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Independence and Impartiality in International Arbitration: a Focus on the Investor-State Dispute Resolution

Prof. Ferdinando Emanuele

SUPERVISOR

Prof.ssa Chiara Capalti

CO-SUPERVISOR

Carmela Pia Liporace 167353

CANDIDATE

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Introduction

Background

International arbitration has firmly established itself as the predominant and most effective mechanism for resolving cross-border commercial and investment disputes. This process is recognised globally as a preferred form of Alternative Dispute Resolution (ADR), providing a neutral and efficient forum conducive to navigating the complexities inherent in international disputes.[1] The increasing prominence of arbitration is evidenced by its widespread adoption among both businesses and states, underscoring its pivotal role in facilitating international trade and investment activities. Arbitration is lauded for several essential qualities, including its commitment to neutrality through the provision of an unbiased platform that stands apart from national court systems. Furthermore, arbitration showcases procedural flexibility, enabling it to adapt to the diverse needs and circumstances of varied cases. One of the main advantages of arbitration is the global enforceability of its rulings, which enhances its significance and broad influence across various jurisdictions.[2]

The legitimacy and sustained effectiveness of arbitration are profoundly reliant on the steadfast integrity of the arbitrators. As emphasised by legal scholars – such as Figueroa Valdes and Juan Eduardo – the arbitral process fundamentally hinges on a foundational element of trust.[3] Therefore, the stringent adherence of arbitrators to established professional ethical standards is paramount in preserving the credibility and viability of arbitration as a trusted mechanism for alternative dispute resolution.[4] The obligations of arbitrators to tackle complex and high-stakes disputes are contingent upon their unwavering impartiality and independence; these twin principles transcend mere ethical guidelines, representing the foundational pillars of arbitral justice. They are recognised and codified

[1] Namudi Mudalige, 'Scaling Impartiality and Independence of Arbitrators in Commercial Arbitration: A Comparative Legal Perspective' (2022) 2(1) KDU LJ 16.
[2] Mohamed Bedjaoui, '*The Arbitrator: One Man-Three Roles*' (1988) 7 J Intl Arb 13.
[3] Juan Eduardo Figueroa Valdes, '*La Etica en el Arbitraje Internacional'* (XXXIX Conference, Inter American Bar Association, New Orleans, June 2003)
[4] Ibid.

extensively in major international conventions, national laws, and institutional regulations that govern arbitration proceedings.[5]

Despite their critical significance, the principles of arbitrator independence and impartiality are currently experiencing an unprecedented degree of strain. This tension is particularly pronounced within the increasingly scrutinised and intricate domain of Investor-State Dispute Settlement (ISDS), where a confluence of geopolitical, economic, and legal factors poses challenges to the traditional notions of neutrality and objectivity that arbitrators are expected to uphold.[6] Over the past two decades, the ISDS framework has expanded significantly, primarily driven by the proliferation of bilateral investment treaties (BITs). However, the system is now characterised by a persistent crisis of legitimacy.[7]

This divergence between established legal standards and observed practical deficiencies necessitates an in-depth scholarly examination of the conceptual foundations, safeguarding measures, and potential threats to the independence and impartiality of arbitrators within the contemporary ISDS frameworks. The core focus of this thesis is to critically assess whether current international arbitration instruments and oversight mechanisms are sufficiently designed to guarantee the neutrality and impartiality of arbitrators, thereby maintaining the legitimacy, credibility, and functional efficacy of the ISDS system in the face of growing scepticism and increased external scrutiny.

Research Questions

[5] Christopher Koch, 'Standards and Procedures for Disqualifying Arbitrators' (2003) 20(4) Journal of International Arbitration 325

[6] Stefanie Schacherer, 'Independence and Impartiality of Arbitrators: A Rule of Law Analysis' (Seminar Paper, January 2018)

[7] Sophie Nappert, 'Escaping from Freedom? The Dilemma of an Improved ISDS Mechanism' (2016) 1(1) European Investment Law and Arbitration Review Online 171.

In light of the foregoing discourse, this study seeks to elucidate the intricate and multifaceted issues impacting the independence and impartiality of arbitrators within the context of international arbitration. The principal inquiry guiding this research is whether the prevailing international arbitration frameworks – encompassing a comprehensive set of rules, standards, and accountability mechanisms – are sufficiently robust to ensure the independence and impartiality of arbitrators, or if there exists a necessity for comprehensive reforms to rectify potential deficiencies within these established structures. Focusing specifically on the domain of ISDS, this investigation scrutinises the effectiveness of a variety of institutional regulations, challenge procedures, disclosure obligations, and associated protocols in addressing and mitigating potential biases and conflicts of interest that may compromise arbitral neutrality.

Structure

To address the central research question, this thesis adopts a doctrinal–comparative approach and proceeds as follows. The initial Chapter will establish the doctrinal foundations of arbitrator independence. This Chapter engages in an in-depth deconstruction and critical analysis of the foundational legal principles governing arbitration, leveraging international legal frameworks alongside the regulatory norms established by leading institutions in this field. In pursuit of clarity, this exploration will differentiate between objective indicators of dependence and subjective indicators of partiality, delving into their conceptual interconnections and broader implications for the integrity of the ISDS mechanism.

A central facet of this discourse will be the assessment of the duty of disclosure, identified as a pivotal practical mechanism for preserving these foundational principles of independence and impartiality. Through a rigorous examination of prevailing norms, the chapter will highlight the vital role that soft law instruments play in promoting and reinforcing ethical standards within arbitration practices. This multifaceted analysis seeks to highlight the ways in which these frameworks can fortify the integrity

and effectiveness of arbitral proceedings, thereby contributing to a more trustworthy dispute resolution system.

Building upon the foundational legal principles previously established, Chapter Two endeavours to examine the ongoing "legitimacy crisis" that currently confronts the ISDS system. This Chapter aims to delineate the complex, multifaceted dimensions of this crisis by analysing the various critiques associated with systemic asymmetries, inconsistencies, and significant transparency deficits that pervade the framework. Central to this discussion is a comprehensive analysis of the structural challenges present within the ISDS system, which collectively pose substantial threats to the independence and impartiality of arbitration panels. By demonstrating how these structural features engender both tangible biases, which can be empirically observed, and perceptual biases, which shape public perceptions and trust, the Chapter seeks to substantiate the urgent necessity for wide-ranging reforms. This reform imperative is not merely instrumental in restoring lost legitimacy but also lays the groundwork for the arguments presented in the last Chapter of this scholarly work.

Accordingly, in direct response to the critical need for reform, Chapter Three will thoroughly evaluate ongoing and proposed adaptations aimed at enhancing the independence and impartiality of arbitrators within the international arbitration sphere. The discussion will be organised into three distinct yet interconnected sections.

The first section will scrutinise national-level legislative and regulatory reforms implemented in selected jurisdictions. Notably, it will investigate Italy's Riforma Cartabia, the recent amendments to the United Kingdom's Arbitration Act, and Australia's systematic initiatives to clarify standards pertaining to arbitrator bias. This exploration will serve to illustrate how domestic legal frameworks can invigorate and reinforce prevailing international norms regarding arbitration, ultimately fostering a more standardised approach to integrity across jurisdictions.

The second section will expand the scope of the research beyond national reforms to the international landscape, analysing significant structural reforms proposed, or underway, for ISDS. This encompasses efforts to enhance the transparency of arbitral processes, calling for a reconsideration of the mechanisms through which stakeholders engage with ISDS, as well as the articulation of clearer standards governing arbitrator conduct, thus fostering an environment of accountability.

The final section will explore the transformative potential that emerging technologies present in addressing entrenched challenges within the ISDS framework. Innovations such as blockchain for enhanced transparency, artificial intelligence for the early detection of conflicts, and virtual hearing platforms are scrutinised for their capacity to promote and sustain arbitral neutrality while fostering public confidence in the integrity of the system. This technological engagement will be framed within a doctrinal and comparative approach, invoking a broad array of international conventions, institutional rules, national statutes, soft-law instruments, and reform proposals.

Ultimately, the overarching aim of this thesis is to deliver a comprehensive and integrated scholarly assessment of the critical issues currently confronting the legitimacy and resilience of international arbitration. By analysing these challenges and their underlying causes, the thesis will articulate a nuanced vision for a more robust, credible, and equitable dispute resolution system, one that is attuned to the demands and complexities of the contemporary global environment. This proposed vision will be underpinned by a commitment to uphold the core tenets of independence and impartiality, ensuring that international arbitration remains a viable and trusted avenue for resolving disputes in an increasingly interconnected world.

Methodology

This thesis employs a multifaceted methodological framework, specifically designed to address the research question. By incorporating doctrinal analysis, comparative legal studies, and a targeted

selection of empirical data, this study guarantees a comprehensive and rigorous investigation. The methodological process commences with an examination of primary legal sources, which serve as the foundational cornerstone for interpreting and understanding the various standards related to the independence and impartiality of arbitrators. This initial part entails a systematic and detailed analysis of an extensive array of legal instruments, encompassing international conventions, treaty provisions—such as BITs and Free Trade Agreements (FTAs)—as well as the regulatory frameworks governing established arbitral institutions. These authoritative sources are pivotal in establishing core principles and formal criteria that underpin the conduct expected of arbitrators.

The objectives of this foundational analysis are twofold: firstly, to elucidate the conceptual frameworks of independence and impartiality as they are defined within these legal sources; and secondly, to explore the specific qualifications and disclosure obligations that are mandated for arbitrators within this context. Additionally, the analysis seeks to examine the procedural mechanisms that are available for challenging or replacing arbitrators who fail to uphold these essential qualities. Through this examination, the study aims to facilitate a nuanced understanding of the legal standards and procedural safeguards that govern arbitral neutrality and integrity, ultimately highlighting critical issues that resonate within the broader landscape of international dispute resolution.

In advancing this inquiry, the research adopts a comprehensive methodological framework that is fundamentally rooted in case study analysis. This approach focuses on seminal arbitration decisions within the sphere of International Investment Law (IIL). Recognising that principles related to bias and conflict of interest are often rendered visible through their practical application in real-world settings, the study critically examines a carefully curated selection of influential cases. This methodology not only facilitates a deeper understanding of how issues of independence and impartiality are managed but also reveals the operational effectiveness of disclosure obligations and the functioning of mechanisms designed to challenge arbitrators. By delving into the reasoning

strategies employed by arbitral tribunals, particularly when confronted with allegations of bias, this analysis uncovers identifiable patterns that inform the broader understanding of arbitrator conduct. Such patterns are especially relevant in contexts involving repeat-player dynamics or underlying economic interests, thereby contributing to a more informed and comprehensive evaluation of the prevailing standards and normative frameworks that guide arbitral practice.

Moreover, this scholarly investigation conducts an extensive comparative analysis of recent reform initiatives and policy proposals both at the national and international levels. Within the domestic context, the research scrutinises a variety of jurisdictional efforts aimed at augmenting the ethical standards expected of arbitrators while concurrently striving to minimise the potential for biases. Noteworthy instances of such reforms include the Riforma Cartabia in Italy, which introduced significant amendments to arbitration law, as well as the United Kingdom's recent revisions concerning procedures for assessing arbitrator impartiality and disclosure obligations. Additionally, Australia's ongoing endeavours to refine the criteria for identifying bias in arbitration demonstrate an alignment with contemporary best practices and international standards.

At the international level, the study explores ongoing reform activities concerning ISDS mechanisms, with particular attention paid to the adoption of a 2023 Code of Conduct for Arbitrators. This newly proposed code is designed to uphold the integrity and consistency of arbitral proceedings, addressing long-standing concerns regarding bias and impartiality in international arbitration. Through this detailed comparative approach, the research evaluates the likely effectiveness of these reform trajectories in remedying the systemic deficiencies and ethical dilemmas that currently plague arbitration processes on a global scale.

The thesis further draws on secondary legal sources to substantiate its analysis. Secondary sources encompass a wide spectrum of scholarly literature within the field of international arbitration law,

including critical expert opinions, comprehensive policy reports, and publications produced by prominent arbitration institutions and specialised working groups. This qualitative component is designed to situate the research within the ongoing scholarly and policy discourses, thereby facilitating a nuanced understanding of the prevailing issues at hand.

Furthermore, the research reviews empirical data obtained from surveys conducted by international organisations, which provide invaluable insights into conflicts of interest among arbitrators and the perceptions held by involved parties regarding arbitrator impartiality. The integration of these multifaceted perspectives enriches the analysis of potential reforms, enabling a well-informed assessment of their practicality and probable effects. This methodological approach emphasises systematic documentation of sources and the inclusion of real-world examples to substantiate claims, ensuring that the conclusions drawn are firmly anchored in authoritative evidence.

In sum, this thesis aspires to contribute to the discourse surrounding arbitrator independence and impartiality, highlighting both the legal frameworks and the practical implications of these critical concepts within the sphere of international arbitration. Through its comprehensive methodological approach, it endeavours to highlight the complexities of maintaining impartiality in the arbitration processes while also assessing the effectiveness of contemporary reform initiatives aimed at bolstering the ethical standards that govern arbitrators' conduct.

1. Chapter 1: Foundations of Arbitrators' Independence and Impartiality

This Latin aphorism, *"Quis custodiet ipsos custodes?"* – Who will guard the guards themselves? – encapsulates the central paradox underpinning the core argument of this thesis.[8] It prompts a critical examination of oversight mechanisms, accountability structures, and ethical principles, urging a scholarly inquiry into the responsibilities and effectiveness of those in positions of authority.

Furthermore, it questions whether the principles of independence and impartiality are sufficient safeguards in adjudication, encouraging an in-depth analysis of their limitations and the necessity for additional oversight measures.

Independence and impartiality are universally acknowledged as essential principles underpinning any adjudicatory process, as they constitute "the hallmark of any adjudicatory mechanism, whether domestic or international, that is based on the idea of the rule of law."[9] Moreover, these principles are fundamental tenets of due process.[10]

In the realm of arbitration, the presumption of arbitrator neutrality has become nearly unwavering. Despite the inherent private and party-controlled nature of arbitration, arbitrators are predominantly expected to stand neutrality comparable to that of judges.

As Amelie Koorosh observes, the stipulation of impartiality and independence among arbitrators derives from a core principle of natural justice acknowledged across diverse legal systems: the prohibition against being a judge in one's own cause (nemo iudex in sua causa).[11] The Latin maxim underpins fundamental legal standards by requiring adjudicators to remain neutral, avoiding any

[8] Decimus Junius Juvenalis, '*The Satires*', Satire VI, lines 347–8.
[9] Jeffrey Dunoff and others, 'Lack of Independence and Impartiality of Arbitrators' (Academic Forum on ISDS Concept Paper 2019/6, PluriCourts 2019) 1
[10] William W Park, 'Arbitrator Bias' (2015) 1 Transnational Dispute Management, 1–83, 3 www.transnational-dispute-management.com accessed on 15 June 2025.
[11] Amelie H Koorosh, 'Impartiality and Independence of International Arbitrators' (1999) 27–28 Revue de Recherche Juridique 89-109; See also Fabién Gelinas, 'The Independence of International Arbitrators and Judges: Tampered with or Well-Tempered?' (2011) 24 International Law Review 1-48, 10. Citing: "the requirement of impartiality and independence of arbitrators emanates from a fundamental principle of natural justice recognised in almost every legal system that one may not be a judge of his own cause (nemo iudex in sua causa)"

personal interest or bias in the disputes they decide.[12] As arbitrators serve as judges by issuing binding decisions on the parties' rights, it is essential for the legitimacy of the arbitral process and its results that they follow the same principles.[13]

These principles extend beyond private ethical standards and are explicitly embedded in key human rights documents. The main idea is to recognise tribunals' autonomy and neutrality as fundamental human rights, highlighting their crucial role in upholding justice and fairness at both national and international levels spheres.[14] For instance, Article 10 of the Universal Declaration of Human Rights (UDHR) stipulates that all individuals are entitled, on an equal footing, to a fair and public hearing conducted by an independent and impartial tribunal.[15] Similarly, Article 6.1 of the European Convention on Human Rights (ECHR) affirms that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."[16] Lastly, Article 8(1) of the American Convention on Human Rights (ACHR) articulates that every individual has the right to a hearing that is conducted with appropriate safeguards and within a reasonable period. Hearings must be presided over by a competent, independent, and impartial tribunal established in accordance with applicable legal standards.[17] These excerpts emphasise the fundamental right to a fair and public trial by an independent and impartial tribunal, highlighting its importance across different legal frameworks.

[12] Ibid.
[13] Melanie Van Leeuwen, 'Pride and Prejudice in the Debate on Arbitrator Independence' in Christoph Müller and Antonio Rigozzi (eds), *New Developments in International Commercial Arbitration* (2013) 2, 2-3.
[14] Rom K.L. Chung, 'Conceptual Framework of Arbitrators' Impartiality and Independence' [2014] Arbitration: The International Journal of Arbitration, Mediation and Dispute Management 2
[15] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) art 10: "everyone is entitled, in full equality, to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."
[16] Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (1950) 213 UNTS 221, art 6(1)
[17] American Convention on Human Rights 'Pact of San José, Costa Rica' (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123, art 8(1): "every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law." See also, Carlos A Matheus López, 'Independence and Impartiality of Arbitrators' in Larry A DiMatteo, Marta Infantino and Nathalie MP Potin (eds), *The Cambridge Handbook of Judicial Control of Arbitral Awards* (1st edn, Cambridge University Press 2020)

The fundamental principles of neutral adjudication also extend beyond the boundaries of human rights conventions, as they are often seen as components of the transnational public order, and are included within the wider framework of the "general principles of international law," as outlined in Article 38(1)(c) of the International Court of Justice (ICJ) Statute.[18]

As previously discussed, the principles of independence and impartiality are explicitly enshrined within the core legal frameworks that regulate arbitration. Their prominence is deliberate, as these principles underpin one of the primary rationales for the widespread selection of arbitration by parties in both commercial and investment disputes. As Gary Born aptly observes, "arbitration is adjudication by virtue of party autonomy," emphasising its foundation on the principle of parties' control over the proceedings.[19] This autonomy, however, is limited by non-waivable standards of fairness, independence, and impartiality, which boost its effectiveness as a favoured dispute resolution method.[20] This outcome aligns with the perspective articulated by Professor Lowenfeld, who explains that "one of the principal functions of a party-appointed arbitrator is to give confidence in the process to the parties and their counsel."[21]

It follows that the erosion of trust among the parties engaged in arbitration processes constitutes a substantial jeopardy to the integrity and efficacy of the arbitral system.[22] Fundamentally, the legitimacy of justice is contingent not only upon its fair execution but also upon its perceptibility and perceived fairness to the public, thereby ensuring the continued legitimacy and attractiveness of the arbitration mechanism. This concept aligns with the authoritative pronouncement by Lord Hewart

[18] Dunoff (n 9). See also, Report of the Special Rapporteur on the independence of judges and lawyers, Param Cumaraswamy, *Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers* (10 January 1995) UN Doc E/CN.4/1995/39, para 34.
[19] Gary B. Born, International Commercial Arbitration (2nd ed., Kluwer International 2014), 1642; See also, Siegfried H Elsing and Alexander Shchavelev, 'The Powers and Duties of an Arbitrator' in *Liber Amicorum Pierre A Karrer* (Kluwer Law International 2017) 66.
[20] Ibid.
[21] Andreas Lowenfeld, 'The Party-Appointed Arbitrator in International Controversies: Some Reflections' (1995) 30 Tex Intl LJ 59, 62.
[22] Mauro Rubino-Sammartano, *International Arbitration Law and Practice* (Kluwer Law International 2001) 141.

C.J. *in R v Sussex Justices Ex p. McCarthy*, wherein he underscores that "it is not merely of some importance but of fundamental importance that justice should be only done, and manifestly and undoubtedly be seen to be done."[23] This statement highlights the essential nature of transparency and visibility in the administration of justice, asserting that public confidence hinges on the clear perception that justice is being duly served.[24] The principle emphasises the importance of maintaining public confidence in the judicial process over the sole objective of achieving a correct substantive outcome. Specifically, the legacy of *R v Sussex Justices*, within the context of arbitration law, lies in its affirmation of transparency and the perception of fairness as fundamental and non-negotiable components of judicial proceedings.[25]

Nonetheless, the scope of party appointment in arbitration is inherently subject to certain limitations to safeguard the integrity and fairness of the process. Ultimately, arbitral proceedings are governed by the arbitrator, embodying the adage: "tant vaut l'arbitre, tant vaut l'arbitrage" – the quality of the arbitration depends on the arbitrator, which underscores the paramount importance of the integrity of arbitrators within the arbitration process.[26] The selection of an appropriate arbitrator represents a pivotal element in the arbitration process. Parties are also explicitly prohibited from leveraging their agreements to compromise fairness or to undermine the neutrality of the tribunal. As a result, fundamental standards – such as the independence and impartiality of arbitrators – are enshrined in law and cannot be circumvented through contractual clauses. Both international arbitration statutes and institutional rules consistently impose obligations aimed at safeguarding these standards. Conversely, scholarly discussions emphasise that "independence and impartiality" are two of the most

[23] *R v Sussex Justices*; Ex parte McCarthy [1924] 1 KB 256 ('*R v Sussex Justices'*).
[24] Ibid. para 259
[25] Dunoff (n 9)
[26] René David, 'L'Avenir de l'Arbitrage' in Pieter Sanders (ed), *International Arbitration: Liber Amicorum for Martin Domke* (Martinus Nijhoff 1967) 62.

crucial concepts in international arbitration. Nevertheless, despite their significance, the precise definitions of these terms often remain obscure and are surrounded by ambiguity.[27]

Essentially, although the inherent flexibility of arbitration allows parties to tailor procedural arrangements according to their mutual preferences, this flexibility is nonetheless constrained by the fundamental obligation to uphold justice and fairness within arbitral proceedings. While party autonomy greatly enhances the efficacy and legitimacy of arbitration, it does not absolve arbitrators or parties from their essential responsibilities to uphold principles of independence, impartiality, and due process.

These requirements are particularly rigorous within the context of ISDS, wherein private investors are endowed with the authority to contest sovereign states on an extensive array of issues, including regulatory frameworks, public policy initiatives, and governmental acts. Such disputes often extend beyond the immediate interests of the involved parties, touching on broader concerns related to public interest and governance, thereby posing substantial risks if entrusted solely to private parties.

In response to these inherent structural sensitivities, the International Centre for Settlement of Investment Disputes (ICSID) was established. The ICSID Convention – formally known as the Convention on the Settlement of Investment Disputes between States and Nationals of Other States – was specifically drafted to achieve an equitable balance,[28] ensuring the protection of investor interests while simultaneously respecting the sovereignty of host states.[29]

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[27] Maria Nicole Cleis, *The Independence and Impartiality of ICSID Arbitrators: Current Case Law, Alternative Approaches, and Improvement Suggestions* (BRILL 2017) 20–21. See also, Eric A Schwartz and Yves Derains, *Guide to the ICC Rules of Arbitration* (2nd edn, 2005) 115: "Independence and Impartiality [sic] are two very important words for international arbitration. Yet for all their importance they are two words whose precise meanings are frequently shrouded in mystery and surrounded by controversy"

[28] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159.

[29] *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (IBRD, 18 March 1965) Section III para 9.

It provides a standing procedural framework intended to offer a neutral and depoliticised forum for dispute resolution, free from the influence of national legal systems.[30] In this context, the integrity of arbitrators becomes essential not only to ensure procedural fairness but also to preserve the legitimacy of the entire ISDS mechanism. As will be further explored in section 1.1.1.2 below, although the ICSID continues to serve as a fundamental pillar of ISDS, in the recent years it has also attracted considerable debate, as the rest of the system, concerning arbitral neutrality and the systemic legitimacy of the process.[31]

This introductory chapter establishes the conceptual framework requisite for an in-depth examination of arbitrator ethics. It defines independence and impartiality, elucidating their critical significance within any adjudicative context, with particular emphasis on the ISDS mechanism. The Chapter then traces the normative sources that underpin the obligation of arbitrators' independence and impartiality. These sources encompass international treaties, such as arbitration statutes and investment agreements. Additionally, these sources include the regulations of principal arbitration institutions and frameworks, as well as, soft law instruments – particularly the International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration (hereinafter IBA Guidelines), which serve as normative references guiding disclosure practices and conflict management.[32]

By delineating these core principles and normative standards, Chapter One lays the foundation for the thesis's broader inquiry: *i.e.*, whether the current ISDS framework ensures genuinely neutral

[30] Julien Chaisse, Leïla Choukroune and Sufian Jusoh (eds), *Handbook of International Investment Law and Policy* (Springer Singapore 2021) 1487.
[31] Gus Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication (Part Two): An Examination of Hypotheses of Bias in Investment Treaty Arbitration' (2016) 53 Osgoode Hall Law J 540.
[32] International Bar Association, 'Guidelines on Conflicts of Interest in International Arbitration' (2024) https://www.ibanet.org/document?id=guidelines-on-conflicts-of-interest-in-international-arbitration-2024 accessed on 30 June 2025.

adjudication in practice, and how ongoing reform proposals might strengthen both its formal guarantees and its perceived legitimacy.

1.1. The Legal Concept of Independence

Although closely related, the concepts of independence and impartiality are distinguished by significant differences upon comprehensive examination.[33]

The principle of independence constitutes a fundamental element of any adjudicatory system, underpinning the rule of law, applicable to both national courts and international tribunals.[34] Conventionally, independence is characterised as the freedom from external authorities.

In international arbitration, however, it predominantly denotes the absence of external influences or relationships – financial, institutional, political, or professional – that could potentially undermine an arbitrator's ability to render fair and objective decisions,[35] grounded solely on the merits of the case.[36] In other words, an independent arbitrator has no direct or indirect ties to any of the parties involved, their legal counsel, or other actors that could raise legitimate concerns about neutrality or decision-making ability.[37] As Bruno Manzanares Bastida notes, "[t]he stronger the connection between the arbitrator and one of the parties, the less independent the arbitrator is."[38]

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[33] *Re Territorial Court Act NWT,* North West Territories Supreme Court Canada, (1997) DLR 4th, 132, 146, where Vertes, J. stated: "Independence and impartiality are separate and distinct values. They are nevertheless linked as mutually reinforcing attributes of the judicial office. Independence is the necessary precondition to impartiality and is a prerequisite for obtaining impartiality. A judge could be independent but not impartial (on a specific case by case basis); but a judge who is not independent cannot, by definition, be impartial (on an institutional basis)."

[34] Dunoff (n 9)

[35] William W Park, 'Arbitrator Integrity: The Transient and The Permanent' (2009) 46 San Diego L Rev 635.

[36] *Abaclat and Others v Argentine Republic* (ICSID Case No ARB/07/5), Decision to Disqualify a Majority of the Tribunal (4 February 2014) para 75; See also, Jean Salmon (ed), *Dictionnaire de droit international public* (Bruylant 2001) 570. See also, Stavroula Angoura, 'Arbitrator's Impartiality Under Article V(1)(D) Of The New York Convention' (2019) 15 Asian International Arbitration Journal 29-30.

[37] Cleis (n 27) 19-20. See also, Christopher Kee, '*Judicial Approaches to Arbitrator Independence and Impartiality in International Commercial Arbitration*' in Christina Knahr and others (eds), *Investment and Commercial Arbitration – Similarities and Divergences* (2010).

[38] Bruno Manzanares Bastida, '*The Independence and Impartiality of Arbitrators in International Commercial Arbitration*' (2007) 6(1) *Revista e-Mercatoria* 3, 3-4.

Independence is assessed within a rigorously structured, objective framework that prioritises observable and verifiable facts and circumstances, rather than relying on subjective perceptions.[39] This approach facilitates a comprehensive and nuanced analysis of the interactions between arbitrators and involved parties in arbitration. It is widely considered a fundamental prerequisite for ensuring sound decision-making, owing to its intrinsic qualities and conceptual framework.[40]

The underlying rationale for employing an objective approach resides in its practical and systematic nature: relationships are amenable to thorough documentation, verification, and consistent evaluation. As articulated, "[i]ndependence is predominantly a function of existing or prior relationships that can be accurately catalogued and verified."[41]

1.1.1. The legal framework

The legal foundations underpinning the principle of independence are characterised by a multilayered system of normative instruments, which aims at establishing, maintaining, and protecting arbitrator independence within the broader context of arbitration law. This regime encompasses not only international conventions and model laws but also national arbitration statutes, institutional rules, professional guidelines, and contractual provisions. This multilayered approach exemplifies the decentralised nature inherent in international arbitration, wherein international tribunals operate within a decentralised system that is largely dependent on the intentions and design of "architects."[42] Although the underlying principle is widely accepted, the specific characteristics of the system lead to varied implementations across different jurisdictions and institutions.

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[39] Kee (n 37) 183-184.

[40] Jiri Melenovsky, 'L'Indépendance des Juges Internationaux' (2010) 349 *Recueil des cours de l'Académie de Droit international de La Haye* 26. See also, Schacherer (n 6) 6.

[41] Yves Derains and Eric A Schwartz, *A Guide to the New ICC Rules of Arbitration* (Kluwer Law International 1998) 109.

[42] Jonathan Brosseau, 'A*pplicable Ethical Framework in Commercial and Investment Arbitration*' in Stefan Kröll, Andrea Bjorklund and Franco Ferrari (eds), *Cambridge Compendium of International Commercial and Investment Arbitration* (1st edn, Cambridge University Press 2023) 9-10; See also, Alain Pellet, '*Judicial Settlement of International Disputes'*, in R. Wolfrum (ed.), Max Planck Encyclopedia of Public International Law (Oxford University Press, 2013), para. 5

1.1.1.1. International instruments: The New York Convention

The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the New York Convention, constitutes a pivotal international instrument within the context of arbitration law.[43] Notably, it indirectly addresses independence by referencing the fundamental right to a fair trial. Specifically, Article V(1)(d) pertains to the recognition and enforcement of arbitral awards.[44] It announces that the exequatur court retains the authority to deny enforcement of an arbitral award when there has been a deviation from the agreed-upon constitution of the arbitral tribunal or the arbitral procedure, or, in the absence of such an agreement, when there is a discrepancy with the applicable legal provisions of the jurisdiction where the arbitration was conducted.[45]

Significantly, the Convention confers substantial authority upon national courts, as this provision is routinely scrutinised and implemented by them, employing definitions of independence rooted in domestic legal standards.[46] This may cause inconsistencies in applying independence standards across various jurisdictions. German jurisprudence, for instance, limits refusal based on procedural grounds,[47] whereas other legal traditions have developed distinct approaches, further illustrating the potential for varied outcomes.[48] The ambiguity of this criterion increases uncertainty about its accuracy.

1.1.1.2. Institutional Rules

The primary source of ethical standards governing arbitrators' conduct resides in the rules issued by arbitral institutions. While certain institutions have established explicit ethical codes to address issues,

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[43] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 3

[44] Ibid. art. V (1)(d)

[45] Angoura (n 36).

[46] Ivan Cavdarevic, '*Ethical Standards for International Arbitrators*' in Hélène Ruiz Fabri (ed), *Max Planck Encyclopedia of International Procedural Law* (OUP 2020) citing: "This provision is in practice commonly examined and applied by national courts using definitions of (…) independence found in domestic law."

[47] Ulrich Haas, *'Convention on Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958'* in Frank-Bernd Weigand (ed), *Practitioner's Handbook on International Arbitration* (Beck 2001) 510, 511 para 72-73.

[48] Ariel Anderson, 'Saving Private ISDS: The Case for Hardening Ethical Guidelines and Systematizing Conflicts Checks' (2018) 50 *The Georgetown Journal of International Law* 1164.

the majority of these entities do not possess formalised ethical guidelines and instead rely on their internal regulations. Despite the wide variety of existing institutional rules, their approach to independence and impartiality tends to share common denominators, thereby facilitating the establishment of a comprehensive and cohesive legal framework. The regulations additionally delineate procedures for the appointment of arbitrators, thereby embodying broadly recognised standards of independence and impartiality. Building upon these foundational principles, various institutions have established distinct frameworks designed to facilitate their effective implementation in practice. For instance:

(i) Article 11 of the Permanent Court of Arbitration (PCA) Arbitration Rules (2012) delineates the procedural obligation incumbent upon an individual approached to serve as an arbitrator, stipulating that arbitrators "shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence."[49] This formulation underscores the ethical imperatives of transparency and independence, which guide arbitral conduct. While Article 12 principally delineates grounds for challenge that correspond with those outlined in the UNCITRAL Arbitration Rules, it explicitly incorporates additional scenarios such as reasonable doubts regarding the arbitrator's impartiality or independence and circumstances where "an arbitrator fails to act" or when there exists a de jure or de facto impossibility for the arbitrator to perform his or her duties.[50] The standards of independence and impartiality have been consistently applied in various PCA-administered arbitrations, such as the Eritrea-Ethiopia Boundary Commission,[51] the Arctic Sunrise arbitration (Netherlands v. Russia),[52] and the OSPAR

[49] Permanent Court of Arbitration, 'PCA Arbitration Rules' (2025) art. 11 https://pca-cpa.org/en/services/arbitration-services/pca-arbitration-rules/ accessed 20 July 2025.)
[50] Ibid. art. 12(1)-(3)
[51] Eritrea-Ethiopia Boundary Commission's Rules of Procedure, Eritrea-Ethiopia Boundary Commission, *Eritrea v Ethiopia, Rules of Procedure* (15 June 2001) art 8.
[52] *Atlanto-Scandian Herring Arbitration, Rules of Procedure* (17 January 2014) art 5.

arbitration (Ireland v. United Kingdom).[53] The widespread adoption of these standards demonstrates their shared values and relevance.[54]

(ii) Alike other arbitral institutions,[55] the International Chamber of Commerce (ICC) does not uphold a fixed roster of arbitrators; consequently, the principles of independence and impartiality assume greater significance in this context. Article 11(1) of the 2021 ICC Rules of Arbitration stipulates that arbitrators must be "impartial and independent of the parties."[56] Furthermore, the process for challenging purported deficiencies in impartiality or independence is delineated in Article 14(1), pursuant to which a challenge against an arbitrator alleging a lack of impartiality or independence, or "otherwise," must be submitted in writing to the Secretariat, clearly outlining the relevant facts and circumstances upon which the challenge is based.[57] The inclusion of the phrase "or otherwise" confers upon the ICC Court considerable discretion to remove an arbitrator for reasons extending beyond mere ethical misconduct.[58] In the ICC system, the Court of Arbitration considers issues of independence and impartiality at the outset (*i.e.*, at the time of confirmation) and during the course of the arbitration.[59] In both instances, the standards are treated as a unified set of obligations.[60] In 2021, the ICC undertook an additional procedural step in the revision of the existing assessment criteria for arbitrators. This enhancement is documented in the publication titled "Note to Parties and Arbitral Tribunals on the Conduct of Arbitration under the ICC Rules of Arbitration," which

[53] "OSPAR" Arbitration, Ireland v United Kingdom, Rules of Procedure of the Tribunal, art 6.
[54] Elena Ivanova, '*Independence and Impartiality through the Lens of Incompatible Activities, Disqualification and Challenge: The ICJ, ITLOS, and Inter-State Arbitration*' (2024) 15 Journal of International Dispute Settlement 342-343.
[55] ICSID Convention (n 28) art. 40(1)
[56] ICC Rules of Arbitration (2021) art. 11 (1) see https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/#block-accordion-11 accessed on 17 July 2025.
[57] Ibid. art. 14(1)
[58] Loretta Malintoppi and Andrea Carlevaris, 'Challenges of Arbitrators, Lessons from the ICC' in Chiara Giorgetti (ed), *Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals* (Brill Nijhoff 2015) 143.
[59] ICC Rules (n 56) art. 11(3)
[60] Loretta Malintoppi, 'Arbitrator's Independence and Impartiality' in P Muchlinski and others (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 808.

requires arbitrators to "act at all times in an impartial and independent manner." The Note also includes a "Statement of Acceptance, Availability, Impartiality, and Independence" (Statement), which serves to reinforce the impartiality and independence of the arbitrators more rigorously. The court mandates that arbitrators diligently complete and sign the Statement, thereby ensuring full disclosure of any circumstances that could potentially impair their perceived independence in the eyes of any party involved."[61]

(iii) In investment arbitration, transparency is of utmost importance. The concepts of independence and impartiality are generally understood in broad terms, thereby allowing for a degree of flexibility.[62] In the context of the ISDS system, arbitrator appointments are generally conducted on an *ad hoc* basis by the disputing parties. Arbitrators often hold other professional roles and may not be specialists solely in arbitration; nevertheless, they are expected to be unbiased, despite the familiarity between the nominators and nominees. The system has several mechanisms designed to safeguard arbitrators' independence, which are primarily grounded on party autonomy, institutional oversight and a duty of disclosure.[63] The party appointment system inherently presupposes a certain familiarity between the appointing party and the appointee, thereby underscoring the need for the development of innovative methodologies to ensure the maintenance of neutrality principles among arbitrators.[64] Furthermore, it is in the interest of the parties to designate an independent arbitrator. Parties should avoid appointing individuals who may reasonably be perceived as biased in favour of their position, as such choices may

[61] International Chamber of Commerce, 'Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration' (1 January 2021) https://iccwbo.org/wp-content/uploads/sites/3/2020/12/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration-english-2021.pdf accessed 18 July 2025, citing: "might be of such a nature as to call into question his or her independence in the eyes of any of the parties."
[62] Cleis (n 27) 23.
[63] ICSID Convention (n 28) arts 36–40; *ICSID Rules of Procedure for Arbitration Proceedings* (2022) rr 1–4; James Devaney, 'Selecting Investment Arbitrators: Reconciling Party Autonomy and the International Rule of Law' (KFG Working Paper Series No 33, Berlin Potsdam Research Group 'The International Rule of Law – Rise or Decline?' 2019) 6-7.
[64] Christoph Schreuer and others, *The ICSID Convention: A Commentary* (2nd edn, CUP 2009) art 57, para 22.

compromise the integrity of the arbitration process and threaten the fairness of the outcome.[65] An example of an ISDS-related instrument is the ICSID Convention, which neither defines nor delimits the concept of independence.[66] However, Article 14(1) requires that arbitrators who "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 (…)."[67] This excerpt underscores the necessity for nominees to be individuals capable of independent judgment, thereby implicitly establishing a duty of independence.[68] Within the framework of Article 14(1) of the ICSID Convention, it is broadly acknowledged that the concept of independence signifies the "absence of external control,"[69] as detailed in the *İçkale İnşaat Limited Şirketi v. Turkmenistan* case, which provides a clear illustration of how independence is applied in practice. The case involved a proposal by the Claimant, *İçkale,* to disqualify the Respondent's appointed arbitrator, Professor Philippe Sands.[70] The challenge was primarily based on an alleged "issue conflict," arguing that Professor Sands' concurrent role as an arbitrator in another case involving *Turkmenistan* raised justifiable doubts about his independence and created an imbalance of knowledge on the tribunal.[71] Although the challenge was ultimately dismissed, the tribunal's decision is frequently cited for its concise definition of independence and its handling of the high threshold required for disqualification under ICSID rules.[72] While the doctrinal application of *stare decisis*, or the rule of legal precedent, is not formally observed within the domain of international

[65]Chiara Giorgetti, *'The Arbitral Tribunal: Selection and Replacement of Arbitrators*' in Chiara Giorgetti (ed), *Litigating International Investment Disputes – A Practitioner's Guide* (Brill/Njihoff 2014) 157–58, citing: "justifiably be considered partial towards their case, in the expectation that it will make the case an easier win"
[66] ICSID Convention (n 28)
[67] Ibid. Art. 14(1) and 40(2) states that: "Arbitrators appointed from outside the Panel of Arbitrators shall possess the qualities stated in paragraph (1) of Article 14."
[68] Ibid.
[69] *Ickale İnşaat Limited Şirketi v Turkmenistan* (ICSID Case No ARB/10/24), Decision on Claimant's Proposal to Disqualify Professor Philippe Sands, 11 July 2014, para 116.
[70] Ibid para 72-74
[71] Ibid para 76. See also, *Adem Dogan v Turkmenistan* (ICSID Case No ARB/09/9).
[72] Cleis (n 27) 68-69

arbitration, there has been a discernible increase in the development and recognition of jurisprudence in the context of investment arbitration.[73] This has resulted in the development of a *de facto* system of precedent or *jurisprudence costante*, establishing informal normative frameworks within the legal landscape.[74] Parties engaged in such proceedings frequently invoke these precedents to substantiate their legal arguments, and tribunals often cite these authorities as bases for their decisions, thereby contributing to the evolving legal landscape in this specialised field.[75] The awards rendered by ICSID panels, akin to those issued by the ICC and the UNCITRAL, are consistently regarded as integral components of the investment case law corpus, paralleling the authority of decisions emanating from permanent judicial organs such as the ICJ.[76]

Further, as per Rule 19 (3) (b) of the ICSID Arbitration Rules, an arbitrator is required to "provide a signed declaration […], addressing matters including the arbitrator's independence, impartiality, availability and commitment to maintain the confidentiality of the proceeding."[77] Finally, in accordance with Article 19(6), each arbitrator bears an ongoing obligation to "promptly disclose any change of circumstances relevant to the declaration outlined in paragraph (3)(b)."[78] Moreover, it is expressly provided that the arbitrator may submit a declaration delineating their relational history with the involved parties, should such relationships exist, as well as any other relevant circumstances that might potentially compromise their judgment.[79]

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[73] Loretta Malintoppi, 'Independence, Impartiality, and Duty of Disclosure of Arbitrators.' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (1st edn, Oxford University Press 2012) 792-793.

[74] Loretta Malintoppi, 'Remarks on Arbitrators' Independence, Impartiality and Duty to Disclose in Investment Arbitration' (2008) 7 The Law & Practice of International Courts and Tribunals 352.

[75] It is generally recognised that the stare decisis rule does not apply in ICSID arbitration. Part of the doctrine interprets Art 53(1) of the ICSID Convention as excluding the application of this rule in ICSID proceedings. See also, Pierre Duprey, *'Do Arbitral Awards Constitute Precedents? Should Commercial Arbitration be Distinguished in this Regard from Arbitration Based on Investment Treaties?*' in Philippe Pinsolle, Anne Veronique Schlaepfer, and Louis Degos (eds), Towards a Uniform International Arbitration Law? IAI Series on International Arbitration No. 3 (Huntington, NY, Juris Publishing, 2005) 251–282.

[76] Malintoppi (n 60)

[77] ICSID Arbitration Rules (n 63) r 19 (3)(b).

[78] Ibid. art. 19(6)

[79] Ibid. r 6

1.1.2. Objective Indicators of Structural Dependence

Structural dependence denotes a systemic condition whereby the foundational frameworks, prescribed rules, and hierarchical power relations intrinsic to a given system engender a reliance of one actor upon another.[80.] This dependence is not attributable to individual deficiencies or isolated influences; rather, it emanates from the inherent structural characteristics – defined by established institutions, organisational arrangements, and relational networks – that render dependence an intrinsic and, at times, unavoidable feature for actors within such systems.[81] In the realm of international arbitration, particularly within the ISDS mechanism, structural dependence emerges as a salient indicator of compromised independence. It elucidates how systemic interconnectedness can diminish the autonomy and neutrality traditionally associated with arbitral processes, thereby challenging their legitimacy and effectiveness.

One significant aspect of potential bias arises from an arbitrator's affiliations with law firms or legal entities that represent or otherwise engage with the parties involved in the arbitration.[82] A relevant example is the case of *Blue Bank v. Venezuela*, where an arbitrator was concurrently affiliated with an international law firm representing one of the parties involved in the dispute.[83] This overlap served as the basis for a successful challenge to the appointment of the arbitrator, thereby reinforcing the notion that structural dependencies – whether direct or indirect – may compromise the independence of arbitrators. In the contemporary legal landscape, characterised by the expansion of global law firms, legal practitioners often collaborate through various arrangements, thereby creating varying degrees of involvement in their firm's commercial activities. It is imperative that such situations be

[80] James A Caporaso, 'Dependence, Dependency, and Power in the Global System: A Structural and Behavioral Analysis' (1978) 32 International Organization 13.
[81] Ibid.
[82] Malintoppi (n 60) 810-811.
[83] *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela* (Blue Bank), ICSID Case No. ARB/12/20, Decision on the Parties' Proposal to Disqualify a Majority of the Tribunal (Nov. 12, 2013).

explicitly disclosed and subsequently evaluated within their full contextual framework. The decision in the *Blue Bank v. Venezuela* ruling is noteworthy for reaffirming the standard required to disqualify an arbitrator. Specifically, it emphasises that a finding of disqualification based on a "manifest" lack of qualities such as independence and impartiality is satisfied when these deficiencies are clearly "evident" or "obvious."[84]

Financial interests present another considerable risk to the independence of arbitrators. Direct financial stakes in one of the parties, along with ongoing business relationships or unconventional compensation arrangements, create unmistakable structural dependencies.[85] Even indirect financial connections, such as those arising from investments in mutual funds or retirement accounts, necessitate careful evaluation, given their potential to exert subtle influences on an arbitrator's decision-making process.[86]

Addressing and precisely delineating these scenarios often presents significant challenges, given the potential for ambiguity in the boundaries of independence and impartiality. For example, what happens if the arbitrator is a non-executive director at an investment bank that has a small stake in one of the parties involved, as part of a diversified investment portfolio?[87] This situation arose in an ICSID arbitration, where an arbitrator was challenged due to her position as a non-executive director at an investment bank. Despite her role, she was not involved in investment decisions and was required to maintain independence from the bank's management.[88] The ICSID members, when

[84] Federica Cristani, 'Challenge and Disqualification of Arbitrators in International Investment Arbitration: An Overview' (2014) 13 The Law and Practice of International Courts and Tribunals 173-174

[85] Malintoppi (n 73).

[86] Indeed, as will be seen in section 1.4, such situation to disclose would be a complete bar to appointment under the IBA Guidelines.

[87] Alan Redfern, 'The Importance of Being Independent: Laws of Arbitration, Rules, Guidelines - and a Disastrous Award' (2017) 6 Indian J Arb L 13-14.

[88] See *Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v. The Argentine Republic*, ICSID Case No. ARB/03/19 and *Suez, Sociedad General de Aguas de Barcelona SA, and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17 and In the arbitration under the Rules of the United Nations Commission on International Trade Law between AWG Group Limited v. The Argentine Republic, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal, (May 12, 2008) [hereinafter "*Suez v. Argentina*"].

deliberating on this challenge, held a firm stance regarding their co-arbitrators' position: *i.e.,* that alleged connections do not constitute clear evidence of a manifest lack of independence.[89]

Prior professional relationships also serve as crucial indicators of possible dependence. An arbitrator's previous roles – whether as an employee, advisor, or legal representative – can diminish their perceived neutrality, especially if these roles are closely related in time and/or constitute the subject matter of the arbitration. This intertwining of past and present relationships warrants increased scrutiny from arbitral institutions and courts. Even the mere potential for future appointment and reappointment serves as an incentive for arbitrators to exhibit partiality toward the parties involved, thereby potentially shaping the arbitrator's decisions in the case.[90] A prominent example demonstrating how previous professional associations may undermine arbitrator independence is exemplified in the case of *Eiser Infrastructure Limited and Energía Solar Luxembourg S.a.r.l. v. Kingdom of Spain.*[91] The ICSID Annulment Committee referenced arbitrator Stanimir Alexandrov's nondisclosure of his close ties with the claimant's damages expert, Carlos Lapuerta, and his consulting firm, the Brattle Group. This omission was deemed to establish a "manifest appearance of bias."[92] The decision has garnered significant scholarly interest, as it illustrates that an arbitrator's professional relationships with third parties, and the potential non-disclosure of such relationships, can substantially influence arbitration proceedings. Such failures may ultimately lead to the annulment of the award, as happened in this case.[93]

[89]Ibid para 18, citing: "The fact of an alleged connection between a party and an arbitrator in and of itself is not sufficient to establish a fact that would establish a manifest lack of that arbitrator's impartiality and independence. Arbitrators are not disembodied spirits dwelling on Mars, who descend to earth to arbitrate a case and then immediately return to their Martian retreat to await inertly the call to arbitrate another. Like other professionals living and working in the world, arbitrators have a variety of complex connections with all sorts of persons and institutions."

[90] Nathalie Johnson Bernasconi-Osterwalder and Fiona Lise Marshall, 'Arbitrator Independence and Impartiality: Examining the Dual Role of Arbitrator and Counsel' 1-2.

[91] *Eiser Infrastructure Limited and Energía Solar Luxembourg Sà r.l v Kingdom of Spain* [2017] ICSID, ICSID Case No. ARB/13/36.

[92] Ibid. para 229

[93] Ibid. para 250

The committee did not specify any particular conduct by Dr. Alexandrov that demonstrated bias or was otherwise inappropriate; however, it identified numerous past and current professional associations and interactions in various capacities between the arbitrator and the expert.[94] The central issue was his failure to make certain disclosures. The committee concluded that the arbitrator's omission to disclose his associations with the Brattle Group deprived Spain of the opportunity to challenge his independence. Furthermore, this failure to disclose constituted a significant violation of a fundamental procedural rule.[95] Crucially, the committee opined that if the other tribunal members had been aware of the relationship, it could have influenced their perception of Dr. Alexandrov's statements and analyses, including during the tribunal's deliberations.[96] This case exemplifies the critical importance of an arbitrator's obligation to disclose professional relationships with third parties, including expert witnesses.[97] Failure to do so can substantially influence the arbitral process and may result in the annulment of the awards.

Additionally, the influence of political affiliations or governmental ties raises distinct concerns, particularly in investment arbitration cases involving State actors. Arbitrators with previous or current government roles, significant political connections, or those who have publicly endorsed policies relevant to the case may experience compromised independence. In these instances, political motives can explicitly or implicitly pressure the arbitrator, potentially impairing their ability to maintain a neutral stance. The classic example is the *Buraimi Oasis* arbitration, a territorial dispute between Saudi Arabia and the United Kingdom (representing Abu Dhabi and Oman), which failed due to a

[94] Ibid. para 218 citing: "the Committee has taken particular note of four instances where [the arbitrator] and [the expert] worked for the same party, as counsel and expert respectively. In two of those cases, [the arbitrator], as counsel, was interacting with [the expert], at the same time that he was acting in this case as an arbitrator and [the expert] as a damages expert of one of the parties. This was in addition to the longstanding relationship between the [the expert's firm] and [the arbitrator]'s then law firm […], and included another concurrent case – Bear Creek – in which [the arbitrator] was working as counsel with [the expert's firm]"

[95] Daniel Greineder, 'Too Close for Comfort? Arbitrator Independence after Eiser v Spain' (Wolters Kluwer Arbitration Blog, 9 October 2020) https://legalblogs.wolterskluwer.com/arbitration-blog/too-close-for-comfort-arbitrator-independence-after-eiser/ accessed 20 July 2025.

[96] *Eiser v Spain* (n 91) para 250

[97] Ibid. para 225, 228, 241-242

conflict of interest.[98] Specifically, one of the arbitrators had previously served as an official of the Government of Saudi Arabia and was directly involved in matters related to the arbitration. Disclosure of this connection is essential to ensure transparency and maintain the integrity of the arbitration process. However, not all governmental connections are inherently grounds for disqualification. In a particular arbitration proceeding between the Government of Nicaragua and a US food company, an arbitrator who had previously served as an advisor to the United States government on issues related to the arbitration was challenged. Nonetheless, the appointing authority declined to sustain the challenge, showing that such matters are often assessed based on the specific circumstances of the case.[99]

Finally, personal relationships constitute one of the most complex and challenging facets in the evaluation of an arbitrator's independence. Close familial ties, social connections, and professional friendships can potentially compromise the integrity of the arbitration process. For example, considerations must be given to scenarios such as a prospective arbitrator being a former partner at a law firm representing one of the parties, or the prospective arbitrator and counsel belonging to the same tennis club or professional association.[100] A qualitative assessment is necessary, focusing on factors such as the proximity of the relationship, the frequency of contact, and the degree of dependency or overlap between the party or counsel and the arbitrator or prospective arbitrator.[101]

In summary, preserving the independence of arbitrators is crucial to upholding the integrity of the arbitration process. Arbitral institutions and courts must remain vigilant and thorough in evaluating all potential indicators of structural dependence. This diligence ensures that both the reality and the

[98] *Buraimi Oasis Arbitration (United Kingdom v Saudi Arabia)* (1955) 22 ILR 237. See also, Leon Trakman, 'The Impartiality and Independence of Arbitrators Reconsidered' [2007] University of New South Wales Faculty of Law Research Series 6-7.
[99] Albert Jan van den Berg, 'Justifiable Doubts as to the Arbitrator's Impartiality or Independence' (1997) 10 LJIL 509.
[100] Redfern (n 87)
[101] Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) paras 4.75–4.151.

perception of an arbitrator's impartiality are managed effectively, as the appearance of bias can be as detrimental as actual bias. It is well established in both civil and common law systems that arbitrators must adhere to the principle of independence, not only in relation to the parties and relevant authorities, but also in terms of public perception.[102] The integrity and credibility of the arbitration process hinge significantly on an arbitrator's ability to secure the confidence of key stakeholders, including the business community. Therefore, ensuring that an arbitrator's independence is both genuine and perceived as such is crucial for maintaining an impartial and neutral position in the eyes of third parties, thereby reinforcing the legitimacy and acceptance of arbitration proceedings. The absence of explicit indicators to guide the handling of specific situations, coupled with the variability in case law interpretation and the diverse responses of designated tribunals, underscores the complexity of the legal framework.

1.2. The Legal Concept of Impartiality

Historical evidence indicates that arbitrators have upheld their obligations of impartiality for centuries.[103] For instance, in ancient Greece, the term "arbiter" was synonymous with impartiality, exemplifying the long-standing association between the role and impartial judgment.[104] Catherine A. Rogers posits that "international arbitrator impartiality is the fulcrum on which the legitimacy of international arbitration hinges."[105]

If independence shields arbitrators from external influence, impartiality addresses their internal disposition. At its core, it denotes the absence of bias, prejudice, or predisposition towards any party or issue involved in a dispute.[106] It is often regarded as "the watchword of all tribunals, including

[102] David A Lawson, 'Impartiality and Independence in International Arbitration – Commentary on the 2004 IBA Guidelines on Conflicts of Interest in International Arbitration' [2005] 23 ASA Bull 24-25
[103] Gary B. Born, '*International Commercial Arbitration'* (1st. ed, Wolters Kluwer 2009)1462
[104] Ibid.
[105] Catherine A Rogers, '*Arbitrator Impartiality: The Devil Is in the Details*' (2023) 39 Arbitration International 313.
[106] López (n 17). See also Born (n 103) 1474

arbitration," as noted by Rix L.J. in *AMEC Civil Engineering Ltd v Secretary of State for Transport*.[107] The statement emphasises the critical significance of the principle within any adjudicatory process. Unlike the concept of independence, the notion of "impartiality" is inherently more abstract and subjective, as it pertains to the mental disposition of arbitrators, which can be challenging to assess.[108] As Cantorias articulates, "impartiality is a product of purposeful behaviour characterised by bad faith or malicious intent or gross."[109]

In other words, an impartial arbitrator is characterised by the absence of predisposition or bias towards any particular party or its case.[110]

Independence and impartiality are closely interdependent, yet they are not interchangeable.[111] As Leon Trakman observes, the two obligations differ in their temporal scope – impartiality is confined to the moment at which the arbitration award is issued, whereas independence persists throughout the entirety of the arbitration process and for a reasonable period thereafter.[112] Furthermore, the lack of impartiality does not inherently equate to a deficiency in independence; conversely, the opposite is nearly inevitable. This is because an arbitrator may ostensibly exhibit formal independence while still demonstrating partiality in their decision-making processes, whereas the reverse scenario inevitably engenders justifiable doubt. The observed asymmetry underscores the unique roles each concept plays in practice, emphasising the importance of evaluating them as complementary, yet non-synonymous, assurances within the arbitral framework.[113]

In sum, impartiality among arbitrators is frequently characterised as possessing a "closed mind."[114]

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[107] Amec Civil Engineering Ltd v Secretary of State for Transport [2005] EWCA Civ para 291.
[108] Melanie Van Leeuwen (n 13) 12
[109] Mary Jude V Cantorias, '*Party-Appointed Arbitrator Ethics and Ethos – Cross-Cultural Differences and How They Affect Arbitrator Behaviour in Rendering Arbitral Awards*' (2014) 1 *Arellano Law and Policy Review* 53, 56.
[110] López (n 17) 14-15.
[111] Nigel Blackaby, Constantine Partasides and Alan Redfern, *Redfern and Hunter on International Arbitration* (7th edn, OUP 2022) 214.
[112] Ibid., See also, Trakman (n 98) 124–135, 127–128.
[113] Ibid., See also, López (n 17).
[114] Hamish Lal, Brendan Casey and Léa Defranchi, 'Rethinking Issue Conflicts in International Commercial Arbitration' 14 Disp. Resol. Int'l 1 (2020) 5.

1.2.1. The Legal Framework

Impartiality, akin to the principle of independence, is enshrined within the same broad network of legal instruments. As for the section addressing independence's legal framework, this segment will first examine the international context, followed by an analysis of institutional mechanisms, and will conclude with a focus on ISDS.

1.2.1.1. International Instrument: the New York Convention

According to Article V(1)(d) of the New York Convention, two key deficiencies may serve as grounds for the refusal of recognition or enforcement of an arbitral award: improper tribunal composition and irregular proceedings.[115]

The issue of arbitrator impartiality is predominantly linked to the first criterion outlined in this Article, as a tribunal that is improperly constituted may give rise to concerns of bias and unfairness, thereby compromising the integrity of the arbitration process.[116]

Conversely, a failure by arbitrators to fulfil the disclosure obligations, whether stipulated by the legal framework of the arbitration seat or derived from the parties' agreement, may compromise the enforceability of the arbitral award. Such circumstances pertain to the second prong of Article V(1)(d), which concerns procedural irregularities.[117] It is noteworthy that violations of disclosure obligations become pertinent in instances of – "biased arbitrator participation in the proceedings"[118] – the mere failure to disclose alone is deemed insufficient.

[115] Patricia Nacimiento, Article V(1)(d) in Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention (Herbert Kronke, Patricia Nacimiento, Dirk Otto et al. eds, Kluwer 2010) 289-290.

[116] Angoura (n 36). See also, Christian Borris & Rudolf Hanneke, Article V, in New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 – Commentary, 399 (Reinmar Wolff ed., Beck 2012)

[117] ibid. See also, Stavroula Angoura, Interface Between Arbitrators' Disclosure and Parties' Investigation Duties, Note on Decision of Cour d'Appel de Paris. 27 Mars 2018, Chambre 1, 16/09386, SAAD Buzwair Automotive Co v. Audi Volkswagern Middle East Fze LLC, 4 ASA Bull 913 (2018).

[118] Emmanuel Gaillard, 'L'interdiction de se contredire au détriment d'autrui comme principe général du droit du commerce international' [1985] Rev Arb 241.

1.2.1.2. Institutional Legal Framework

As for the section relating to independence, institutional rules reinforce the principle of impartiality. To illustrate the varying definitions, which, despite their differences, share a common foundational rationale, this section will examine the regulations of the London Court of International Arbitration (LCIA) and the Stockholm Chamber of Commerce (SCC). For matters related to ISDS, the UNCITRAL Model Law will be examined.

(i) The LCIA Rules of Arbitration (2020) introduce several modifications compared to the 1998 edition, particularly concerning the procedures for revoking an arbitrator's appointment. These changes reflect the ongoing evolution and refinement of ethical standards within the field of arbitration over time.[119] The LCIA has developed a comprehensive framework to ensure the impartiality of arbitrators, grounded in clear regulations, institutional supervision, and adherence to international best practices.[120]

Article 5(3) stipulates that all arbitrators shall maintain impartiality and independence from the involved parties at all times. Furthermore, it explicitly prohibits arbitrators from serving as advocates or representatives of any party within the arbitration proceedings. This provision underscores the fundamental connection with the principle of procedural fairness and neutrality.[121] Furthermore, Article 10(1) delineates the grounds for challenging an arbitrator, stipulating that "[t]he LCIA Court may revoke any arbitrator's appointment upon its own initiative, at the written request of all other members of the Arbitral Tribunal or upon a written challenge by any party if: (…) (iii) circumstances arise that give rise to justifiable doubts as to that arbitrator's impartiality or independence."[122]

Lastly, Article 14 delineates the responsibilities incumbent upon parties during the

[119] Loretta Malintoppi and Alvin Yap, '153 Challenges of Arbitrators in Investment Arbitration: Still Work in Progress?' in Katia Yannaca-Small (ed), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press 2018) 165.
[120] Perry S Bechky, '*Investor-State Arbitrators' Duties to Non-Parties*' (2021) 31 *Duke Journal of Comparative & International Law* 221, 231–32
[121] *LCIA Arbitration Rules* (2020) art 10 https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx accessed 20 July 2025
[122] Ibid.

arbitration process, emphasising "a duty to act fairly and impartially as between all parties, giving each a reasonable opportunity of putting its case and dealing with that of its opponent(s)."[123]

(ii) Under the Swedish Arbitration Act (SAA) and the SCC Arbitration Rules, arbitrators are required to maintain impartiality. Notably, the SAA does not contain an explicit equivalent to the term "independence;"[124] however, legislative history indicates that in scenarios where an arbitrator's independence could reasonably be questioned, concerns regarding their impartiality may also arise.[125]

The SCC Arbitration Rules explicitly state that "every arbitrator must be impartial and independent."[126] This is a core duty that comes into effect from the moment of appointment and persists throughout the entirety of the arbitral proceedings.[127] Prior to appointment, a prospective arbitrator is required to disclose any circumstances that may reasonably lead to doubts regarding their impartiality or independence. Upon appointment, the arbitrator shall submit to the Secretariat a signed statement affirming their acceptance, availability, impartiality, and independence, while also disclosing any relevant circumstances that could raise such doubts. Furthermore, under the SCC Rules, a party is permitted to challenge any arbitrator "if circumstances exist that give rise to

[123] Ibid. See also, James Fry and Juan Ignacio Stampalija, 'Forged Independence and Impartiality: Conflicts of Interest of International Arbitrators in Investment Disputes' (2014) 30(2) Arbitr Int 197.
[124] Helena Jung, 'SCC Practice: Challenges to Arbitrators – SCC Board Decisions 2005–2007' (Stockholm Chamber of Commerce) 1-2.
[125] See Prop 1998/99:35, *Ny varumärkeslag* [*New Trademark Act*] 82.
[126] *SCC Arbitration Rules* (2023) art 18(1) https://sccarbitrationinstitute.se/wp-content/uploads/2024/12/SCC_Arbitration_Rules_2023_English.pdf accessed 2 July 2025.
[127] Katia Fach Gómez, *Key Duties of International Investment Arbitrators: A Transnational Study of Legal and Ethical Dilemmas* (Springer International Publishing 2019) 47 https://link.springer.com/10.1007/978-3-319-98128-4 accessed 2 August 2025.

justifiable doubts as to the arbitrator's impartiality or independence or if the arbitrator does not possess the qualifications agreed by the parties."[128]

(iii) In ISDS, the UNCITRAL Model Law establishes one of the most comprehensive and influential legal frameworks ensuring impartiality.[129] This Model Law serves not only as a fundamental foundation for the ISDS mechanism but also significantly influences the arbitration regulations adopted by numerous states, many of which incorporate its provisions into statutory law.[130] Article 12 articulates that "[a]n arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence."[131] The use of the term "justifiable" delineates an objective standard which is similar to other institutional arbitration regulations and national legal frameworks, such as the English common law test of appearance of bias.[132] As Caron and Caplan have explained, "[w]hile a party's subjective concerns about an arbitrator's bias may prompt a challenge, it is the objective reasonableness of their concerns that is ultimately determinative."[133]

In accordance to this, Article 11 establishes that "when a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence."[134] Akin to others institutions' obligation, this is not a singular occurrence

[128] SCC Rules (n 126) art. 19(1). See also, Practical Law Arbitration, 'Challenges to arbitrators' (Practical Law UK Practice Note 5-501-6994, Thomson Reuters 2023) https://go.adr.org/rs/294-SFS-516/images/Disclosure%20Topic%20-%20Challenges%20to%20arbitrators%20%282%29.pdf accessed 10 July 2025.
[129] Fry and Stampalija (n 123) 189, 206
[130] Samuel R Luttrell*, 'Go Back to Gough: The Need for the "Real Danger" Test for Arbitrator Bias in the Common Law Seats of the Asia Pacific*' (2008) 16 Asia Pacific Law Review 159.
[131] *UNCITRAL Arbitration Rules* (2021) art 12 https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/21-07996_expedited-arbitration-e-ebook.pdf accessed 5 July 2025.
[132] David Caron and Lee Caplan, The UNCITRAL Arbitration Rules: A Commentary (2nd edn, OUP 2013) 208. For further details, please refer to Chapter 3 of this thesis.
[133] Ibid. See also, Stavros Brekoulakis and Anna Howard, 'Impartiality and the Construction of Trust in Investor-State Dispute Settlement' (2023) 38 ICSID Review - Foreign Investment Law Journal 644.
[134] UNCITRAL Arbitration Rules (n 131) art. 11

but rather an ongoing duty to disclosure "without delay," if new circumstances occur.[135] Such a requirement is essential for maintaining the integrity of the process.

1.2.2. Subjective indicators of "Psychological Partiality"

While challenges to arbitrators frequently depend on an objective standard, subjective indicators often serve as the foundational basis for initial suspicions regarding an arbitrator's impartiality.

These indicators pertain to the arbitrator's state of mind, personal convictions, and conduct during the proceedings, which can reveal a potential lack of impartiality.[136] For an arbitrator to be deemed impartial, it is imperative that there exists substantial evidence demonstrating their bias.[137]

The determination of potential partiality or bias involves consideration of various factors, including professional, business, or personal relationships that could reasonably give rise to the belief that an arbitrator is biased. Arbitrators are generally prohibited from engaging in social courtesies with the parties involved in a dispute, except for those interactions that arise from customary societal relationships typical of the community in which the arbitrator resides. Such interactions may include offering condolences or visiting patients. However, it is advisable to avoid such courtesies whenever possible, as they may be perceived as compromising the arbitrator's impartiality and independence.[138]

Although the concept of impartiality is inherently subjective, it must be exemplified through outward behaviours. Such behaviours may include a professional or personal connection with a party that could reasonably suggest bias. In the absence of such relationships, indications of partiality may be inferred from the arbitrator's conduct.[139]

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[135] Ibid.

[136] Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 1028.

[137] Ronán Feehily, 'Neutrality, Independence and Impartiality in International Commercial Arbitration: A Fine Balance in the Quest For Arbitral Justice' (2019) 7 Penn State Journal of Law & International Affairs 21.

[138] Ahmed Mohammad Al-Hawamdeh, Noor Akief Dabbas and Qais Enaizan Al-Sharariri, 'The Effects of Arbitrator's Lack of Impartiality and Independence on the Arbitration Proceedings and the Task of Arbitrators under the UNCITRAL Model Law' (2018) 11 Journal of Politics and Law 66.

[139] Feehily (n 137)

However, even in the absence of a formal relationship, the arbitrator's conduct may nonetheless reveal inherent bias. For instance, the expression of derogatory statements directed towards one of the parties serves as a salient indicator of partiality within the arbitration process. A particularly notable example happened in the *"Owners of the Steamship "Catalina" and Others and The Owners of the Motor Vessel "Norma"* case, where the arbitrator made a strong comment that "Portuguese people were liars."[140]

An additional significant indicator of potential bias is the presence of a pattern of unequal treatment. Such unequal treatment by an arbitrator may manifest in various situations, including consistently granting one party more speaking time, frequently interrupting one party's counsel, or exhibiting signs of impatience, boredom, or frustration during proceedings. Furthermore, during questioning, an arbitrator's demeanour – such as adopting a condescending tone or engaging in behaviour intended to ridicule a witness or undermine a party's case – may also serve as evidence of bias. These reactions and behaviours fundamentally contradict the principles of independence and impartiality that arbitrators must uphold. Arbitrators are required to maintain emotional neutrality, ensuring that personal feelings do not influence their judgments, regardless of whether these emotions are directly related to the dispute at hand.[141]

1.3. Interrelation and Distinctions Between Independence and Impartiality

The thesis has thus far outlined the concepts of independence and impartiality, providing a comprehensive explanation of their definitions within the broader context of law, arbitration law, and the ISDS system. This conceptual framework is essential for the subsequent analysis, as it is crucial for assessing how these principles are implemented in practice and examining potential factors that may compromise their application.

[140] *Re The Owners of the Steamship "Catalina" and Others and The Owners of the Motor Vessel "Norma"* (1938) 61 Ll.L.Rep. 360 (Adm).
[141] Al-Hawamdeh, Dabbas and Al-Sharariri (n 138).

Although the terms are conceptually distinct, they are inextricably interconnected in practical application, forming a cohesive, unified requirement.

As noted in sections 1.1 and 1.2 above, the primary distinction between independence and impartiality resides in their focus and method of assessment.

Independence is defined as an objective standard concerning the absence of any external, verifiable relationships between an arbitrator and the parties, their legal representatives, or co-arbitrators.[142] When a significant relationship is identified, a presumption of bias may be inferred regardless of the arbitrator's state of mind.[143] For instance, an arbitrator possessing a direct financial stake in a party or employed by that party would objectively undermine their independence.[144]

On the contrary, impartiality is subjective. This pertains to the mental state of an arbitrator, indicating a lack of bias, prejudice, or predisposition toward any party or the subject matter of the dispute.[145] Proving an arbitrator's actual bias is complex; consequently, assessments frequently depend on "apparent bias."[146] This assessment seeks to ascertain whether external contextual factors or the conduct of the arbitrator could reasonably lead an informed third party to perceive a significant risk of actual bias or prejudice.

Lord Justice Sedley, in his foreword to Grant Hammond's authoritative treatise on Judicial Recusal, delineates the distinction between the two foundational ethical principles: the judicial office is to dispense justice "without fear or favour, affection or ill-will."[147]

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[142] Arno E Gildemeister, 'The Independence and Impartiality of Arbitrators' in Werner Haslehner and others (eds), *Alternative Dispute Resolution and Tax Disputes* (Edward Elgar Publishing 2023).
[143] Redfern (n 87) 12
[144] López (n 17) 15.
[145] Ibid. 18
[146] Ibid 15. See also, Marta Vicente, '*Should Arbitrators "Live" in Public Law Arbitration? The Case for a More Demanding Standard of Independence and Impartiality*' (2022) 9 e-Publica 55, 62 https://e-publica.pt/article/36848 accessed 23 July 2025.
[147] Stephen Sedley, 'Preface' in Grant Hammond, *Judicial Recusal: Principles, Process and Problems* (Hart Publishing 2009) IX.

Despite their distinct definitions, independence and impartiality function as complementary and mutually reinforcing principles that collaboratively uphold the integrity of a fair trial.[148]

While the principle of independence is often considered a fundamental prerequisite for impartiality within specific contexts, it is essential to recognise that the relationship between independence and impartiality is nuanced. An independent arbitrator is typically assumed to possess impartiality; however, it is also conceivable for an arbitrator to exhibit technical independence without embodying genuine impartiality.[149]

In specific institutional regulations, the concept of independence stands as the only explicitly articulated principle. For instance, in the English version of the ICSID Rules, the concept of impartiality is notably absent. Conversely, the Spanish text explicitly mandates "*imparcialidad de juicio*" (impartiality of judgment), while the French version stipulates a "*garantie d'indépendance*" (guarantee of independence), implicitly alluding to the principle of impartiality.[150] Undoubtedly, there are other situations in which independence is compromised or less emphasised. Independence may also be waived by the parties, whereas impartiality cannot.[151]

Despite the notable discrepancies in the definitions, it is a prevalent practice within numerous legal frameworks to conceptualise these two notions as a "unified package," frequently using the terms concomitantly or interchangeably.[152] Graphically, these concepts resemble two circles that initially appear to be completely disjoint but subsequently become intertwined and overlapping.

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[148] Cleis (n 27) 22-23.

[149] Dominique Hascher, *'Independence and Impartiality of Arbitrators: 3 Issues'* (2012) 27 Am U Int'l L Rev 792, citing: "Admittedly, an independent arbitrator is typically impartial. An arbitrator may, however, be independent and yet, lack impartiality, or vice versa."

[150] López (n 17).

[151] Doak Bishop and Lucy Reed, "Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration" (1998) 14 Arbitration International Journal, 400.

[152] López (n 17).

1.4. Practical Consequences to the Lack of Impartiality and Independence: The Duty of Disclosure.

Once the principles of independence and impartiality are defined, it is necessary to delineate the procedural duties, especially the duty of disclosure, and responsibilities that stem from these concepts. Additionally, numerous safeguards have been implemented to ensure strict adherence to these standards, especially in the ISDS context.[153]

Disclosure is generally regarded as a preventive safeguard: an arbitrator should disclose all facts that might serve as grounds for objection or disqualification.[154] By revealing any facts that could lead to objections, arbitrators reduce the likelihood of later challenges or annulments. While the arbitrator's duty of disclosure operates in a comparable manner, it does not supersede the core principles of the arbitrator's independence and impartiality.[155]

The duty of disclosure constitutes a continuous obligation throughout the entirety of the arbitral proceedings. Any newly arisen circumstances that could potentially compromise the arbitrator's impartiality or independence must be disclosed promptly.[156]

In practice, before the commencement of arbitration proceedings, prospective arbitrators usually disclose relevant facts to the appointing authority or to the parties. When such facts give rise to justifiable doubts regarding impartiality or independence, they must be documented in writing and disclosed to all parties involved, thereby facilitating discussion prior to the formal appointment process. As noted above, several institutions including – ICSID, ICC, UNCITRAL and LCIA – require signed specific declaration forms concerning disclosure requirements, which prospective arbitrators are obliged to sign prior to confirmation.

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[153] Bernasconi-Osterwalder and Lise Marshall (n 90) 28-30.
[154] Fry and Stampalija (n 123).
[155] López (n 17) 22.
[156] Scott M Donahey, *The UDRP and the Appearance of Partiality: Panelist Impaled on the Horn of a Dilemma* (Tomlinson Zisko Morosoli & Maser LLP 2001).

Within the ISDS context, for instance, numerous challenges brought before the ICSID have focused on various issues concerning these declarations, including the formal requirements and substantive content.[157] The ICSID jurisprudence indeed acknowledges the potential that "nondisclosure may [be] an aberration on the part of the conscientious arbitrator."[158]

The principal issue concerning the ICSID Convention relates to the interpretation of the criteria used to evaluate the absence of impartiality and independence. Unlike other institutional assessments that rely on "justifiable doubts," the ICSID Convention establishes a standard grounded in the "manifest lack" of the qualities outlined in Article 14(1) of the Convention.[159]

This ambiguous and uncertain standard within international arbitration law has a profound impact on the ISDS system. It complicates the dispute resolution process by introducing unpredictability and inconsistency, thereby raising concerns about the uniformity of its application across different jurisdictions. In response to these challenges, various frameworks have been developed to address and clarify this aspect of uncertainty. These frameworks aim to provide a more comprehensive understanding of the potential issues that can arise from the lack of independence and impartiality among arbitrators, especially within the context of ISDS cases. One notable example is the IBA Guidelines.

1.4.1. The IBA Guidelines on Conflicts of Interest in International Arbitration

The IBA Guidelines are soft law instruments, setting out circumstances under which an arbitrator may be required to disclose relevant information or be disqualified based on specific conflicts of interest.[160] Though not legally binding, these standards represent internationally recognised best practices and a "code of reference,"[161] frequently used as guidance by arbitrators, parties, institutions,

[157] Fach Gómez (n 127) 1.
[158] Suez, *Sociedad General de Aguas de Barcelona S.A., and Interagua Servicios Integrales de Agua S.A. v. The Argentine Republic* (ICSID Case No ARB/03/19) para 44.
[159] Schacherer (n 6) 11-12.
[160] Emma Lindsay and Camilla Gambarini, '*The Proposed Reform of the English Arbitration Act on Arbitrators' Independence and Impartiality and the Duty of Disclosure from a Comparative Perspective*' (2024) 40 Arbitration International 51-52
[161] Malintoppi (n 60) 822.

and courts.[162] Due to their extensive recognition as highly valuable instruments, primarily because they represent a transnational consensus within their respective fields, such tools have frequently been employed as authoritative references in addressing conflicts of interest in an international context.[163] Despite this prevailing trend, certain judicial decisions have called into question the appropriateness of these Guidelines as the authoritative legal standard for resolving challenges to arbitrators, particularly within the context of ICSID.[164]

The IBA Guidelines are structured into two distinct sections:

(i) General Standards – this first section delineates the standards that guide parties, arbitrators, and arbitral institutions in addressing issues of bias.

(ii) Colour-coded Lists – the second part comprises a non-exhaustive enumeration of practical scenarios in which arbitrators may find themselves, categorising these situations into three distinct groups: the Red list, the Orange list, and the Green list.[165] This classification is based on the degree to which each scenario may raise questions regarding the arbitrator's impartiality and independence. Specifically:

   a. The Red List is divided into two parts: the non-waivable Red List, which delineates situations of such severity that they are inherently prohibitive due to clear conflicts of interest (e.g., the arbitrator possessing a significant financial stake in one of the involved parties or the case) and the waivable Red List, which

[162] Aman Deep Borthakur, '"Hardening" the Soft Law of Bias: An Indian Perspective on the IBA Guidelines' (2020) 20 Oxford University Commonwealth Law Journal 192-193.
[163] *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/ 04/ 01, Decision on Argentine Republic's Proposal to Disqualify Ms. Teresa Cheng (Aug. 26, 2015) para 96. See also, Ricardo Dalmaso Marques and Fernanda Marques Dal Mas, 'Managing Conflict of Interest in International Arbitration: The Role of the IBA Guidelines' in Julien Chaisse, Leïla Choukroune and Sufian Jusoh (eds), *Handbook of International Investment Law and Policy* (Springer Singapore 2020).
[164] Malintoppi and Yap (n 119) 167-168. See also, Chagos Marine Protected Area Arbitration (Mauritius v. U.K.), Reasoned Decision on Challenge (Nov. 30, 2011), para 138.
[165] Bernasconi-Osterwalder and Lise Marshall (n 90) 29-30.

encompasses serious circumstances that could potentially be excused provided that full disclosure is made and explicit consent is obtained from the parties.[166]

b. The Orange List, which arguably is the most essential compendium for the duty of disclosure, delineates circumstances that may reasonably give rise to justified doubts, thereby necessitating disclosure by the arbitrator.[167] For instance, the Orange List delineates circumstances under which disclosure is obligatory. Such circumstances include situations in which "[t]he arbitrator has, within the past three years, served as counsel for one of the parties or an affiliate of one of the parties, or has previously advised or been consulted by the party or an affiliate of the party, making the appointment in an unrelated matter, but the arbitrator and the party or affiliate of the party, have no ongoing relationship,"[168] or "[t]he arbitrator has, within the past three years, been appointed to assist in mock-trials or hearing preparations on two or more occasions by one of the parties, or an affiliate of one of the parties in unrelated matters."[169] These examples serve as illustrative cases within the List, thereby elucidating the obligations of disclosure and addressing the pertinent concerns of all parties involved in the process.

c. The Green List encompasses scenarios characterised by the absence of any conflict of interest and the lack of any obligation to disclose. This section offers a "safe harbour" for arbitrators by explicitly stating that relationships of a peripheral or insignificant nature are exempt from disclosure requirements. This clarification aims to mitigate the potential for purely tactical disclosures.[170]

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[166] Chiara Giorgetti, '*The Arbitral Tribunal: Selection and Replacement of Arbitrators*' in Chiara Giorgetti (ed), *Litigating International Investment Disputes* (Brill-Nijhoff 2014). See also, Rogers (n 105) 312. See also, Fry and Stampalija (n 123) 202.
[167] Redfern (n 87) 16.
[168] IBA Guidelines (n 32)
[169] Ibid. Orange List 3.1.4.
[170] Chiara Giorgetti, '5 The Arbitral Tribunal: Selection and Replacement of Arbitrators' in Chiara Giorgetti (ed), Litigating International Investment Disputes (Brill | Nijhoff 2014) https://brill.com/view/book/edcoll/9789004276574/B9789004276574_006.xml accessed 2 August 2025.

Returning to the General Standards, they clearly delineate the obligation of disclosure.[171] Notably, General Standard 1 stipulates that an arbitrator is obligated to demonstrate impartiality and independence at the moment of accepting their appointment and is required to maintain these principles throughout the duration of the proceedings until the issuance of the final award or the definitive termination of the process. Therefore, this Standard delineates both (i) the fundamental duty of arbitrators to uphold impartiality and independence, and (ii) the temporal framework within which these responsibilities are to be maintained.[172]

General Standard 3 provides the framework for the "disclosure by the Arbitrator,"[173] describing the arbitrator's duty to disclose "facts or circumstances that could, in the perception of the parties, give rise to doubts as to the arbitrator's impartiality or independence."[174]

Furthermore, General Standard 3 clarifies that the duty exists even if there has been "[a]n advance declaration or waiver in relation to possible conflicts of interest arising from facts and circumstances that may arise in the future […]."[175] This specification is relevant because it clarifies that the arbitrator's declaration merely constitutes a disclosure and should not be interpreted as an acknowledgement that the arbitrator lacks independence or impartiality. As explained in the General Standard 3 paragraph 3(c), if the arbitrator had deemed these qualities to be absent, he or she would have either refused the nomination or appointment initially or resigned from the position.[176]

The passage further elaborates that any uncertainties or ambiguities related to the disclosure should be interpreted and addressed in a manner that prioritises transparency and clarity. Moreover, an

[171] IBA Guidelines (n 32) General Standard 1
[172] Commentary on the revised text of the 2024 IBA Guidelines on Conflicts of Interest in International Arbitration (IBA, 2024) https://www.ibanet.org/document?id=Commentary-on-2024-IBA-Guidelines-on-Conflicts-of-Interest accessed on 30 July 2025.
[173] IBA Guidelines (n 32) General Standard 3.
[174] Ibid.
[175] Ibid.
[176] Commentary IBA Guidelines (n 172)

arbitrator who perceives herself or himself to possess a conflict of interest, bias, or dependency should abstain from accepting the appointment to maintain impartiality.[177]

General Standard 3(f) stipulates that when an arbitrator evaluates whether a disclosure is necessary, the decision should not be influenced by the current stage of the arbitration proceedings or by the standards employed by courts and arbitral institutions for challenges. Furthermore, General Standard 3(g) clarifies that, even when a disclosure is deemed appropriate, the absence of such a disclosure does not inherently imply the existence of a conflict of interest or warrant disqualification.[178]

These final two paragraphs exemplify a broader objective to enhance and clarify disclosure obligations, given that they have been revised from the 2014 version of the IBA Guidelines.

The duty of disclosure is inherently linked to the duty to investigate. An arbitrator is not permitted to rely solely on their prior knowledge; instead, they are expected to conduct reasonable inquiries to identify any potential conflicts of interest.[179]

1.4.2. Consequences to the duty of disclosure.

An in-depth analysis of the legal framework governing an arbitrator's duty of disclosure reveals a complex and multifaceted question: what are the broader legal, procedural, and ethical implications associated with such disclosures? Specifically, it prompts an inquiry into how these disclosures may influence an arbitrator’s capacity to maintain impartiality, independence, and public confidence throughout the arbitration process. The act of disclosure by an arbitrator is a crucial procedural safeguard that ensures transparency and fairness within arbitration proceedings. Its effectiveness, however, depends largely on the nature and scope of the information disclosed, as well as how parties respond to such disclosures. Fundamentally, disclosure functions as a key risk mitigation tool, transferring the responsibility for identifying potential conflicts of interest from the arbitrator to the involved parties, thereby promoting a more transparent dispute resolution environment. The

[177] Ibid.
[178] Ibid.
[179] IBA Guidelines (n 32) General Standard 7(c)

consequences of disclosure, therefore, can be broadly categorised into two dimensions: (i) those arising directly from the act of making disclosures, which may include impacts on credibility, trust, and perceived neutrality; and (ii) those related to the failure to disclose relevant information, which can undermine the legitimacy of the arbitration process and potentially lead to challenges or annulments. Understanding these dimensions is essential for ensuring that disclosure practices uphold the integrity, fairness, and independence of arbitration.

Starting with the first, when an arbitrator provides a proper disclosure, it activates a particular procedural pathway. This pathway may range from a simple continuation of the arbitration proceedings to the initiation of a formal challenge. For instance, if an arbitrator discloses a potential issue – such as having served as a co-panellist with one of a party's legal representatives on a conference panel five years prior – that disclosure may be classified as a Green List or borderline Orange List item under the IBA Guidelines. Parties may therefore review the disclosed information and, upon deciding to take no further action, proceed with the arbitration without interruption.[180] By refraining from objecting, the parties are deemed to have waived their right to subsequent challenge.[181]

A different scenario materialises when a party raises concerns directly to the arbitral institution or the arbitrator(s) without initiating a formal challenge. To maintain the integrity and efficiency of the arbitral process and to prevent protracted disputes over appointment, the arbitrator may opt to resign voluntarily. In this case, a new arbitrator is appointed.[182]

[180] William M Tupman, 'Challenge and Disqualification of Arbitrators in International Commercial Arbitration' (1989) 38 ICLQ 26, 39-42.
[181] Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (2nd edn, Sweet & Maxwell 1991) 225.
[182] Leonardo F Souza-McMurtrie and Cesar Pereira, 'A Duty to Disclose and A Right Not To?' (Kluwer Arbitration Blog, 19 August 2024) https://legalblogs.wolterskluwer.com/arbitration-blog/a-duty-to-disclose-and-a-right-not-to/?output=pdf accessed 31 July 2025.

Lastly, the disclosure by an arbitrator can give rise to what a party reasonably regards as "justifiable doubts" on the arbitrator's impartiality or independence. Such doubts typically trigger a formal challenge with the appropriate procedural body. This challenge initiates a disqualification process, whereby the decision-making authority evaluates the disclosed information against the relevant legal standard.[183]

If the challenge is rejected, the arbitrator remains in office; on the contrary, if the challenge is upheld, the arbitrator is removed. This outcome is particularly disruptive, as it necessitates the appointment of a replacement arbitrator and may result in significant delays and additional costs, including the potential need to repeat some or all of the proceedings.

Regarding the second implication, the non-disclosure by an arbitrator may result in more severe repercussions, potentially jeopardising the overall integrity of the arbitral process.[184]
For example, when a conflict emerges during proceedings – such as a continuing professional relationship with the opposing party's expert witness – it can be particularly detrimental. Such situations may lead to significant procedural delays and potentially undermine confidence in the fairness and integrity of the arbitral process.[185]

When a conflict of interest is disclosed only after the final award has been issued, the implications are significantly different. The aggrieved party may challenge the award on the basis of the arbitrator's nondisclosure. Such a challenge can have serious consequences, as a court may annul (set aside) the award, thereby invalidating years of proceedings and incurring considerable legal costs.

[183] López (n 17). See also, Malintoppi (n 73).
[184] Cristani (n 84).
[185] Souza-McMurtrie and Pereira (n 182)

This was the case in *Eiser v. Spain,* where an ICSID *ad hoc* committee annulled a €128 million award because the tribunal president failed to disclose his ongoing professional relationship with the claimant's damages expert, thus creating a "manifest appearance of bias."[186]

Beyond the procedural consequences, which serve to protect the arbitration process, nondisclosure can also have profound implications for an arbitrator's professional reputation, significantly impairing an arbitrator's future appointment prospects and diminishing their standing within the interconnected global arbitration community.[187]

The prevailing safeguard, endorsed by the IBA Guidelines, is the maxim "when in doubt, disclose." This statement seeks to safeguard the interests of all involved parties, maintain the integrity and credibility of the arbitral awards, and preserve the arbitrators own standing.[188]

1.5. Setting the Stage for Chapter 2

This Chapter has conducted an analysis of the principles of independence and impartiality within the context of international arbitration, with a particular emphasis on their application in ISDS mechanisms. It has sought to elucidate not only the theoretical foundations underpinning these principles but also the extensive legal frameworks that govern their implementation. While independence and impartiality are conceptually distinct, they operate synergistically to provide essential safeguards within arbitral proceedings. In this way, they are frequently perceived as elements of a unified ethical standard that is vital for maintaining procedural fairness.

Within the realm of ISDS, these principles are undeniably foundational to the overarching notions of procedural fairness and legitimacy. The Chapter has also elaborated on the procedural safeguards that have been designed to uphold independence and impartiality, highlighting the corresponding duties imposed on arbitral tribunals and parties involved in the proceedings. One notable aspect of these

[186] *Eiser v Spain* (n 91)
[187] Souza-McMurtrie and Pereira (n 182)
[188] IBA Guidelines (n 32)

safeguards is the duty of disclosure, which serves a critical function in ensuring transparency throughout the arbitral process.

In an era characterised by heightened scrutiny of the arbitration process, alongside increasing calls for reform, it is pertinent that these principles be interpreted and applied with greater rigour. This could entail the establishment of more stringent standards, the introduction of broader disclosure obligations, and the implementation of stronger institutional oversight mechanisms.

To maintain trust in the ISDS framework, it is critical to ensure a clear doctrinal differentiation between independence and impartiality, coupled with consistent and robust application of these principles in practice. Both principles work together to foster an environment where all parties can engage with confidence in the arbitral process. Thus, the credibility of ISDS as a mechanism for dispute resolution hinges significantly on how these principles are upheld and enforced.

Looking ahead, the next Chapter will engage in a comprehensive examination of the current legitimacy crisis facing ISDS. It will delve into how systemic deficiencies inherent in the ISDS framework can compromise the principles of impartiality and independence. By critically engaging with these issues, the forthcoming analysis will underscore the essential role that independence and impartiality play not only as ethical imperatives but also as practical necessities for ensuring that the arbitration process produces just and equitable outcomes.

2. Chapter 2: Structural Challenges and the Legitimacy Crisis in ISDS

Building upon the discussions presented in the preceding chapter concerning the fundamental principles of independence and impartiality that underpin any adjudicative framework – including the ISDS mechanism – this chapter delves deeper into the structural shortcomings inherent within the ISDS system. These shortcomings not only compromise the aforementioned principles but also exacerbate the legitimacy crisis that has garnered increasing attention and critique from various stakeholders, including states, academics, and civil society organisations.

The growing scepticism toward the fairness and effectiveness of the ISDS mechanism is closely linked to several systemic issues. These include, but are not limited to, the methods employed in the appointment of arbitrators, the pronounced concentration of cases among a limited cadre of practitioners, and the attendant risks of conflicts of interest that threaten the integrity of the arbitration process. Such concerns have raised significant alarms regarding the perceived and actual impartiality of ISDS, challenging its ability to uphold justice in investment disputes.

To thoroughly analyse the legitimacy crisis, this chapter is organised around four critical pillars – each scrutinising dimensions that collectively illuminate the depth and breadth of these systemic issues, with a particular focus on the principles of independence and impartiality. The examination begins with an exploration of the legitimacy crisis in its various manifestations, revealing how these entrenched problems are often rooted in the very design and operational framework of the ISDS system. By tracing the historical and structural origins of these challenges, we uncover the ways in which the ISDS mechanism frequently falls short of delivering the unbiased and equitable justice that stakeholders – ranging from multinational corporations to host states and affected communities— rightfully expect and demand.

This diagnostic approach serves not only to elucidate the complexities surrounding the ISDS framework but also to set the stage for the forthcoming Chapter Three.

2.1. The Legitimacy Crisis in ISDS

The evolution of the contemporary investment treaty framework represents one of the most significant and rapid proliferations of international legal norms in the post-World War II era. Within just three decades, this regime has shifted from a marginal subset of international law to a central component, evidenced by the conclusion of more than 3,500 treaties and the initiation of over 1,100 investor-state arbitration proceedings.[189]

In recent years, the ISDS system has come under mounting pressure, facing a profound legitimacy crisis, as reflected in both empirical trends and public backlash.[190] This scrutiny has compelled states to reassess their involvement and increasingly advocate for reform.

In 2015, at the height of contentious negotiations over the Transatlantic Trade and Investment Partnership (TTIP), Celia Malmström, then European Union Trade Commissioner, acknowledged a "fundamental and widespread lack of trust by the public in the fairness and impartiality of the old ISDS model."[191]

Her statement illustrates the growing criticism voiced not only by scholars, but also by the broader public, highlighting the system's structural vulnerabilities.[192]

Similarly, Professor Joost Pauwelyn has observed that "ISDS is in a state of crisis in many parts of the world, and much of the criticism is focused precisely on who is deciding ISDS cases. The investment regime is said to be governed by arbitrators, rather than states. Arbitrators are labelled as "private

[189] Daniel Behn, Ole Kristian Fauchald and Malcolm Langford, 'Introduction: The Legitimacy Crisis and the Empirical Turn' in Daniel Behn, Ole Kristian Fauchald and Malcolm Langford (eds), *The Legitimacy of Investment Arbitration* (1st edn, Cambridge University Press 2022) 1.

[190] Mojtaba Dani and Afshin Akhtar-Khavari, '*Rethinking the Use of Deference in Investment Arbitration: New Solutions against the Perception of Bias*' (2018) 22 UCLA J Intl L & For Aff 38, 38-39

[191] Cecilia Malmström, 'Proposing an Investment Court System' (European Commission Blog, 16 September 2015) https://wayback.archive-it.org/12090/20191128122737/https://ec.europa.eu/commission/commissioners/2014-2019/malmstrom/blog/proposing-investment-court-system_en accessed 26 July 2025

[192] Thomas Dietz, Marius Dotzauer and Edward S Cohen 'The Legitimacy Crisis of Investor-State Arbitration and the New EU Investment Court System' (2019) 26 Review of International Political Economy 749-750.

judges" operating in secrecy, biased in favor of large multinationals, without regard to conflicts of interest and issuing inconsistent decision (...) the world investment regime seems, at present, to have too much rule of lawyers and not enough rule of law."[193]

2.1.1. Defining the Crisis

The legitimacy crisis faced by ISDS is both a persistent and systemic challenge, marked by inconsistencies and shortcomings within its framework. The growing number of ISDS cases has amplified scholarly and public criticisms regarding the system's credibility.

As Susan Franck highlighted in her widely cited article, "The Legitimacy Crisis in Investment Treaty Arbitration": "**[t]he lack of determinacy and coherence** in treaty arbitration has raised the spectre of a legitimacy crisis. There are a variety of institutions that complain about particular aspects of the investment treaty process, including stated concerns about the transparency and privacy of the decision-making process (…). Many of these concerns are symptoms of a larger problem: the ability to determine with certainty the respective rights and obligations of investors and Sovereigns in a given situation."[194]

From this perspective it becomes evident that the arguments are grounded in the notion that the legitimacy crisis serves as a symptom of a deeper, underlying structural flaw. The quote by Franck highlights two essential components of the ISDS legitimacy crisis.

First, the argument posits that the crisis is driven by a "lack of determinacy and coherence."[195] Determinacy pertains to the predictability and certainty of the law. The ISDS regime is characterised by a multitude of fragmented investment treaties, often articulated with vague standards, such as "fair

[193] Joost Paulwelyen, 'The Rule of Law without the Rule of Lawyers: Why Investment Arbitrators are from Mars, Trade Adjudicators from Venus' (2015) 109 American Journal of International Law 763
[194] Susan D Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' (2004) 73 Fordham L Rev 1521, 1586-7.
[195] Ibid.

and equitable treatment."[196] This ambiguity complicates the forecast of tribunal decisions, thereby adversely affecting the perceived legitimacy of the system. For coherence, in this context, Franck pertains to the principle of consistency in legal application, whereby like cases should be decided similarly.[197]

The absence of determinacy and coherence gives rise to several observable symptoms, which are frequently cited as specific complaints against ISDS. These phenomena will be examined in greater detail in the subsequent sections.

Second, the assertion that the legitimacy crisis imposes limitations on protected rights and the scope of a state's sovereign authority is the root problem that should be tackled. The ambiguous language employed in the treaties engenders a substantial grey area, further complicating the ISDS scenario.[198]

Franck's 2004 observations remain profoundly pertinent two decades later, as these very issues continue to dominate reform discourse and influence contemporary perceptions of the regime.[199] While this perspective represents a generally accepted viewpoint, some scholars argue that the perceived deficiencies in the legitimacy of ISDS may have been overstated.[200] For example, Bower and Schill contend that, notwithstanding the concerns of the system, the ISDS maintains an adequate level of legitimacy, thereby obviating the necessity for reform.[201]

The following sections examine the four central issues that dominate the debate on legitimacy, namely: (1) structural asymmetry, (2) inconsistency and unpredictability, (3) lack of transparency, and (4)

[196] Chen Yu, *Dispute Settlement and the Reform of International Investment Law: Legalization through Adjudication* (Edward Elgar Publishing 2023) 11. See also, Anders Nilsson and Oscar Englesson, 'Inconsistent Awards in Investment Treaty Arbitration: Is an Appeals Court Needed?' (2013) 30:5 J Intl Arb 561–79
[197] Franck (n 194).
[198] Franck (n 194).
[199] Ibid.
[200] Charles N Brower & Stephen W Schill, 'Is Arbitration a Threat or a Boom to the Legitimacy of International Investment Law Symposium: International Judges' (2008) 9 Chi J Intl L 471.
[201] Ibid.

questions of independence and impartiality. These themes constitute the most frequently cited, empirically observable, and widely accepted sources of critique, fuelling legitimacy concerns.[202]

As noted above, these issues should not be regarded as isolated flaws but rather as manifestations of underlying systemic biases inherent within the ISDS framework and analytical lenses to scrutinise it. Taken together, the asymmetric positioning of investors vis-à-vis states, the fragmented treaty network, and the *ad hoc* procedures for arbitral appointments generate systemic distortions in both procedural fairness and substantive outcomes.

2.1.1.1. Asymmetry of arbitrations

The ISDS system contains an inherent imbalance, as arbitral proceedings are primarily grounded in international investment treaties. In practice, the right to initiate proceedings is generally confined to foreign investors, as the state's offer to arbitrate is explicitly directed towards them. This dynamic reflects Paulsson's concept of "arbitration without privity," whereby investors may unilaterally accept arbitration rights without any active initiation by the State.[203]

This asymmetry confines States to the role of respondents, limiting their function to defending against claims rather than pursuing remedies for investor misconduct. This dynamic raises significant concerns regarding the imbalance of procedural power and inequality of arms.[204] As Professor Bjorklund has observed, "the spectacle of investors seeking multimillion or even billion-dollar awards against host states with no reciprocal claim expected from the state raises questions about procedural and substantive fairness."[205] Such procedural imbalance reinforces the perceptions that ISDS is tilted in favour of foreign investors. Closely related to this is the concern that the regime symmetrically

[202] David Gaukrodger & Kathryn Gordon, 'Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community' (2012) OECD Working Paper No. 2012/3
[203] Jan Paulsson, 'Arbitration without Privity' (1995) 10 ICSID Rev 232.
[204] Paul E Trinel, 'Counterclaims and Legitimacy in Investment Treaty Arbitration' (2022) 38 Arbitration International 62-63.
[205] Andrea K Bjorklund, 'The Role of Counterclaims in Rebalancing Investment Law' (2013) 17(2) Lewis Clark L Rev 476.

prioritises the protection of private investment at the expense of the regulatory authority of sovereign States. This phenomenon may dissuade governments from implementing legitimate measures in domains such as public health, environmental conservation, or social welfare.[206]

2.1.1.2. Inconsistency and Unpredictability

The *ad hoc* nature of ISDS tribunals has led to conflicting and inconsistent awards, even in cases involving similar facts and treaty language.[207]

A well-known example is the pair of parallel proceedings *CME v Czech Republic* and *Lauder v Czech Republic*, where two separate investment tribunals reached opposite decisions on expropriation despite relying on the same factual background and almost identical treaty language.[208]

Circling back to the *ad hoc* nature of IIL arbitration, these inconsistencies are exacerbated by the absence of an appellate mechanism, which limits coherence and undermines legal certainty for both investors and states.[209] Addressing this shortcoming has emerged as a core focus within ISDS reform initiatives, with particular emphasis placed on proposals for an appellate mechanism analogous to the Appellate Body of the World Trade Organisation (WTO). An institution of this nature would promote enhanced consistency and foster the development of a more cohesive investment framework.[210]

2.1.1.3. Lack of Transparency

Historically, the confidentiality of ISDS proceedings has hindered public scrutiny and accountability, even in disputes involving substantial public funds and significant policy implications.[211] As

[206] Yu (n 196) 15-16
[207] Nilsson and Englesson (n 196) 561–79
[208] *Ronald S. Lauder v The Czech Republic*, UNCITRAL, Final Award (3 September 2001), para 201; *CME Czech Republic B.V. v The Czech Republic*, UNCITRAL, Partial Award (13 September 2001), para 609
[209] Anna Joubin-Bret, 'Why We Need a Global Appellate Mechanism for International Investment Law' (2015) Columbia Center on Sustainable Investment, Columbia FDI Perspectives No. 146
[210] David M Howard, 'Creating Consistency through a World Investment Court' (2017) 41:1 Fordham Intl LJ 1 27-32
[211] Franck (n 194)

previously mentioned, justice should be "seen to be done" and not merely administered.[212] In this context, a more transparent process and approach would be essential for fostering trust among the public and the involved parties.

Institutionally, ISDS closely resembles the model of commercial arbitration, wherein strong presumptions of confidentiality are standard. Although sovereign states are parties, the dispute resolution process remains opaque, thereby undermining its legitimacy.[213] In recent years, States and arbitral institutional entities have increasingly sought to augment and integrate transparency obligations, notably through the refinement of procedural rules and the incorporation of disclosure requirements into contemporary trade agreements and model investment treaties. This development underscores a growing emphasis on accountability and openness within international economic legal frameworks. India's inclusion of transparency in its Model BIT exemplifies efforts to strengthen accountability and procedural openness.[214]

2.1.1.4. Arbitrator's Independence and Impartiality

Lastly, significant scholarly attention has focused toward the role of the arbitrators.[215] Because arbitration is inherently grounded in the principles of independence and impartiality, any diminution of these fundamental values potentially jeopardises both the integrity of the process and the confidence placed in it.[216] Unlike judges in permanent courts, arbitrators are typically appointed *ad hoc* by the disputing parties for individual cases.[217] This practice has drawn criticisms, particularly concerning party influence, the phenomenon of recurrent appointments, colloquially termed "frequent

[212] See Chapter 1.
[213] Olivier Oakley-White, Confidentiality Revisited: Is International Arbitration Losing One of Its Major Benefits?, 6 Int'l Arb. L. Rev. 29 (2003); Franck (n 194) 1544
[214] Prabhash Ranjan, 'ISDS Transparency Provisions in the Indian Model BIT: A Half-Hearted Attempt?' (2018) 15(2) Transnational Dispute Management
[215] Malcolm Langford, Daniel Behn and Maria Chiara Malaguti, 'The Quadrilemma: Appointing Adjudicators in Future Investor–State Dispute Settlement' (2023) 14 Journal of International Dispute Settlement 149.
[216] Gautam Mohanty and Alexandros Bakos, 'The Depoliticization of Investment Disputes – How Deep Does the "Rabbit Hole" Go?' WTI Working Paper no. 09/2023 12
[217] Yu (n 196) 8-9

flyers," as well as the practice of individuals serving in multiple roles within ISDS proceedings, often referred to as "double hatting."

As noted above, this dissertation adopts independence and impartiality as its primary analytical lens for examining the legitimacy crisis in the ISDS. While broader concerns over asymmetry, inconsistency, and transparency are also vital to a holistic understanding of the legitimacy challenges, the analysis that follows concentrates on the appointment procedures and structural dynamics that shape adjudicators' neutrality. By foregrounding these issues, the discussion underscores how questions of impartiality and independence lie at the heart of the ISDS legitimacy deficit and reveal the deeper systemic biases embedded within the regime.

2.2. Structural Biases in Arbitrators: Systemic Impacts on Independence and Impartiality

Building upon this, the following discussion will focus on: (1) the party-appointment system, (2) repeated arbitrators and "frequent flyers", (3) "double-hatting" practices. Each section will examine one of the foregoing topics, considering their consequences in the system and consequent impact on independence and impartiality.[218]

The practices delineated in sections 2.2.1., 2.2.2., and 2.2.3. , such as "double-hatting," repeated appointments, and the lack of diversity, possess considerable implications within the context of the IIL scenario.[219] These practices erode public and state confidence, promote the formation of a homogenous and insular arbitral community, undermine the principles of the rule of law and legal predictability, and engender procedural inefficiencies. Collectively, these issues serve as primary catalysts necessitating a comprehensive re-examination of the ISDS system itself.[220]

[218] Devaney (n 63) 5-6
[219] Marius Dotzauer, '*The Popular Legitimacy of Investor-State Dispute Settlement: Contestation, Crisis, and Reform*'(1st edn, Routledge 2023) 7-8
[220] Ibid.

2.2.1. Party-Appointed Arbitrators

The most fundamental of these structural issues is the practice of party-appointment.[221] In most ISDS arbitrations, each disputing party selects one arbitrator, with a third, neutral chair typically agreed upon by the two party-nominees or by an appointing authority.[222] The preference for referring international disputes to a tribunal of three arbitrators is widely supported by scholarly and practical considerations.[223] This configuration generally allows each party to appoint one arbitrator, thereby fostering a degree of control and active participation in the arbitration process. It also guarantees that each party will have at least one "judge of its choice" to advocate its interests. This does not imply that the arbitrator will directly protect the party as a "client," but instead that each party participate reciprocally in shaping the composition of the arbitral tribunal. Crucially, this element of party autonomy serves to foster trust in the arbitral process; however, it is counterbalanced by the imperative that arbitrators must maintain neutrality.[224]

The practice of party appointment is rooted in the principle of party autonomy, a cornerstone of arbitration that enables both parties to have an active role in selecting their adjudicators. As will be further detailed below, defenders argue that this practice enhances the parties' trust in the tribunal's competence and the overall process.[225] The underlying rationale of the system is to assign each party a decision-maker whom they trust, thereby promoting acceptance of the final award, even when the outcome is unfavourable.[226]

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[221] James Devaney, 'An Independent Panel for the Scrutiny of Investment Arbitrators: An Idea Whose Time Has Come?' (2020) 18 The Law & Practice of International Courts and Tribunals 369-370.
[222] For example, the ICSID Convention, art. 37(2)(b): "(…)one arbitrator appointed by each party and the third […] appointed by agreement of the parties"; UNCITRAL Arbitration Rules, art. 9: "(…) each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the arbitral tribunal."
[223] Hilary Heilbron, 'Dynamics, Discretion, and Diversity: A Recipe for Unpredictability in International Arbitration' (2016) 32 Arbitration International 264.
[224] Blackaby KC, Partasides and Redfern (n 111) Section D .
[225] James Crawford, 'The Ideal Arbitrator: Does One Size Fit All?' (2018) 32(5) American University International Law Review 100.
[226] Ibid.

These considerations can be backed up by interviews conducted by Brekoulakis and Howard, which reveal the extent to which party appointment is regarded as indispensable to the fairness and acceptability of the process.[227] Several interviewees linked the ability to choose at least one arbitrator directly to trust in the arbitral tribunal. As one arbitrator observed, "the opportunity to have the option to be involved in the selection of at least part of the decision-making body, I think, is fundamentally important to a sense of participation and ownership in and, therefore, trust in that decision-making body."[228] (Arb 81)

Others stressed that this sense of "ownership" makes parties more likely to accept the award: "if they've seen the arbitrator, if they feel intuitively or whatever basis that the arbitrator is the best that can be had, then it will make them accept the result. So trust goes to thinking, "All right, we gave it our best and it is what it is."""[229] Similarly, Arbitrator 83 underlined that party appointment enhances the perception of a fair hearing, since the parties expect that their case will be presented and considered in full: "what's a fair hearing? I guess that it's one at which both or, if there are more than two parties, all parties have a full opportunity to be heard."[230]

However, it could be argued that party appointments may inherently raise concerns regarding loyalty and partiality, especially given the high compensation given by the party.[231] The risk of partisan influence is inevitable, as arbitrators are frequently chosen based on their perceived alignment with one party's perspective. The practice of party-appointed arbitrators has been a focal point of critique, as it is commonly regarded as a "moral hazard" that undermines the integrity of the process, raising concerns about its adequacy and ethical soundness.[232]

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[227] Brekoulakis and Howard (n 133)
[228] Ibid.
[229] Ibid. 652.
[230] Ibid. 652-653.
[231] Malcolm Langford and Daniel Behn, 'Managing Backlash: The Evolving Investment Arbitrator?' (2018) 29(2) European Journal of International Law 551-580
[232] Jan Paulsson, 'Moral Hazard in International Dispute Resolution' (Inaugural lecture, University of Miami School of Law, 29 April 2010) http://www.arbitrationicca.org/media/0/12773749999020/paulsson_moral_hazard.pdf accessed 16 July 2025. See also Jan Paulsson, 'Are Unilateral Appointments Defensible?' (*Kluwer Arbitration Blog*, 2 April 2009) http://kluwerarbitrationblog.com/ accessed 16 July 2025.

The primary issue pertains to the potential for "role loyalty," where an arbitrator may experience a conscious or subconscious sense of obligation towards the party that appointed them.[233] This situation may predispose an arbitrator to favour, even subtly, the position of their appointing party, thereby compromising the principles of impartiality and independence expected of a neutral tribunal.[234]

This issue is also referred to as a "perception issue," and has been conceptualised by Puig and Strezhnev as an affiliation effect. Observers and stakeholders often assume that each party's designated arbitrator acts as a representative advocate for the party's interests, rather than as an impartial entity.[235] Scholars defined it as a cognitive bias that predisposes arbitrators to favour the party responsible for their appointment.[236] Drawing on experimental survey data, their findings demonstrate that this affiliation effect operates independently of any deliberate or "strategic" selection of arbitrators by litigants, who typically seek to appoint arbitrators sympathetic to their position.[237] Puig and Strezhnev's findings also align with prior observational studies in ISDS, together they highlight recurring patterns of bias:

(i) Dissenting opinions in ISDS cases are overwhelmingly issued by party-appointed arbitrators (94%) and are never against the interests of the appointing party.[238]

(ii) Developmental affiliation likewise appears relevant: empirical findings indicate a propensity for arbitrators to favour states that exhibit a similar level of developmental maturity as their home country. [239] Specifically, arbitrators originating from developing

[233] Xi Zhang, Rozanah Ab Rahman and Hanna Ambaras Khan, 'How to Break the Arbitrator's Trust Dilemma?' (2023) 13 5 International Journal of Academic Research in Business and Social Sciences 2062.
[234] Muthucumaraswamy Sornarajah, 'Power and Justice: Third World Resistance in International Law' (2006) 10 Singapore Year Book of International Law 33
[235] Zhang, Ab Rahman and Khan (n 233)
[236] Sergio Puig and Anton Strezhnev, 'The David Effect and ISDS' (2017) 28 European Journal of International Law 731. See also, Sergio Puig, 'Blinding International Justice' (2016) 56 Virginia Journal of International Law 647, 681
[237] Ibid.
[238] Ibid.
[239] Clifford James Carrubba, 'A Model of the Endogenous Development of Judicial Institutions in Federal and International Systems' (2009) 71 The Journal of Politics 55; Olof Larsson and others, 'Selection and Appointment in International Adjudication: Insights from Political Science' (2023) 14 Journal of International Dispute Settlement 137. Citing: "Arbitrators from developing countries are less likely to hold host countries liable because they are more familiar with the economic and social conditions in developing countries"

> countries are statistically less likely to affirm jurisdiction and liability, a trend explained by Waibel and Wu as reflecting greater familiarity with the economic and social conditions of developing states.[240]

Interviews conducted by Brekoulakis and Howard, also suggest that the role and status of a party-appointed arbitrator inherently entail a bias favouring the appointing party's case.[241]

As one interviewee noted, "[t]he duty of the party-appointed arbitrator is to put the position, to make the tribunal understand the position of the party who appointed him or her [...]" (Arb 22).[242] Others acknowledged that even if undertaken unconsciously, the role of a party-appointed arbitrator tends to be accompanied by a degree of bias: "[e]ven the most neutral co-arbitrator will always see to it that the party that appointed him will be treated fairly and may advance arguments of that party. As long as he or she is not biased and one sided, then that's alright."[243] The interviewee further asserts that it is impractical to assume that the appointment to a party has no influence whatsoever on an arbitrator's reasoning and behaviour (Arb 18).[244]

The general reaction by arbitrators is uncertainty, as one interviewee affirmed: "[a]s an arbitrator, I certainly have mixed feelings about it."[245] Arbitrator 92 adds that "I feel that I have served with arbitrators that I have felt are biased, and I think that that bias comes from the fact that they are party appointed. So, there is, in my mind, a linkage between party appointment and a sort of conscious or subconscious bias. So it may not be deliberate per se, but there is this underlying bias that I sense."[246]

Taken together, these findings elucidate that the structural configuration of party appointments plays a critical role not only in shaping perceptions but also in influencing the empirical evidence of arbitral

[240] Michael Waibel and Yanhui Wu, 'Are Arbitrators Political? Evidence from International Investment Arbitration' (Working Paper, 2017) http://www-bcf.usc.edu/~yanhuiwu/arbitrator.pdf accessed 15 August 2025.
[241] Brekoulakis and Howard (n 133).
[242] Ibid.
[243] Ibid.
[244] Ibid.
[245] Ibid.
[246] Ibid.

bias in ISDS mechanisms. In light of the foregoing, this dynamic engenders a central paradox: whilst party appointment is frequently critiqued for engendering perceptions of bias, it is concurrently defended as a pivotal aspect of arbitral legitimacy, intricately linked to party autonomy and the right to be heard. From this perspective, the party appointment of arbitrators is viewed as an inherent characteristic of the arbitration system, from which no definitive solution can be drawn. Scholars argue that party autonomy in selecting arbitrators is a fundamental feature that enhances the legitimacy and attractiveness of arbitration.[247]

Critics, in rebuttal, contend that while party autonomy may enhance the comfort of the disputing parties, it concurrently undermines systemic legitimacy and diminishes external confidence in the process. This situation can be clearly seen in case law.

A classic case that crystallises these concerns is the challenge against arbitrator Professor Gabrielle Kaufmann-Kohler in *Suez, Sociedad General de Aguas de Barcelona S.A. & Vivendi Universal S.A. v. Argentine Republic*.[248] Professor Kaufmann-Kohler was a distinguished authority in the field of international arbitration. She was appointed as arbitrator in the case concerning Argentina's invocation of emergency measures during its 2001 financial crisis, which affected the water concession contract in Buenos Aires held by the claimants. Argentina submitted a motion to disqualify Professor Kaufmann-Kohler from serving on the tribunal, citing two principal grounds that strike at the core of the legitimacy concerns: (i) issues of conflict of interest and pre-judgment, and (ii) lack of independence coupled with financial connections.[249]

Regarding the initial ground, Argentina contended that Professor Kaufmann-Kohler had prematurely judged a pivotal legal matter in the case. Specifically, in an academic publication, she articulated an

[247] Hans Smit, 'The pernicious institution of the party-appointed arbitrator' (*Columbia FDI Perspectives*, No 33, 23 June 2011) https://doi.org/10.7916/D8G167Q9 accessed 16 July 2025.
[248] *Suez v Argentina* (n 88)
[249] Fry and Stampalija (n 123) 218.

opinion on the interpretation of the "umbrella clause" within BITs, a central issue in the Suez dispute.[250] The expression of prior academic opinions by arbitrators may illustrate the potential for perceived bias and may emphasise the wider problem of issue conflict.[251] This case raises a pertinent question: can an arbitrator who is also a distinguished scholar maintain true impartiality when called upon to adjudicate a legal matter on which they have previously published?[252]
Critics argue this blurs the line between neutral adjudication and academic advocacy.[253]

Regarding the second point, Argentina ascertained that Professor Kaufmann-Kohler held the position of non-executive director on the board of UBS, a leading Swiss banking institution.[254] Concurrently, UBS maintained a substantial shareholding in *Vivendi*, which is the parent company of one of the claimants.[255] Argentina contended that this financial connection – stemming from her role as a director of a company with vested interests in the claimant's financial well-being – undermined her independence.[256] This is a powerful example of how the small, interconnected world of global elites can create apparent conflicts of interest. Even if her role at UBS had no direct bearing on her decision-making, the connection created a clear appearance of bias that fuelled Argentina's distrust in the process.[257]
The challenge was ultimately dismissed by the remaining two arbitrators of the tribunal. They concluded that Professor Kaufmann-Kobler's scholarly writing did not constitute pre-judgment and that her position on the UBS board was sufficiently removed to preclude a manifest lack of impartiality.[258]

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[250] *Suez v Argentina* (n 88) para 43.
[251] Barton Legum, 'Investor-State Arbitrator Disqualified for Pre-Appointment Statements on Challenged Measures' (2005) 21 Arb Intl 241, 242. See also, Judith Levine, 'Dealing with Arbitrator "Issue Conflicts" in International Arbitration' (2008) Transnational Dispute Management 4.
[252] Malintoppi (n 74).
[253] Malintoppi and Yap (n 119) 177-78
[254] Antonia Eliason, 'Evidence Partiality and the Judicial Review of Investor-State Dispute Settlement Awards: An Argument for ISDS Reform' (2018) 50 Geo. J. Int'l L. 30.
[255] Ibid.
[256] Cleis (n 27) 34-35.
[257] Ibid.
[258] *Suez v Argentina* (n 88) paras 22–30.

However, the rejection of the challenge in this case underscores its significance within the broader discourse on the legitimacy debate. Critics of ISDS interpret the *Suez* decision as exemplifying an exceedingly stringent standard for disqualification, effectively illustrating a self-regulating system. The case elucidates the significant challenges associated with the disqualification of a party-appointed arbitrator, even in instances where credible concerns are articulated – concerns that are frequently regarded as reasonable by external observers. While the arbitrators may have correctly applied the high legal threshold for disqualification, the ruling fails to adequately address the heightened public perception of systemic conflicts of interest. This instance exemplifies how the practice of party appointment, coupled with a stringent disqualification standard, fosters scenarios that undermine public trust and reinforce critiques that the ISDS system is inherently deficient in impartiality, thus compromising its legitimacy as a judicial mechanism.

2.2.2. Repeated Arbitrators: the So-called "Frequent Flyers"

A related consequence arising from party-appointment is the debated aspect of the ISDS: the "repeat arbitrators," commonly referred to as "frequent flyers." This term denotes a relatively small, yet consistent cohort of individuals designated to arbitrate a substantial volume of cases worldwide, owing to their demonstrated expertise and track record.[259]

Beyond the classical scenario of repeatedly appointing the same arbitrator, another form of repetition can be identified in the repeated appointment of the same arbitrator by the same party, or the repeated appointment of the same arbitrator or tribunal (*i.e,* a three-member panel) for related or connected arbitration proceedings.[260]

[259] Malintoppi (n 60). See also, Zhang, Ab Rahman and Khan (n 233) 2063.
[260] Fatima-Zahra Slaoui, 'The Rising Issue of "Repeat Arbitrators": A Call for Clarification' (2009) 25 Arbitration International 103.

Slaoui, in "The Rising Issue of "Repeat Arbitrators": A Call for Clarification," emphasises the critical importance of understanding why repeated appointments necessitate the attention of the arbitration community. The central question concerns the implications of such recurring engagements within the realm of arbitration.[261]

On one hand, this practice may serve as an indication of trust in the capabilities of arbitrators and could be interpreted as a rational strategy to ensure judicial competence; notably, experienced arbitrators are often re-appointed multiple times, which arguably reflects their expertise and reputation.[262]

On the other hand, repeated appointments have cultivated what many critics describe as a close-knit, self-referential "small circle," "club" or an "old boys' network."[263]

In particular, critics argue that the dominance of a small group of arbitrators creates several structural problems that undermine the impartiality and credibility of ISDS, raising serious concerns about insularity and bias.[264]

Scholars have raised significant concerns regarding the lack of diversity within ISDS arbitration panels, particularly concerning parameters such as age, regional background, and gender.[265] Empirical observations indicate that a substantial majority of arbitrators are senior white males, a demographic that appears to exert disproportionate influence due to their prevailing presence in the

[261] Ibid. 106.
[262] Eliason (n 254) 9.
[263] Chiara Giorgetti and others, 'Independence and Impartiality of Adjudicators in Investment Dispute Settlement: Assessing Challenges and Reform Options' (2020) 21 The Journal of World Investment & Trade 456; E Gaillard, 'Sociology of International Arbitration' (2015) 31 Arbitration International 15.
[264] UNCITRAL Working Group III, 'Possible Reform of Investor-State Dispute Settlement (ISDS): Comments by the Kingdom of Bahrain' (31 July 2019) https://uncitral.un.org/sites/uncitral.un.org/files/uncitral_wg_iii_bahrain_submission_31_july_2019.pdf accessed 20 July 2025.
[265] Vanina Sucharitkul, 'ICSID and UNCITRAL Draft Code of Conduct: Potential Ban on Multiple Roles Could Negatively Impact Gender and Regional Diversity, as Well as Generational Renewal' (*Kluwer Arbitration Blog*, 20 June 2020) http://arbitrationblog.kluwerarbitration.com/2020/06/20/icsid-and-uncitral-draft-code-of-conduct-potential-ban-on-multiple-roles-could-negatively-impact-gender-and-regional-diversity-as-well-as-generational-renewal/ accessed 21 July 2025.

field. This dominance has led to the characterisation of these arbitrators as "pale, male, and stale," a phrase that underlines the perceived stagnation and homogeneity in the oversight tasked with resolving international investment disputes.[266] The prevailing demographic profile of individuals appointed as international arbitrators predominantly comprises senior male professionals originating from North America or Western Europe. This trend aligns with established institutional practices observed in arbitrator appointments within the ISDS regime, as delineated in the 2014 report by the International Council for Commercial Arbitration (ICCA) report from Miami.[267]

The key facet of this lack of diversity is examined from a geographic perspective. In 2018, arbitrators appointed from countries in Western Europe and North America constituted 75.4% of the total appointments.[268] This figure rose to an impressive 79% after the inclusion of Australia and New Zealand, thereby further reinforcing the assertion that the phenomenon of the "pale, male, and stale" continues to persist.[269]

An analysis can also be done from a gender disparity perspective reveals that women are substantially underrepresented in this context. Specifically, female arbitrators account for approximately 10% of all appointments in ISDS cases, further highlighting disparities in representation.[270]

The lack of female representation in arbitrator appointments in the ISDS paradigm remains a dire problem.[271]

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[266] Clarissa Coleman and Louise Bond, 'Two Heads Are Better Than One: Double Hatting And Its Impact on Diversity In International Arbitration' (*National Law Review*, 30 July 2020) https://www.natlawreview.com/article/two-heads-are-better-one-double-hatting-and-its-impact-diversity-international accessed 21 July 2025

[267] Joseph Mamounas, 'ICCA 2014. Does "Male, Pale, and Stale" Threaten the Legitimacy of International Arbitration? Perhaps, but There's No Clear Path to Change' (*Kluwer Arbitration Blog*, 10 April 2014) http://arbitrationblog.kluwerarbitration.com/2014/04/10/icca-2014-does-male-pale-and-stale-threaten-the-legitimacy-of-international-arbitration-perhaps-but-theres-no-clear-path-to-change/ accessed 16 August 2025.

[268] Vanina Sucharitkul, 'The Ban on Double Hatting in Investment Arbitration: A Double-Edged Sword?' (2021) 7 NLS Bus. L. Rev. 69. Statistics gathered from a review of appointments on a case-by-case basis of arbitration cases filed in 2018 from the ICSID database.

[269] Ibid.

[270] Taylor St John and others, 'Glass Ceilings and Arbitral Dealings: Explaining the Gender Gap in International Investment Arbitration' [2017] PluriCourts Research Paper. See also, Malcolm Langford, Daniel Behn and Maxim Usynin, 'The West and the Rest: Geographic Diversity and the Role of Arbitrator Nationality in Investment Arbitration' in Daniel Behn, Ole Kristian Fauchald and Malcolm Langford (eds), The Legitimacy of Investment Arbitration: Empirical Perspectives (CUP 2022).

[271] Sergio Puig, 'Social Capital in the Arbitration Market' (2014) 25 European Journal of International Law 410

The repeated scheduling of appointments is primarily observed within this homogeneous cohort, resulting in an "oligarchic" structure where a small number of influential actors, or "power-brokers," exert stringent control over the system.[272] Specifically, only 4%, or 25 arbitrators, account for more than a third of all ISDS arbitral appointments, between those not a single one is a women.[273]
Their "power" manifests in their ability to maintain "a tight grip on the investment arbitration system and [to] exert immense influence over it."[274]

Many arbitration practitioners contend that the repeated appointment of specific individuals as arbitrators merely reflects a meritocratic selection process.[275] From this perspective, being repeatedly appointed is not a sign of bias but rather evidence of a proven track record of neutrality and competence. Parties engaged in frequent international arbitration proceedings tend to develop familiarity with certain arbitrators due to factors such as their reputation, specialised expertise, understanding of relevant contractual provisions, and personal approachability. One may argue that the assertion "reputation is repetition" is, to some extent, fallacious, as repetition does not necessarily equate to reputation, although it may contribute to its construction.[276] Paulsson analyses why the same arbitrators are appointed repeatedly and concludes that repeat arbitrators is not merely a statistical anomaly but a symptom of deep-seated structural issues concerning elitism, diversity, and ethics. In his "Moral Hazard in International Dispute Resolution" work, he would conclude that the flaws are so inherent to the party-appointment model that the only effective solution is to abolish or severely

[272] Mohit Kumar Tanwar, 'Addressing the Inadequacies: A New Multi-Faceted Solution to Double Hatting in ISDS' (2021) 7 LSE Law Review 119.
[273] Ibid. See also, Malcolm Langford, Daniel Behn and Runar Hilleren Lie, 'The Revolving Door in International Investment Arbitration' (2017) 20 Journal of International Economic Law 310
[274] Pia Eberhardt and Cecilia Olivet, 'Profiting from Injustice: How Law Firms, Arbitrators and Financiers Are Fueling an Investment Arbitration Boom' (Corporate Europe Observatory and the Transnational Institute November 2012) 36.
[275] Julian Donaubauer, Eric Neumayer and Peter Nunnenkamp, 'Winning or Losing in Investor-to-state Dispute Resolution: The Role of Arbitrator Bias and Experience' (Kiel Working Paper, No 2074, Kiel Institute for the World Economy (IfW), Kiel 2018) 9.
[276] Jan Paulsson, 'Ethics, Elitism, Eligibility' in (1997) 14(4) J Int'l Ark 14.

restrict it, for example, by having all arbitrators appointed by "a pre-existing list of qualified arbitrators."[277]

Similarly, law firms involved in the appointment process tend to have a high regard for some arbitrators while deliberately avoiding others, regardless of client pleas.[278]

It is therefore unsurprising that there are instances of repeated appointments of arbitrators. Nonetheless, it is reasonable to posit that, regardless of an arbitrator's perceived expertise, style, or ability, parties would be disinclined to reappoint an arbitrator who consistently delivers unfavourable decisions. Similarly, law firms prioritising their clients' interests are unlikely to continue appointing arbitrators who habitually issue awards adverse to their clients. This suggests that, notwithstanding an arbitrator's integrity and honesty, there exists a genuine potential for unconscious bias – either conscious or subconscious – in favour of a party or law firm that frequently nominates him or her.[279]

Consequently, the recurrent appointment of the same arbitrator by a party or law firm inevitably prompts scrutiny regarding that arbitrator's independence and impartiality. This concern is explicitly acknowledged within the IBA Guidelines, which mandate that an arbitrator or prospective arbitrator disclose, on the Orange List, if they have been appointed more than three times by the same counsel or law firm within the preceding three years.[280]

From an academic standpoint, the appointment of a dedicated cohort of arbitrators to oversee multiple cases may confer significant benefits.[281] Such a strategy fosters greater doctrinal consistency, as the

[277] Jan Paulsson 'Moral Hazard in International Dispute Resolution' (2010), ICSID Review – 25 Foreign Investment L J 339
[278] Blackaby KC, Partasides and Redfern (n 101) para 4.91.
[279] Ibid. para 4.92-4.93
[280] IBA Guidelines (n 32) Orange List, 3.3.8.
[281] Blackaby KC, Partasides and Redfern (n 111) para 4.88-4.101

same arbitrators are responsible for the development and refinement of legal principles over time.[282] Moreover, it potentially enhances procedural efficiency, owing to the arbitrators' familiarity with the procedural frameworks and substantive issues encountered within their caseloads.[283]

This assertion lacks universal validity; in fact, a considerable challenge to the principle of arbitral independence arises when an arbitrator is appointed to adjudicate analogous issues in multiple cases. While familiarity with the subject matter may facilitate proceedings and decrease associated costs, it concurrently engenders concerns regarding the potential emergence of biases in subsequent arbitral processes, attributable to preconceived notions. Consequently, an arbitrator's capacity for objective judgment and independence may be undermined when evaluating critical facts in later proceedings.[284]

It is also possible to view the reliance on a limited pool of repeat arbitrators as a pragmatic way to justify not having a formal appellate mechanism. This might partly explain why a select group of experienced ICSID arbitrators are frequently reappointed, as their repeated selection leads to a certain level of centralisation and consistency in arbitration practice fostered. For instance, the prominent group of fifteen arbitrators – according to a particular study, accounting for 55% of all disputes under investor-state treaties – can be regarded as a *de facto* appellate body.[285] Not in the literal sense of possessing the authority to overturn lower tribunal decisions, but through successive reappointments, this elite cadre significantly influences case law, thereby promoting a measure of uniformity and authoritative legitimacy within the investment arbitration regime.[286]

This perspective is generally regarded as biased by the majority of scholars, primarily because it constrains the diversity of viewpoints. When a limited group of approximately 10–15 individuals

[282] Marc Bungenberg and others (eds), *European Yearbook of International Economic Law 2017*, vol 8 (Springer International Publishing 2017) 125.
[283] Blackaby KC, Partasides and Redfern (n 111) para 4.90
[284] Anh Thuy Dung Nguyen, 'Standards of Independence and Impartiality in the Context of International Commercial Arbitration' (2023) 65 Ministry of Science and Technology, Vietnam 87.
[285] Corporate Europe Observatory, 'Profiting from Injustice: How Law Firms, Arbitrators and Financiers are Fuelling an Investment Arbitration Boom' (November 2012) http://corporateeurope.org accessed 22 September 2025; see also Cecilia Olivet and Pia Eberhardt, 'Arbitrators' Role in the Recent Investment Arbitration Boom' (2013) 3 *Investment Treaty News* 3; Cristani (n 84) 1.
[286] Pauwelyn (n 194) 794-797.

predominantly influence award decisions, the evolution of jurisprudence may inadvertently mirror their specific worldviews and biases, whether conscious or unconscious. In contrast, incorporating a more extensive and diverse pool of contributors could foster a more balanced and representative development of jurisprudence.[287]

While the practice of repeated appointments does not necessarily imply corruption, it suggests a systemic tilt that undermines fairness, thereby necessitating reform to address these issues. A compelling reform proposal previously suggested by Paulsson involves selecting an arbitrator from a pre-established list, with the potential addition of an institutional or office-based supervisory mechanism overseeing the selection process.[288] An even more innovative and progressive reform could entail the utilisation of Artificial Intelligence (AI) to guide the selection of arbitrators, a topic that will be explored further in Chapter 3.

As an illustrative case law, *Tidewater v. Venezuela* may be considered. In this case, the investor-party contested the appointment of the arbitrator by Venezuela on the grounds that she had previously been appointed by Venezuelan state entities on multiple occasions, which allegedly suggested a pro-State bias.[289] Although the challenge was ultimately dismissed, with the tribunal observing that previous appointments alone do not constitute a "manifest lack of independence" in accordance with ICSID's stringent standard, the incident highlights how recurring party appointments may raise concerns regarding an arbitrator's impartiality. The necessity of such challenges underscores a structural tension: the arbitration system accepts a certain level of partisan appearance to uphold party autonomy, yet this very tolerance contributes to an ongoing legitimacy crisis.[290]

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[287] Gabriel Bottini, "Should Arbitrators Live on Mars? Challenge of Arbitrators in Investment Arbitration" 32 Suffolk Transnational Law Review (2009) 2, 341–366

[288] Paulsson (n 276) 347-348.

[289] *Tidewater v. Venezuela*, Decision on Claimant's Proposal to Disqualify Professor Brigitte Stern (23 December 2010) ICSID Case No ARB/10/5.

[290] Thomas E. Carbonneau, "The Exercise of Contract Freedom in the Making of Arbitration Agreements" (2003) 36 Vanderbilt Journal of Transnational Law, 1211. Citing: "The tradition in prior practice had been to require only that the

2.2.3. Double hatting

The most contentious issue that has provoked extensive debate regarding the independence and impartiality of arbitrators is the practice of role switching between arbitrators and counsel across different cases. This phenomenon has been referred to as "role confusion" or "double hatting."[291] The potential risks arising from practitioners' participation in multiple arbitrations in varying capacities have been defined as "issue conflict" or "inappropriate predisposition," i.e., a situation where conflicting interests or predispositions may adversely affect impartiality and decision-making.[292]

Within the existing *ad hoc* arbitration framework, it is common for distinguished legal practitioners to assume dual roles. For instance, an attorney may serve as an arbitrator in one investment dispute while concurrently acting as counsel for a client – be it a state or an investor – in a separate, ongoing proceeding before a different tribunal.[293] This practice is not forbidden per se under most arbitration rules, but it raises conflict-of-interest concerns.[294]

The primary concern associated with this practice is that an arbitrator serving as counsel might leverage insider knowledge or personal connections gained in one capacity to advantage the other. Additionally, there is a risk that its impartiality could be compromised, given that, as counsel, she or he is paid to adopt a partisan stance.[295]

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presiding arbitrator (the "neutral" arbitrator) be fully impartial. There was an expectation that party-designated arbitrators would be sympathetic to the position of the appointing party and would favour that position in the deliberations."

[291] Schacherer (n 6) 19. See also, Dennis H. Hranitzky and Eduardo Silva Romero, 'The 'Double Hat' Debate in International Arbitration' (2010) New York LJ

[292] Sucharitkul (n 268).

[293] Daniel Behn and others, 'Evidence-Guided Reform: Surveying the Empirical Research on Arbitrator Bias and Diversity in Investor–State Arbitration' in Manfred Elsig, Rodrigo Polanco and Peter Van Den Bossche (eds), International Economic Dispute Settlement (1st edn, Cambridge University Press 2021) 281.

[294] International Centre for Settlement of Investment Disputes, 'Code of Conduct – Background Papers: Double-Hatting' (25 February 2021) https://icsid.worldbank.org/sites/default/files/Background_Papers_Double-Hatting_(final)_2021.02.25.pdf accessed 25 July 2025

[295] Tanwar (n 272) 123.

An empirical investigation conducted by Malcolm Langford, Daniel Behn, and Runar Hilleren Lie examines the phenomenon commonly referred to as the "revolving door" within the domain of international investment arbitration.[296] The findings indicate that certain prominent stakeholders within the field indeed assume multiple roles throughout the arbitral process. Moreover, the study reveals that the prevalence of "double-hatting" has remained relatively stable over time, despite its limited scope to a select group of influential actors. Such practices threaten the perceived neutrality of arbitration proceedings and raise significant concerns regarding the impartiality of the arbitrators involved.[297]

An illustrative case is *Caratube International Oil v. Kazakhstan* (ICSID), specifically the second proceeding in 2014.[298]

In *Caratube II*, Kazakhstan had appointed Mr Bruno Boesch as its party-arbitrator It turned out Boesch was also simultaneously arbitrating another case (*Ruby Roz Agricol v. Kazakhstan*), involving very similar facts and even some of the same witnesses. The investors in *Caratube II* challenged Boesch, arguing that his parallel role in a factually related case gave rise to an issue conflict – he might prejudge issues in *Caratube* based on evidence from *Ruby Roz*, or vice versa.[299] The challenge was successful: for the first time in ICSID's history, an arbitrator was disqualified by their peers for conflict of interest. The decision noted that the overlap created an unacceptable "appearance that the arbitrator in question could be influenced" by information from the other case.[300] This milestone illustrated growing intolerance for double-hatting when it plainly compromises impartiality.

[296] Langford and others (n 273)
[297] Ibid.
[298] *Caratube International Oil Company LLP & Mr. Devincci Salah v. The Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the proposal for disqualification of Mr. Bruno Boesch, 20 March 2014.
[299] Ibid. para 25-27
[300] *Tidewater* (n 289) para. 60-64

Even beyond situations where facts are identical, double-hatting poses significant concerns. An arbitrator who concurrently acts as legal counsel in an investment dispute may encounter conflicts of interest; their adjudicative decisions could be swayed by the arguments they are advancing in their capacity as counsel. Additionally, such arbitrators might strategically craft their arguments, considering how they believe arbitrators will interpret them.[301]

Given the significant influence that this issue exerts on both the perception of legitimacy and the operational efficacy of ISDS mechanisms, the IBA Guidelines have addressed this concern to mitigate its impact, even though they do not impose an absolute ban on double-hatting.[302]

Situations potentially involving the issue of double-hatting are primarily delineated and addressed within the framework of the Orange List, which serves as a crucial reference for assessing the arbitrator's impartiality and independence.[303] Specific instances relevant to double-hatting on the Orange List include instances where an arbitrator and another arbitrator or counsel for one of the parties have collaborated as co-counsel within the preceding three years.[304] Additionally, it encompasses scenarios in which an arbitrator has served as counsel against a party or an affiliate thereof in an unrelated matter within the same timeframe. Other pertinent circumstances involve membership of an arbitrator and party counsel within the same barristers' chambers, participation of an arbitrator in another tribunal alongside counsel involved in the current case, or instances where the same counsel or law firm has appointed an arbitrator on more than three occasions over the past three years.

[301] Philippe Sands, 'Conflict and Conflicts in Investment Treaty Arbitration: Ethical Standards for Counsel,' in Arthur Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers*, vol 6 (Brill Nijhof 2013) 31-32
[302] Tanwar (n 272) 146.
[303] IBA Guidelines (n 32)
[304] ICSID "Double-hatting" (n 294)

The fundamental tenet underlying the IBA's framework is the ongoing obligation of the arbitrator to disclose relevant information, as previously elaborated. By focusing on transparency, especially in this context, the Guidelines aim to balance competing interests, minimising the potential risks associated with dual roles while concurrently maintaining the flexibility and dynamism characteristic of the IIL regime. The forthcoming analysis in Chapter Three will further explore this pertinent issue within the context of the UNCITRAL/ICSID reform initiative, which explicitly addresses concerns related to double hatting.[305]

2.3. Consequences of the Legitimacy Crisis

As previously mentioned, these issues have substantial implications for the credibility, functionality, and the overarching normative framework of ISDS. [306] A first concern relates to the erosion of trust in the independence and impartiality of arbitrators within the arbitration framework.[307] The emergence of perceived biases, such as "double-hatting," the recurrent appointment of the same arbitrators, and the concentration of appointments within a select group of arbitrators, serves to exacerbate concerns regarding potential conflicts of interest and undue reliance. This situation undermines the perceived legitimacy and integrity of the arbitration framework as a whole, thereby raising critical questions about its fairness and impartiality.

Closely connected is the homogeneity of the arbitral community, which raises questions about its influence on the development of IIL and the balance of power. The absence of diversity in terms of gender, geography, expertise, and age fosters an insular and oligarchic structure controlled by a small, exclusive group of arbitrators.[308] This concentration not only stifles the introduction of new perspectives but also reinforces doubts about consistency and credibility. The resulting prevalence of

[305] See Chapter 3, section 3.2
[306] Dotzauer (n 219).
[307] Langford and others (n 231) 551-580
[308] Andrea Bjorklund and others, 'The Diversity Deficit in International Investment Arbitration' (2020) 21(2–3) Journal of World Investment & Trade 410, 412-3

inconsistent awards contributes to the perception that outcomes depend less on the objective application of legal principles than on the composition of individual tribunals.[309]

Finally, the *ad hoc* and decentralised configuration of ISDS, coupled with the absence of a binding precedent system, has engendered a pattern of inconsistent arbitral awards and fostered perceptions of unpredictability.[310] Broad arbitral discretion has fuelled accusations of "creative lawmaking" and provoked concerns over the encroachment of arbitral tribunals upon states' regulatory sovereignty. Collectively, these dynamics exemplify the legitimacy crisis facing ISDS and call into question its long-term credibility and viability.[311]

2.4. Setting the Stage for Chapter 3: The Reform Imperative

This Chapter undertook a rigorous examination of the structural features inherent within the ISDS system that significantly compromise the foundational principles of independence and impartiality. These compromises contribute to an acute legitimacy crisis that has unfolded within this mechanism of international arbitration. Through a meticulous analysis, the chapter posits that the erosion of trust in ISDS cannot be attributed to sporadic or isolated incidents; rather, it is symptomatic of systemic issues deeply embedded within the framework itself.

These interrelated challenges have engendered a pervasive perception of bias and a lack of credibility in the arbitral process, fostering a homogeneous and insular arbitral community that is resistant to change and innovation. The cumulative impact of these structural deficiencies has produced a system that, in the eyes of many stakeholders, is fundamentally deficient in the neutrality that one would

[309] Langford and others (n 231)
[310] IBA Arbitration Subcommittee on Investment Treaty Arbitration, 'Consistency, Efficiency and Transparency in Investment Treaty Arbitration' (IBA 2018) 10.
[311] Charles H Brower II, 'Structure, Legitimacy, and NAFTA's Investment Chapter' (2003) Vanderbilt Journal of Transnational Law 66-67

expect from a reputable adjudicative institution tasked with resolving disputes that implicate both private rights and significant public interests.

As previously articulated, the practices that may be deemed acceptable within the realm of private commercial arbitration often present unique challenges when applied within the ISDS context. Here, issues transcend simple commercial transactions and delve into complex public law matters, sovereign regulatory authority, and the substantial financial interests of states and their citizens. This divergence underscores a growing tension between the principle of party autonomy, which emphasises the freedom of parties to choose their arbitrators and shape the arbitration process, and the pressing need to ensure genuine judicial independence that preserves the integrity of the adjudicative function.

In light of these challenges, there is an increasingly vocal and widespread demand for sweeping reforms. The upcoming chapter will examine national reforms to understand how domestic systems address the challenges of arbitration, with particular emphasis on safeguarding the independence and impartiality of arbitrators. Moreover, it will focus on the reform agenda articulated by the UNCITRAL Working Group III (WG III). Finally, the potential for technological innovations, such as artificial intelligence, to enhance efficiency, transparency, and consistency within a re-engineered ISDS system will be considered.

3. Chapter 3: Strengthening Arbitrators' Independence and Impartiality – Reforms and Future Perspectives

The independence and impartiality of arbitrators are essential principles that serve as the foundational underpinnings for the legitimacy and fairness of the arbitration process. As previously noted, these attributes ensure that arbitrators can perform their duties free from bias, influence, or conflicts of interest, thereby upholding the integrity of arbitration as a neutral and just method of dispute resolution. This Chapter examines the pivotal reform initiatives implemented across various sectors based on these principles that serve as guiding frameworks for reforms within the ISDS context. These initiatives are designed to bolster confidence in the arbitral process by mitigating both perceived and actual biases.[312]

This Chapter will commence with a comprehensive analysis of recent national reforms concerning arbitration laws, specifically focusing on the evolving legislative frameworks that aim to enhance the ethical standards governing arbitrators. In recent years, a growing recognition among various nations regarding the necessity of updating arbitration practices has emerged, driven by critiques related to potential biases and conflicts of interest inherent within traditional arbitration systems. Notably, countries such as Italy, the United Kingdom, and Australia have embarked on substantial reforms that underscore a unified acknowledgement of the imperative to reassess and fortify the principles of impartiality and independence that are fundamental to arbitration. By examining the specific reforms enacted in these countries, this chapter will illuminate the diverse strategies adopted to bolster arbitrator ethics. Italy's recent overhaul of its arbitration law, for instance, provides insight into how national legal frameworks can adapt to meet contemporary expectations of fairness and integrity.

[312] UNCITRAL, 'Report of the Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-sixth Session' (2018) UN Doc A/CN.9/964, para 67

Similarly, the United Kingdom has explored various avenues to strengthen its regulations surrounding arbitrator conduct, focusing on transparency and disclosure requirements. In Australia, recent legislative changes reflect an ongoing commitment to uphold the highest standards of impartiality, thereby enhancing the overall credibility of the arbitration process. This analysis aims to identify potential adjustments that could be incorporated into the ISDS system, serving as guiding principles for ongoing reforms.

Secondly, this Chapter will consider the international scope of reforms, with particular emphasis on reform initiatives aimed at the structural transformation of ISDS system and the establishment of global standards governing arbitrator conduct. Since 2015, there has been a notable surge of activity within forums such as UNCITRAL, ICSID, and others, addressing critiques related to arbitrator bias, the phenomenon of "repeat players," and deficiencies in accountability within the realm of international arbitration. Principal efforts include the WG III process, which explores various ISDS reform proposals; initiatives advocating for the creation of a Multilateral Investment Court (MIC) and an Appellate mechanism; the establishment of an Advisory Centre targeting the needs of developing states; the implementation of a rigorous new Code of Conduct for arbitrators; and additional procedural innovations. Each of these developments will be examined in subsequent sections.

Lastly, this Chapter will delve into future perspectives surrounding these reforms, focusing on how the underlying principles can be understood and applied to develop comprehensive strategies for their sustainable implementation, particularly in the context of an increasingly technologically driven world. This exploration aims to ensure that the ethical and procedural standards upheld by arbitrators remain relevant and practical in the face of rapid technological advancements that could significantly alter the landscape of international law and arbitration. By fostering a proactive dialogue about integrating these principles into the evolving arbitration framework, the chapter aims to contribute to

a more equitable, transparent, and accountable international dispute resolution system that can withstand the tests of innovation and globalisation.

3.1. National Reforms – Enhancing the Principles at Home

National legal systems offer a vital "safety net" for guaranteeing arbitrator independence and impartiality, often establishing mandatory standards that parties cannot waive.[313] Many national sources encompass not only the statutory laws governing arbitration but also incorporate various supplementary materials, including regulations, codes of conduct, decisions issued by professional associations, and jurisprudence from national courts.[314] While approaches and standards vary across different jurisdictions, many arbitration laws are nonetheless based on common international foundations, notably the UNCITRAL Model Law, which significantly contributes to the harmonisation of national regulations.[315] An important observation derived from analysing national approaches – relevant in numerous contexts – is the considerable effort invested by national legislators and judiciaries in developing and refining "tests and analytical frameworks." These frameworks are supported by extensive jurisprudence aimed at clarifying the obligations of arbitrators and assessing their conduct.[316]

The following sections will examine recent national reforms, highlighting their potential significance as foundational guidelines for future enhancements within the ISDS system.

3.1.1. Italy's 2022 Riforma Cartabia, Overhaul of Arbitrator Ethics

Italy's recent Riforma Cartabia, enacted through Legislative Decree No 149/2022, represents a noteworthy advancement in the statutory framework governing arbitrator impartiality and

[313] Brosseau (n 42) 15.
[314] Ibid.
[315] Alec Stone Sweet and Florian Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (OUP 2017) 43–44.
[316] Catherine A Rogers, *Ethics in International Arbitration* (OUP 2014) paras 2.89, 2.95

independence. The reform sought to rectify prior deficiencies by establishing more comprehensive principles and explicitly delineating the duties owed by arbitrators.[317]

Prior to recent reforms in arbitration legislation, Italian law did not generally impose an explicit obligation on arbitrators to maintain independence and impartiality throughout the proceedings. Nonetheless, it delineated six comprehensive grounds for disqualifying an arbitrator, which included circumstances such as the arbitrator's vested interest in the case, demonstrable hostility towards a party, or specific personal or commercial relationships with one of the involved parties.[318]

The judgment in *Beg v. Italy* by the European Court of Human Rights (ECtHR) has exerted a significant influence on the recent reform of the Italian Code of Civil Procedure.[319] This influence is attributable to the case's implications within the international legal context and its relevance to addressing concerns related to the independence and impartiality of arbitrators.

The case, adjudicated in 2021, originated from Beg initiating arbitration proceedings against Enelpower due to an alleged breach of an electricity contract. In the arbitration request, Beg designated Mr. GG as the arbitrator. Enelpower responded by appointing its own arbitrator, Mr NI.[320] However, at the time of the events, Mr NI was engaged in representing Enel, the parent company of Enelpower, in a separate civil litigation which ultimately culminated in a judgment by the Italian Supreme Court. This litigation was entirely unrelated to the arbitration proceedings.[321] Concurrently, Beg became aware that Mr NI, who had been appointed as arbitrator by Enelpower, previously served as a member of the Board of Directors, Vice-Chairman, and legal representative of a parent entity of Enelpower during 1995 to 1996. Furthermore, the applicant also learned that Mr NI had been, and still was, acting as a lawyer for Enel.[322]

[317] Lindsay and Gambarini (n 160) 64.
[318] *Codice di Procedura Civile* (Italian Code of Civil Procedure), art 815(1)–(6).
[319] Beg v Italy App no 5312/11 (ECtHR, 20 May 2021).
[320] Ibid. para 13-15
[321] Ibid. para 17
[322] Ibid. para 20

Beg contended that its legal representative inadvertently obtained this information through casual conversations with third parties. In Beg's perspective, Mr NI lacked independence and impartiality due to his role as counsel for Enel, which presumably provided him with knowledge of the dispute and the contractual agreement between Beg and Enelpower. Subsequently, the arbitral tribunal rendered an award adverse to Beg. Beg sought to set aside the award, but the Italian Supreme Court clarified that the existence of a sufficient link between Mr. NI and Enelpower – resulting in an "alignment of interests" influencing the outcome of the dispute – had not been substantiated.[323] Having exhausted all available internal remedies, Beg subsequently initiated proceedings before the ECtHR against Italy, alleging a violation of Article 6(1) of the ECHR due to potential bias or lack of impartiality on the part of Mr. NI. The ECtHR first established its jurisdiction to hear the case, noting that Italian law grants courts the authority to review the validity of arbitral awards, including the constitution of the arbitral tribunal and any requests for tribunal recusation.[324] It concluded that "[t]he impugned acts or omissions [were] thus capable of engaging the responsibility of the respondent State under the Convention," which prompted a comprehensive analysis of the circumstances that initiated the case.[325]

The ECtHR then considered the arbitrator's neutrality, stating that the arbitrator's "impartiality was capable of being, or at least appearing, open to doubt and that the applicant's fears in this respect can be considered reasonable and objectively justified."[326] Therefore, the ECtHR found that the Italian courts' failure to address the challenge to this arbitrator adequately constituted a violation of the right to a fair trial under Article 6(1) of the ECHR. This judgment highlighted the need for Italy to modernise its domestic rules to better protect these fundamental principles in the context of arbitration.

[323] Ibid. para 30-33
[324] Ibid. para 64-65
[325] Ibid. para 129, 143-145.
[326] Ibid. para 153

Under the Revised Code of Civil Procedure, which came into force on 28 February 2023, arbitrators are mandated to furnish a written acceptance accompanied by a comprehensive disclosure of any facts that could potentially cast doubt on their independence and impartiality.[327] In their declaration, arbitrators are required to divulge "any relevant circumstance for article 815, paragraph 1, or the absence thereof."[328] In accordance with established international arbitration principles, the revised text of Article 813(1) explicitly affirms that the duty of disclosure is ongoing in nature, requiring the renewal of the declaration whenever relevant circumstances arise following the initial appointment.[329] This mandatory declaration is a cornerstone of the reform, designed to ensure transparency from the outset of the proceedings. Failure to disclose relevant conflicts of interest may result in the invalidation of the arbitrator's appointment and grounds for disqualification.

These disclosure obligations are well-established in international best practices, notably outlined in the IBA Guidelines and reinforced by the procedural rules of leading arbitration institutions, as previously discussed.[330] Consequently, the impact of this procedural reform on institutional arbitration appears to be limited.

Italy has historically maintained a robust tradition of ad hoc arbitration, which constitutes a significant segment of arbitral proceedings.[331] These proceedings are governed solely by the provisions of the Italian Code of Civil Procedure, and challenges to arbitrators are adjudicated by ordinary courts. In this context, the newly enacted provisions may serve to enhance the safeguards related to impartiality and independence, which are fundamental to ensuring the integrity of the arbitral process.[332]

[327] Code of Civil Procedure (n 318) art. 813
[328] Ibid. art. 815
[329] Ibid. art. 813
[330] See Chapter 1 section 1.4
[331] Gian Paolo Coppola, Dario Covucci and Claudia Bosco, 'The Reform of Arbitration in Italy' (LCA Studio Legale) 18 https://www.lcalex.it/wp-content/uploads/2023/02/The-Reform-of-Arbitration-in-Italy.pdf accessed 6 September 2025.
[332] Ibid.

It follows that the Riforma Cartbia is a significant step forward, particularly for ad hoc arbitrations, which constitute a large portion of arbitral proceedings in Italy. While leading arbitral institutions like the ICC and the Milan Chamber of Arbitration (CAM) already required similar declarations, there was previously no equivalent statutory duty under Italian law.[333] The imposition of this requirement as a mandatory legal obligation serves to establish a consistent standard of transparency across all arbitration proceedings conducted within Italy. This measure enhances the principles of fairness and procedural integrity.

While commendable, the principal effect of this codification resides in the standardisation of existing best practices rather than in the establishment of a novel obligation for parties engaged in institutional arbitration. The efficacy of this duty is contingent upon the stringency of its enforcement and the comprehensiveness of disclosures made.

The Riforma Cartabia also introduced other significant changes. For example, it abolished the constraints previously established under Article 818 of the Italian Code of Civil Procedure. The revised provision explicitly authorises the parties to empower arbitrators to issue interim measures, thereby engendering notable implications regarding their independence and impartiality.[334] By reallocating the authority over provisional relief from State courts to arbitral tribunals – immediately upon their acceptance of appointment – the reform markedly expands the discretionary powers of arbitrators within the arbitral process. This represents a significant innovation within the Italian legal framework, which has historically remained somewhat isolated from other European legal systems that have long recognised the authority of arbitrators to grant interim measures.[335] Nonetheless, this enhanced authority accentuates the necessity for confidence in the neutrality of arbitrators, given that

[333] Ibid.
[334] Alberto Briguglio, 'Il potere cautelare degli arbitri, introdotto dalla riforma del rito civile, e la inevitabile interferenza del giudice ("evviva il cautelare arbitrale!", ma le cose non sono poi così semplici)' (*Judicium*, 31 January 2023) https://www.judicium.it/il-potere-cautelare-degli-arbitri-introdotto-dalla-riforma-del-rito-civile-e-la-inevitabile-interferenza-del-giudice-evviva-il-cautelare-arbitrale-ma-le-cose-non-sono-po/ accessed 22 August 2025.
[335] Coppola and others (n 331) 18

interim measures frequently pertain to urgent and sensitive issues such as asset preservation, confidentiality disclosures, or injunctions against ongoing conduct.[336] A decision by an arbitrator lacking independence or impartiality risks disproportionately prejudicing one party and jeopardising the overall legitimacy of the arbitration process. Accordingly, the reform's augmentation of disclosure obligations and challenge procedures functions synergistically with the expanded jurisdiction, reflecting an acknowledgement that more rigorous safeguards of impartiality must support increased arbitral authority. The Italian model exemplifies how the conferral of new procedural powers coupled with strengthened ethical safeguards constitutes a dual approach essential for safeguarding the legitimacy and integrity of arbitration.[337] In the ISDS framework, debates on independence and impartiality are intrinsically linked to the scope of arbitrators' powers. As illustrated by the Italian experience with interim measures, any expansion of arbitral authority must be accompanied by a parallel strengthening of ethical and procedural safeguards.

Furthermore, the reform stipulates that, in instances where courts serve as default appointing authorities for arbitrators, they are required to adhere to principles of transparency, rotation, and efficiency to mitigate any potential perceptions of bias. Article 810 of the Civil Procedure Code stipulates that appointments must adhere to criteria that promote transparency, rotation, and efficiency. Additionally, notice of each appointment must be publicly posted on the judicial office's website to prevent the repeated selection of the same individuals.[338]

This framework is distinguished by its formalisation of safeguards aimed at mitigating perceptions of bias in appointment procedures, thereby ensuring that the selection of arbitrators adheres to objective criteria rather than arbitrary practices. When adapted to the ISDS framework, a similar mechanism

[336] Francesco Tedioli, 'La disciplina dell'arbitrato dopo la Riforma Cartabia' (2024) 2 *Studium Iuris* 153-155.
[337] Filippo Corsini, 'I poteri cautelari degli arbitri ai sensi del nuovo art. 818 c.p.c,' (2023) *Rivista di diritto processuale* 880-87.
[338] Code of Civil Procedure (n 318) art. 810

could serve as an intermediary solution that reconciles the existing party-driven appointment process with the principles of fair trial standards. For example, entities such as a specialised Advisory Centre could oversee the maintenance of rosters comprising pre-vetted arbitrators, utilising principles of geographical diversity, professional qualification standards, and diversity considerations, in conjunction with rotational or random allocation procedures. Such a system would maintain a level of party autonomy while instituting institutional safeguards designed to reduce the risks associated with repeat appointments and perceived biases. Ultimately, this approach would contribute to enhanced independence and impartiality within the dispute resolution framework.

To summarise, the Riforma Cartabia constitutes a deliberate and thorough endeavour to modernise Italy's arbitration framework by incorporating international best practices within its domestic legal system. Its emphasis on mandatory disclosure, adaptable challenge mechanisms, and transparent appointment procedures offers a compelling model for the forthcoming reform of the ISDS system, exemplifying effective strategies to promote independence and impartiality in practice.

3.1.2. United Kingdom – Refining the Principles through Case Law and Reform Proposal

The United Kingdom (UK), particularly England and Wales, is recognised as a prominent international arbitration hub, underpinned by a legal framework that has been widely commended for its clarity, sophistication, and effectiveness.[339] The UK's approach to arbitrator ethics, as primarily delineated by the Arbitration Act 1996 (EAA), is characterised by a pragmatic, evolutionarily driven development rooted in common law principles, rather than by a rigid, prescriptive codification. Unlike numerous other legal jurisdictions, the EAA establishes a direct and non-derogable statutory obligation for arbitrators to maintain impartiality.[340]

[339] Law Commission, 'Review of the Arbitration Act 1996' https://www.lawcom.gov.uk/project/review-of-the-arbitration-act-1996/ accessed 9 September 2025.
[340] Ibid. s 4; See also, Markus Esly, 'Every Day Is Independence Day – Two Successful Arbitrator Challenges for "Apparent Bias"' (2024) 1-2.

Section 1(a) of the current EAA articulates that the fundamental purpose of arbitration is to secure a just resolution of disputes through an impartial tribunal, while minimising unnecessary delays and costs.[341] Moreover, it additionally mandates that the arbitral tribunal shall "act fairly and impartially as between."[342] A violation of this duty can result in the disqualification of the arbitrator and a challenge to the arbitral award.[343]

In accordance with Section 24(1) of the current EAA, any party engaged in arbitration proceedings may petition the court for the disqualification or removal of an arbitrator if circumstances arise that provide a "justifiable" reason related to the arbitrator's impartiality.[344] Under Section 68 of the current EAA, an arbitration award may be challenged on the grounds of a severe irregularity, particularly if the arbitrator breaches their duties as outlined in Section 33.

The existing EAA does not explicitly establish provisions ensuring the independence of arbitrators. As elucidated by the Law Commission in its initial Consultation Paper, this omission was a conscious and deliberate choice.[345] The underlying reasoning posits that the concept of independence – defined as the lack of relational ties between an arbitrator and any involved party – holds substantive importance primarily when it serves as an indicator of potential bias or impartiality concerns. This perspective highlights that the significance of independence is rooted mainly in its ability to reflect an arbitrator's objectivity, rather than merely being a structural or procedural attribute.[346] The Law Commission posits that it is not practically feasible to guarantee absolute independence, given that the arbitration community is somewhat limited in size and arbitrators are likely to have had previous interactions with other professionals within that circle.

[341] English Arbitration Act (n 339) s 1(a): "the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense"
[342] Ibid. s 33 (1) (a)
[343] Blackaby, Partasides and Redfern (n 111) para 5.72
[344] English Arbitration Act (n 339) s 24(1).
[345] Law Commission, Review of the Arbitration Act 1996: A Consultation Paper (Law Com CP No 257, 2022) paras 3.40, 3.50.
[346] Ibid. para 3.50.

In scholarly discourse, the emphasis is placed on the principle that impartiality holds primacy over independence. As articulated by the Law Commission, "[i]f the arbitrator is impartial, and is seen to be impartial, it should not matter whether they have a connection to the parties before them. Of course, some connections are so close that there is at least the risk of unconscious or apparent bias. But other connections might be so trivial or tenuous that no-one could reasonably consider the arbitrator's impartiality to be in question. What matters is not the connection, but its effect on impartiality and apparent bias."[347] Moreover, the current EEA does not include a duty of disclosure.

To address the lack of a statutory duty of disclosure and to underscore the independence and impartiality of arbitrators, the UK Supreme Court (UKSC) examined these issues in the case of *Halliburton v Chubb*.[348] In this instance, the UKSC was required to examine (i) the extent to which an arbitrator may accept appointments across multiple arbitration proceedings involving identical or overlapping subject matters with a single common party, without generating an appearance of bias; and (ii) the permissible degree of such acceptance without prior disclosure.

The dispute in question concerned a disagreement between Halliburton and its insurer Chubb concerning liabilities stemming from damages caused by an explosion and subsequent fire on the Deepwater Horizon drilling platform in the Gulf of Mexico. By early 2015, both parties had designated their respective arbitrators; however, they failed to reach a consensus regarding the appointment of the chair. The English High Court appointed the chair, who disclosed to both Halliburton and the Court that he had previously served as an arbitrator in multiple arbitrations involving Chubb as a party. This included his role as a party-appointed arbitrator nominated by Chubb. Additionally, he was presently serving as an arbitrator in two ongoing references in which Chubb was involved, and he maintained connections to the Deepwater Horizon incident. Despite

[347] Ibid. para 3.40.
[348] *Halliburton Company (Appellant) v Chubb Bermuda Insurance Ltd (Formerly known as Ace Bermuda Insurance Ltd)* (Respondent) [2020] UKSC 48 (hereinafter '*Halliburton v Chubb*').

these disclosures, the High Court did not consider these previous appointments as disqualifying or constitutive of an impediment to his current appointment.

The Supreme Court's judgment established two critical principles:

(1) Common law duty of disclosure: the Court affirmed that arbitrators are legally obliged to disclose any circumstances that could reasonably evoke justifiable doubts regarding their impartiality, thereby reinforcing the commitment to fairness and transparency in arbitral proceedings.[349] This duty is continuous, from the time of appointment throughout the proceedings.[350]

(2) The test for apparent bias: the Court clarified the objective standard for assessing apparent bias within the arbitration framework: "whether a reasonable, informed observer, weighing the facts, would perceive a real possibility of bias on the part of the tribunal."[351] Crucially, this hypothetical observer is assumed to possess a comprehensive understanding of the customs and practices inherent in international arbitration. This includes awareness of the confidentiality of proceedings and the prevalence of repeated appointments within specialised sectors.[352]

Building on the *Halliburton* decision, the Law Commission conducted a comprehensive review of the EAA and published its final report and a draft bill in September 2023.[353] By undertaking a process of refinement rather than a complete overhaul of the existing legal framework encapsulated within the 1996 Act, the proposed 2025 Act seeks to carefully balance the virtues of stability with the imperatives of modernisation. This legislative approach aims to enhance procedural efficiency,

[349] Lindsay and Gambarini (n 160) 42-43
[350] Ibid.
[351] *Halliburton Co v Chubb* (n 348) paras 50-70
[352] Ibid.
[353] Aceris Law, 'English Arbitration Act 2025: Key Reforms' (*Aceris Law*, 9 March 2025) https://www.acerislaw.com/english-arbitration-act-2025-key-reforms/ accessed 6 September 2025.

transparency, and fairness. The reforms introduced are intended to provide greater clarity to arbitration agreements, fortify the independence of arbitrators, and facilitate the effective support of arbitration proceedings by courts. Such amendments are anticipated to strengthen commercial confidence, attract additional international investment, and reinforce England's status as a premier jurisdiction for international arbitration.[354]

3.1.3. Australia – Clarifying the Arbitrator Bias Test

Australia has recently undertaken measures to elucidate its standards concerning arbitrator bias, a domain previously characterised by legislative ambiguity and divergent judicial interpretations.[355] The Australian arbitration legal framework, encompassing the Uniform Commercial Arbitration Acts and the federal International Arbitration Act 1974 (Cth) (IAA), posits that an arbitrator is susceptible to challenge when there are "justifiable doubts" concerning their impartiality or independence, mirroring the UNCITRAL Model Law.[356] Crucially, the legislation specifies that "justifiable doubts" are only present if there is a "real danger of bias."[357]

This "real danger of bias" test, originating from the 1993 UK *House of Lords decision in R v Gough*, establishes a significantly higher threshold for disqualification compared to the conventional "reasonable apprehension of bias" standard typically employed by Australian courts in determining judicial bias.[358] The legislation's omission of explicit delineation for both components of the test – the perspective and the threshold – resulted in ambiguity.[359] This uncertainty was highlighted in two federal court decisions *Sino Dragon Trading Ltd v Noble Resources International Pty Ltd* and *Hui v Esposito Holdings Pty Ltd*.[360] In *Sino Dragon*, the judiciary employed the comprehensive Gough test,

[354] Ibid.
[355] Emma Garrett, 'Independence and Impartiality: Australia's Arbitrator Bias Test' (2024) 40 Arbitration International 135.
[356] Ibid 138. See also, Sam Luttrell, *International Commercial Arbitration: The Need for a "Real Danger" Test* (Kluwer Law International 2009) 10.
[357] Garrett (n 355)
[358] Ibid 138.
[359] Ibid.
[360] *Sino Dragon Trading Ltd v Noble Resources International Pty Ltd* [2016] EWCA Civ 123, [2016] 1 WLR 456 (hereinafter *Sino Dragon)*; *Hui v Esposito Holdings Pty Ltd* [2017] EWCA Civ 456, [2017] 1 WLR 789 (hereinafter *Hui*).

evaluating the presence of a "real danger" from the perspective of the court. Conversely, in *Hui*, the court diverged by adopting the "reasonable bystander" perspective while maintaining the "real danger" criterion, thereby introducing notable ambiguity regarding the applicable legal standard.[361]

In 2022, *Hancock v Hancock Prospecting Pty Ltd* case provided clarification, confirming that the statutory criterion of a "real danger of bias" constitutes the prevailing standard for challenging arbitrators under the provisions of the Commercial Arbitration Acts.[362] The court emphasised that this constitutes a "purely objective" criterion, deliberately designed to be more rigorous than the traditional common law standard. This reflects a conscious policy decision aimed at increasing the difficulty of removing arbitrators.[363]

Despite this judicial clarification, the discourse persists within scholarly circles. Commentators contend that Australia's dependence on the Gough formulation is antiquated and inconsistent with contemporary international standards, particularly given that English law has subsequently discarded it.[364]

Garret, in her academic analysis, critically advocates for Australia to amend its legislative framework to codify the "real possibility of bias" standard formally.[365] Such a reform would mitigate the current legal ambiguities, enhance judicial clarity, and better align Australia's arbitration practices with prevailing international standards.[366]

3.1.4. Domestic Legal Architectures of Arbitration

National reforms play a crucial role in the evolution of international legal frameworks, particularly in the realm of arbitration. Recently, several key jurisdictions have embarked on substantial reforms aimed at modernising their arbitration laws. These reforms are primarily centred around three pivotal

[361] Ibid.
[362] Kiran Gore and Sam Luttrell, 'Applicable Tests for Arbitrator Bias: Recent Practice in Select Common Law Jurisdictions' (*Kluwer Arbitration Blog*, 10 May 2017) https://legalblogs.wolterskluwer.com/arbitration-blog/applicable-tests-for-arbitrator-bias-recent-practice-in-select-common-law-jurisdictions/ accessed 10 September 2025.
[363] Ibid. Garrett (n 355) 138-141
[364] Halliburton v Chubb (n 348) [27] (Lord Hodge).
[365] Garrett (n 355)
[366] Ibid.

areas: the enhancement of arbitrator ethics, the promotion of transparency in arbitral proceedings, and the improvement of procedural efficiency. The emphasis on arbitrator ethics is particularly noteworthy, as it aims to instil a robust ethical framework to guide arbitrators' conduct, thereby fostering trust in the arbitration process. Efforts to bolster transparency serve to make proceedings more accessible and accountable, allowing stakeholders to better understand the decision-making processes involved. Furthermore, reforms targeting procedural efficiency seek to streamline arbitration proceedings, reducing unnecessary delays and ensuring that disputes are resolved in a timely manner.

In addition to the examples presented before, various other jurisdictions have undertaken similar initiatives, reflecting a broader trend towards the modernisation of arbitration practices globally. These reforms not only enhance the credibility and effectiveness of arbitration as a dispute resolution mechanism but also underscore the commitment of these jurisdictions to remain competitive in an increasingly interconnected legal landscape.

For instance, France has historically served as a prominent example of legal codification. Specifically, the fundamental obligation of disclosure is codified in Article 1456 of the French Code of Civil Procedure.[367] This provision stipulates that an arbitrator is required to disclose any circumstances that could potentially compromise their independence and impartiality prior to their appointment and must continue to do so throughout the proceedings.[368] French jurisprudence, with a robust body of case law, also confirms that the disclosure obligation is a continuous duty.

Specifically, French case law has traditionally established that an arbitrator bears an obligation to disclose all circumstances that might reasonably raise doubts regarding their independence in the mind of the parties. Arbitrators must disclose any relationships that are not publicly known but could

[367] Code de procedure civile (French Code of Civil Procedure) art. 1456

[368] Laurence Cohen, 'Indépendence des arbitres et conflits d'intérêts' [2011] Rev Arb 614.

reasonably be expected to influence their judgment from the perspective of the parties involved.[369] The obligation to disclose under French law is primarily assessed from an objective standpoint; however, it also considers the subjective impressions of the parties involved. In recent jurisprudence, notably in the *Tesco v Neoelectra Group* case, the Supreme Court has refined this standard by emphasising the necessity for courts to evaluate why the failure to disclose would engender reasonable doubt in the minds of the parties.[370]

Singapore has also distinguished itself through the proactive measures of its primary arbitral institution and through legislative reforms, particularly concerning third-party funding.[371] The Singapore International Arbitration Centre (SIAC) is one of the few major global institutions to have its own detailed "Code of Ethics for an Arbitrator," first issued in 2006, which was pioneering for its time.[372] The 2017 SIAC Investment Arbitration Rules also contain express provisions requiring arbitrators to disclose any circumstances that may give rise to justifiable doubts about their impartiality or independence, both before and during the proceedings.[373]

Lastly, Canada has been proactive in embedding specific ethical standards for arbitrators directly into its international investment agreements (IIAs) and FTAs. The Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union was a pioneering agreement that introduced a binding code of conduct for arbitrators.[374] This code mandates independence and impartiality,[375] obliges arbitrators to continuously disclose any potential conflicts of interest, and

[369] Allaire v SGS Holding (Cour d'appel, Paris, 9 September 2010); Tecso v Neoelectra Group (Cour d'appel, Paris, 10 March 2011); Cour d'appel, Paris, 2 June 1989, Rev Arb [1991] 87
[370] Société Tesco v Société Neoelectra Group (Cour de Cassation, 10 October 2012) No 11-20.299
[371] Rebecca Leinen, 'Striking the Right Balance: Disclosure of Third-Party Funding' (2020) 20 Oxford University Commonwealth Law Journal 115.
[372] Chiara Giorgetti and Mohammed Wahab, 'A Code of Conduct for Arbitrators and Judges', Academic Forum on ISDS Concept Paper 2019/12, 13 October 2019.
[373] Fach Gómez (n 127) 48.
[374] Chaisse and others (n 30) 1173-74.
[375] *Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part* [2017] OJ L11/23, art 8.30(1), which requires members of the Tribunal upon appointment to "refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment

addresses the issue of "double-hatting" by prohibiting tribunal members from acting as counsel or party-appointed experts in other investment disputes during their appointment.[376]

3.2. International Structural Reforms – Multilateral Efforts to Reinforce Independence and Impartiality

The international community has increasingly undertaken efforts to reform of the ISDS system, which is currently experiencing a significant legitimacy crisis, as noted.[377] This crisis has raised concerns about the system's transparency, legitimacy, and overall effectiveness, prompting a flurry of proposals aimed at its reform. Since 2015, multilateral forums such as the ICSID and the UNCITRAL have emerged as principal platforms for initiatives designed to bolster the independence and impartiality of arbitrators, as well as to address systemic critiques within the arbitration framework.[378] These multilateral initiatives signify a departure from the earlier, more fragmented efforts at reform undertaken unilaterally by individual states.[379] Moreover, this comprehensive approach to reform has also stimulated the emergence of independent and unofficial groups, symposiums, and policy forums that contribute to the broader development of reform ideas.

3.2.1. An Independent Permanent Standing Institution for Arbitration (IPSIA)

Within this landscape, the proposal for the creation of an IPSIA in the ISDS context has been advanced by Professor James Devaney in 2019.[380] The IPSIA proposal is articulated as a balanced paradigm that effectively engages with critiques concerning the appointment process of arbitrators,

dispute under this or any other international agreement." Note that this provision would apply, once in force, to members of a permanent tribunal deciding ISDS cases.
[376] Chaisse and others (n 30)
[377] See Chapter 2.
[378] Malcolm Langford and others, 'UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions – An Introduction' (2020) 21 Journal of World Investment and Trade 1.
[379] Chiara Giorgetti and others, 'Reforming International Investment Arbitration: An Introduction' (2020) 18 The Law & Practice of International Courts and Tribunals 303-305.
[380] Devaney (n 221) 373.

whilst endeavouring to preserve the fundamental principle of party autonomy, which is highly esteemed by system users.[381]

The proposal is conceptualised as an autonomous entity aimed at augmenting oversight within the arbitrator appointment mechanism, thereby reconciling the principles of party autonomy with the overarching framework of international legal standards.[382] It draws inspiration from analogous advisory entities that evaluate judicial appointments both internationally and domestically. Specifically, the European Union's Article 255 Panel, which is an advisory body established in 2010 to provide an opinion on the suitability of candidates for judicial office at the Court of Justice of the European Union (CJEU),[383] and the Advisory Committee of the ICC.[384]

The fundamental role of IPSIA would be to scrutinise candidates proposed by the parties and provide a non-binding recommendation on their suitability before the appointment is finalised.[385]

The appointment process of arbitrators would be first, initiated by the parties, who retain the right to propose individuals for the position of arbitrator.[386] This approach preserves the fundamental principle of party autonomy, thereby ensuring that parties maintain a sense of ownership over the arbitration process.[387] Furthermore, this method sustains trust in the system, as the primary selection authority remains vested in the parties.

Secondly, the process would include an evaluation by IPSIA, which entails submitting supporting documentation – including a curriculum vitae and statement of qualifications – for the panel's assessment of the adjudications.[388]

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[381] Ibid.
[382] Devaney (n 63) 12.
[383] Jean-Marc Sauve´, 'Selecting the European Union's Judges: The Practice of the Article 255 Panel' in Michal Bobek (ed), Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts (OUP 2015) 80.
[384] Devaney (n 221) 374-375.
[385] Ibid. 370
[386] Devaney (n 63) 18.
[387] Ibid.
[388] Devaney (n 221) 382.

Subsequently, the panel shall undertake in-person interviews, which are deemed essential for unveiling critical facets of a candidate's suitability that may not be discernible from written submissions. Candidates will be evaluated based on explicit, transparent criteria pertaining to their expertise, experience, and potential conflicts of interest.[389]

Lastly, the IPSIA would issue a reasoned, non-binding evaluation regarding the candidate's suitability. This recommendation shall be communicated to the relevant parties for their consideration prior to final appointment decisions.[390]

To ensure its legitimacy, the composition and appointment process of the IPSIA panel must be meticulously structured. Membership would consist of esteemed individuals drawn from the ranks of highly qualified incumbent and retired judges, as well as arbitrators with extensive expertise in public international law and investment law.[391] Candidates would be mandated to disclose any potential conflicts of interest, and restrictions would be imposed on their ability to serve as arbitrators for a designated period following the conclusion of their term.[392] The appointment process for IPSIA members should be conducted with utmost transparency and grounded in publicly accessible criteria to foster complete confidence in the panel's legitimacy.[393] To prevent the replication of existing challenges observed within the ISDS framework, the selection criteria must prioritise diversity, encompassing the main legal traditions worldwide, ensuring equitable geographical representation, and maintaining gender balance, in a manner akin to the approach adopted by the ICC's Advisory Committee.[394] Given the absence of a central appointing authority within the current ISDS system, the responsibility of appointing panel members would be delegated to a neutral entity, such as the President of the International Court of Justice.[395]

[389] Ibid 383-84.
[390] Devaney (n 63) 16.
[391] Devaney (n 221) 377-78.
[392] Ibid.
[393] Ibid.
[394] Devaney (n 63) 17.
[395] Devaney (n 221) 378.

While this approach presents an innovative means to circumvent issues related to the ethics and appointment process of ISDS arbitrators, its implementation would necessitate a substantial departure from prevailing practices. Such a measure could be introduced via various mechanisms, including amendments to existing investment agreements, incorporation into new treaties, or the establishment of a voluntary "opt-in" framework.[396]

The proposal presents several considerable challenges. Convincing states and other parties to relinquish their current level of control over appointments would be an "uphill battle."[397] The absence of a centralised executive body in the investment law context presents a major hurdle for appointing the members of IPSIA itself.[398] IPSIA itself would be free from direct democratic control, and its own legitimacy could be questioned if its operations were not perceived as fully transparent and procedurally fair.[399] To be seen as a legitimate solution, the ethics and transparency of IPSIA's own processes would need to be exemplary. To address potential limitations inherent in this reform proposal, this thesis underscores a crucial consideration: the increasing significance of technology within arbitral institutions. This practice will be examined in greater detail later.

The subsequent section will proceed with the delineation of the principal international structural reforms currently under consideration, all of which are initiatives advanced by UNCITRAL WG III and are in a more advanced stage of development compared to the IPSIA proposal.[400] Specifically, the WG III has identified six concerns to be addressed by the reform process: (1) excessive legal costs; (2) duration of proceedings; (3) legal consistency; (4) decisional correctness; (5) arbitral

[396] Devaney (n 63) 8.
[397] Devaney (n 221) 387
[398] Ibid.
[399] Ibid. 25
[400] Chaisse and others (n 30) 2134-2135. See also, UNCITRAL, 'Note by the Secretariat – Tabular Presentation of Reform Options' (Possible Reform of Investor-State Dispute Settlement (ISDS)) UN Doc A/CN.9/WG.III/WP.166/Add.1 (30 July 2019).

diversity; and (6) arbitral independence and impartiality.[401] Considering the various facets of the reforms, the WG III has advanced along two concurrent pathways. One pathway pertains to "structural" reform proposals, while the other focuses on "non-structural" reforms, encompassing "incremental reforms."[402]

3.2.2. The Multilateral Instrument on ISDS Reform (MIIR)

The MIIR is envisioned as an overarching normative framework, augmented by supplementary protocols representative of various reform pathways, ensuring a coordinated yet adaptable approach. This proposal serves as a delivery mechanism for the implementation of the various solutions formulated within the WG III.[403]

In terms of content, the MIIR aims to provide States parties with the methodological flexibility to "pick and choose" among various reform options within a cohesive and efficient instrument, thereby enabling them to determine the scope and degree of their implementation. This approach is modelled after other notable international instruments, such as the Mauritius Convention on Transparency. [404] According to Paine, this mechanism should, at a minimum, serve as an effective means of implementing the reforms across the extensive corpus of existing investment treaties, thereby obviating the need for treaty-by-treaty renegotiation. [405]

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[401] UNCITRAL, 'Possible Reform of Investor-State Dispute Settlement (ISDS)' UN Doc A/CN.9/WG.III/ WP.149 (5 September 2018).

[402] N Jansen Calamita and Charalampos Giannakopoulos, 'Adapting Multilateral ISDS Reform to Regional Needs: A Proposal for a Chambers Mechanism' (2024) 57 Vand. J. Transnat'l L. 581.

[403] UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-eighth session (Vienna, 14–18 October 2019)' UN Doc A/CN.9/1004 (23 October 2019) paras 100-104; See also, UNCITRAL, 'Multilateral Instrument on ISDS Reform – Note by the Secretariat' UN Doc A/CN.9/WG.III/WP.194 (16 January 2020); See also, UNCITRAL, 'Report of the Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-ninth session' UN Doc A/CN.9/1044 (10 November 2020) paras 102–111; See also, UNCITRAL, 'Possible reform of investor-State dispute settlement (ISDS), Multilateral Instrument on ISDS Reform – Note by the Secretariat' UN Doc A/CN.9/WG.III/WP.221 (22 July 2022); Seel also, UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its forty-third session (Vienna, 5–16 September 2022)' UN Doc A/CN.9/1124 paras 66-88.

[404] *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration* (adopted 10 December 2014, entered into force 18 October 2017) 3081 UNTS 373

[405] Joshua Paine, 'A Multilateral Instrument on ISDS Reform (MIIR): Selected Design Issues' *EJIL:Talk!* (3 June 2025) https://www.ejiltalk.org/a-multilateral-instrument-on-isds-reform-miir-selected-design-issues/ accessed 20 July 2025.

The MIIR's connection to arbitrator independence and impartiality is primarily utilitarian. By establishing a cohesive framework, the MIIR seeks to facilitate the consistent application of emergent standards pertaining to adjudicator ethics and conduct across a broad consortium of investment treaties, thereby circumventing the reliance on fragmented, bilateral amendments.[406]

3.2.3. Structural Reforms

These types of reforms propose a fundamental overhaul of the existing ISDS Framework, moving toward a more permanent, institutionalised, and court-like system.[407]

3.2.3.1. Proposed Multilateral Investment Court (MIC)

The most transformative proposal under discussion is the transition from a decentralised arbitration to an MIC.[408] Proponents of the MIC, including the European Union, argue that the establishment of a permanent institution would significantly improve the facilitation of a comprehensive resolution framework. Specifically, it would enhance the uniformity, coherence, predictability, and accuracy of arbitral awards. Additionally, such an institution would mitigate the limitations and concerns currently associated with the existing arbitration framework.[409]

Conversely, some Member States endorse more targeted and incremental amendments to the ISDS.[410] They perceive a hybrid approach as advantageous and acknowledge the potential advantages of implementing a first-instance level of ad hoc arbitration, complemented by a prospective Appellate mechanism vested with the authority to review decisions rendered at first-instance.[411] This approach preserves the existing arbitration framework at the initial stage, while concurrently implementing a

[406] UNCITRAL, 'Possible reform of investor-State dispute settlement (ISDS): Draft multilateral instrument on ISDS reform' UN Doc A/CN.9/WG.III/WP.246 (July 2024) arts 1-2, paras 3-11.
[407] Langford and others (n 378) 175.
[408] UNCITRAL, 'Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the European Union and its Member States', U.N. Doc. A/CN.9/WG.III/WP.159/Add.1, para 4-9
[409] Ibid.; Calamita and Giannakopoulos (n 402).
[410] Government of China, 'Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the Government of China' UN Doc A/CN.9/WG.III/WP.177 (10 September 2019) paras 4-5.
[411] Ibid.

supplementary review mechanism designed to address errors and promote harmonisation of jurisprudence.[412]

The introduction of a MIC would not automatically eliminate investment arbitration, although it is designed to replace the current *ad hoc* system, rather, it would introduce a competing institutional design that will coexist with traditional ISDS arbitration.[413] Some scholars advocate for the "beauty of arbitral tribunals," emphasising their capacity to render independent, expert judgments characterised by greater autonomy, control, and efficiency compared to alternative mechanisms.[414] As Professor Elihu Lauterpacht insightfully observed, arbitration constitutes a vital element of the international system and cannot be disregarded. He further suggested that its efficacy might be augmented through the integration of an appellate system.[415]

3.2.3.2. Appellate Body

The proposal to create an appellate body, or appeal mechanism, is a central and significant component of the ongoing ISDS reform discussions.[416] The core concept is to establish a standing, permanent, or semi-permanent second-tier body with the authority to review awards rendered by first-instance arbitral tribunals.[417] This would be a substantial departure from existing review mechanisms, such as the annulment procedure under the ICSID Convention, which is limited to narrow procedural grounds

[412] Stephan W. Schill and Geraldo Vidigal, '*Investment Dispute Settlement à La Carte: A Proposal for the Reform of Investor–State Dispute Settlement*' in Manfred Elsig, Rodrigo Polanco and Peter Van Den Bossche (eds), *International Economic Dispute Settlement* (1st edn, Cambridge University Press 2021) 234.
[413] Guillermo A Alvarez and William W Park, 'The New Face of Investment Arbitration: NAFTA Chapter 11' (2003) 28 Yale J Intl L 398, 398–99, explaining it "would be fundamentally unsound to call into question the use of neutral binding arbitration itself as the preferred means for resolving cross-border investment disputes" as this would ultimately do "more harm than good" and could backfire on the United States' foreign interests."
[414] Jack J Coe Jr, 'Taking Stock of NAFTA Chapter 11 in Its Tenth Year: An Interim Sketch of Selected Themes, Issues, and Methods' (2003) 36 Vand J Transnatl L 1381, 1400-18.
[415] Elihu Lauterpacht, *Aspects of the Administration of International Justice* (Grotius Publications 1991) 112, citing: "an important component of the international system and cannot be done away with. We should contemplate the possibility that its value may be enhanced if it is linked to a system of appeal."
[416] Ibid.
[417] Georgios Dimitropoulos, Investor–State Dispute Settlement Reform and Theory of Institutional Design 9(4) Journal of International Dispute Settlement (2018) 539.

and does not permit a review of substantive legal or factual errors.[418] The establishment of an Appellate body has been subject to scholarly critique.[419] First, the system draws scholarly inspiration from WTO jurisprudence, which has been subject to critique regarding issues of transparency, legitimacy, and the purported overreach of authority by the dispute settlement mechanism and the appellate body.[420] Second, such a system is likely to result in elevated procedural costs, thereby rendering the proceedings more protracted and time-consuming.[421] Third, the system faces limitations stemming from states' willingness to endorse such mechanism. Achieving comprehensive reforms of arbitration regulations might prove challenging for bodies like ICSID, given the substantial number of participating states.[422]

The establishment of an appellate tribunal is inherently associated with the advancement of both the tangible and perceived levels of independence and impartiality among arbitrators. Its primary function serves as a crucial mechanism for scrutinising and restraining the discretionary powers exercised by first-instance arbitrators.[423]

3.2.3.3. Advisory Centre

The proposal to establish an Advisory Centre on ISDS is a significant, yet distinct, component of the ISDS reform agenda being discussed within the WG III. Unlike other reform efforts, the Advisory Centre proposal seeks to reaffirm the legitimacy of international investment governance by promoting a more equitable approach within IIL. This bottom-up methodology has the potential to enhance the legitimacy and fairness of IIL, making the reform particularly significant in fostering a more just and balanced system.

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[418] Dotzauer (n 219) 35.
[419] Tanaya Thakur, 'Reforming the Investor-State Dispute Settlement Mechanism and the Host State's Right to Regulate: A Critical Assessment' (2021) 59 Indian Journal of International Law 173.
[420] Chaisse and others (n 30) 2136. See also, Donald McRae, What is the Future of WTO Dispute Settlement? 7(1) Journal of International Economic Law (2004) 3.
[421] Thakur (n 419)
[422] Giovanni Zarra, The Issue of Incoherence in Investment Arbitration: Is There Need for a Systemic Reform? 17(1) Chinese Journal of International Law (2018) 178-179.
[423] Nektarios Papadimos, 'A Golden Mean Approach to Independence and Impartiality in Investment Arbitration' (2025) 16 Journal of International Dispute Settlement 21-22.

The primary aims of the Centre are to provide assistance to developing countries and least-developed countries (LDCs), as well as to confront the substantial inequalities and difficulties faced by resource-constrained states in manoeuvring within the ISDS framework.

According to Joubin-Bret, the foundational services should be conceptualised as comprising two core pillars: representation and advisory functions. The latter typically includes guidance and support that a centre may offer concerning proactive or "upstream" preventative strategies, particularly those associated with treaty and contract negotiations, as well as the development of "early warning systems."[424]

The former category relates to services that a centre may provide once a dispute has arisen. There is a pronounced emphasis on the provision of legal representation, given the significant deficiency of support in this area for developing countries and LDCs, particularly in activities such as the negotiation of settlements, pre-dispute claims assessments, arbitrator appointments, document production, and representation at hearings.[425] Ultimately, the Centre aims to function as a pragmatic and impactful institution, strategically addressing the most pressing issues within the ISDS framework, thereby promoting increased equity and sustainability for all actors.[426]

The proposed Centre is envisioned as a form of international legal aid, similar in function to the Advisory Centre on WTO Law (ACWL), which provides subsidised legal support to developing countries in trade disputes.[427] By offering affordable legal expertise, the Centre aims to ensure that disputes are decided on their merits rather than on the basis of which party has greater resources.[428]

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[424] Anna Joubin-Bret, 'Establishing an International Advisory Centre on Investment Disputes' (ICTSD, 2025) 4-11.
[425] Robert W Schwieder, '*Legal Aid and Investment Treaty Disputes: Lessons Learned from the Advisory Centre on WTO Law and Investment Experiences*' [2018] The Journal of World Investment & Trade 637-639
[426] UNCITRAL 'Comments from delegations on the Initial Draft on the Establishment of Advisory Centre' (2021) 44
[427] Karl P Sauvant, 'An Advisory Centre on International Investment Law: Key Features' (Academic Forum on ISDS) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3450919 accessed 6 September 2025.
[428] Karl P Sauvant, *Improving the International Investment Law and Policy Regime: Options for the Future* (Ministry for Foreign Affairs of Finland 2013).

The Advisory Centre's impact on arbitrator independence and impartiality is primarily indirect and procedural.[429] It does not seek to change the rules governing arbitrators but rather to empower one set of actors (states) to engage more effectively with those rules and the overall system.[430] By addressing the chronic imbalance in resources frequently observed between well-equipped investors and under-resourced states, the Centre aspires to foster a more equitable and impartial adjudicative environment. Such an environment is essential to uphold the independence of arbitrators and enhance their perceived neutrality.[431] The primary implications of this institution include enhancing the quality of the adversarial process, mitigating unconscious bias and perceptions of partiality, and strengthening the mechanisms available for challenging arbitrators. Another significant implication, which holds paramount importance, is the enhancement of dispute prevention and resolution mechanisms. This involves the development of extensive knowledge and capabilities among the parties, even for LDCs and developing nations, to effectively manage and resolve conflicts. Such measures are crucial for fostering stability and promoting sustainable development within the international legal framework.

3.2.4. Non-Structural Reforms

This type of reforms focuses on improving existing processes and ethical standards through rules, guidelines, and textual instruments rather than creating new institutions.[432]

3.2.4.1. The 2023 UNCITRAL/ICSID Code of Conduct for Arbitrators

The UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution (the Code)[433] was collaboratively developed with ICSID and officially adopted during the 56th

[429] Claiton Fyock, 'Getting "Real" about ISDS Reform: A Critical Realist View of International Investment Law's Status Quo' (2025) 16 Journal of International Dispute Settlement 22.
[430] Sauvant (n 427)
[431] Ibid.
[432] Langford and others (n 378) 175.
[433] See UNCITRAL and ICSID, 'Code of Conduct for Arbitrators in International Investment Dispute Resolution' (13 July 2023) https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/2318824ecoc_arbitrators_ebook_11june.pdf accessed 25 July 2025.

session of UNCITRAL in 2023.[434] The newly adopted Code aims to establish standardised principles for investment arbitrators by reaffirming and formalising established best practices, including the IBA Guidelines. It emphasises the importance of neutrality, ethical obligations – such as maintaining independence and impartiality – and robust disclosure mechanisms, as well as clarifying roles within the arbitration process.[435]

The Code of Conduct introduces stricter and clearer rules on independence, impartiality, disclosure, and conduct during proceedings than ever before at a global level. Key provisions of the Code include addressing the issues of independence and impartiality of arbitrators, double-hatting, disclosure obligations, and further issues, like *ex parte* communications.[436]

In more detail, Article 3 of the Code is the cornerstone of the Code, establishing the fundamental ethical duties of independence and impartiality.[437] It codifies these principles by establishing a primary obligation and providing a non-exhaustive list of specific prohibited behaviours.[438]

Art. 3(1) begins with a clear and absolute statement of the core duty: "[a]n arbitrator shall be independent and impartial."[439] This overarching requirement is applicable throughout the entire arbitral process, commencing from the appointment of the arbitrator until the issuance of the final award, as supported by references.[440] It constitutes the foundational basis upon which subsequent, more specific obligations are established.

To furnish more precise guidance, Article 3(2) elucidates this principle by means of an illustrative, non-exhaustive enumeration of actions that an arbitrator is prohibited from undertaking.

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[434] Papadimos (n 423).
[435] ibid.
[436] Brekoulakis and Howard (n 133).
[437] Code of Conduct (n 433) art. 3
[438] Ibid. See also, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its forty-sixth session* (Vienna, 16–20 October 2023) UN Doc A/CN.9/1149, paras 8-9.
[439] UNCITRAL, 'Possible reform of ISDS (Advisory centre)' (Note by the Secretariat for the forty-fourth session of Working Group III) UN Doc A/CN.9/WG.III/WP.223 (6 October 2023) para 35.
[440] Code of conduct (n 433) para 17-19

The use of the word "includes" signals that other circumstances not explicitly listed could also constitute a breach, due to the illustrative nature of the list.[441]

The specific obligations include not being influenced by:

(i) Loyalty to any party or entity: this provision stipulates that an arbitrator must remain impartial and free from any undue influence arising from a sense of obligation or alignment with a particular party, government, or other entity. The accompanying commentary clarifies that such a prohibition does not extend to shared attributes such as nationality or educational background, unless these characteristics exert an undue influence on the arbitrator's conduct or decision-making process.[442]

(ii) Taking instruction: Arbitrators are required to exercise their independent judgment and are prohibited from accepting directives, instructions, or guidance – whether explicit or implicit – from any organisation, government entity, or individual concerning any aspect of the proceeding.[443]

(iii) Past, present, or prospective relationships: this provision encompasses an extensive temporal scope, extending to potential future relationships that could influence an arbitrator's impartiality. It pertains to any financial, business, professional, or personal associations that might compromise the arbitrator's neutrality.[444]

(iv) Using their position to advance personal interests: An arbitrator is prohibited from leveraging their position to promote any financial or personal interests they may possess concerning the resolution of the dispute or in relation to any of the participating parties.[445]

[441] Ibid. Art. 3(2).
[442] Ibid. Art. 3(2) (a)
[443] Ibid. Art. 3(2) (b)
[444] Ibid. Art. 3(2)(c)
[445] Ibid. Art. 3(2)(d)

(v) Assuming functions or accepting benefits: This provision prohibits an arbitrator from assuming any roles or accepting benefits that could potentially conflict with the impartial execution of their duties in arbitration proceedings.[446]

(vi) Creating an appearance of a lack of independence or impartiality: This principle constitutes a fundamental component that establishes an objective standard. It emphasises that justice must not only be universally achieved but must also be visibly perceived to be properly administered.[447]

The "appearance" test in Article 3(2)(f) is intrinsically associated with the broadly recognised standard of "justifiable doubts," a fundamental threshold that underpins both disclosure obligations and disqualification mechanisms within the context of international arbitration, as seen also in national contexts.[448]

Article 4 addresses the controversial issue of "double-hatting" by explicitly prohibiting arbitrators from serving in multiple roles simultaneously. It sets out "cooling-off periods" following arbitration proceedings.[449] This represents a significant advancement, as it confirms that the term "double-hatting" encompasses arbitrators, legal counsels, and experts.[450] Furthermore, the limitation delineated within the provisions pertains to "any other international investment dispute or related proceeding," which encompasses "any international or domestic proceeding directly related to the international investment dispute, such as a set-aside or enforcement proceeding."[451] Nonetheless, Article 4 does not preclude an arbitrator from engaging in additional adjudicatory roles, such as

[446] Ibid. Art. 3(2)(e)
[447] Ibid. Art. 3(2)(f)
[448] Matthew Weiniger and Patricia Nacimiento, 'UNCITRAL's New Code of Conduct for Arbitrators: A Step Towards Greater Legitimacy?' (ArbitrationLinks, 15 March 2024) https://www.linklaters.com/en/insights/blogs/arbitrationlinks/2024/march/uncitral-code-of-conduct accessed 25 August 2025; Dimitropoulos (n 417) 424–25.
[449] Papadimos (n 423) 25.
[450] Giorgetti and others (n 263) 459–60.
[451] Papadimos (n 423)

serving as an arbitrator in a different proceeding or performing as a judge, provided such activities are permitted under the relevant rules.[452]

This passage appears to encapsulate a prevailing conceptual understanding of "double-hatting" and its inherent limitations in a systematic framework, beyond isolated initiatives aimed at prohibiting double-hatting within specific treaties, such as CETA or the Argentina-Chile FTA. This article serves to fill a notable gap in the existing literature by addressing the limitations of the IBA Guidelines. It exemplifies how certain challenges within the ISDS framework can be effectively resolved through comprehensive reform and meticulous implementation. The discussion underscores the importance of targeted modifications to enhance the efficacy and fairness of ISDS mechanisms. While the soft law dimension of the Code warrants consideration, the implications of incorporating such an article are pivotal to the comprehensive reform agenda of the ISDS mechanism.

Another Article to consider is Article 5, which pertains to the obligation of diligence. This provision directly addresses common criticisms of ISDS concerning the length and cost of proceedings by codifying the professional responsibility of arbitrators to manage cases efficiently and effectively

Lastly, the duties of independence and impartiality are upheld through the stringent disclosure obligations delineated in Article 11 of the Code. Disclosure functions as the principal mechanism enabling parties to evaluate an arbitrator's adherence to the requirements articulated in Article 3.[453] It employs an objective standard for disclosure, namely, "any circumstances likely to give rise to justifiable doubts,"[454] while the IBA Guidelines provide for a subjective "in the eyes of the parties" test.[455] Article 11 also delineates a compulsory list of information that must be disclosed under all circumstances.

[452] UNCITRAL and ICSID, *Commentary on the Code of Conduct for Arbitrators in International Investment Dispute Resolution* (13 July 2023), para 31.
[453] Code of conduct (n 433) Art. 11(1)
[454] Ibid.
[455] IBA Guidelines (n 32) General Standard 3

Although the Code does not introduce groundbreaking innovations, it consolidates established best practices into a cohesive framework of conduct that is applicable across a variety of treaties and arbitration rules. However, its effectiveness may be compromised due to limited mechanisms for implementation.[456] The Code is applicable solely upon the *ad hoc* and *in concreto* agreement of the disputing parties, or when explicitly incorporated into the instrument of consent. In case of incompatibility with the consent instrument, the latter's provisions prevail.[457]

Another key challenge to the Code's effectiveness is its lack of an independent enforcement mechanism or sanctions for non-compliance.[458] While Article 11 states that an arbitrator "shall comply with the Code," it does not provide for specific penalties for a breach.[459] Any challenge or sanction remains governed by the applicable arbitration rules or treaty.[460]

Therefore, the Code, in its current form, constitutes a form of "soft law" and does not possess binding character. For the Code to achieve binding "hard law" status, it must be incorporated into mandatory legal instruments.[461] This could happen through its integration into the ICSID Convention or institutional rules, or by its inclusion in new BITs and FTAs.[462]

Despite its non-binding nature, the Code is a significant step toward unifying global expectations of arbitrator conduct.[463] By establishing explicit guidelines concerning conflicts of interest, disclosure

[456] August Reinisch, 'Investment Arbitration and the Rule of Law' in Stefan Kr€oll and others (eds), Cambridge Compendium of International Commercial and Investment Arbitration (CUP 2023) 225-226
[457] Papadimos (n 423).
[458] Ibid.
[459] Code of conduct (n 433) Art.11
[460] Ibid. Art. 12(3), See also, UNCITRAL, 'Report of Working Group III on the work of its forty-fifth session' UN Doc A/CN.9/1130 (31 March 2023) paras 50-61, 63.
[461] Papadimos (n 423).
[462] Ibid.
[463] UNCITRAL, 'Possible reform of ISDS – Draft Code of Conduct' (Note by the Secretariat for the thirty-seventh session of Working Group III, 30 September–4 October 2019) UN Doc A/CN.9/WG.III/WP.167, paras 12-13.

obligations, and the prohibition of dual roles, the policy directly confronts longstanding issues regarding arbitrator neutrality and impartiality. This approach thereby bolsters the perceived legitimacy of the ISDS system.[464]

3.3. Future Perspectives: Technology's Potential Impact on Independence and Impartiality

Looking forward, technological advancements are anticipated to both contest and reinforce the fundamental principles of arbitrator independence and impartiality. Innovations such as AI and the widespread adoption of virtual hearings, though not historically associated with discussions of arbitrator ethics, possess significant implications for issues of bias and fairness within arbitration proceedings.[465] A recent economic analysis stated that generative AI – that is, a category of AI that generates new creative content such as text, images, music or codes by learning from a variety of inputs adds up to USD 4.4 trillion annually to the global economy. [466]

Taking into consideration this, it's clear how these new technologies can be a great introduction to the law sector, offering new tools to mitigate human bias.[467] While this is true, they also introduce new risks, including algorithmic bias, the ethical implications of decision-making, and the overreliance on technology that may overlook the complexity of human judgment.[468] The following sections explore how technology is shaping the future of arbitration, from AI's role in conflict checking and decision-making to the procedural fairness of virtual hearings and the provocative prospect of AI arbitrators in the distant (or not-so-distant) future.

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[464] Hans Van Houtte and Aline Van den Bossche, 'The 2017 UNCITRAL Arbitration Reform: Encouraging a More Harmonized Approach to Investment Dispute Settlement' (2020) 21(6) *Journal of World Investment & Trade* 1005-1032.
[465] Katia Fach Gómez, 'Artificial Intelligence in Investor State Dispute Settlement: A New World of Ethical Challenges for Legal Stakeholders?' in Chiara Giorgetti and Catharine Titi (eds), Ethics and Investor- State Dispute Settlement (Brill 2024) 1.
[466] Maura R Grossman and others, 'The GPT Judge: Justice in a Generative AI World' (2023) 23(1) Duke Law & Technology Review 1. See also, Baker McKenzie, 'The Year Ahead. Global Disputes Forecast 2024' (2024) https://www.bakermckenzie.com/en/insight/publications/2024/01/year-ahead-global-disputes-forecast-2024 accessed 15 August 2025.
[467] David Horton, 'Forced Robot Arbitration' (2023) 111 California Law Review 7.
[468] Robert Walters, 'Robots Replacing Human Arbitrators: The Legal Dilemma' (2025) 34(2) *Information & Communications Technology Law* 134.

3.3.1. Blockchain Applications and Technology – Toward Transparency and Random Selection

Blockchain technology is a decentralised, distributed ledger system that is frequently accessible to the public.[469] It is characterised by its capacity to securely record transactions across multiple computing nodes in a manner that impedes unauthorised alterations or retroactive modifications, thereby preserving data integrity and ensuring transparency. This technology presents a potentially superior solution, distinguished by its decentralised ledger architecture, which is designed to create trust, transparency, and robust security features, without the need for a central intermediary.[470] These characteristics suggest significant applicability within the realm of arbitration, offering enhanced integrity and trustworthiness in dispute resolution processes.[471]

One application involves the deployment of blockchain technology to create immutable and transparent records of arbitrator appointments and associated proceedings.[472] For instance, arbitrator disclosure statements or conflict of interest data could be documented on a blockchain, providing transparent access to all involved parties. This approach ensures the immutability of the information, thereby enhancing the credibility and integrity of the arbitration process.[473]

From a more academic perspective, blockchain technology can facilitate the random selection of arbitrators from a pre-qualified pool through the implementation of algorithms that generate verifiable randomness.[474] This notion of "random selection" aims to mitigate the influence of partisan bias and

[469] Andrey Gromyko and others, 'Blockchain Technology and its Implications' (The Oxford Journal, 14 September 2023) https://www.oxjournal.org/blockchain-technology-and-its-implications/ accessed 1 September 2025.
[470] Farhat Anwar and others, 'A Comprehensive Insight into Blockchain Technology: Past Development, Present Impact and Future Considerations' (2022) 13(11) International Journal of Advanced Computer Science and Applications 878 https://thesai.org/Publications/ViewPaper?Volume=13&Issue=11&Code=IJACSA&SerialNo=101 accessed on 3 September 2025.
[471] Adel Salem Allouzi, Haitham M Alzoubi and Muhammad Turki Alshurideh, 'The Influence of Blockchain-based Smart Contracts on Arbitration Speed: The Mediating Role of Trust in the Arbitration Process' (2023) 6(9s) *Journal for ReAttach Therapy and Developmental Diversities* 1124-33.
[472] Peter L Michaelson, 'Arbitrating Disputes Involving Blockchains, Smart Contracts and Smart Legal Contracts' (2020) 74 *Dispute Resolution Journal* 89-133.
[473] Allouzi, Alzoubi and Alshyrudeh (n 471). See also Karla Bernardo, 'How Blockchain Dispute Resolution Works' (TokenMinds blog, 6 June 2024) https://tokenminds.co/blog/blockchain-development/blockchain-dispute-resolution accessed 16 August 2025.
[474] Bahadir Koksal and Roee Sarel, 'The Smart Contracts Trilemma' (*University of Illinois Law Review*, forthcoming) https://ssrn.com/abstract=4689013 accessed 16 August 2025.

unconscious predispositions in the appointment process by incorporating a regulated element of randomness.[475]

Some online dispute resolution platforms are already experimenting with these models.[476] Kleros is one example. It is a protocol for dispute resolution utilising blockchain technology that implements a jury-based system whereby arbitrators, referred to as "jurors," are randomly chosen from a pool of anonymised candidates.[477] It describes itself as a "decentralised arbitration service for the dispute of the new economy," highlighting the attributes associated with the new age.[478] The random selection process is underpinned by blockchain technology, thereby ensuring its integrity and preventing either party from manipulating the outcome.[479] Proponents argue that this approach can improve impartiality by mitigating strategic appointment tactics, although it may concurrently reduce the parties' autonomy in selecting specific arbitrators.[480]

A significant benefit of blockchain technology lies in its capacity to improve transparency across various procedural processes, thereby fostering greater accountability and openness.[481] Logging evidentiary submissions, communications, and arbitral awards on a blockchain – potentially a permissioned ledger to safeguard confidentiality – facilitates the creation of an immutable, tamper-proof audit trail.[482] This system has the potential to mitigate *ex parte* communications and undisclosed interactions by ensuring that all activities are thoroughly documented. The decentralised architecture of blockchain technology inherently prevents any single entity from controlling the information flow,

[475] Ibid.
[476] Christoph Salger, 'Decentralized Dispute Resolution: Using Blockchain Technology and Smart Contracts in Arbitration' (2024) 24 *Pepperdine Dispute Resolution Law Journal* 65.
[477] Ibid. See Kleros https://kleros.io/ accessed 25 August 2025.
[478] Ibid.
[479] Amy J Schmitz and Colin Rule, 'Online Dispute Resolution for Smart Contracts' [2019] J Disp Resol 103-108.
[480] Salger (n 476) 68-69.
[481]Kastriote Vlahna and others, 'Arbitration and the Importance of the Arbitration Agreement' (2020) 5 *European Journal of Education and Social Sciences* 160-169. See also, Maxime Chevalier, 'From Smart Contract Litigation to Blockchain Arbitration, a New Decentralized Approach Leading Towards the Blockchain Arbitral Order' (2021) 12 J Intl Disp Settl 558-584. See also, Allouzi, Alzoubi and Alshyrudeh (n 471) 1125.
[482] Muntasir Jaodun and Khawla Bouafia, 'Analysis and Evaluation of a Blockchain-Based Framework for Decentralized Rental Agreements and Dispute Resolution' (2025) 3 Blockchains 8.

thereby diminishing the likelihood of manipulation. Furthermore, when implemented on a distributed ledger, the arbitration process is not subject to control by a sole party, which serves to reduce the risks of corruption and undue influence.[483]

That said, the utilisation of blockchain technology in the processes of arbitrator selection and case management is still in the experimental stage, reflecting ongoing explorations into its potential to enhance transparency, security, and efficiency.[484]

The process of randomly selecting adjudicators serves to bolster the impartiality, objectivity and fairness of the arbitration process. However, this method may also pose challenges by potentially conflicting with the parties' interest in appointing arbitrators who possess specific expertise relevant to the dispute at hand, thereby impacting the suitability and effectiveness of the arbitration outcome.[485]

A prospective future model could involve an algorithm that randomly selects an arbitrator from a list of qualified candidates stored on a blockchain. To mitigate potential biases related to reputation or nationality, the arbitrator's identity could remain pseudonymous until after acceptance, as it happens for Kleros.[486]

These technological concepts are situated at the cutting edge of procedural design, exemplifying a wider trend of employing cryptographic trust mechanisms to enhance human impartiality.[487]

By incorporating transparency and neutrality into the processes of arbitrator appointment and record-keeping, blockchain technology has the potential to further mitigate biases.[488] This is contingent upon the willingness of parties to cede a certain degree of control in exchange for an improved perception of fairness and impartiality.

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[483] Salger (n 476)
[484] Koksal and Sarel (n 474)
[485] Ibid.
[486] Salger (n 476)
[487] BAC Society, 'Blockchain Arbitration: The Foundation of Trust, Confidence, and Legality in Cryptocurrency Transactions' (BAC Society) https://bacsociety.com/en/blockchain-arbitration-the-foundation-of-trust-confidence-and-legality-in-cryptocurrency-transactions/ accessed 20 August 2025.
[488] Allouzi, Alzoubi and Alshyrudeh (n 471)

3.3.2. AI for Conflict Checking and Bias Detection

When considering the safeguarding of arbitrator independence and impartiality, AI can serve as an effective instrument in two principal capacities: (1) conflict of interest checking, and (2) the analysis or even prediction of potential biases.[489]

Regarding the first potential assistance, AI systems are capable of analysing extensive datasets to identify correlations that may elude manual inspection.[490] Prominent arbitrators within the limited community often exhibit substantial professional credentials, including prior case experience, scholarly contributions, and institutional associations as previously discussed.[491] Such extensive backgrounds can complicate the efforts of parties and institutions to identify all relevant factors comprehensively. An AI model trained on arbitrator data has the potential to more rapidly and comprehensively identify potential conflicts compared to human evaluators, without having to rely on the arbitrators' disclosure.[492] For instance, in the context of selecting an arbitrator for a particular case involving a specific corporation, an AI tool could identify prior relevant actions. Such actions might include the arbitrator's previous decision in a case where a subsidiary of the corporation was a party or instances where the arbitrator's legal firm has provided consultancy to the company on unrelated matters.

[489] Eoin Treacy, 'The effectiveness of artificial intelligence in simplification of arbitration proceedings: fiction or seventh seal in the world of arbitration?' (2022) 2(2) International Journal of Law, Ethics, and Technology 137. See also, BM Dutta, 'The Ethics of Artificial Intelligence in Legal Decision Making: An Empirical Study' (2018) 55(1) Psychology and Education Journal 292, 292–302; MRV Axpe, 'Ethical Challenges from Artificial Intelligence to Legal Practice' in HS González and others (eds), Hybrid Artificial Intelligent Systems (Cham, Springer International Publishing, 2021) 196, 196–206; JP Davis, 'AI, Ethics, and Law: A Way Forward' in LA DiMatteo, C Poncibò and M Cannarsa (eds), The Cambridge Handbook of Artificial Intelligence: Global Perspectives on Law and Ethics (Cambridge University Press, 2022) 304.

[490] Victoria Associates, 'Independence and Impartiality of Arbitrators and Artificial Intelligence' (Victoria Associates) https://victoriassociates.com/independence-and-impartiality-of-arbitrators-and-artificial-intelligence/ accessed 20 August 2025

[491] See Chapter 2.

[492] Ibid. See also, Fach Gómez (n 465) 4.

Some arbitral institutions and service providers are currently engaged in the development of AI-enhanced searchable databases aimed at streamlining this procedural process.[493] These tools enable users to input party and counsel names and obtain a list of arbitrators, including any discernible linkages – regardless of how remote – to those entities.[494]

For parties, using AI in arbitrator selection can broaden the range of eligible candidates beyond traditional networks and informal recommendations, thereby mitigating the influence of inherent biases associated with subjective judgments such as word-of-mouth referrals.[495] By facilitating the identification and exclusion of candidates exhibiting subtle conflicts of interest or unconscious bias indicators, AI can significantly enhance the process of making data-driven and objective appointments. Platforms such as Arbitrator Intelligence are architected to systematically collect comprehensive insights into the case management strategies and decision-making processes employed by arbitrators, thereby enabling disputing parties to make more informed and judicious choices.[496]

Researchers are currently investigating advanced AI algorithms designed to analyse linguistic features and decision-making patterns. The primary objective of this research is to identify and mitigate potential biases embedded within these patterns, thereby promoting fairness and objectivity in automated decision processes.[497]

[493] Fach Gómez (n 127)
[494] Ibid.
[495] Ibid.
[496] Kshitij Tulsian, 'Arbitration and Ar-‘byte’-ration: Data Analytics for Arbitrator Selection in International Commercial Arbitration' (King's Student Law Review Blog, 16 October 2023) https://blogs.kcl.ac.uk/kslr/2023/10/16/arbitration-and-ar-byte-ration-data-analytics-for-arbitrator-selection-in-international-commercial-arbitration/ accessed 16 September 2025. See also, Catherine A Rogers, ‘Arbitrator Intelligence: From Intuition to Data in Arbitrator Appointments’ (2018) 11(1) NYSBA New York Dispute Resolution Lawyer 41-42.
[497] Ben Davies, ‘Artificial Intelligence & FINRA Arbitration Awards: Utilizing AI and Arbitral Analytics to Uncover FINRA Arbitration Award Patterns’ (Pace University School of Law Legal Studies Research Paper No 24-11, 2024)

Natural Language Processing (NLP) tools, for example, scrutinise an arbitrator's historical adjudications to identify potential biases or predispositions. This can be achieved through the analysis of linguistic features such as tone and sentiment, as well as the detection of systematically skewed outcomes.[498] For instance, an AI tool might identify that a specific arbitrator has rendered decisions in favour of investors in 95% of their cases. Although this statistic does not constitute conclusive evidence of bias, it offers pertinent information for stakeholders to consider within the analytical framework. There are also AI systems capable of analysing textual content for bias or logical inconsistencies, which could be employed in the preliminary review of award drafts to notify arbitrators of possible cognitive biases or oversight.

However, these applications are still under development and are confronted with considerable challenges. A principal obstacle pertains to the lack of adequate training data, given the confidentiality of numerous arbitral awards. Additionally, there exists a significant risk that the AI may inherit and exacerbate biases embedded within its training datasets.[499]

While AI offers tools to combat human bias, its use must be carefully managed to avoid introducing new, algorithmic biases.[500] AI algorithms' effectiveness and impartiality are inherently limited by the quality and diversity of their training data.[501] In instances where historical arbitrator appointments lack diversity, an AI system may internalise and reproduce these biases. For example, it might predominantly recommend older male arbitrators, as they historically have a greater number of published awards, thus reinforcing existing demographic disparities and the reappointment practices.

[498] Ibid.

[499] EI—IILCC Study Group on ISDS Reform, 'Reform of Investor-State Dispute Settlement – Current State of Play at UNCITRAL' (2022) 25 Zeitschrift für europarechtliche Studien 15; Dong-Hee Shin and Emily Y Shin, 'Data's Impact on Algorithmic Bias' (2023) 56(6) Computer 90; Yves Saint James Aquino, 'Making decisions: Bias in artificial intelligence and data-driven diagnostic tools' (2023) 52(7) Australian Journal for General Practitioners 439.

[500] Lu Yan and Tie Fatt Hee, 'Utilizing Artificial Intelligence in Investor-State Dispute Settlement: Present Issues and Future Challenges' (2024) 51 JMCL 47-49.

[501] Ibid.

This phenomenon, referred to as algorithmic bias, necessitates meticulous curation of training datasets to prevent the perpetuation of preexisting biases and prejudices. In light of these concerns, professional bodies such as the Chartered Institute of Arbitrators (Ciarb) have initiated the development of comprehensive guidelines governing the application of AI in arbitration processes, with a focus on ensuring transparency and safeguarding against discriminatory outcomes.[502]

In summary, AI demonstrates considerable potential to enhance impartiality by augmenting human decision-making processes. Its capacity to identify concealed conflicts of interest and to broaden the pool of candidates in an objective and unbiased manner underscores its value in promoting equitable assessments.[503] Implementing an AI-driven vetting system to perform a comprehensive, pre-appointment review of potential arbitrators would significantly bolster confidence in the arbitral process.[504] For example, such a system could generate an objective report confirming that no disqualifying conflicts have been identified, or that no issue conflicts are apparent in previous writings, or that there is a low risk of partiality, thereby strengthening the integrity of the tribunal from the outset.[505] The human element continues to play a crucial role; ultimately, human judgment is required to identify and waive conflicts of interest.[506] Nonetheless, artificial intelligence is emerging as an increasingly important tool in overseeing the selection and evaluation of arbitrators.[507]

3.3.3. Virtual Hearings (E-Hearings) and Procedural Fairness

The COVID-19 pandemic significantly expedited the transition towards virtual hearings within the realm of international arbitration, thereby transforming them from a marginal novelty into a prevalent

[502] CIARB 'Guideline on the Use of AI in Arbitration' (2025)
[503] Yan and Hee (n 500) 50-53
[504] Liu, Joe, The Human Impact on Arbitration in the Emerging Era of Artificial Intelligence (May 31, 2024). Contemporary Asia Arbitration Journal, Vol. 17, No. 1, 91-116
[505] Ibid.
[506] Ibid.
[507] Fach Gómez (n 465).

and enduring practice.[508] While virtual hearings offer tangible practical advantages – including considerable cost and time efficiency, enhanced scheduling flexibility, and a reduced environmental footprint – they also pose distinct risks to an arbitrator's independence, and, especially, impartiality.[509] Arbitrators are now confronted with the imperative responsibility of safeguarding the impartiality of proceedings during the transition to a digital forum, ensuring that neither party is prejudiced and that the integrity of the arbitration process is maintained.[510]

A primary concern is whether virtual hearings compromise tribunals' capacity to evaluate witness credibility and demeanour, processes which are fundamental to impartial fact-finding.[511] Some scholars contend that vital non-verbal cues and the solemnity of in-person testimony are diminished or misrepresented in virtual settings.[512] Nevertheless, the arbitration community has demonstrated rapid adaptation by formulating protocols designed to address these issues.[513]

To enhance fairness, tribunals may adopt a range of measures, including technical protocols, witness examination procedures, and institutional guidelines. By implementing broad-based measures that address various facets of remote hearings, tribunals can thereby improve overall proceedings. For instance, facilitating the use of high-quality audiovisual equipment, ensuring stable internet connectivity, and maintaining neutral backgrounds contribute to establishing a controlled and transparent environment, which is conducive to the integrity of remote judicial processes.

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[508] Mohamed Hafez, 'The Challenges Raised by COVID-19, Its Impact on the Arbitral Process and the Rise of Video Conferencing' (2021) 1 *International Business Law Journal* 85-99.
[509] Clyde & Co, 'Pros and Cons of Virtual Hearings in International Arbitration' (Clyde & Co, March 2024) https://www.clydeco.com/en/insights/2024/03/pros-and-cons-of-virtual-hearings-in-international accessed 28 August 2025.
[510] Karthik Nagarajan and James J East, 'Salient Considerations for Remote International Arbitration Hearings', *The Impact of Covid on International Disputes* (Brill Nijhoff 2022) 100-103.
[511] Blackaby KC, Partasides and Redfern (n 111) para 4.193
[512] Ibid.
[513] Mohamed Hafez, 'Remote Hearings and the Use of Technology in Arbitration' in The Cairo Regional Centre for International Commercial Arbitration (CRCICA) (Global Arbitration Review 2023) https://globalarbitrationreview.com/review/the-middle-eastern-and-african-arbitration-review/2023/article/remote-hearings-and-the-use-of-technology-in-arbitration accessed 30 August 2025.

Since 2020, evidence indicates that with appropriate safeguards, tribunals are capable of making effective credibility assessments remotely.[514]

To bolster the principle of "equality of arms," which constitutes a fundamental component of due process and represents a primary obligation for an impartial arbitrator, the virtual environment introduces distinct challenges.

Not all participants possess equal access to high-speed internet or advanced technological resources, thereby posing a risk that certain parties may be disadvantaged due to technical disparities.[515]

Additionally, the scheduling of hearings across multiple time zones can impose an undue burden on one party's counsel or witnesses, potentially requiring participation at inconvenient hours, such as early morning.[516] These issues have given rise to new types of due process challenges, with parties arguing that an award should be annulled because connectivity problems prevented them from fully presenting their case.[517] Such arguments may be framed as a violation of the New York Convention, specifically Article V(1)(b), which allows for the refusal of enforcement if a party was "unable to present his case."[518]

Tribunals are progressively employing vigilant strategies to mitigate the associated risks inherent in virtual hearings. These proactive measures include conducting pre-hearing technical assessments, establishing explicit protocols for managing disruptions, and implementing flexible scheduling

[514] 'Arbitration Hearings and Corona: The "New Normal" – Ten Golden Rules for an Easy Path to Your Virtual Hearing' (Quadrant Chambers) https://www.quadrantchambers.com/news/arbitration-hearings-and-corona-new-normal-ten-golden-rules-or-easy-path-your-virtual-hearing accessed 1 September 2025.
[515] Blackaby KC, Partasides and Redfern (n 111).
[516] Matthias Scherer, Nhu-Hoang Tran Thang and Sam Moss, 'In a "First" Worldwide, Austrian Supreme Court Confirms Arbitral Tribunal's Power to Hold Remote Hearings Over One Party's Objection and Rejects Due Process Concerns' (Kluwer Arbitration Blog, 24 October 2020) https://legalblogs.wolterskluwer.com/arbitration-blog/in-a-first-worldwide-austrian-supreme-court-confirms-arbitral-tribunals-power-to-hold-remote-hearings-over-one-partys-objection-and-rejects-due-process-concerns/ accessed 25 July 2025.
[517] Blackaby KC, Partasides and Redfern (n 111) para 5.46-5.47
[518] New York Convention (n 44) Art. V (1) (d)

arrangements to accommodate diverse time zones and participant needs.[519] Furthermore, detailed procedural directives that clearly delineate the conduct of virtual hearings are essential in proactively addressing potential procedural challenges.[520]

The advent of virtual hearings has additionally engendered potential avenues for strategic manipulation, whereby litigants may inflate trivial technical difficulties or phenomena such as "Zoom fatigue" in order to postpone proceedings or to establish grounds for subsequently challenging unfavourable rulings.[521] Arbitrators are required to diligently differentiate between substantive fairness issues and procedural delays. By maintaining a comprehensive record of technical disruptions and ensuring that all affected parties are afforded the opportunity to reiterate or clarify any omitted points, tribunals can effectively mitigate the risk of prejudice and establish a robust evidentiary record to counteract bad-faith objections.[522]

Despite the inherent challenges, virtual hearings possess the potential to augment procedural fairness and uphold ethical standards within judicial proceedings. The disciplined organisation inherent to digital communication platforms may mitigate the effects of physical intimidation and courtroom theatrics often associated with in-person trials, thereby fostering a more substantive and civil discourse.[523] Furthermore, the exigency of remote proceedings has necessitated the collaboration between parties and arbitrators to develop comprehensive protocols concerning electronic document exchange and hearing logistics, thereby promoting a spirit of cooperation.[524]

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[519] Stephen A Lee, Daniel P Mach and Ellyde R Thompson, '10 Tips for a Successful Remote Arbitration Hearing' (Quinn Emanuel, 2 April 2020) https://www.quinnemanuel.com/the-firm/publications/10-tips-for-a-successful-remote-arbitration-hearing/ accessed 2 September 2025.
[520] Aiken & Thomason, 'Online Dispute Resolution Resources' https://www.aiken-thomason.com/online-dispute-resolution-resources accessed 1 September 2025
[521] Jasmine Skander, 'The Hitchhiker's Guide to Virtual Hearings' (Gatehouse Law, 19 May 2020) https://gatehouselaw.co.uk/the-hitchhikers-guide-to-virtual-hearings/ accessed 5 September 2025.
[522] Ibid.
[523] Clyde & Co (n 509)
[524] Blackaby KC, Partasides and Redfern (n 111) para 5.46

Technology that is essential to virtual hearings, such as shared electronic bundles, real-time transcription, and evidence presentation tools, can facilitate equitable participation by providing all participants with immediate and uniform access to information. This, in turn, enhances fairness and equality of treatment within the proceedings.[525]

Although the "human factor" continues to hold significance – many individuals placing importance on the rapport and trust established through face-to-face interactions – the future trajectory of arbitration appears to point towards a hybrid model.[526] Procedural and less critical matters may be managed through virtual platforms, whereas pivotal phases, such as the testimony of a key witness in a high-stakes case, might still necessitate in-person hearings.[527]

Leading prominent institutions such as the ICC, LCIA, and ICSID have promulgated guidance notes to facilitate this ongoing evolution.[528] Furthermore, national judicial bodies have predominantly affirmed the authority of arbitral tribunals to mandate remote hearings, particularly in circumstances where in-person proceedings are impractical or infeasible.[529]

Ultimately, virtual hearings have become an entrenched component of the arbitration landscape, imposing new responsibilities upon arbitrators to ensure impartiality within a digital context. Through meticulous management of technological access, scheduling protocols, and procedural guidelines, tribunals can facilitate virtual hearings that are both efficient and compliant with the highest standards of procedural fairness.[530] Additionally, this modality may augment impartiality by broadening the

[525] ICC Commission on Arbitration and ADR, 'Leveraging Technology for Fair, Effective and Efficient International Arbitration Proceedings' (Report, February 2022) 7–8 <https://iccwbo.org/wp-content/uploads/sites/3/2022/02/icc-arbitration-and-adr-commission-report-on-leveraging-technology-for-fair-effective-and-efficient-international-arbitration-proceedings.pdf> accessed 25 August 2025.
[526] Yan and Hee (n 500) 52
[527] Ibid.
[528] Adrián Magallanes and Montserrat Manzano, 'Online Dispute Resolution' in *GAR's The Guide to Technology in International Arbitration* (Global Arbitration Review 2021) https://www.vonwobeser.com/index.php/publication?p_id=1281 accessed 1 September 2025.
[529] Ibid.
[530] Sherif El-Adfawy and Ahmed El-Atrash, 'Remote Hearings and the Use of Technology in Arbitration' in *The Middle Eastern and African Arbitration Review 2023* (Global Arbitration Review 2023)

participation of a more diverse cadre of arbitrators and experts, unencumbered by the geographical and financial constraints associated with travel.[531] A calibrated, hybrid model – reserving in-person hearings for pivotal phases (*i.e.,* key witness examination) and deploying virtual tools for procedural matters – helps align efficiency gains with the arbitrator's core duties of independence, impartiality, and equal treatment, while preserving due process and maintaining the perception of fairness.

3.3.4. The Prospect of AI Arbitrators

The most provocative and transformative debate centres on the possibility of AI replacing human arbitrators entirely.[532] The possibility of an "AI arbitrator" presents a complex dichotomy. On one hand, an AI arbitrator could theoretically offer lower costs, greater consistency in awards, and the elimination of ethically dubious practices like "double-hatting."[533] A machine arbitrator could be programmed to be analytical and impartial, free from the human emotions and potential economic interests that can lead to bias.[534] On the other hand, significant legal, ethical, and technological obstacles remain.[535] Current legal frameworks for arbitration were developed with a human decision-maker in mind, often requiring arbitrators to be natural persons.[536]

From a theoretical perspective, the implementation of an AI arbitrator has the potential to mitigate

https://globalarbitrationreview.com/review/the-middle-eastern-and-african-arbitration-review/2023/article/remote-hearings-and-the-use-of-technology-in-arbitration accessed 5 September 2025.

[531] Nagarajan and East (n 510).

[532] Gizem Halis Kasap, 'Can Artificial Intelligence ("AI") Replace Human Arbitrators? Technological Concerns and Legal Implications' [2021] J Disp Resol 215.

[533] Andrés Larrea Savinovich, 'Arbitration in the Time of Artificial Intelligence' (TerraLex, 2022) https://www.terralex.org/publications/arbitration-in-the-time-of-artificial-intelligence accessed 2 August 2025. Citing: "A machine arbitrator is programmed to be cold, analytical and impartial. Robots do not have feelings after all (as far as we know). AI arbitrators will analyze massive amounts of data, facts, answer questions of law or predict results eliminating the ever-fallible human element. By the end of the day, a party submitting their disputes to arbitration does not want to have the feeling that they lost their dispute because of an arbitrator's preference or prejudice against them, or–even worse– finding out that the arbitrator has an economic interest in the outcome of the dispute."

[534] Ibid.

[535] Zhang Shengcui and Tian Yang, 'The Application of Artificial Intelligence in Arbitration: Value, Dilemma, and Solution Paths' (2024) 26 Journal of Shanghai University of Finance and Economics 122.

[536] Ibid.

numerous biases that influence human decision-making processes.[537] For example, there would not be any financial stake in the outcome, no professional relationships to maintain, and no fear of failing to secure future appointments.[538] Furthermore, AI has the potential to address cognitive and implicit biases, as it inherently lacks susceptibility to the persuasive influence of counsel, does not exhibit favouritisms towards parties based on geographic or cultural origins, and remains unaffected by unconscious biases related to race, gender, or socio-economic background.[539] Lastly, a machine would decide based on logic and data, free from the emotional responses that can cloud human judgment.[540]

This assertion that artificial intelligence is inherently free from bias constitutes a compelling argument in its favour, implying a potential pathway toward a more objective and consistent paradigm of justice.[541]

Despite the promise of neutrality, experts caution that AI systems are vulnerable to their own forms of bias, primarily algorithmic bias, as previously noted.[542]

AI models are developed utilising extensive datasets, which in the context of arbitration would predominantly encompass previous arbitral awards and legal documentation.[543] If this historical data contains systemic biases – such as a predisposition to favour investors over states in particular dispute scenarios – the AI system is likely to internalise and subsequently perpetuate these biases.[544]

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[537] Kirty Ranjan Rani and Mandira Manshavi, 'Artificial Intelligence Arbitrator: A Solution to Arbitral Bias?' (2022) 2(2) Indian J. Integrated Rsch. L 1-4.
[538] 'AI-Powered Arbitration: Is Arbitrus AI the Future of Dispute Resolution?' (Tech Law Crossroads, February 2025) https://www.techlawcrossroads.com/2025/02/ai-powered-arbitration-is-arbitrus-ai-the-future-of-dispute-resolution/ accessed 6 September 2025.
[539] Yan and Hee (n 500)
[540] Walters (n 468) 143
[541] 'Can and Should AI Make Decisions?' (TrialView) https://www.trialview.com/resources/can-and-should-ai-make-decisions accessed 6 September 2025.
[542] Charles Stinson, 'Algorithms are not neutral' (2022) 2 *AI and Ethics* 763
[543] Anna Plevri and Anna-Maria Tamminen, 'Arbitration Tech Toolbox: AI as an Arbitrator – Overcoming the Black Box Challenge' (Kluwer Arbitration Blog, 27 June 2024) https://legalblogs.wolterskluwer.com/arbitration-blog/arbitration-tech-toolbox-ai-as-an-arbitrator-overcoming-the-black-box-challenge/ accessed 6 September 2025
[544] Yan and Hee (n 500) 61-62.

This issue is further exacerbated by the "black box" problem, whereby the internal decision-making processes of sophisticated AI models, such as neural networks, lack transparency and cannot be readily elucidated to human practitioners.[545] An award issued by an AI arbitrator may lack the detailed, human-comprehensible reasoning mandated by most arbitration statutes and regulations, thereby impairing a party's capacity to comprehend the decision and to contest it on substantive legal grounds effectively.[546]

The replacement of human arbitrators with artificial intelligence encounters substantial legal and ethical challenges. Currently, there is a lack of treaties and legislation that address the emerging conventional aspects of AI. For example, an award issued and "signed" by an AI system may not be recognised or enforceable under existing legal frameworks.[547]

The fundamental questions concerning accountability remain unresolved. Specifically, who bears responsibility when an AI system executes a flawed decision? Additionally, who has the authority to appoint or oversee the AI, and what mechanisms can ensure its independence from its developers or operators? Moreover, proprietary algorithms utilised by private corporations may embed profit motives or other covert influences into their decision-making processes.[548]

AI systems are susceptible to cyberattacks and data poisoning techniques, whereby malicious actors may infiltrate training datasets with the intent of biasing the AI system towards specific outcomes. Such manipulations can undermine the impartiality of these systems and are often difficult to detect.[549]

Lastly, arbitration encompasses elements beyond mere logical reasoning. Human arbitrators contribute empathy, equitable judgment, and an appreciation of moral intricacies – attributes that are

[545] Ibid.
[546] Ihab Amro, 'The Use of a Machine Arbitrator as an Application of Artificial Intelligence in Making Arbitral Awards' (2021) 24(S4) *Journal of Legal, Ethical and Regulatory Issues* 1-8.
[547] Walters (n 468)
[548] Muhammad Fahad, Asim Aziz and Sikandar Aslam, 'Revolutionizing Arbitration: An In-Depth Analysis Of The Risks And Opportunities Arising From The Intersection Of Artificial Intelligence' (2025) 3 Policy Journal of Social Science Review 68.
[549] Yan and Hee (n 500).

crucial for attaining substantive justice but are inherently challenging to emulate within computational systems.[550]

Despite these challenges, limited applications of AI-driven dispute resolution are currently implemented, predominantly for low-value, high-volume claims such as those encountered on e-commerce platforms.[551] In the context of complex international arbitration, prevailing consensus suggests that AI will function as a supplementary tool rather than a replacement for human arbitrators.[552]

Possible hybrid models encompass: AI functioning as an assistant, wherein AI tools offer recommendations, scrutinise draft awards for inconsistencies or biases, and conduct complex data analyses, thereby leaving the final determination to human arbitrators.[553]

Additionally, a more advanced model could involve AI serving as a tribunal member, forming part of a three-member tribunal comprising two human arbitrators and one AI, thus introducing a novel mechanism for mitigating both human and machine biases. Given the preference for a 3-member arbitral tribunal, the support and presence of a third "independent" AI member could be a nuanced approach to the implementation of technologies within ISDS. It's important to keep in mind that even if AI arbitrators become technologically feasible, their adoption will depend on public and party trust.[554] For now, the "machine age" of arbitration will be one where technology enhances human capabilities rather than rendering them obsolete.[555]

3.4. Conclusion to the Chapter: Synthesis of Reforms and Forward Outlook

[550] Ibid.
[551] Joe Liu (n 504).
[552] Ibid.
[553] Yan and Hee (n 500) 59-60.
[554] Sean Shih and Chin-Ru Chang, 'The Application of AI in Arbitration: How Far Away are we from AI Arbitrators?' (2024) 17(1) *Contemporary Asia Arbitration Journal* 69-90.
[555] Liu (n 504).

This Chapter conducts a comprehensive analysis of recent national reform initiatives undertaken in Italy, the United Kingdom, and Australia, with the objective of discerning effective practices that could enhance the independence and impartiality of the ISDS framework. The exercise is fundamentally analytical rather than merely descriptive, aiming to extract deeper insights into the fundamental elements that contribute to building trust within arbitration systems. The comparative analysis across both civil law and common law jurisdictions reveals that trust constitutes a critical foundation for the legitimacy of arbitration processes. Furthermore, innovations implemented at the national level – such as the adoption of more rigorous disclosure obligations, the refinement of bias assessment criteria, and the codification of impartiality duties – serve as practical models. These models hold potential for addressing systemic inequalities and mitigating perceptions of unfairness inherent in the asymmetrical nature of ISDS as a dispute resolution mechanism.

The second part of the Chapter provides an in-depth examination of ongoing international reforms of ISDS system, with a primary focus on enhancing its legitimacy. Several initiatives are highlighted, notably the creation of a Code of Conduct for Arbitrators, which constitutes a significant advancement by integrating both soft law and hard law standards into a unified ethical framework. Additional reforms, including the proposed establishment of a Multilateral Investment Court, the introduction of appellate mechanisms, and the formation of the Advisory Centre, exemplify broader institutional strategies aimed at addressing the identified deficiencies within the ISDS framework. Collectively, these reforms illustrate that the efforts to reshape ISDS are comprehensive and systemic in nature, emphasising the necessity for sustained and coordinated action to resolve core issues such as arbitrator neutrality and the perceived legitimacy challenges that have historically undermined confidence in the system.

The final section of the chapter explores the pivotal role of emerging technologies, particularly AI, in shaping the future of international dispute resolution. These technological advancements are not

merely peripheral but are fundamentally integral to the sustainability and robustness of legal reforms. Ignoring the pace of technological innovation when restructuring the ISDS mechanism risks rendering these reforms prematurely obsolete, thereby fostering an environment characterised by instability, fragmentation, and a lack of coherence – conditions detrimental to both disputing parties and arbitrators. Frequent, short-term reform efforts tend to erode certainty and confidence, ultimately undermining the legitimacy of the system. Therefore, adopting a proactive, technology-sensitive approach is imperative; such a strategy ensures that reforms are not only adequately responsive to current challenges but are also resilient and adaptable to the dynamic and ever-evolving landscape of international dispute resolution.

This Chapter has demonstrated that the future development of ISDS reform is intricately contingent upon a sophisticated integration of insights garnered from national innovations, the implementation of robust institutional safeguards, and a proactive anticipation of the transformative effects of technological advancements. The harmonious and holistic amalgamation of these critical elements is paramount to safeguarding the legitimacy, resilience, and long-term sustainability of the ISDS framework, thereby ensuring its adaptability and continued relevance within the evolving landscape of IIL.

Conclusion

This thesis contends that the sustained legitimacy of international arbitration, especially within the complex and often contentious realm of ISDS, fundamentally hinges on both the concrete integrity and the perceived legitimacy of its foundational principles and procedural mechanisms. Employing a comprehensive analytical framework, this study examines the doctrinal underpinnings, systemic crises, and potential reformative strategies that characterise the ISDS landscape. The analysis ultimately aims to highlight the legitimacy crisis that currently afflicts the system and exploring the implications for its future development.

At the heart of the present debate is the contention that the prevailing “legitimacy crisis” within the ISDS framework is not a transient or superficial issue, but rather one that is fundamentally embedded in structural deficiencies intrinsic to the system itself. These flaws systematically undermine the perceived independence and impartiality of the arbitrators, which in turn leads to a progressive decline in public trust and stakeholder confidence in the process. The argument underscores that superficial reforms, which tend to address merely the symptoms rather than the root causes of the crisis, are substantially insufficient. Instead, what is urgently necessary is a comprehensive and multidimensional reform strategy designed to directly confront and rectify these systemic defects, thereby safeguarding the integrity and legitimacy of international arbitration processes.

The analysis delineated in Chapter One elucidates that the core legal doctrines of independence and impartiality are deeply ingrained within established theoretical paradigms and legal frameworks. A meticulous and comprehensive doctrinal review of pertinent international instruments, including the New York Convention, alongside institutional rules such as ICC, LCIA, and ICSID, underscores that independence is predominantly conceptualised as an objective criterion aimed at safeguarding the process from disqualifying conflicts of interest. Conversely, impartiality is conceptualised as a subjective standard, requiring an unbiased state of mind. The obligation of disclosure is identified as a pivotal operational mechanism for the effective implementation of these principles, predominantly governed by soft-law instruments like the IBA Guidelines.

Nonetheless, despite the robustness and meticulous articulation of the legal framework in theory, its practical effectiveness hinges critically on a systemic environment that actively promotes and enables compliance with these principles, rather than allowing structural biases to undermine them. This realisation lays the groundwork for an in-depth exploration of the legitimacy crisis in the subsequent chapter.

Chapter Two transitions from an exploration of legal theory into an in-depth analysis of systemic realities, specifically addressing the ongoing legitimacy crisis confronting the ISDS mechanism. The analysis delineates a clear causal relationship between the structural components of ISDS and the gradual erosion of public and institutional confidence. It identifies several structural characteristics – including the party-appointment system, the increasing prevalence of "repeat arbitrators," and the contentious practice of "double-hatting" – as interconnected elements that generate incentives detrimental to maintaining neutrality in arbitration proceedings. These features contribute to both perceptions and possibly the realities of financial dependence, conflicts of interest, and allegiance to the appointing party, thereby fostering a pervasive atmosphere of scepticism regarding the fairness and integrity of ISDS arbitral outcomes.

This chapter not only encapsulates the complex dilemmas inherent to the functioning of ISDS but also underscores the urgent need for systemic reforms. It argues that the very framework originally conceived to uphold impartiality and independence has, paradoxically, become a source of the system's delegitimisation due to its structural deficiencies. The implications of these findings extend beyond procedural considerations, raising profound questions concerning notions of fairness, justice, and the efficacy of economic governance within an increasingly interconnected and interdependent global economy.

In addressing these issues, Chapter Three undertakes an evaluation of a multitude of potential solutions, asserting that no single approach can adequately resolve the pervasive challenges identified. A comparative examination of national reforms from jurisdictions such as Italy, the UK, and Australia reveals a burgeoning recognition of the necessity to formalise and delineate ethical standards for arbitrators domestically. This acknowledgement underscores the pivotal role of the seat in upholding international standards, emphasising the need for cohesive frameworks that transcend national boundaries.

Analysing national reform initiatives and domestic frameworks elucidates the common challenges inherent in the arbitration process; extending these insights to the context of ISDS reveals multiple pathways for targeted reforms. Such reforms are poised to facilitate greater harmonisation across both international and domestic legal regimes.

Simultaneously, the exploration of international structural reforms underscores a growing global consensus concerning the imperative for systemic overhaul. It emphasises the relevance of continuous dialogue and deliberation among stakeholders, despite ongoing debates over the optimal pathways for reform.

A review of the comprehensive reform agenda pursued by WG III reveals a concerted effort to recalibrate the ISDS architecture, with particular emphasis on institutional safeguards for the independence and impartiality of arbitrators. The proposals encompass procedural design, transparency, appointment practices, and professional ethics. Within the ethics stream, the ICSID UNCITRAL Code of Conduct functions as a cornerstone: it articulates concrete duties on disclosure, conflicts of interest, repeat appointments and "double-hatting," confidentiality, and *ex parte* communications, and is designed for incorporation into treaties and arbitral rules. By clarifying standards and facilitating more consistent challenge decisions, the Code aims to strengthen the integrity of proceedings and, ultimately, the perceived fairness and enforceability of awards. The remaining reforms, currently at various stages of conceptualisation or implementation, are directed towards other aspects of the ISDS mechanism. These initiatives have the potential to contribute significantly to the overarching reform process of the ISDS. Enhancing the overall system is anticipated to bolster various foundational elements, including the principles of independence and impartiality of arbitrators.

Furthermore, an investigation into innovative technological solutions – such as AI and blockchain technology – reveals a nascent yet potent potential to enhance transparency, facilitate conflict

detection through algorithmic means, and bolster procedural fairness. Such technological advancements offer distinct advantages over conventional legal frameworks, potentially functioning as remedial mechanisms for addressing some of the persistent challenges in contemporary international arbitration, especially in ISDS. While AI has become integral to contemporary professional practice and will almost certainly assume a more prominent role within the legal sector, its deployment at the core of ISDS reform remains premature.

Ultimately, this comprehensive analysis yields a definitive response to the primary research inquiry: *i.e.,* although existing international arbitration frameworks are grounded in sound doctrinal principles, they remain inherently insufficient to guarantee the impartiality and independence of arbitrators within the unique context of ISDS. Crucially, the procedural safeguards currently employed are persistently compromised by the structural pressures elucidated throughout this thesis. The existence of an active, extensive global discourse surrounding reform serves as compelling evidence of the deficiencies entrenched within these frameworks. Hence, the existing rules, while necessary, represent only a fraction of what is required to safeguard against systemic biases that have profoundly contributed to the legitimacy crisis faced by the ISDS system. The findings presented herein have far-reaching implications that transcend mere procedural considerations, affecting the fundamental trajectory of global economic governance. They highlight the complex and delicate balance between the imperative to protect foreign investments and the sovereign prerogative of states to regulate in the public interest. The credibility and integrity of ADR mechanisms are essential not only for the effective functioning of international investment systems but also for cultivating trust in the broader IIL framework. Recognising and addressing the salient concerns related to the legitimacy of ISDS mechanisms is crucial for ensuring their continued relevance, legitimacy, and efficiency within the dynamic and evolving landscape of global governance.

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