Neva Cirkveni
Oblin Rechstanwalte, Vienna
neva.cirkveni@oblin.at

Today, investor–state dispute settlement (ISDS) through arbitration remains in question. Criticism is coming from all sides and is mostly focused on those who decide investment dispute cases. Investment arbitrators have been called biased towards multinational companies and said to have no regard for conflicts of interest.[1] A blog post by EU Trade Commissioner Malmström stating, 'I want the rule of law, not the rule of lawyers',[2] illustrates popular distrust of investment arbitrators. Although the statement might be exaggerated and slightly biased, it does raise the question of whether the current system of international investment arbitration is adequate and whether it follows the fundamental principles of the rule of law, especially the independent administration of justice.

Independent administration of justice

The independent administration of justice requires that the adjudicators exercise their adjudicative function in an independent and impartial manner. Simply put, independence means that adjudicators make their decisions free from any external pressures or manipulations.[3] This independence is further divided into personal and institutional freedom. Personal freedom refers directly to the adjudicator and is safeguarded by rules on qualifications, conflict of interest and disclosure. Institutional freedom ensures that the members of particular adjudicative institutions are protected and is protected by the autonomy of the institution itself. On the other hand, impartiality refers to the absence of bias towards a specific party or legal question in a given case. Concerning investor–state dispute settlement, the independence and impartiality of arbitrators have been questioned. Concerns about possible conflicts of interests of arbitrators pose a challenge to the autonomy of decision makers and thereby to the rule of law and the independent administration of justice.[4]

When it comes to international law, members of the field often fill a variety of positions: some act not only as counsel, but also as arbitrators, corporate officials and academics, albeit in different proceedings. Investment arbitration is an area where this is often discussed, especially regarding whether the independence of arbitrators is put into question in light of their interests in other professional roles.

Some argue that the views of arbitrators that arise from their work in commercial practice, where they make their living, have an impact on their decisions regarding arbitral awards. Although the topic of arbitrators' conflicts of interest is heavily discussed, a less discussed topic flowing out of that one is whether the views of arbitrators on specific points of law, either expressed during a case or in published work, should be challengeable. Or whether this is only part of their academic freedom and should not be regarded as an obstacle to arbitrators in fulfilling their adjudicative roles without bias.

This article will first put forward the legal framework regarding challenging arbitrators based on their academic writing and will then look at the two most recent challenges based on the arbitrator's familiarity with the subject-matter of the case. Finally, the article aims to assess whether academic writing really should be part of arbitrator's academic freedom, or if there is enough basis in academic writing to serve as means for disqualification.

Legal framework

ICSID CONVENTION

The International Centre for Settlement of Investment Disputes (ICSID) Convention (the 'ICSID Convention'), Regulations and Rules contain provisions on the independence and impartiality of arbitrators, as well as their disclosure obligations and the right of parties to challenge and remove arbitrators.[5] Article 14(1) of the ICSID Convention sets out that: '[p]ersons designated to serve on the Panels shall be persons of high moral character and recognised competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.' Unlike the Spanish version, the English and French versions do not refer to impartiality. However, it has been accepted that Article 14(1) needs to be understood as incorporating the requirement of impartiality in all languages.[6]

Related to ethical standards is the duty of the arbitrator to ensure that the exercise of their adjudicative function is not tainted by bias. The proper exercise of the arbitrator's adjudicative function can be carried out through disclosure of any information relevant. The ICSID Convention through Rule 6(2) provides that '[b]efore or at the first session of the Tribunal, each arbitrator shall sign a declaration… attached is a statement of (a) [his/her] past and present

professional, business and other relationships (if any) with the parties and (b) any other circumstance that might cause [his/her] reliability for independent judgment to be questioned by a party'. The difficult question here is which particular circumstances would give rise to justifiable doubts as to an arbitrator's independence and impartiality.[7] The disclosure requirement is meant for avoiding bias, not for eliminating biased arbitrators. However, each disputing party may challenge an arbitrator through Article 57 of the ICSID Convention, which states: 'a party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14'.[8] The removal of an arbitrator is subject to a 'manifest lack' of qualities listed in Article 14(1) of the ICSID Convention. The main issue here is what constitutes a 'manifest lack.' ICSID case law has not provided a consistent approach to determine this threshold, with approaches varying from 'strict proof'[9] to 'reasonable doubts',[10] as well as mixed approaches.[11] The 'strict proof' approach requires an actual lack of independence, which has to be 'manifest' or 'highly probable' and not just 'possible'.[12] On the other hand, the 'reasonable doubts' approach requires that the circumstances must be actually established and must negate impartiality, or place it in clear doubt.[13]

The reasons for disqualification under the ICSID Convention have varied, but the main categories include:

> the switching of roles between arbitrators, counsels and experts in different cases;
>
> the repeat appointment of arbitrators in similar cases;
>
> previous contact of an arbitrator with a party or party's counsel; and
>
> familiarity with the subject-matter of the proceedings.[14]

The latter deals with issues and legal questions similar to those in a given case. However, the focus of this article is on recent developments regarding arbitrator's academic writing.

(UNCITRAL)ARBITRATION RULES 1976

Under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules 1976, any arbitrator may be challenged. If the challenged arbitrator was appointed by an appointing authority, then that authority rules on the challenge. If they were not, then the agreed upon authority shall rule on the

challenge. Article 10(1) governs challenges to arbitrators and states that: 'Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.' The standard applied here evaluates the objective reasonableness of the challenging party's concern.[15]

Challenge in Urbaser SA v Argentina

An arbitrator's academic writing or previous publicly-made statements that demonstrate bias can be challengeable under the category of familiarity with the subject-matter of the case. On 12 August 12 2010, an arbitrator challenge decision was handed down in the ICSID case *Urbaser SA v Argentina*, in which a challenge was denied to the appointment of legal academic Professor Campbell McLachlan, based on general views of law he had expressed in his academic writings.[16] The claimants challenged McLachlan's appointment by Argentina because he had previously made statements on points of law that would be central in the *Urbaser* arbitration and for that reason, the claimants argued that McLachlan 'has already prejudged an essential element of the conflict that is the object of this arbitration.'[17] The claimants' position was that an arbitrator appointed to an ICSID tribunal must fulfill two requirements of impartiality and independence. In the claimants' view, the first requirement has a strong subjective element, where partiality exists not only concerning one of the parties, but also when the arbitrator shows a preference towards the position adopted by one of the litigants, or has in some other way prejudged the matter of the case.[18] Furthermore, the claimants argued that McLachlan lacked an appearance of trust and that he had shown prejudice towards fundamental elements of the arbitration at hand and had not shown that he might have changed his opinion on these elements in the meantime. The respondent's position was that opinions previously published by an arbitrator do not raise an issue of lack of impartiality or independence when issued outside the framework of the ongoing arbitration.[19] A similar argument to that of the respondent was put forward in the case of *Giovanni Alemanni and others v Argentine Republic*, where the objection to the appointment of an arbitrator based on an opinion given by him in another case was rejected. [20] However, unlike in the case of *Urbaser SA v Argentina*, that case did not revolve around statements made in academic writings.

The tribunal found that according to Articles 57 and 14(1) of the ICSID Convention, the crux of the analysis was whether McLachlan's opinion constituted a manifest lack of qualities contained within Article 14(1), which are required to

provide independent and impartial judgment. The claimants referred to the IBA Rules of Ethics for International Arbitrators 1987, particularly Rule 3.1, which states that 'The criteria for assessing questions relating to bias are impartiality and independence. Partiality arises when an arbitrator favours one of the parties, or where he is prejudiced in relation to the subject-matter of the dispute.' They also referred to Rule 3.2, which states that: 'Facts which might lead a reasonable person, not knowing the arbitrator's true state of mind, to consider that he is dependent on a party create an appearance of bias. The same is true if an arbitrator has a material interest in the outcome of the dispute, or if he has already taken a position in relation to it.'[21] The tribunal held these points to be too widely construed, stating that 'The provisions are even more unclear or totally ambiguous when the issue to be considered is, like in the instant case, the interpretation of legal concepts in isolation from the facts and circumstances of a particular case.'[22]

It is important to mention that McLachlan offered a statement to the tribunal in which he stated that it is essential to distinguish the role of the legal scholar from that of an arbitrator, further indicating that 'When writing a book or article, the legal scholar must express views on numerous general issues of law, based on the legal authorities and other material then available to him', while '[t]he task of the arbitrator is completely different. It is to judge the case before him fairly as between the parties and according to the applicable law. This can only be done in the light of specific evidence, the specific applicable law and the submission of counsel for both parties.' He then further assured the parties that he would have no prejudgments in the case at hand.[23]

The two members of the tribunal that were seized with the challenge submitted by the claimants were of the view that a mere showing of an opinion is not sufficient to sustain a challenge for lack of independence or impartiality of an arbitrator. For such a challenge to succeed, they held that there must be a showing that such opinion is supported by factors related to and supporting a party to the arbitration, by a direct or indirect interest of the arbitrator in the outcome of the dispute, or by a relationship with any other individual involved.[24] Furthermore, the tribunal held that if any academic opinion previously expressed is to be considered as an element of prejudgment in a particular case, just because it might become relevant, the consequence would be that no potential arbitrator would ever express their views on any such matter, which would restrict both their academic freedom and the development of international investment law.

Challenge in CC/Devas and others v India

In the case of *CC/Devas and others v India*, a challenge was brought by the respondent against the Presiding Arbitrator – the Honorable Marc Lalonde – and Professor Francisco Orrego Vicuña, appointed by the claimants, on the grounds that the arbitrators served together on two tribunals that took a position on a legal issue (the 'essential security interests' clause) expected to arise in the present proceedings. The respondent found further grounds for challenging Vicuña's appointment in the form of a third tribunal he sat on, which also took up the same issue, as well as in an article he had written, in which he discussed his views on the issue.

The respondent challenged the appointments of the Lalonde and Vicuña on the basis of a 'lack of the requisite impartiality under Article 10(1) of the 1976 UNCITRAL Arbitration Rules due to an "issue conflict".'[25] By 'issue conflict', the respondent referred to a pre-existing view held by the arbitrators regarding an issue in dispute between the parties. The respondent claimed that the articulated positions taken by these two arbitrators gave rise to justifiable doubts regarding their impartiality. In respect to its challenge to Vicuña, the respondent further argued that his 'strong public declarations on the subject had included at least one clear writing in addition to the three decisions in the aforementioned cases, [and] a chapter in a book published in 2011 in which he strongly defended his position'.[26] In the claimant's view, 'the mere fact that an arbitrator has decided a particular legal issue in the past case involving a different treaty and different parties, is simply not a proper basis for challenging that arbitrator's impartiality.'[27] The claimants further pointed to the *IBA Guidelines on Conflicts of Interest in International Arbitration*, which expressly provide in Rule 4.1 that no conflict or bias is created when an arbitrator has previously published a general opinion concerning an issue arising in the arbitration.

The then president of the International Court of Justice, Tomka J, who decided the challenge as the appointed authority, rejected the challenge against Lalonde, stating that merely expressing prior views on an issue in an arbitration did not result in a lack of impartiality or independence.[28] The reason for this being that Lalonde had not taken a position on the legal concept in issue, but had merely expressed his views. However, he disagreed with the claimants and upheld the challenge against Vicuña, stating:

'In my view, being confronted with the same legal concept in this case arising from the same language on which he has already pronounced on the four aforementioned occasions could raise doubts for an objective observer as to [the arbitrator's] ability to approach the question with an open mind. The latter article, in particular, suggests that, despite having reviewed the analyses of the three different annulment committees, his view remained unchanged. Would a reasonable observer believe that the Respondent has a chance to convince him to change his mind on the same legal concept?'[29]

Tomka J's decision shows that an arbitrator may run the risk of being disqualified on the basis of taking a strong position on a legal issue. In principle, there is no reason why the positions expressed by arbitrators in their academic writing should be exempt from challenges based on 'issue conflict'. There remains a concern, however, that exposing opinions on legal issues to challenges might have an adverse effect on academic writing.

Conclusion

As there is no prominent arbitral forum or national jurisdiction that allows arbitrators to be successfully challenged for prior statements made on general points of law[30], especially in their academic writing, the fact that the claimants' challenge was denied in the *Urbaser* case is not remarkable. However, it is important to note the problems that arise with the current approach taken by arbitral tribunals. McLachlan was not challenged by the claimants on general points of law. Rather, he was challenged on two specific statements he had made in his academic publications, which had a direct impact on the case at hand, as the specific bilateral investment treaty involved in the *Urbaser* arbitration was also the subject of his academic writing.

Challenges based on generalised statements of law would create a particular difficulty for the arbitrator challenge system. The justification for allowing parties to select their arbitrator is to ensure that at least one arbitrator on the tribunal understands their perspective. However, although unintended and not allowed, the parties can also select arbitrators predisposed to rule in their favour. As Professor Tony Cole says: 'the entire point of party selection of arbitrators would be undermined if the parties could not consider an arbitrator's substantive views on principles of law relevant to the arbitration.'[31] The logical reasoning here would be that if it is central for parties to consider the arbitrator's substantive views on points

of law when selecting them for arbitration, wouldn't it then be reasonable also to take these same substantive views into account when the parties wish to challenge arbitrators?

There are significant complications involved in an attempt to develop a standard for allowing challenges on previously expressed points of view on legal questions. The difficulty involved in finding a proper standard to be followed should not be a justification for merely not finding one at all. The parties should be afforded the right to arbitrate in front of an unbiased tribunal, as that is what they initially agreed to do. The problem highlighted by the *Urbaser* case was to an extent addressed by the decision in the *CC Devas* case. Tomka J's view seems to be that the key question is whether a reasonable observer would be able to convince the arbitrator to change their stance on a legal issue on which they have repeatedly voiced a consistent opinion. This seems to give importance to the number of times, or the strength with which, the said arbitrator has stood by their position and whether or not the position was expressed in only one forum, or multiple different forums. Thus, the challenging party must show that the arbitrator has expressed certain views on a particular legal issue in a consistent and unchanged manner, but also that the arbitrator is not willing to change their mind on that matter. This is a high threshold for the challenging party to meet, but it is an existing threshold, nonetheless. Could this potentially be the standard that will be followed by arbitral tribunals in the future?

It has been established in this article that there is no reason to exempt arbitrators' academic writing from challenge based on 'issue conflict'. However, challenging arbitrators in this way raises concern that there will be a detrimental effect on the quality of academic writing. This is why some argue that if considered good law, the decision in the *CC Devas* case will disincentivise already established academics in the field to make meaningful contributions to investment law. Others argue that on a systemic level, this would compromise the development of investment law and give parties the ability to steer that development in a certain direction by only appointing individuals who have expressed certain views on investment law in academic writing rather than others.[32]

Arbitrators who are also academics should not be discouraged from continuing to be involved in academia and publishing articles simply because it could cost them future appointments. The development of law should be more important than the simplicity found in making a profit. The legal career is at its core a public service,

and there is a certain standard attached to it. If that point of view is too utopian, the fear of compromising the development of investment law may be a little excessive too. At worst, the academia of investment law would become for people who perceive themselves as critical observes solely and who have no intention to become future actors in practice. Independent observers often make the most important contributions because of the distance they have to practice and the ability to observe the practice from a perspective detached from material expectations.[33]

Every individual conveys ideas and opinions based on their moral, cultural, educational and professional experience. When it comes to rendering legal judgments, the ability to consider the merits of each case without relying on outside factors with no relation to such particular merits is what is required. That is what is meant by the notions of impartiality and independence. To challenge arbitrators on their expressed views on certain legal questions would not be a challenge to their academic freedom, but merely a way to achieve a fair and unbiased procedure. If the parties take into account views of arbitrators on certain points of law when selecting them, isn't it only fair that they may remove those same arbitrators based on the same process?

Notes

[1]Gus Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration' (2012) 50 (1) Osgoode Hall Law Journal Osgoode CLPE Research Paper no 41/2012; see also Joost Pauwelyn, 'The Rule of Law without the Rule of Lawyer?' (2015) 109 AJIL 761, 763.

[2]Cecilia Malmstro¨m, 'Blog Post', see https://ec.europa.eu/commission/commissioners/2014-2019/malmstrom/blog/investments-ttip-and-beyond-towards-international-investment-court_en

[3]Jean Salmon (dir) *Dictionnaire de droit international public* (Bruylant 2001) 570.

[4]S Schacherer, *Independence and Impartiality of Arbitrators, A Rule of Law Analysis* (2018 4–5.

[5]S Schacherer, *Independence and Impartiality of Arbitrators, A Rule of Law Analysis* (2018) 7.

[6]All language versions are equally authentic, ICSID Arbitration Rules Art 56(1).

[7]Schreuer et al (n 42) 'Article 40' paras 19–20.

[8]ICSID Convention art 57; see also ICSID Arbitration Rules rule 9.

[9]*Amco Asia Corporation and others v Republic of Indonesia* [1982] ARB/81/1 (ICSID): 'Decision on Proposal to Disqualify an Arbitrator' (not public). See Cleis (n 33) 32.

[10]*Compan~ia de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic* [2001] ARB/97/3 (ICSID): 'Annulment Proceeding'.

[11]Cleis (n 33) 32–49.

[12]Schreuer et al (n 42) 'Article 57' para 22.

[13]*Compan~ia de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic* [2001] ARB/97/3 (ICSID): Annulment Proceeding.

[14]S Schacherer, *Independence and Impartiality of Arbitrators, A Rule of Law Analysis* (2018) 10–15.

[15]David D Caron and Lee M Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (Oxford University Press 2013) 210.

[16]T Cole, 'Arbitrator appointments in investment arbitration: Why expressed views on points of law should be challengeable' [2010] Investment Treaty News.

[17]*Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic* ARB/07/26 (ICSID) para 23: 'Decision on Claimant's Proposal to Disqualify Professor Campbell McLachlan, Arbitrator'.

[18]*Ibid* para 26.

[19]*Ibid* para 27.

[20]*Giovanni Alemanni and others v Argentine Republic* ARB/07/8 (ICSID).

[21]*Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic* ARB/07/26 (ICSID) para 42: Decision on Claimant's Proposal to Disqualify Professor Campbell McLachlan, Arbitrator.

[22]*Ibid*.

[23]*Ibid* para 31.

[24]*Ibid* para 45.

[25]*CC/Devas (Mauritius) Ltd, Devas Employees Mauritius Private Ltd and Telcom Devas Mauritius Ltd v The Republic of India* 2013-09 (PCA).

[26]*Ibid*: Respondent referred the article: Francisco Orrego Vicuña, 'Softening Necessity' in **Mahnoush H Arsanjani**, **Jacob Cogan**, **Robert Sloane**and **Siegfried Wiessner**(eds),*Looking To The Future: Essays On International Law In Honor Of W. Michael Reisman*(Leiden 2011) 741–751.

[27]*CC/Devas (Mauritius) Ltd, Devas Employees Mauritius Private Ltd and Telcom Devas Mauritius Ltd v The Republic of India* 2013-09 (PCA).

[28]S W Schill, 'Editorial: The new Journal of World Investment and Trade; Arbitrator independence and academic freedom; In this issue' [2014] The Journal of World Investment & Trade 1.

[29]*CC/Devas (Mauritius) Ltd, Devas Employees Mauritius Private Ltd and Telcom Devas Mauritius Ltd v The Republic of India* 2013-09 (PCA).

[30]T Cole, 'Arbitrator appointments in investment arbitration: Why expressed views on points of law should be challengeable' [2010] Investment Treaty News.

[31]*Ibid*.

[32]S W Schill, 'Editorial: The new Journal of World Investment and Trade; Arbitrator independence and academic freedom; In this issue' [2014] The Journal of World Investment & Trade 3.

[33]*Ibid*.