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THE INDEPENDENCE AND IMPARTIALITY OF ARBITRATORS AS A KEY ELEMENT OF THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM: STATEMENT OF CHALLENGES

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Introduction. The proliferation of bilateral investment treaties in the late 20th century has led to a proportional increase in the number of disputes between investors and host states.
Materials and methods. Based on traditional methods of system analysis, deduction and induction, scientific analysis, but also system analysis of various international acts, decisions of investment arbitrations and national courts, the author forms the vectors of research of the complex and sometimes contradictory practice of implementing the procedural principles of independence and impartiality in the field of investment arbitration.
Discussion. According to the standard provisions of investment treaties, disputes between states and investors arising from them were subject to referral to ad hoc arbitration, created on the model of international commercial arbitration. However, the overwhelming majority of claims filed by investors concerned not violations of investment contracts, but rather challenges to general measures taken by states to regulate their economies. Traditionally, such measures were challenged in national courts, but the practice of considering them in investment arbitrations quickly revealed a number of problems directly related to the specifics of the formation of such arbitration tribunals. As a result of the emerging practice, investment arbitration found itself in a deep crisis of legitimacy for the reasons set out in the study. The ways out of the crisis necessitated identifying its causes and making attempts to resolve them.
The main results. The issues of independence and impartiality of arbitrators in resolving investment disputes are a legitimate concern for states that have allowed, in their international treaties, disputes between investors and the state to be considered not in national courts but in special ad hoc arbitration. This problem has become particularly acute in light of the obvious tendency of investors to refer disputes related to the adoption by states of general measures taken for public purposes and aimed at regulating the economy to arbitration. States have approached the issue of resolving the problems that have arisen in different ways. The nearest future will show the real impact of the adopted Code of Conduct for Arbitrators in Resolving International Investment Disputes on the perception of the parties to the dispute as to what level of impartiality the arbitrators should have and on the tendency to increase the disqualification of arbitrators on the grounds of their bias.

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1. Introduction.

The rapid development of international investment law in the form of a sharp increase in the number of bilateral international treaties concluded by states on the protection of foreign investments has become a significant feature of the development of international law at the end of the 20th century. However, the proliferation of such treaties has also entailed a proportional increase in the number of disputes between investors and investment-receiving states. In 2011, the number of proceedings initiated annually exceeded the threshold of 50 cases and has now stabilized at an average of approximately 50–60 disputes per year [1, p. 111].

Under standard investment treaty provisions, such disputes were to be referred to ad hoc arbitration, modelled on international commercial arbitration. It quickly became clear that the overwhelming majority of demands made by investors did not concern violations of investment contracts (as was initially assumed), but rather general measures taken by states to regulate their economies (tax measures, measures to protect public health and the environment, etc.). Traditionally, such measures were challenged in national courts, but the practice of considering them in investment arbitrations quickly revealed a number of problems directly related to the specifics of the formation of such arbitration tribunals. The appointment of arbitrators by the parties to the dispute began to be perceived as a synonym for their bias, which could not but cause an increase in mistrust of states in this method of resolving investment disputes, which entailed a large-scale crisis of the legitimacy of investment arbitration, the existence of which is widely recognized in the literature [about this: 2]. Investment arbitration itself has earned the assessment that it is one of the most controversial phenomena of modern international law [about this: 3].

All this could not but cause growing concern among states, which served as an impetus for the beginning of consideration of issues of reforming the mechanism for resolving investment disputes within the framework of Working Group III of UNSTIRAL (hereinafter referred to as WG III). States provided WG III with a broad mandate to carry out work on analyzing existing problems in this area and developing proposals for their solution.

2. The systemic nature of investment arbitration challenges.

In a note prepared in 2017, the WG III Secretariat noted that the key problems of the investment dispute settlement system are 1) inconsistency in arbitral decisions, 2) limited mechanisms to ensure the correctness of arbitral decisions, 3) lack of predictability, 4) appointment of arbitrators by parties (“party-appointment”), 5) the impact of party-appointment on the impartiality and independence of arbitrators, 6) lack of transparency, 7) increasing duration and costs of the procedure[1].

Among these six main problems, the problem of lack of independence and impartiality on the part of the arbitrators has gained a significant place[2]. However, all these problems, according to many states, are systemic in nature. All of them stem from the general nature of arbitration as a method of resolving investment

[1] Possible reform of investor-State dispute settlement (ISDS). Note by the Secretariat Working Group III (Investor-State Dispute Settlement Reform) United Nations Commission on International Trade Law. A/CN.9/WG.III/WP.142. 18.09.2017. Para. 20. URL: https://docs.un.org/en/A/CN.9/WG.III/WP.142. Date of access 15.04.2025.

[2] UNCITRAL. Possible Reform of Investor-state Dispute Settlement (ISDS), Thirty-sixth session (Vienna, 2 November 2018) UN Doc № A/CN.9/WG.III/WP.149.

disputes. Investment arbitration was largely built on the model of international commercial arbitration, and was endowed with such properties as the ad hoc nature of the arbitration tribunal being created; the appointment of arbitrators by the parties; the finality of decisions, i.e. the impossibility of appealing them; confidentiality of hearings; reimbursement of arbitration costs (including arbitrators' fees) at the expense of the parties[3, p. 81]. The doctrine also recognizes that most of the problems associated with the ISDS system are related to the influence of commercial arbitration[4, p. 4].

3. The role of independence and impartiality of arbitrators in shaping the legitimacy of investment arbitration.

In modern international justice, a special place is given to guarantees of independence and impartiality of arbitrators or judges, which is perceived as an important component of the right to a fair trial or arbitration, especially when it comes to challenging measures of a general nature adopted by the state for public purposes. With regard to investment arbitration, it can be said that the arbitrators are faced with not only the task of understanding the disputed legal relations and qualifying them through the interpretation and application of the norms of international, and in some cases, national law, but also of preparing an arbitration award that would reflect all the circumstances that were taken into account by the panel of arbitrators and formed the basis for the final conclusions on the merits of the dispute. In addition to the fact that the reasoning behind an arbitral award must be convincing and transparent, since it serves as the basis for enforcement of the award, arbitrators must carefully consider the practical and financial consequences for the disputing parties. For investors, a positive award may mean an award of compensation for the breach of contractual obligations found by the arbitral tribunal, while for host States, the consequences of having to pay compensation may entail problems for their budget[5, p. 142].

At the same time, the doctrine notes that «the legitimacy of the investment arbitration system depends on the perception of arbitrators not simply as private arbitrators serving the interests of the disputing parties, but as impartial guardians of the rule of law in international investment law»[5, p. 142]. For this reason, the issue of selection and appointment of arbitrators[about this: 6], ensuring their independence and impartiality is a key factor in the “crisis of legitimacy” of the existing Investor-State Dispute Settlement mechanism.

4. The specifics of independence and impartiality of arbitrators in the context of the reform of the ISDS system.

The ethical requirements for arbitrators and the process of administration of justice themselves have received considerable impetus in the discussions within WG III. Moreover, the growing attention to the ethical requirements for arbitrators has recently become part of the judicial strategy of the parties to the case.

For example, the existence of reasonable suspicions of bias on the part of one of the arbitrators of the panel may be qualified as a violation of the principle of independence and impartiality with respect to the entire composition of the arbitration tribunal. After all, it is not possible to single out the role of each of the arbitrators in the panel's decision, just as it is not advisable to maintain in force and enforce a decision based on the consensus of only supposedly unbiased members of the panel.

In this regard, the decision[3] of the ad hoc

[3] Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain, ICSID Case № ARB/13/36 Decision on annulment. URL:

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committee within the ICSID to set aside the entire arbitral award in the case of Eiser and Energia Solar Luxembourg v. Spain is of interest only on the grounds of a conflict of interest on the part of one of the three arbitrators. According to the committee, the facts presented by the respondent were such that any reasonable observer would find a manifest appearance of bias on the part of the arbitrator. In conclusion, the Committee noted that where one of the fundamental requirements of justice, namely the right to a hearing by an independent and impartial tribunal, is violated, the decision cannot stand and must be set aside in its entirety (paragraph 352).

The same approach has been upheld by national courts in cases in which arbitrators' awards have been set aside. In a 2017 case brought against Mexico by US motorcycle manufacturer Vento Motorcycles Inc., the plaintiff alleged that Mexico had discriminatorily applied a 30% import duty on its products, effectively destroying its business in Mexico, and sought damages of between US$658 million and US$2.748 billion. The tribunal unanimously rejected all of the plaintiff's claims. In proceedings to set aside the arbitral award, the Ontario National Court refused to set aside the award, despite concerns about bias in the arbitration. However, the Ontario Court of Appeal overturned the arbitral award, finding reasonable grounds for suspicion of bias in one of the arbitrators[4]. The fact is that Mexico's appointed arbitrator, Hugo Perescano, communicated with high-ranking Mexican officials during the arbitration, including Orlando Perez Garate, Mexico's lead attorney in the arbitration. The communications concerned, inter alia, an invitation for Perescano to apply for appointment to arbitration tribunals on various other trade agreements, which was later confirmed by his actual appointment as an arbitrator in another case[about this: 7]. The court's decision was also influenced by the fact that the arbitrator had not deemed it necessary to disclose his interactions with the competent Mexican officials to the opposing party and the other arbitrators in the case. Moreover, the Ontario Court of Appeal assessed the interaction between the principle of impartiality of the arbitrator, on the one hand, and the principles of efficiency and finality of the award, on the other. The latter, given the context of the problems of the ISDS system, are of great importance, since the procedures for considering investment disputes place a heavy burden on the parties to the proceedings. However, in overturning the award due to the bias of one of the arbitrators, the court emphasized that while «finality and efficiency are important goals», nevertheless «they should not be achieved at the expense of an impartial hearing»[5]. This case clearly demonstrates the systemic nature and interaction of the problems of the ISDS regime.

When a dispute is referred to arbitration, the question remains unresolved of how the independence and impartiality of the arbitrators appointed by the parties themselves will be ensured. The right of the parties to appoint arbitrators has thus become one of the sources of criticism of the ISDS system, which concerns various aspects: a) the lack of sufficient guarantees of the independence and impartiality of arbitrators acting in their personal capacity; b) the small number of persons appointed as ISDS

https://www.italaw.com/sites/default/files/case-documents/italaw11591.pdf. Date of access 15.04.2025.

[4] Court of Appeal for Ontario. Vento Motorcycles, Inc. v. Mexico, 2025 ONCA 82. // URL: https://www.canlii.org/en/on/onca/doc/2025/2025onca82/2025onca82.html?searchUrlHash=AAAAAQAQ0YDQsNGB0LrRgNGL0YLRjAAAAAAB&offset=0&highlightEdited=true. Date of access 15.04.2025.

[5] Court of Appeal for Ontario. Vento Motorcycles, Inc. v. Mexico, 2025 ONCA 82. Para. 52.

arbitrators more than once; c) the lack of transparency in the process of appointing arbitrators; d) the combination by some persons of the functions of counsel in one ISDS proceeding and of arbitrator in another, which may lead to conflicts of interest and/or so-called conflicts of contentious issues; e) the prevailing perception that arbitrators are less concerned with the public interest than judges, who are state officials; f) ethical issues arising from the development of third-party funding practices (possible conflicts of interest between arbitrators and funding providers, as well as confidentiality obligations of those parties) and procedural issues (the ability of the funding party to control or influence the arbitration process, as well as the allocation of costs, including arbitrators' fees)[6].

5. Requirements for arbitrators.

Requirements for arbitrators are defined in the appointment and selection procedure, but failure to comply with them may be grounds for challenging an arbitrator or be grounds for cancellation (annulment) of the award or recognition of the award as unenforceable.

Many procedural rules contain requirements that arbitrators appointed under them must possess. For example, Article 14(1) of the ICSID Convention requires that arbitrators appointed to the panels must be persons of high moral character and «recognized competence» in the fields of law (referred to later in the text as being of "particular importance"), trade, industry or finance. All of this taken together, within the meaning of the rule, must result in a reasonable expectation of their «independent judgment»[7]. Interestingly, impartiality, which is usually combined with a commitment to independence[8, p. 12], is not expressly provided for in either the English («Persons designated to serve on the Panels shall be persons … who may be relied upon to exercise independent judgment»), or the French ("Les personnes désignées pour figurer sur les listes doivent … offrir toute garantie d'indépendance dans l'exercice de leurs fonctions"), or Russian versions of the ICSID Convention. But the authentic Spanish version of the ICSID Convention states that arbitrators must be impartial ("Las personas designadas para figurar en las Listas deberán … inspirar plena confianza en su imparcialidad de juicio"). As a result, there is general agreement among scholars and parties to ICSID disputes that both requirements are mandatory. The same standard of independence and impartiality applies to all arbitrators, whether appointed by the parties or by the chairpersons of the arbitral institutions[8, p. 12-13; 9, p. 9].

Article 14(1) and Article 57 of the ICSID Convention do not require proof of actual dependence or bias to challenge arbitrators; it is sufficient to establish the appearance of dependence or bias.

Beyond these somewhat objective standards, **parties and their lawyers** engage in lengthy and careful selection of individuals who will serve as arbitrators in their particular dispute. Assessing whether an arbitrator is suitable for a given case typically involves considering, among other things, the candidate's previous experience in resolving the issues at issue, his or her approach to them, including his or her views expressed in public speeches and academic publications[10, p. 945].

This approach to judicial procedural conduct seems quite reasonable. But in some

[6] Possible reform of investor-State dispute settlement (ISDS). Note by the Secretariat Working Group III A/CN.9/WG.III/WP.142. 18.09.2017. Para. 44.

[7] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID). Concluded in Washington on 18.03.1965.

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cases it can lead to unexpected results, as happened, for example, with the famous arbitrator Professor Orrego Vicuno in the case of CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telcom Devas Mauritius Limited vs Republic of India (hereinafter referred to as the case of Divas v. India)[8]. The respondent challenged two of the arbitrators (Professors Orrego Vicuna and Marc Lalonde) on the grounds that they had both jointly "held strong and clearly articulated positions" regarding the interpretation of the essential security interests clause in two other cases (CMS Gas Transmission Company v. Argentine Republic (ICSID Case No. ARB/01/8); Sempra Energy International v. Argentina (ICSID Case No. ARB/02/16)), and that Professor Orrego Vicuna had reiterated this position in Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic (ICSID Case No. ARB/0113) and had also reflected it in a chapter of a 2011 book he authored[9]. In this case, the defendant's concern about the possible bias of these arbitrators was not related to the content of the arbitrators' previously stated opinions, but rather to the totality of the circumstances presented by them.

In his decision on the disqualification of the two arbitrators, the President of the ICJ, Judge Tomka, who was the person authorized to consider such matters, noted that all three awards cited by the respondent were later set aside in the annulment proceedings at ICSID precisely on the grounds of a clear breach of the applicable rules, including the clause in question. However, Professor Orrego Vicuna, judging by his publication, which was published after the arbitral awards were set aside, remained unconvinced. All this led Judge Tomka to conclude that the professor was completely biased, since he not only voted in accordance with a particular interpretation, but also later defended this approach (erroneously, since this is how he was assessed by the ICSID Annulment Committees). Judge Tomka assessed the balance between the right of an arbitrator to express his views on questions of law, including academic freedom, and the right of a party to the dispute to have its arguments heard and decided impartially by the arbitrators. He stated that "in this case, the right of the party to the dispute prevails," which ensures the principle of impartiality of arbitration as a basic component of the overall legitimacy of arbitration.

The requirements that must be taken into account to comply with the principle of independence and impartiality do not stagnate, they are constantly supplemented and developed. In this case, the only drawback is the lack of case law to form a more predictable legal effect from possible statements of bias.

The standards of ethical conduct expected of arbitrators are changing and evolving to reflect changing realities. However, in light of the structural imbalances in investment arbitration noted earlier, it can be argued that they should take into account the socio-economic needs of host States when making decisions. However, such an expectation has no legal basis in current investment treaties and arbitration rules, and the practice of arbitration tribunals is far from uniform in the application of mechanisms for disqualifying arbitrators.

The doctrine attempted to generalize the circumstances or types of behavior of the arbitrators themselves that could become grounds

[8] PCA. Case № 2013-09. CC/Devas (Mauritius) LTD., Devas EMployees Mauritius Private Limited, and Telcom Devas Mauritius Limited and The Republic of India. Decision on the Respondent's Challenge to the Hon. Marc Lalonde as Presiding Arbitrator and Prof. Francisco Orrego Vicuna as Co-Arbitrator. By The Appointing Authority: H.E. Judge Peter Tomka, President, International Court of Justice. September 30, 2013.
[9] Ibid. Para. 53.

for challenging the arbitrators[about this: 11]. Such circumstances may include a) so-called «double hatting» (i.e. a situation where an arbitrator simultaneously or successively acts as a lawyer in other cases) [about this: 12; 13]; (b) conflict of opinions, i.e. a challenge based on positions previously taken by the arbitrator on a specific issue that he has repeatedly expressed (e.g. opinions expressed in academic publications and other sources); and (c) the phenomenon of repeated appointment of the same arbitrator by exactly the same party (e.g. the same country)[10].

Currently, WG III has already adopted the Code of Conduct for Arbitrators in International Investment Disputes. Its final text was published in early 2024 following its endorsement by the UNGA in December 2023. Together with the Code of Conduct for Arbitrators, UNCITRAL published an official Commentary thereto, which serves as a guide to the Code, explaining the content of the articles, discussing their practical implications and providing examples. The Code is assessed as one of the most promising reform proposals currently under discussion in WG III[14, p. 176]. WG III delegates generally agreed on the importance of such a code, particularly as a measure to enhance confidence in the independence and impartiality of ISDS judges.

The Code, inter alia, sets out comprehensive and ongoing disclosure obligations that apply throughout the proceedings. Article 11 imposes a duty on arbitrators to disclose any circumstances that might give rise to justifiable doubts as to their independence or impartiality. Also subject to disclosure are any financial, business, professional or close personal relationships they have had in the past five years with any party (legal representative) to the dispute, with other arbitrators and expert witnesses in the proceedings, with any person or entity identified by a party to the dispute as being related to it or having a direct or indirect interest in the outcome of the proceedings, including third party funding. Disclosure shall include information about any financial or personal interest in the outcome of the proceedings, as well as information about any investment proceedings or related proceedings in which the candidate or arbitrator is currently involved or has been involved in the past five years, or has been appointed by a party to the present proceedings as an arbitrator, legal representative or expert witness, as well as a forthcoming appointment as a legal representative or expert witness in any other investment dispute or other dispute.

Thus, an arbitrator is obliged to always disclose new or newly discovered circumstances and information as soon as he becomes aware of such circumstances or information[15, p. 144], but the fact of non-disclosure of the information in question does not in itself necessarily indicate a lack of independence or impartiality.

With regard to the restrictions on information disclosure over the past five years, it must be said that the developers of the Code clearly took into account the latest practice in these matters. For example, in the case of Alpha Projektholding GmbH v. Ukraine in 2010, two arbitrators, deciding on the challenge of the third arbitrator, concluded that he "was not o bliged to disclose information that he studied at the same law faculty with the plaintiff's lawyer 30 years earlier (in 1987-

[10] Universal Compression International Holdings v Venezuela, Decision on the Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Santiago Tawil (20 May 2011). The defendant's arbitrator was disqualified because she had been appointed by Venezuela to hear three previous cases.

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1990)[11]. Christopher Schreuer also concludes that "not every past contact, professional or personal, with a party can disqualify that person as an arbitrator" [about this: 16].

Article 3(1) of the Code, "Independence and Impartiality," provides that an arbitrator shall not: (a) be influenced by any allegiance to any party to the dispute or any other person or entity; (b) receive instructions from any organization, government or individual on any matter under consideration in the proceedings; (c) be influenced by any past, present or prospective financial, business, professional or personal relationship; (d) use his or her position to advance any financial or personal interest that relates to a party to the dispute or to the outcome of the proceedings; (e) assume any function or accept any benefit that would in any way interfere with his or her duties; or (f) take any action that creates the appearance of a lack of independence or impartiality.

The innovation in the Code of Conduct for Arbitrators is to extend the arbitrators' obligations of independence, impartiality and disclosure to other persons or entities to whom the arbitrators may have allegiance, and in particular to third-party funders. The Commentary to the Code of Conduct for Arbitrators specifies that this phrase covers, inter alia: (i) parties not party to the dispute that have been granted leave to make written submissions in the proceedings; (ii) a State not party to the dispute or a regional economic integration organization that is a party to the host investment treaty; (iii) another member of the arbitral tribunal or of an ICSID ad hoc committee; (iv) third-party funders; (v) expert witnesses; and (vi) legal representatives of the parties to the dispute.

[11] Alpha Projektholding GmbH v Ukraine, ICSID Case No ARB/07/16, «Decision on Proposal for Disqualification of an Arbitrator», para. 83 (19 March 2010).

One of the important tasks facing the developers of the Code was to limit the practice of double-hatting, when an arbitrator simultaneously acts as a representative or expert in other cases [15, p. 143]. This was reflected in Article 4 of the Code, "Restriction on the Simultaneous Performance of Several Functions," which prohibits combining the functions of an arbitrator and another participant in the process (representative, witness, expert) in disputes between specific parties to an investment dispute or between parties related to them. In each specific case, time limits for the prohibition on combining are established.

6. Conclusions.

The issues of independence and impartiality of arbitrators in resolving investment disputes are a matter of justified concern by States that have allowed, in their international treaties, the consideration of disputes between investors and the State not in national courts but in special ad hoc arbitration. This issue has become particularly acute in light of the obvious tendency of investors to refer disputes related to the adoption by States of general measures taken for public purposes and aimed at regulating the economy to arbitration.

The current practice of appointing arbitrators to resolve investment disputes by the parties to the dispute, borrowed from international commercial arbitration, raises doubts among States regarding the provision of guarantees of independence and impartiality, which was recognized by WG III as one of the systemic challenges of the existing arbitration mechanism for resolving investment disputes.

It is significant that the opinions of States regarding strengthening guarantees of independence and impartiality of arbitrators in resolving investment disputes differ most radically. A number of States, primarily the countries of the European Union, consider it

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necessary to solve this problem only by completely abandoning the practice of appointing arbitrators by the parties to the dispute and moving to the consideration of investment disputes by judges of a permanent international investment court appointed by States for a long term. Other States consider it possible to solve these issues by developing stricter rules governing cases of possible conflicts of interest and disclosure of information by appointed arbitrators. In this direction, as a compromise option, the Code of Conduct for Arbitrators in Resolving International Investment Disputes, which is a Soft Law instrument, was developed within the Working Group and adopted in 2024. It is assumed that judges of the international investment court will have their own rules that will differ from the provisions of this Code. The near future will show the real impact of the adopted Code on the perception by the parties to the dispute of the required level of impartiality of arbitrators and on the noticeable trend towards an increase in both attempts to disqualify arbitrators on the grounds of their bias and an increase in the number of such disqualifications.

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