resort to different methods to solve their disagreements. As the current protection for Brazilian outward foreign direct investment (OFDI) is limited and the Brazilian government has not chosen investor-to-state arbitration as a way of protecting its OFDI, Brasília has decided to promote the investment at issue via a new structure for its BITs. This article, therefore, will investigate the challenges to transparency and ethics in alternatives to arbitration in the area of international investments because “the time may be right to revisit the possibilities of investor-State mediation in appropriate cases, as either an alternative or a precursor to eventual arbitration”.¹

In order to clarify the main concepts used in this paper, it is important to define them. When this paper refers to the expression ‘alternatives to arbitration’, it refers to alternatives to arbitration where there is a third party who helps the

¹ Kalicki, J. “Mediation of Investor-State Disputes: Revisiting the Prospects,” *Kluwer Arbitration Blog*, 14 June 2013, p. 3, (retrieved 25 June 2015), <http://kluwerarbitrationblog.com/blog/2013/06/14/mediation-of-investor-state-disputes-revisiting-the-prospects/>.

disputing parties to achieve an agreement in the realm of international investment. Disputing parties may eventually resort to alternatives without the participation of a third party. However, this paper clearly does not refer to alternatives to international investment arbitration without the participation of a third party unless otherwise stipulated. Therefore, the arguments and conclusions of this paper only apply to alternatives with the participation of a third party. It is also important to mention that conflict, dispute and litigation are different concepts. Conflict is a disagreement between the parties and takes the form of either a dispute or litigation. Dispute implies a conflict that parties try to solve without resorting to a judicial or administrative court (for instance, mediation, conciliation, dispute board and arbitration). Litigation implies a conflict that parties endeavour to resolve by means of a judicial or administrative tribunal. Arbitration, in turn, is a way of settling a conflict by means of arbitrators.

Settlements of international investment dispute in the promotion of the international rule of law began to play a more prominent role in the mid-to-late nineties.² We consider rule of law as a synonym of formal legality, that is, those operating with the law have to apply it in a consistent and impartial manner.³ As alternatives to arbitration are closely linked to the rule of law, the demystification of two of their challenges, namely, transparency and ethics, is necessary.

² Schultz, T. & Dupont, C. Investment Arbitration: Promoting the Rule of Law or Over-Empowering Investors? A Quantitative Empirical Study. *European Journal of International Law*, 2014, forthcoming; King's College London Law School Research Paper No. 2014-16, p. 4 (retrieved 4 February 2016), <http://dx.doi.org/10.2139/ssrn.2399179/>.

³ *Op. Cit.* P. 22.

2. Beginnings of international investment conflicts

The protection granted to foreign investors dates back several centuries. However, we can see a substantial rise in the number of treaties signed between states offering protection from the last decades of the 17th century.⁴ Initially, international investors could resort to local courts to try to obtain indemnity for violations of their assets. Later, the treaties began to include a new mechanism that accorded a new sort of protection – espousal; in other words, the investor's state took on the claim. In this way, the conflict became a matter of state versus state.

2.1. Diplomatic protection

Once the investor's state takes on the claim, the issue of sovereignty emerges. In public international law, countries are formally equal which enables the investor's state to demand compensation for any damages incurred.

However, it is important to note that diplomatic protection is just an option. According to the International Court of Justice (ICJ),⁵ the investor's country is not obliged to take on the claim. Furthermore, it is up to the investor's state to decide about the relief to be pursued and the strategies to be adopted. Payments by the

⁴ Schefer, K. *International Investment Law: Text, Cases and Materials*, Cheltenham: Edward Elgar, 2013, p. 364.

⁵ Spain. *Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain)*, Judgment, 1970 ICJ 3 (Feb. 5), p. 44.

host state are due to the investor's country although in practice some countries give them back to their nationals.

2.2. Conflict settlement between states

Another possible way of solving investment conflicts is by a case between home state and host state. The case can take the form of either a court case⁶ or arbitration.

Although the insertion of arbitration clauses in investment treaties is common, their use is rare. An instance of such a clause is paragraph 2 of Article 12 of the BIT between Australia and Poland:

If a dispute is not resolved by such means within six (6) months of one Contracting Party seeking in writing such consultations or negotiations, it shall be submitted at the request of either Contracting Party to an Arbitral Tribunal established in accordance with the provisions of Annex A of this Agreement or, by agreement, to any other international tribunal.⁷

2.3. Utilization of force

Nowadays the employment of force is widely condemned and must be approved by the UN Security Council.⁸ From the 18th to the mid-20th century, the

⁶ Regarding litigation, the ICJ has decided a few such cases. Two landmark cases are ELSI and Barcelona Light and Traction.

⁷ Agreement between Australia and the Republic of Poland on the Reciprocal Promotion and Protection of Investments (adopted 7 May 1991, entered into force 27 March 1992) (retrieved 6 May 2015), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/163>.

⁸ Paragraph 4 Article 2 of the UN Charter.

international economic context was characterized by industrialization and imperialism.⁹ Thus, the most powerful nations were seen to employ military action in order to ensure that their economic goals were achievable.

In the process described above, private relations were becoming international in a gradual manner. This is why on many occasions merchants did not want governments to interfere in international affairs. Indeed, such interference "tended to upset private contractual arrangements that the large firms had with local hosts and cause more complications than they resolved".¹⁰

The advent of numerous international conventions on humanitarian law is another factor which explains the reduction in the opportunities for the use of force. Indeed, the 1949 Geneva Conventions and their Additional Protocols play a major role in this realm. Notwithstanding the attention that the international community has given to the abolition of use of force in international law, this subject is still problematic:

At the beginning of a new millennium, international law faces the difficult task of finding a new balance between security and justice in international relations, bearing in mind the danger of abuse by states. Furthermore, since any war causes immense grief to the people concerned and is subject only to the limited rules of international humanitarian law, one may question whether war is a suitable means for achieving justice at all. In legal terms, this relates to the problem of the proportionality of means employed.¹¹

2.4. International arbitration between private investors and countries

⁹ Schefer, K. *International Investment Law: Text, Cases and Materials*, Cheltenham: Edward Elgar, 2013, p. 367.

¹⁰ *Op. Cit.* P. 367.

¹¹ Heselhaus, S. *International Law and the Use of Force*. Encyclopedia of Life Support Systems (EOLSS), 2002, p. 2, (retrieved 6 July 2015), <http://www.eolss.net/sample-chapters/c14/e1-36-01-02.pdf>.

It is clear that the methods mentioned above have often been inadequate in settling international investment cases. They are bureaucratic and do not give the investors the opportunity to control the actions of the case. Moreover, it is not always certain that the investors will receive any form of effective relief.

International investment law has moved towards a particular type of dispute settlement: international arbitration between private actors and host countries. Arbitrations already existed in the 19th and early 20th centuries, notably in particular arrangements destined to settle specific disputes. After the Second World War, numerous countries opted for nationalization. This fact led to the signature of contracts containing consent-to-arbitrate provisions. Then, in the mid-1960s, a bilateral investment treaty signed between Germany and Pakistan heralded the dawn of a new era in investment dispute.

This treaty provided for the state's consent in the treaty itself. In such a way, the utilized instrument moved from a contract to a treaty. Any investor from the other country could take advantage of such a provision. In the case of contracts, the host country had to decide which investor could potentially make use of the arbitration clause. The new approach, termed 'arbitration without privity',¹² was supposed to facilitate the flow of inward investment to the host state. Moreover, the host state acquired direct liability *vis-à-vis* the investors in case of breach of any clause of the treaty.

2. 5. International investment arbitration based upon BITs

¹² Paulsson, J. Arbitration without Privity. ICSID Review, 10(2), 1995, pp. 232-257.

The features of international investment arbitration are different from those of the classical arbitration which arise between states that are often settled under the traditional principles of public international law.

Regarding the defendant and the measures that are imposed,¹³ a dispute relating to international investment has a country as a respondent. Here, the defendant is different from traditional international commercial arbitration where respondents are from the private sector. Moreover, the claim will be against a measure imposed by a country. Several states have sub-entities which may, eventually, be the agent imposing the measure. However, it is the sovereign country that is responsible for imposing the measure in international order. Another aspect is that these measures frequently involve the execution of complicated public policies which may toughen their withdrawal in the case of a final verdict against the state.

There is a second group of features. Unlike classical public international law, if the investor wins the claim, the set of remedies at his/her disposal will be different. Most International Investment Agreements (IIAs) grant investors the possibility to resort to either the ICSID or the UNCITRAL (United Nations Commission on International Trade Law) rules. In addition, the investor and the sovereign state usually have a long-term relationship with each other. Investors often spend huge amounts of money when they are engaged in M&As or greenfield projects in the host state. Finally, when there is a conflict, it frequently

¹³ United Nations Conference on Trade and Development (UNCTAD). *Investor-State Disputes: Prevention and Alternatives to Arbitration*, New York: United Nations, 2010, pp. 10-11.

involves a great sum of money, occasionally more than commercial arbitration between private entities.¹⁴

3. Challenges to international investment arbitration and to alternatives to international investment arbitration

Jurisprudence on international investment arbitration started only at the beginning of the 1990s. There are, however, some disadvantages to it. For example, arbitration can be costly, time-consuming, unpredictable and capable of eroding the usual long-term relationship between investor and host state.

Although claimants may vary, from those with little international experience to large multinationals,¹⁵ the issue is that claimants have to bear high costs. Salacuse reports that “the direct costs usually consist of two elements: (1) the expenses of a party’s legal representation and (2) each party’s share of the costs of administering the arbitration”.¹⁶ The OECD states that the average cost of

¹⁴ United Nations Conference on Trade and Development (UNCTAD). *Investor-State Disputes: Prevention and Alternatives to Arbitration*, New York: United Nations, 2010, pp. 11-12.

¹⁵ Organization for Economic Cooperation and Development (OECD). *Government perspectives on investor-state dispute settlement: a progress report*, 14 December 2012, Paris, p. 7.

¹⁶ Salacuse, J. Is There a Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution. *Fordham International Law Journal*, 31(1), 2007, p. 142.

international investment cases is over US\$ 8 million, sometimes rising to US\$ 30 million.¹⁷

Arbitration can also be time-consuming. The respondent may utilize procedural instruments with the aim of delaying the execution of the awards from arbitrators. For example, if the losing defendant makes use of annulment, this procedure may delay the execution of the arbitral sentence. UNCTAD reports that “the average for a case to be heard and finally settled varies from three to four years”.¹⁸

Investment arbitration may be unpredictable. The outcomes of published final judgments suggest that host states are more likely to be winners than losers. According to UNCTAD,¹⁹ while 43% of the cases were judged in favour of states, investors won only 31% of the cases and 26% were settled.

Another negative aspect of arbitration is the fact that it may have a negative effect on transactions between the investor and the state involved in the dispute. International investments usually imply long-term transactions. Both investors and states are dependent on each other. As in many long-term relationships, conflicts can occur. The important question that arises here is how can parties resolve these conflicts. This can be done through arbitration but it is the last step which investors resort to because it may signify the escalation of the conflict and the end of a mutually beneficial business.

¹⁷ Organization for Economic Cooperation and Development (OECD). “Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community,” OECD Working Papers on International Investment, 2012, p. 19.

¹⁸ United Nations Conference on Trade and Development (UNCTAD). *Investor-State Disputes: Prevention and Alternatives to Arbitration*, New York: United Nations, 2010, p. 18.

¹⁹ United Nations Conference on Trade and Development (UNCTAD). “Recent Developments in Investor-State Dispute Settlement,” IIA Issues Note, (1), 2014, p. 10.

Finally, there are two other concerns regarding international investment arbitration: lack of transparency and legitimacy. The former relates to confidentiality where the arbitral proceedings are often closed and there is no public access to the documents of the disputes. The latter refers to the appointment of arbitrators. Sometimes, when lawyers are acting in international investment disputes as arbitrators there may be doubts about their independence and impartiality. Franck suggests that there could be a crisis when values such as justice, fairness and accountability are absent in the proceedings, thus harming legitimacy.²⁰

Alternatives to international investment arbitration, in turn, may be an effective way of settling disputes in international investment. Nonetheless, they face challenges in obtaining greater visibility and thus becoming more attractive.

Most of the disputes in international investment involve a developing state as a respondent. Unfortunately, it is generally the case that many developing states lack technical expertise to tackle the difficulties in the alternatives at issue. International investment dispute is not only a recent area of law, it is also a highly sophisticated domain. The most famous law firms which are prepared to offer legal support are located in developed countries.

A second difficulty is that states, especially developing states, may not know where to find a person capable of acting as a conciliator/mediator.²¹ A further complicating factor is that the third party at issue has to possess multiple abilities

²⁰ Franck, S. The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions. *Fordham Law Review* 1521, 73, 2005, p. 1584, (retrieved 2 February 2006), <http://ir.lawnet.fordham.edu/flr/vol73/iss4/10>.

²¹ *Op.cit.* p. 178.

in extrapolating law, a skill which reduces the number of potential people still further.

Political elections may also become difficult and thus hinder the process of alternatives to arbitration. Politicians of respondent states may fear that resorting to mediation may signify the acceptance of investor's pressure to reach an agreement. They may sense that this acceptance implies a signal of weakness showing subservience to imperialistic countries. Therefore, alternatives to arbitration could reduce their chances of being elected.

Another difficulty relates to the internal structure of the government of the respondent state. It may occur that the organ responsible for preparing the state's defence is not the one originally dealing with the problem concerned.²² For example, a multinational company may win a bidding process for the construction of energy plants in a developing country. The ministry of energy signs a concession agreement with the company. However, a few months later the ministry of energy discovers that there is a problem in the structure of the plants and decides to terminate the contract. The investor then files an arbitration suit against the state, which is then entitled to offer a defence.

In the example above, it may be that the ministry of foreign affairs or the office of the attorney-general prepares the state's reply to the suit. However, they usually have little information about the case at first. Furthermore, it may be difficult to communicate with other agencies or ministries because they may have divergent views about the case or they could be in competition with each other.

²² Legum, B. The Difficulties of Conciliation In Investment Treaty Cases: A Comment On Professor Jack C. Coe's 'Toward A Complementary Use Of Conciliation In Investor-State Disputes – A Preliminary Sketch. MEALEY'S International Arbitration Report, 21(4), April 2006, p. 1.

Finally, the two most important challenges of alternatives to arbitration are the lack of transparency and legitimacy. Keeping in mind what was pointed out in the section above on the difficulties of international arbitration, the lack of transparency refers to the confidentiality of procedure. The lack of legitimacy, in turn, alludes to the questionable way in which conciliators/mediators are chosen.²³

As these two last challenges are quite important, we will address them as specific items.

4. Transparency in alternatives to international investment arbitration

In general terms, transparency means that parties interested in the case other than the complainant and respondent can have access to the development of the proceedings. The existence of the dispute is an open fact, hearings are held publicly, and documents and decisions are available to the public.

However, arbitral proceedings are usually confidential with only a few details of the case being disclosed such as the registration of the dispute and the final award. The following statement by the International Chamber of Commerce

²³ When both transparency and legitimacy are not present in international courts, adjudicators lack credibility, inasmuch as “states will use tribunals and comply with their judgments only if they believe that the judgments will be unbiased.” Posner, E. & Yoo, J. Judicial Independence in International Tribunals. California. Law Review, 93(1), 2005, p. 21, (retrieved 8 February 2016), <http://scholarship.law.berkeley.edu/californialawreview/vol93/iss1/1>).

(ICC) on its website illustrates the degree of confidentiality offered in these proceedings:

The Court respects your privacy. In contrast with ordinary courtroom proceedings under public and media gaze, ICC does not divulge details of an arbitration case and keeps the identities of the parties completely confidential. So your business remains nobody else's business. Sometimes, of course, parties will publicize an award – but ICC's lips are always sealed. If you wish, you may also enter into a confidentiality agreement with the opposing party as an additional safeguard.²⁴

If a proceeding is open to the public, this may democratize the alternatives to arbitration. Moreover, the mere knowledge of the existence of the alternatives in question via its openness may suffice to inform about a delicate issue in which a certain government is currently involved. Thus, when the national community is aware of a specific alternative this may act as:

timely and comprehensive data dissemination by national authorities [that] are intended to avoid situations in which any piece of bad news – whether accurate or not – is potentially seen by markets participants as the tip of a hidden iceberg, with ensuing panicky reactions which can be quickly magnified by herding behavior.²⁵

Private trade arbitration is another area that has exerted influence on international investment disputes. As private trade arbitration is rather closed, notably because of the absence of a state as a party, international investment

²⁴ International Chamber of Commerce (ICC). Frequently asked questions on ICC Arbitration, 2014, p. 2, (retrieved 6 May 2015), <http://www.iccwbo.org/FAQs/Frequently-asked-questions-on-ICC-Arbitration/>.

²⁵ Gelos, R. & Wei, S. Transparency and International Investor Behavior. National Bureau of Economic Research, Working Paper 9260, 2002, p. 16, (retrieved 7 July 2015), <http://www.nber.org/papers/w9260>.

disputes tend to become confidential by utilizing private trade arbitration as a source.

There have been some initiatives which have tried to make investment arbitration more open to the public, such as registration of disputes, public hearings and publication of party submissions. This trend towards a more transparent arbitral system arises out of the need for the host state's populace to have easy access to a considerable amount of information through the internet and media. This could lead to a more intensive demand and search for transparent actions from national governments. As noted by Kinnear, this can be understood within the context of a more general trend towards greater transparency:

[c]itizens increasingly are challenging their governments and asking for credible explanation of, and justification for, government action. Citizens also appear to have become more litigious, using adjudication as a mechanism to challenge government action. This is true both domestically and in the investor-State context.²⁶

The initiatives with respect to transparency have been carried out in various ways. The first one is the practice that arbitral tribunals have developed in their own decisions. Declarations and interpretative notes to the treaties have also become a common way of rendering the mechanism more transparent. Another source of transparency tools is the one emerging from the practice of using arbitral centres. In this regard, one can mention the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration or the IBA Guidelines on Conflicts of Interest in International Arbitration. Regarding the main instruments that could be used to render the proceedings of the alternatives more transparent, although

²⁶ Kinnear, M. Transparency and Third Party Participation in Investor-State Dispute Settlement. Making the Most International Investment Agreements: a Common Agenda, symposium co-organised by ICSID, OECD and UNCTAD, Paris, 2005, p. 2.

most of them come from arbitral proceedings, they could potentially be adapted to these alternatives.

4.1. Registration of disputes

Registration of disputes is an important way of knowing about the filing of any arbitral or conciliation proceedings. Interested parties have the opportunity to familiarize themselves with the main information on the dispute. The most important data that arbitral institutions have to publish relate to the parties' names, the treaties that the parties are invoking, a summary of the complainant's allegations, and the date of commencement of action.

The North America Free Trade Agreement (NAFTA) Chapter 11 appears to be the only treaty that stipulates that the initiation of an arbitral action should be registered with the NAFTA Secretariat; once a respondent receives the Notice of Arbitration, the registration is mandatory. NAFTA, as a process of economic integration, has an administrative centre that provides logistical support. Nevertheless, BITs do not possess a secretariat. Even if the treaty is plurilateral, like the Energy Charter Treaty (ECT), a secretariat is unusual.

If there is no treaty which stipulates registration then this will depend upon the arbitral rules that the investor selects. The ICSID is a classic example. This institution makes a list available on its website that contains the basic details of the dispute.²⁷ It divides the cases into pending and concluded cases. For each case, the following information is available: subject of dispute, composition of tribunal,

²⁷ See: <http://www.worldbank.org/icsid/cases/cases.htm>.

party's representatives, date of registration, and a chronological order of the procedural march of the action.

As the ICSID does not mention the source of the claim, it is impossible to be sure what it is about – whether it is about a BIT, a law or a contract. Nonetheless, Peterson reports that numerous claims are based upon either treaties or laws.²⁸

Another regrettable omission concerning the ICSID cases is that its website mentions neither the complainant's main allegations nor the measure that violates the investor's rights. If the details which the ICSID provide are not complete, other relevant arbitral institutions lack transparency even more. For instance, the Stockholm Chamber of Commerce (SCC) does not even mention the parties' names. It merely categorises the types of claims that are most common (business acquisitions, partnership agreements, service agreements etc) and the parties' nationalities.

Ad-hoc arbitration or *ad-hoc* alternatives to arbitration is by far the type that poses the most challenges. It can take place anywhere without any public registration requirement. Article X.2 of the Association of Southeast Asian Nations (ASEAN) Agreement for the Promotion and Protection of Investments is a good example.

Even though a great number of *ad-hoc* arbitral disputes are carried out under the UNCITRAL rules, the UNCITRAL Secretariat does not map the utilization

²⁸ Peterson, L. All Roads Lead Out of Rome: Divergent Paths of Dispute Settlement in Bilateral Investment Treaties. International Sustainable and Ethical Investment Rules Project, Nautilus Institute for Security and Sustainable Development, 2002, p. 10, (retrieved 28 May 2015), http://www.iisd.org/pdf/2003/investment_nautilus.pdf.

of UNCITRAL norms.²⁹ Accordingly, anyone who needs to find information about the disputes in question has to resort to:

a variety of needle-in-a-haystack techniques, including, reading transcripts of government foreign relations committee hearings; scrutinizing the publicity materials of law firms offering legal services; or poring over the statutory filings of publicly traded companies.³⁰

However, the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (hereinafter UNCITRAL Rules on Transparency)³¹ aims to shed light on the obscure functioning of the *ad-hoc* tribunals based upon the UNCITRAL rules by making “available to the public information regarding the name of the disputing parties, the economic sector involved and the treaty under which the claim is being made.” Despite the fact that the rules could have obliged the repository to publish more details concerning the cases,³² this initiative is seemingly reluctant to do so even though it would give more credibility to these tribunals.

The experience of the World Trade Organisation (WTO) illustrates this. Its website³³ provides a full range of information regarding disputes, including the

²⁹ Op. Cit P. 11.

³⁰ Op. Cit P. 11.

³¹ Pursuant to article 1.1 of the UNCITRAL Rules on Transparency, the rules apply to treaties “concluded on or after 1 April 2014 unless the Parties to the Treaty have agreed otherwise” (footnotes omitted). With regard to the application of the UNCITRAL Rules on Transparency to treaties signed before its entry into force, there is the UN Mauritius Convention which was adopted by the UN General Assembly on 10 December 2014. This Convention allows states to apply the UNCITRAL Rules to BITs that were already in force.

³² See article 8 of the UNCITRAL Rules on Transparency: “the repository of published information under the Rules on Transparency shall be the Secretary-General of the United Nations or an institution named by UNCITRAL.”

³³ See http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm.

measures challenged, the agreements cited, and a summary of the dispute to date. Nonetheless, it has to be noted that the WTO only settles cases involving states.

Lastly, it is worthwhile mentioning that, in February 2016, twelve countries signed the Trans-Pacific Partnership (TPP) Agreement. Parties agreed on the use of alternative methods to arbitration; however, these proceedings shall be confidential.³⁴ Hence, this lack of publicity may undermine the credibility of TPP.

4.2. Public hearings

Public hearings are another way of rendering the proceedings more transparent. Hearings are important insofar as they are a good opportunity to collect evidence and to have personal contact with the disputants.

NAFTA countries are pioneers in terms of public hearings. Kinnear³⁵ reports that Canada and the USA agreed on public hearings for all cases under the NAFTA in October 2003³⁶ and that Mexico also agreed in July 2004. As the discussions in these hearings are highly technical, the audience tends to be rather limited.

Another source is Article 10.21.2 of the Central America Free Trade Agreement (CAFTA), which stipulates that hearings should be publicly held. The Investment Agreement for the COMESA Common Investment Area, signed in 2007,

³⁴ Articles 28.5.8 and 28.6.2.

³⁵ Kinnear, M. Transparency and Third Party Participation in Investor-State Dispute Settlement. Making the Most International Investment Agreements: a Common Agenda, symposium co-organised by ICSID, OECD and UNCTAD, Paris, 2005, p. 3.

³⁶ Unites States of America NAFTA Commission Joint Statement. Department of Foreign Affairs and International Trade News Release, No. 152, 7 October 2003, (retrieved 16 July 2014), http://w01.international.gc.ca/minpub/Publication.asp?publication_id=380398&Language=E.

and the ASEAN Comprehensive Investment Agreement, signed in 2009, also have clauses on public hearings.³⁷

Under NAFTA and CAFTA, hearings usually take place in a separate room and are transmitted via closed circuit to the audience in another room or sent as a webcast such as the hearing held in the case *Pac Rim Cayman LLC v. Republic of El Salvador* under the auspices of the ICSID.³⁸

The ICSID Rules did not provide for open hearings some years ago. Only the parties and the adjudicators were allowed to attend the hearing. However, in 2006, the ICSID Rules became more flexible owing to a change in the rules allowing the adjudicators to authorize third parties to attend the hearing unless one of the litigants makes an objection. In fact, there was an attempt at granting the tribunal a certain margin of discretion regarding this matter but this faced fierce opposition.³⁹

The UNCITRAL Rules on Arbitration (hereinafter the 2010 UNCITRAL Rules) only allow third parties to attend the hearings if there is explicit consent by the disputants.⁴⁰ The advent of the UNCITRAL Rules on Transparency, however, has

³⁷ Pohl, J., Mashigo, K., & Nohen A. Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey. OECD Working Papers on International Investment, 2012/02, OECD Publishing, p. 37, (retrieved 8 July 2015), <http://dx.doi.org/10.1787/5k8xb71nf628-en>.

³⁸ ICSID. *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Public Hearing (18 May 2011), <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement89>.

³⁹ UNCITRAL. Settlement of commercial disputes. Transparency in treaty-based investor-State arbitration. Comments by the International Centre for Settlement of Investment Disputes (ICSID). Note by the Secretariat, 8 August 2011, p. 9, (retrieved 4 June 2015), http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html.

⁴⁰ UNCITRAL Rules, 2010, (retrieved 20 June 2015), <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf>, article 28(3).

given more transparency to the 2010 UNCITRAL Rules by plainly stating that “hearings for the presentation of evidence or for oral argument (“hearings”) shall be public.”

Recent research has shown that there has been a limited number of bilateral arrangements that provide for public hearings: “Canada-Jordan BIT (2009); Canada-Panama FTA (2010); Canada-Romania BIT (1996); Chile-Colombia FTA (2006); Korea-United States BIT (2007); Mexico-Switzerland BIT (1995); Morocco-United States FTA (2004); Peru-United States FTA (2006).”⁴¹

In the WTO, public hearings have become increasingly common. One example is the case of *Australia – Apples* in which the Appellate Body declared the following:

We recall that requests to allow public observation of the oral hearing have been made, and have been authorized in five previous appeals. In its rulings, the Appellate Body has held that it has the power to authorize such requests by the participants, provided that this does not affect the confidentiality in the relationship between the third participants and the Appellate Body, or impair the integrity of the appellate process.⁴²

A public hearing that is not supported by an administrative centre may be very hard to arrange since there are many details that organizers have to keep in

⁴¹ Pohl, J., Mashigo, K., & Nohen, A. Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey. OECD Working Papers on International Investment, 2012/02, OECD Publishing, p. 37 (retrieved 8 July 2015), <http://dx.doi.org/10.1787/5k8xb71nf628-en>.

⁴² WTO, Australia - Measures Affecting the Importation of Apples from New Zealand, Appellate Body Report, WT/DS367/AB/R, adopted 17 December 2010, Annex 3, para. 4 (footnote omitted).

mind, such as safety, a place to accommodate the audience, and how to protect confidential business information.⁴³

4.3. Publication of party submissions

There has been a tendency towards the publication of party submissions. Although this is only just beginning to happen, it shows how disputing states are making an effort to bring transparency to the realm of international investment disputes.

Schefer points out three advantages of the publication of party submissions: the local population where the disputants live may know the facts surrounding the controversy; they may follow the progress of the suit; and thereby evaluate how powerful their countries' allegations are.⁴⁴

Pursuant to the US Model BIT, Article 29(1), the respondent has to make his/her written submissions public. Canada's approach has been slightly narrower; Canada's Model FIPA in its Article 38(3) states that "all documents submitted to, or issued by, the Tribunal shall be publicly available unless the disputing parties otherwise agree, subject to the deletion of confidential information". Other arrangements adopt an even more restrictive approach. For example, Japan and Mexico signed a bilateral accord establishing a free trade area (FTA). Article 94 of this agreement reads: "either disputing party may make available to the public in a

⁴³ Kinneer, M. Transparency and Third Party Participation in Investor-State Dispute Settlement. Making the Most International Investment Agreements: a Common Agenda, symposium co-organised by ICSID, OECD and UNCTAD, Paris, 2005, p. 3.

⁴⁴ Schefer, K. International Investment Law: Text, Cases and Materials, Cheltenham: Edward Elgar, 2013, p. 457.

timely manner all documents, including an award, submitted to, or issued by, a Tribunal”.

Another relevant initiative is the one taken by the UNCITRAL Rules on Transparency which state in Article 3.1 that written documents by disputing parties should be made publicly available. Furthermore, the EU’s proposal concerning investment in the Transatlantic Trade and Investment Partnership (TTIP) proposes, in Article 18.5 of Section 3, that “a disputing party may disclose to other persons in connection with proceedings, including witnesses and experts, ... documents as it considers necessary in the course of the proceedings” provided that they remain confidential.

4.4. Publication of awards

The publication of awards is another way of providing more transparency. When an award becomes available to the public, it is possible to know not only what the adjudicators thought but also the arguments raised by both parties.

The ICSID has been the most transparent forum in relation to the publication of awards. If one of the parties wishes to make public the award, it can do so; the other party’s consent is unnecessary. Nevertheless, if the ICSID intends to publish the decision, the parties’ agreement is indispensable.

Lately, the ICSID has gone through a process of initiatives to render proceedings more transparent. Consequently, as a result of the 2006 reform on the ICSID Rules, there have been publications of small parts of the awards, even if the disputants do not explicitly give their consent. The excerpts are published in the

ICSID Review – Foreign Investment Law and on the ICSID website. Furthermore, it is worth pointing out that:

The ICSID commenced a project in 2010 to make more ICSID “jurisprudence” publicly available. The purpose of the publication project is to provide access to as much ICSID case law as possible, including procedural and substantive rulings.⁴⁵

The Permanent Court of Arbitration (PCA) and SCC only publish the awards if they have the consent of both parties. The ICC is the most obscure institution as it never discloses its decisions. Yet, the UNCITRAL Rules on Transparency suggest that orders and awards should be published.⁴⁶

Under NAFTA, the US and Canada can publish the awards of the cases they were involved in.⁴⁷ With respect to Mexico, the specific arbitration regulations concerning the publication of decisions govern the disputes in which it is involved. In addition, all NAFTA members publish their awards on their respective websites. The UNCITRAL Rules on Transparency also state that decisions and awards rendered by arbitral tribunals should be public.⁴⁸

Even though some fora may not make their decisions public, one of the parties may publish the award on its website⁴⁹ unless there is a confidentiality

⁴⁵ UNCITRAL. Settlement of commercial disputes. Transparency in treaty-based investor-State arbitration. Comments by the International Centre for Settlement of Investment Disputes (ICSID). Note by the Secretariat, 8 August 2011, p. 4, (retrieved 4 June 2015), http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html.

⁴⁶ Article 3.1.

⁴⁷ NAFTA Article 1137.

⁴⁸ Article 3.1.

⁴⁹ The EU has recently announced that it will donor EUR 100,000 to “a publicly accessible register of documents related to international investor-to-state dispute settlement (ISDS) cases and decisions of ISDS tribunals” (European Commission. “EU contributes €100,000 to increase ISSN: 1980-1995
e-ISSN: 2318-8529

agreement between stakeholders. Moreover, some websites run by academics contain investment awards, such as the Investment Treaty Arbitration Resource website and the NAFTA Claims.⁵⁰

With respect to decisions about arbitrator challenges, international practice has demonstrated that these decisions are not usually substantiated as arbitral tribunals tend to consider them administrative in nature. Nevertheless, arbitral courts should modify the way they view the matter. If adjudicators start to reason their judgments, this stance could “promote understanding of and consistency in standards for reviewing arbitrator challenges.”⁵¹ This could lead to “better decision-making by (1) individual arbitrators considering an appointment, (2) those facing challenge decisions, and finally, (3) national courts reviewing challenge decisions, who might pay greater deference to reasoned decisions than those that go unexplained and perhaps appear arbitrary”.⁵²

Finally, it is worthwhile mentioning that international investment law is a restricted field. When awards are ready, lawyers acting in this area usually have access to the orders and awards in an informal manner so “practitioners enjoy a comparative advantage when it comes to knowledge about recent developments and interpretations in this young field.”⁵³

transparency in investor-to-state disputes,” (retrieved 11 February 2016), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1428>).

⁵⁰ See <http://ita.law.uvic.ca/> and <http://naftaclaims.com>, respectively.

⁵¹ Brower, C. “Keynote Address: The Ethics of Arbitration: Perspectives from a Practicing International Arbitrator,” *Berkeley Journal of International Law Publicist*, 5, 2010, p. 20, (retrieved 10 February 2016), http://bjil.typepad.com/brower_final.pdf.

⁵² *Op. Cit.* P. 20.

⁵³ Peterson, L. All Roads Lead Out of Rome: Divergent Paths of Dispute Settlement in Bilateral Investment Treaties. International Sustainable and Ethical Investment Rules Project, Nautilus ISSN: 1980-1995 e-ISSN: 2318-8529

4.5. *Amicus curiae*

Registration of disputes, public hearings, publication of party submissions and awards are interesting initiatives aimed at bringing investment disputes into the open. Nevertheless, none of them allow people who are not a direct party in the proceedings to express their opinion with a view to assisting the court in resolving the case.

Amicus curiae, or "friend of the court," signifies the participation of third parties through the submission of briefs to the arbitral court in order to provide information on a specific issue of a case.

Although the authorization of *amicus* briefs may legitimise the proceedings, it may add costs for the parties. At the end of the procedure, both complainant and respondent will have to pay their lawyers and the tribunal's fees, which are frequently high, sometimes amounting to more than a million dollars. If parties and adjudicators have to spend several hours checking what the *amicus* briefs report, the entire proceedings could be even more costly.

In October 2003, Mexico, Canada and the US agreed on the participation of *amicus curiae* in NAFTA investment disputes.⁵⁴ The new rules at the time established four criteria for the admission of *amicus curiae*. As Kinnear observes:

Institute for Security and Sustainable Development, 2002, p. 12, (retrieved 28 May 2015), http://www.iisd.org/pdf/2003/investment_nautilus.pdf.

⁵⁴ "Celebrating NAFTA at Ten., Statement of the Three Trade Commission on Non-disputing Party Participation, NAFTA Free Trade Commission. 7 October 2003, (retrieved 16 June 2015), http://www.sice.oas.org/tpd/nafta/nafta_e.asp.

First, amicus participation must assist the tribunal in assessing the facts and legal issues by bringing a perspective to the proceedings different than that of the disputing parties. Second, the brief must address matters within the scope of the dispute. Third, the amicus must have a significant interest in the arbitration at hand. Fourth, the subject matter of the arbitration must contain an element of public interest.⁵⁵

With regard to the ICSID, it is important to highlight that:

Until the 2006 revision of the ICSID Rules, those rules, too, were silent with respect to the amicus curiae question. As happened with application of the UNCITRAL Rules, the pre-2006 ICSID Rules' silence on the issue did not prevent tribunals from accepting amicus curiae briefs.⁵⁶

The first ICSID case dealing with submission of *amicus* briefs was *Methanex v. USA* 2001. The 1976 UNCITRAL Arbitration Rules governed this dispute and, in spite of the refusal of the claimant, the court accepted the briefs. The same reasoning was also followed in *UPS v. Canada*, also in 2001. Under the ICSID Convention, the leading case the leading was *Aguas del Tunari v. Bolivia*. In 2001, the court refused to accept the *amicus* brief on the grounds that if the parties had not plainly consented, the court did not possess discretion to receive the brief. However, in 2005, the adjudicators in *Suez et al. v. Argentina* ruled that they could accept the *amicus* submission as the case related to public interest and the ICSID Convention Article 44 gave them the right to do so.⁵⁷

⁵⁵ Kinnear, M. Transparency and Third Party Participation in Investor-State Dispute Settlement. Making the Most International Investment Agreements: a Common Agenda, symposium co-organised by ICSID, OECD and UNCTAD, Paris, 2005, p. 6.

⁵⁶ Bernasconi-Osterwalder, N. & Johnson, L. Transparency in the Dispute Settlement Process: Country Best Practices. International Institute for Sustainable Development, February 2011, p. 9, (retrieved 7 July 2015), http://www.iisd.org/pdf/2011/transparency_dispute_settlement_processes.pdf.

⁵⁷ UNCITRAL. Settlement of commercial disputes. Transparency in treaty-based investor-State arbitration. Comments by the International Centre for Settlement of Investment Disputes (ICSID). Note by the Secretariat, 8 August 2011, p. 5, (retrieved 4 June 2015), http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html.

At the beginning, most of the *amici* in international investment arbitration consisted of NGOs and civil society groups.⁵⁸ Still, tribunals perceived that the intervention of NGOs and civil society groups could not add much substance to the final result of the case.⁵⁹⁶⁰ Nevertheless, over time, the number of those acting as *amici* expanded. Third parties who had a direct interest in the outcome of the dispute then began to play the part of *amici*.⁶¹

Surprisingly, the UNCITRAL Rules on Transparency provide for the submission of *amicus curiae*. In Article 4, adjudicators are granted discretion to receive the *amicus* brief after consulting with the parties. In order to optimize the procedure, the court is entitled to limit the number of pages of the documents and has to consider “whether the third person has a significant interest in the arbitral proceedings and ... the extent to which the submission would assist the arbitral tribunal in the determination of a factual or legal issue related to the arbitral proceedings.”

Another meaningful source is Article 23 of Section 3 of Chapter 2 of the EU proposal concerning investment in the TTIP. Progress was made with a provision from the EU which stipulated that “the Tribunal shall permit any natural or legal person which can establish a direct and present interest in the result of the dispute

⁵⁸ Levine, E. *Amicus Curiae* in International Investment Arbitration: The Implications of an Increase in Third-Party Participation. *Berkeley Journal of International Law*, 29(200), 2011, p. 209, (retrieved 11 February 2016), <http://scholarship.law.berkeley.edu/bjil/vol29/iss1/>.

⁵⁹ *Op. Cit.* P. 212.

⁶⁰ Nonetheless, pursuant to Becker, the case-law has not decided yet whether the amici's participation is either procedural or substantive (Becker, S. ‘*Amicus Curiae*’: un Análisis Comparativo del Sistema de Solución de Diferencias de la OMC y el Arbitraje Internacional de Inversión. *Revista Latinoamericana de Derecho Comercial Internacional*, 3(1), 2015, p. 302, (retrieved 8 February 2016), [http://derecho.posgrado.unam.mx/latam/04_production/inserts/issues/v1_2015/\(6\)_V3_I1_2015_A15_Espanol.pdf](http://derecho.posgrado.unam.mx/latam/04_production/inserts/issues/v1_2015/(6)_V3_I1_2015_A15_Espanol.pdf)).

⁶¹ *Op. Cit.* P. 212-214.

(the intervener) to intervene as a third party.”⁶² The intervener is entitled to receive a copy of every procedural document, to submit a statement, to attend the hearings and to exercise the previous rights before the appeal tribunal.

Drawing a parallel with international trade litigation, the WTO jurisprudence has accepted *amicus curiae* submissions only if the parties incorporate the *amicus* briefs into their own submissions.⁶³

5. Ethics in international investment disputes

International investment disputes have slowly increased over the last two decades. In spite of this reduced pace, ethics has become a key point in this area. As the disputes are resolved by *ad hoc* tribunals, the number of arbitrators has increased substantially. Moreover, there has also been “a commensurate diversification of the cultural and legal traditions among them [arbitrators] and among parties.”⁶⁴

In this scenario with the increasing numbers of arbitrators, international investment arbitration has been “criticized because the adjudicators often decide that domestic laws passed to protect human rights and public safety violate

⁶² The tribunal in question is the Tribunal of First Instance.

⁶³ See, for example, Canada – Certain Measures Affecting the Renewable Energy Generation Sector (WTO, Panel Report, WT/DS412/R, adopted 19 December 2012, para. 1.13).

⁶⁴ Rogers, C. The Ethics of International Arbitrators. In Legal Studies Research Paper Series, Institute of Comparative Law “Angelo Sraffa,” Bocconi University, 2008, p. 2, (retrieved 6 May 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1081436.

international economic laws.”⁶⁵ This is particularly important for alternatives to arbitration, which are intended to be credible.

Since many adjudicators also act as lawyers in other investment disputes, a minimum set of rules about ethics in investment dispute is mandatory. Occasionally, human nature may be weak and may not be able to withstand certain difficulties. There may also be situations which require special attention from arbitrators to avoid any misunderstanding. Indeed, it should be noted that:

[I]t is often these “gray areas” in which arbitrators might be most tempted to act inappropriately, sometimes just by omissions, thereby often alienating the parties in an arbitration. In this regard, it is often not improper conduct in the decision making process of an arbitration. Rather, it is the arbitrator’s failure to conduct and steer the proceedings in a way that serve the purpose of arbitration.⁶⁶

5.1. Sources of adjudicators’ duties

There are several sources in which we can find adjudicators’ duties, namely, ethical codes and institutional arbitration rules, domestic laws, international arbitration conventions and national bar associations. A number of institutions have published their own ethical codes. The most renowned ones are the AAA (American Arbitration Association)/ABA (American Bar Association) Code of Ethics for Arbitrators in Commercial Disputes, published for the first time in 1977 and reviewed later in 2004; the IBA (International Bar Association) Rules of Ethics for

⁶⁵ Schefer, K. Independent and impartial? Re-thinking the adjudication of trade and investment disputes, 2 May 2014, p. 1 (retrieved 4 June 2015), <https://www.opendemocracy.net/openglobalrights-blog/krista-nadakavukaren-schefer/independent-and-impartial-rethinking-adjudication>.

⁶⁶ Peters, P. Can I do this? – Arbitrator’s Ethics. Kluwer Arbitration Blog, 9 November 2010, p. 2, (retrieved 30 June 2015), <http://kluwerarbitrationblog.com/blog/2010/11/09/can-i-do-this-%E2%80%93-arbitrator%E2%80%99s-ethics/>.

International Arbitrators and the 2004 IBA Guidelines on Conflicts of Interest in International Arbitration. Some regional institutions have also released their ethical codes, such as the Singapore International Arbitration Centre.

Institutional arbitration rules are also a source of adjudicators' obligations. The ICC Arbitral Rules are a good example. Article 7 states that "every arbitrator must be and remain independent of the parties involved in the arbitration". In addition, the London Court of International Arbitration (LCIA) Rules, Article 5(2) notes that "all arbitrators conducting an arbitration under these Rules shall be and remain at all times impartial and independent of the parties."

Another relevant source is domestic laws. They often possess articles that govern the procedure for arbitrator challenges and award reviews. An example comes from the Brazilian legislation which states that anyone who had connections with the disputing parties or with the case for which they were appointed, or have been suspected of impeachment or other misconduct, are prohibited from acting as adjudicators. Moreover, prior to their appointment, candidates for the role of adjudicators have to disclose anything that may place doubt on their impartiality and independence.

International arbitration conventions also contribute in addressing the ethical duties of adjudicators. Rogers⁶⁷ reports that these conventions do not possess explicit articles which outline adjudicators' duties. Interested parties are obliged to invoke the exceptions to these conventions governing award enforcement.

Lastly, there has been an increasing number of national bar associations trying to establish rules on the conduct of lawyers who act in more than one

⁶⁷ *Op. Cit.* P. 7.

country. Article 55 of the *Codice Deontologico Forense* provides that Italian attorneys acting as arbitrators must be independent, reveal specific details on relevant contacts and keep the confidences that stakeholders place in them.

5.2. Adjudicators' obligations

Having discussed the sources of the adjudicators' duties, it is clear that there is a minimum set of rules governing adjudicators' duties. Although these rules may sound abstract, they are important in order to give more credibility and legitimacy to the system.

5.2.1. Impartiality and independence

In principle, when parties resort to arbitration, they will expect adjudicators to be neutral and conduct themselves in an even-handed way. However, it is worthwhile mentioning that:

[A]rbitrators may be induced to adopt pro-investor or pro-host State stance in order to improve their chances to be appointed by one side or the other. This "competition" within a profession whose members are appointed on a case by case basis seems difficult to reconcile with the ... requirement of independence.⁶⁸

⁶⁸ Hachez, N. & Wouters, J. International Investment Dispute Settlement in the 21st Century: Does the Preservation of the Public Interest Require an Alternative to the Arbitral Model? Working Paper No. 81, Leuven Centre for Global Governance Studies, 2012, p. 9, (retrieved 9 February 2016), https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp81-90/wp-81-hachez-wouters-iil-arbitration-and-the.pdf.

As regards terminology, we assume that independence and impartiality are equivalent and may be used interchangeably. It is certainly true that some laws do not employ the same expressions, thus leading to more confusion in relation to terminology. While the ICC Arbitration Rules makes reference to 'independence,' the 1996 English Arbitration Act states that adjudicators must be 'impartial.' The UNCITRAL Model Law, in turn, uses both expressions.⁶⁹

Some commentators have observed that independence refers to the objective side of the link between the adjudicator and the parties. For example, the arbitrators in *ConocoPhillips Company et al. v. Bolivarian Republic of Venezuela* stressed that independence is the "lack of relations with a party that might influence the arbitrator;"⁷⁰ impartiality, in turn, "involves not favouring one party or the other."⁷¹ Impartiality is thus the subjective side of the relations between the adjudicator and the stakeholders. In order to try to illustrate these two concepts, which may sound rather theoretical, Schefer provides the following example:

If an investor is alleging an indirect expropriation of a construction project by virtue of a size restriction imposed on the building, and an arbitrator owns a cement company that supplies the construction company, that arbitrator would not be independent ... So, in the above example, if the arbitrator, rather than owning the cement company, has a different construction project in a different host territory that is also facing size-restricting regulations, that arbitrator would be partial (not impartial).⁷²

⁶⁹ *Op. Cit.* P. 9.

⁷⁰ ICSID. *ConocoPhillips Company et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify L. Yves Fortier, QC, Arbitrator (27 Feb. 2012), para. 55.

⁷¹ ICSID. *ConocoPhillips Company et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify L. Yves Fortier, QC, Arbitrator (27 Feb. 2012), para. 55.

⁷² Schefer, K. *International Investment Law: Text, Cases and Materials*, Cheltenham: Edward Elgar, 2013, pp. 476-77.

In practical terms, it may be almost impossible to ascertain an adjudicator's thoughts. As the tribunal in *Suez v. Argentina* pointed out:

Independence and impartiality are states of mind. Neither the Respondent, the two members of this tribunal, or any another body is capable of probing the inner workings of any arbitrator's mind to determine with perfect accuracy whether that person is independent or impartial. Such state of mind can only be inferred from conduct either by the arbitrator in question or persons connected to him or her. It is for that reason that Article 57 requires a showing by a challenging party of any fact indicating a manifest lack of impartiality or independence.⁷³

As a result, in order to check whether he/she is either impartial or independent, one has to investigate his/her actions. In this case, the absence of proof of actual bias is not an advisable approach. The best path, therefore, is two-fold: demonstration of actual or apparent partiality and the presence of a risk, or potential, of a tendency. The double-approach at issue has to be founded on an objective standard. Moreover, one has to bear in mind what a reasonable citizen would think.

The important issue here is the margin of independence or impartiality that is required from the adjudicator. Pursuant to the ICSID Rules, parties wishing to disqualify an adjudicator have to demonstrate a 'manifest' absence of independence in order to succeed. Schefer explains that "[t]ribunals differ on exactly what this means, but the term itself indicates that there is room for *de minimis* flexibilities in the standard to be applied."⁷⁴

⁷³ ICSID. *Suez v. Argentina*, ICSID Case No. ARB/03/19, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, para. 30.

⁷⁴ *Op. Cit.* P. 478.

In November 2015, the EU presented its proposal with regard to the investment chapter in the TTIP.⁷⁵ With a view to preserving his/her neutrality, the mediator must not belong to either disputing party. Furthermore, he/she has to refrain from having either a direct or indirect conflict of interest and has to behave appropriately observing high standards of conduct. In addition, he/she “shall not be influenced by self-interest, outside pressure, political considerations, public clamour, loyalty to a Party or disputing party or fear of criticism.”⁷⁶ Former mediators are also prohibited from behaving in a way that indicates that they were not neutral.⁷⁷ Nevertheless, the Code of Conduct makes use of a general clause by

⁷⁵ In fact, the aforementioned proposal is a momentous one insofar as it implies the creation of a Tribunal of First Instance, comprising fifteen judges, of a Permanent Appeal Tribunal, comprising six members, and of a mediation mechanism for investor-to-state cases, comprising six individuals of “high moral character and recognised competence in the fields of law, commerce, industry or finance.” The idea of an appeal court is not new. According to Weidemaier, “the ICSID has also expressed support for the creation of an appellate mechanism, although so far no such tribunal has been established” (Weidemaier, W. *Toward a Theory of Precedent in Arbitration*. William & Mary Law Review, 51, 1895 (2010), p. 1946, (retrieved 4 February 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1594970). In previous literature, Hueckel, for instance, proposes the creation of a review body in the international investment system (Hueckel, J. “Rebalancing Legitimacy and Sovereignty in International Investment Agreements,” *Emory Law Journal*, 61(3), 2012, pp. 14-16, (retrieved 10 February 2016), <http://law.emory.edu/elj/content/volume-61/issue-3/comments/rebalancing-legitimacy-sovereignty.html>).

⁷⁶ Article 1 of the Code of Conduct for Members of the Tribunal, the Appeal Tribunal and Mediators.

⁷⁷ Still, Van Harten casts doubt on the adjudicators’ impartiality: “Most importantly, ICS “judges” would continue to have a financial interest in future claims because they are still paid a (lucrative) daily fee in a context where only one side – foreign investors – can bring claims, they would continue to operate under the usual ISDS arbitration rules, they would not have to meet the requirements for judicial appointment in any country, and they would not even be barred from working on the side as ISDS arbitrators. I am prompted to say that, if ISDS is “dead”, as some officials have claimed, then the EC’s ICS proposal reminds me of a zombie movie” (footnotes omitted) (Van Harten, G. “Key Flaws in the European Commission’s Proposals for Foreign Investor Protection in TTIP,” *Osgoode Legal Studies Research Paper No. 16/2016*, 12(4), 2016, pp. 1-2, (retrieved 18 February 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2692122&download=yes).

asserting that “all former members must avoid actions that may create the appearance that they were biased.”⁷⁸

Regarding the EU proposal mentioned in the previous paragraph, it is important to note that both mediators and former mediators cannot disclose the information they obtained when they were carrying out their mandate. The ultimate objective of this provision is to ensure that those conducting the dispute will not make inappropriate use of privileged data acquired in the proceedings.

Concerning the TPP Agreement, the rules about impartiality and independence only refer to panellists. There is no code of conduct for mediators as there is in the TTIP. Perhaps the reason for this lack of reference to either mediators or conciliators is that alternative methods to arbitration shall be confidential under the TPP Agreement.

5.2.2. Party-nominated adjudicators

In international investment dispute, the issue of party-nominated adjudicators may be controversial. As pointed out earlier, adjudicators are expected to be impartial and independent. The question, therefore, is whether the proceedings would sound legitimate if the adjudicator had the same nationality as one of the litigants.

⁷⁸ See article 6. Although article 6 contains just one paragraph, we are of the view that all the five paragraphs of article 5 which grapple with current mediators’ independence and impartiality should be considered important guidelines with the aim of ascertaining whether former mediators were biased.

It would appear that sometimes parties may contact a potential adjudicator of the same nationality with the aim of checking their availability to participate in the dispute. Nevertheless, chairpersons are frequently chosen by the party-nominated adjudicators.

Bearing in mind that talks between one of the parties and his/her nominated adjudicator would take place, it is reasonable to conclude that:

all arbitrators are equally “neutral” is mostly a triumph of rhetoric, and perhaps not even a very helpful one. Parties expect party-appointed arbitrators to play a unique role to ensure that at least one member of the tribunal will comprehend and be sensitive to its cultural and legal background and, by extension, its legal arguments.⁷⁹

Investment dispute rules tend to be quite restrictive with regard to allowing a party-appointed adjudicator to be from the same nationality as the party that appointed him. For example, the ICSID Rules of Procedure for Arbitration Proceedings stipulate that “the majority of the arbitrators shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute.”

Factors other than nationality may render the problem of the party-appointed adjudicator even more complex, notably if a controversy involves areas or countries with ongoing historical hostilities or religious disputes. Regarding this, the ICC Arbitration Rules state that where appointments are concerned, adjudicators should take into consideration factors other than nationality such as “residence and other relationships with the countries of which the parties or the other arbitrators are nationals.”

⁷⁹ *Op. Cit.* P. 12.

The scenario may become more complicated due to the omnipresence of the state, for example, where the state plays a very active role in the whole economy of the country, being responsible for the administration of institutions in charge of hiring experts in investment disputes. In *Berschader v. Russian Federation*,⁸⁰ Moscow chose one of its own nationals, Sergei Lebedev, a renowned expert at international law working for the Moscow State Institute of International Relations. Despite the fact that the plaintiff decided to disqualify Professor Lebedev, the court dismissed the challenge.⁸¹

Another aspect to be examined is that most alternatives to investment arbitration are relatively informal, such as mediation and conciliation. Thus, owing to this margin of informality, parties might desire to disregard the rule that prohibits the appointment of nationals coming from one of the stakeholders. The most important point here is that parties have to feel comfortable in order to achieve an amicable solution to the dispute. This feature may, therefore, justify the mitigation of the rule referred to.

5.2.3. The obligation of disclosure

⁸⁰ Berschader v. Russian Federation, SCC Case No. 080/2004.

⁸¹ Rubins, N. & Lauterburg, B. Independence, Impartiality and Duty of Disclosure in Investment Arbitration. in Knahr et al. (eds.), Investment and Commercial Arbitration – Similarities and Divergences, The Hague: Eleven International Publishing, 2010, pp. 153-180 (170-171), (retrieved 26 April 2015), http://www.prager-dreifuss.com/system/document_ens/57/original/Independence_Impartiality_and_Duty_of_Disclosure_in_Investment_Arbitration.pdf?1273064482.

The obligation of disclosure is part of the impartiality duty which means that adjudicators have to reveal information that may influence the outcome of the case.

The main purpose of the duty in question is to give the parties the chance of assessing the information revealed. Accordingly, the parties will be able to decide whether to challenge the adjudicator. According to Cheng, "the mechanism for the removal of judges exerts control over those judges who, through their misconduct, pose a systematic threat to the legitimacy of the entire system."⁸² Additionally, the entire procedure will become more legitimate and transparent when all the actors involved in the proceedings (parties, other adjudicators, the institution providing logistical support to the procedure and the society as a whole) can obtain a good idea about the circumstances that are likely to influence the adjudicator's impartiality.

It is important to distinguish standards of disclosure and patterns of disqualification. Taking into consideration the objectives of the duty to unfold which were mentioned above, it can be concluded that:

[I]t follows that the body of information that must be disclosed should be understood as broader than the information that can constitute a basis for disqualification of an arbitrator. In other words, not every disclosure that is made should necessarily result in a disqualification, while the fact [that] that information would not be sufficient to disqualify an arbitrator does not suggest that it need not be disclosed.⁸³

The duty of disclosure has developed from a subjective approach to a more objective one. The 1975 ICC Arbitration Rules contained a subjective test which stipulated that adjudicators disclose information that, "in their opinion," could cast

⁸² Cheng, T. Precedent and Control in Investment Treaty Arbitration. *Fordham International Law Journal*, 30(4), 2006, p. 1020, (retrieved 2 February 2016), <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2062&context=ilj>.

⁸³ *Op. Cit.* P. 15.

doubt on the adjudicators' freedom "in the eyes of the parties." However, it should be noted that ICC rules have been improved and now provide for disclosure of "any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties."⁸⁴ Furthermore, the objective test has become more sophisticated, moving "from objective but qualitative disclosure and disqualification standards to objective categorical descriptions of the specific content that must be disclosed."⁸⁵ The IBA Guidelines on Conflicts of Interest in International Arbitration reflect this.

The IBA Guidelines adopt an approach similar to traffic lights.⁸⁶ Its red list is split into two sections: a 'non-waivable red list' and a 'waivable' one. The red list enumerates a series of circumstances "which, depending on the facts of a given case, give rise to justifiable doubts as to the arbitrator's impartiality and independence."⁸⁷ The non-waivable list contains situations that the parties cannot override. On the other hand, the waivable red list enumerates circumstances that parties can ignore because, despite the seriousness of the circumstances, they are less grave than the circumstances that the non-waivable list contains. The orange list is a series of circumstances that, in the eyes of the stakeholders, may cause

⁸⁴ ICC Arbitration Rules, Article 7(2).

⁸⁵ *Op. Cit.* P. 16.

⁸⁶ As an international institution, the IBA comprises lawyers from different countries and with distinct backgrounds. As a result, one has to bear in mind that "it can be impossible to obtain consensus amongst professional advocates with fundamentally opposed philosophies about their roles and duties. The temptation will be to ... distil the lowest common denominator from these opposing views whilst remaining silent on the truly contentious issues" (Sarvarian, A. Problems of Ethical Standards for Representatives before ICSID Tribunals. *The Law and Practice of International Courts and Tribunals*, 10, 2011, pp. 67-134 (89), (retrieved 12 February 2016), <http://booksandjournals.brillonline.com/content/journals/10.1163/157180311x565160>).

⁸⁷ International Bar Association (IBA). IBA Guidelines on Conflicts of Interest in International Arbitration, 22 May 2004, p. 17, (retrieved 26 May 2015), http://www.ibanet.org/ENews_Archive/IBA_July_2008_ENews_ArbitrationMultipleLang.aspx.

reasonable doubts concerning the adjudicator's impartiality. If the parties make no objection in a certain period of time after the disclosure, it is assumed that the parties have agreed with the adjudicator. Finally, the green list consists of "a non-exhaustive enumeration of specific situations where no appearance of, and no actual, conflict of interest exists from the relevant objective point of view. Thus, the arbitrator has no duty to disclose situations falling within the Green List."⁸⁸

In the EU proposal regarding investment in the TTIP, mediators are obliged to inform the parties about any fact or matter that may jeopardize their credibility in the proceedings. Thus, mediators "shall communicate matters concerning actual or potential violations of ... [the] Code of Conduct in writing, to the Parties and, if applicable, to the disputing parties."⁸⁹ In other words, the duty to disclose is also present in Brussels'. Furthermore, Paris adds an interesting quarantine period, proscribing adjudicators from being appointed counsels of the parties or of any third party in a case with similar facts *vis-à-vis* the main case before and after five years of the claim's presentation.⁹⁰

5.2.4. Other duties

⁸⁸ International Bar Association (IBA). IBA Guidelines on Conflicts of Interest in International Arbitration, 22 May 2004, p. 18, (retrieved 26 May 2015), http://www.ibanet.org/ENews_Archive/IBA_July_2008_ENews_ArbitrationMultipleLang.aspx.

⁸⁹ Article 3.2 of the Code of Conduct.

⁹⁰ France. Towards a new way to settle disputes between states and investors. Foundations for a Free Information Infrastructure, pp. 15-16, (retrieved 5 February 2016), http://www.diplomatie.gouv.fr/fr/IMG/pdf/20150530_isds_papier_eng_vf_cle09912d.pdf.

Adjudicators have obligations other than those mentioned in the previous section. For example, they have to conduct the proceedings pursuant to the agreement, treaty or institutional convention. This confers predictability and legal certainty to the procedure. Another duty refers to both competence and diligence.⁹¹ Adjudicators have to indicate that they have the necessary skills to conduct the proceedings and sufficient time to settle the dispute on their agenda. A final relevant obligation refers to the offer of an accord. This may sound controversial because some arbitral institutions may prohibit *ex parte* communication. However, in relation to alternatives to arbitration, adjudicators are required to propose an arrangement - an activity which is basically their main task.

6. Conclusion

International arbitration has existed for centuries. However, the way it is settled has varied over time. Today, arbitration between investor and state has become quite common. Despite its widespread use, arbitration has encountered dissatisfaction among parties involved in it, notably developing states. High costs including arbitrators' fees and awards have undermined its credibility.

Alternatives to investment arbitration (for instance, mediation, conciliation and dispute board) have been implemented in a gradual manner. The big challenge is how the alternatives in question can be employed keeping in mind the necessary balance between their main characteristic, informality, and the fact that more of the public would be able to know what is happening in these procedures,

⁹¹ The duty of diligence stems from article 4.1 of the Code of Conduct. This article is included in the EU proposal with respect to investment in the TTIP.

and that adjudicators would be accountable to legitimate rules and be obliged to take into account minority interests. In other words: transparency and ethics pose serious challenges to alternatives to international investment arbitration. Therefore, the following conclusions apply only to these two issues, namely, transparency and ethics in alternatives to international investment arbitration.

Registration of a dispute should be mandatory. This simple measure merely testifies to the existence of a procedure, thus providing those interested in knowing about the case with the most pertinent details of the dispute, such as parties' names, dispute area, and the laws and treaties challenged. It would be enough to make the registration of disputes available on the institution's website.

Concerning public hearings, and bearing in mind the necessary equilibrium between the informality of the alternatives and the binomial transparency/legitimacy, it is suggested that public hearings should be optional. In other words, it is the parties who will decide about opening the hearing to other states or civil societies. It would seem that public hearings in a previous phase of arbitration or recourse to national courts might politicize the dispute, thus damaging the relationship of the parties and diminishing the chances of an agreement.

Regarding the publication of party submissions, although informality is predominant in the alternatives referred to, parties may have to draft written submissions which would be of interest to the public when published. In principle, one of the parties could not agree to publish its submissions without the other. Nonetheless, the investment treaty could either oblige parties to make their submissions public or give this task to the institution that provided logistical support in the proceedings.

As regards the publication of awards and other decisions rendered by the institution responsible for the conduct of the proceedings, they should be mandatory as they would provide transparency to them. The population of the state involved in the case, notably the minority interests, would be aware of what had occurred in the informal proceedings. It would seem to follow naturally that awards or agreements reached by the parties should be enforceable. If one of the parties does not fulfill its obligations, the other one could execute the award or the arrangement.

Regarding *amicus curiae*, his/her participation necessarily refers to two opposite aspects: on the one hand, *amicus curiae* may provide stakeholders with more technical information; on the other hand, they may make the process more costly and time-consuming. Moreover, WTO experience has demonstrated that the influence of *amicus* briefs on adjudicators has been negligible. Accordingly, the parties or the court should be able to rule on the adoption or not of *amicus* briefs.

Ethics are also relevant to alternatives to arbitration. As international investment dispute is a restricted area, experts in alternatives to arbitration are scarce. Furthermore, even when they are appointed, there may be situations in which their reputation or credibility may be at stake. For instance, if the law firm of an appointed conciliator provides one of the parties with legal advice two years before a dispute arises, an outsider may have doubts about the conciliator's impartiality. In an arbitral phase, this circumstance would normally disqualify the arbitrator.

Yet, we have to consider that informality is the main feature of alternatives to arbitration. Parties have to rely on a person who embodies the necessary credibility and expertise. In addition, there may also be situations in which the state is omnipresent in the economy, hampering even more the appointment of a

commonly neutral adjudicator. Parties should, therefore, be entitled to appoint any adjudicator they want to; the other measures mentioned in the previous paragraphs would offset the apparent doubts which could be raised by the fact that the parties have appointed one of their nationals or directors, for example.

Finally, one has to take into account that there have been six fora dealing with international investment disputes: ICSID, UNCITRAL, PCA, SCC, ICC and LCIA. Whilst the genesis of the first three is intergovernmental, the nature of the last three is private.⁹² Hence, it is unknown whether those institutions will try to develop more aggressive practices to attract more disputes. Notwithstanding the fact that these organizations are free to decide about their strategies, we hope they become increasingly transparent and legitimate.

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