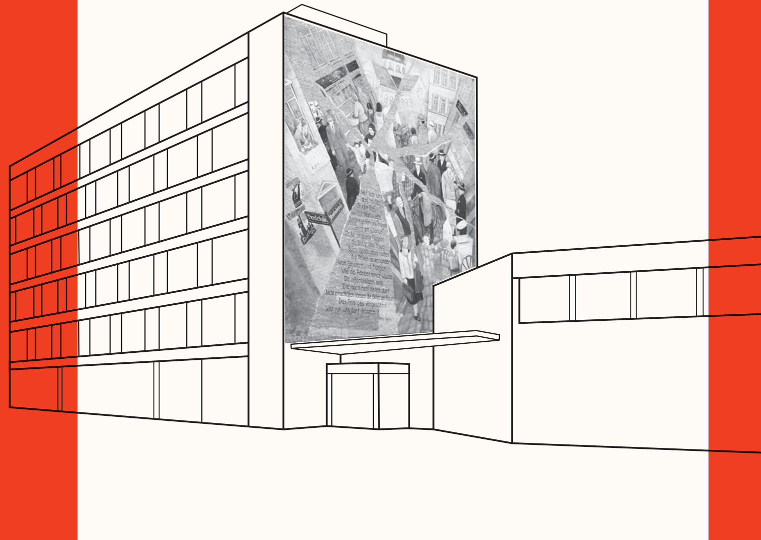

Karsten Nowrot/
Emily Sipiorski

Arbitrator Intimidation and the Rule of Law: Aspects of Constitutionalization in International Investment Law

Rechtswissenschaftliche
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Hamburger Sozialökonomie

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A. Introduction

The letter had arrived on Professor A's desk during the weekend, its source unknown. A payment to the professor's bank account on a specific date was indicated. The information was cryptic but clear: a certain result in an upcoming decision involving an alleged expropriation of a rare minerals mine. A positive result would involve the payment; if the professor allowed a decision against the company, it would activate its network and ensure that the professor was not appointed again in similar disputes. Professor A had a known reputation for applying a strict approach to host states' obligations towards investors. His current opinion, as yet unwritten, was that the state had violated the legitimate expectations of the owners of the mine by suddenly revoking an access agreement. The state cited substantial environmental toxicity resulting from the mine operations but during the hearing, Professor A had been unconvinced by their experts and relevant environmental analyses.

Professor A was left with a choice: would he proceed as intended, as if the letter had never arrived, or would he disclose the contents of the letter to his co-arbitrators? He had no concerns about his impartiality; his decision would in no way be influenced by the monetary contribution from the unknown source or the threat of non-reappointment.

The reality of intimidation of arbitrators in international investment arbitration has grown alongside the number of cases and increased monetary stakes. The one-off nature of tribunals, possibility for future appointment, and necessary element of compensation for arbitrators based on each distinct appointment opens the system to certain vulnerabilities. Intimidation, however, undermines the purpose of international arbitration to achieve a neutral and fair forum for the resolution of disputes. Although a certain consistency of practice has developed, the need for more established standards and protections has been recognized.

The above example approaches the reality of bribes – which could occur at any stage of the proceedings – and the underlying threat of non-reappointment. Both subtle scenarios regarding possibilities of reappointment, as well as less subtle types of intimidation – bribery, threats, physical harm – can be complicated to approach in the investor-state context. The overriding authority of the tribunal to decide the dispute plays against the reality of a potentially compromised member of the panel. The compromised arbitrator also bears a significant responsibility to disclose. A deliberately balanced response would have to recognize both the benefits the perpetrator attempted to achieve and the complicity of a compromised arbitrator. In many situations, it may be impossible to detect the correct balance. In general, however, guidance is provided in this regard through general principles of law, soft law guidelines on arbitrator conduct, and the provisions on impartiality and independence in the relevant rules and conventions.

These issues of impartiality of the arbitrators drive at the heart of rule of law within the investment arbitration context and enlighten the discussion on issues of constitutionalization of international investment law. Rule of law, in its integral role in constitutionalism, demonstrates one aspect of the current developments within the investment arbitration sphere. In particular, rule of law has long recognized the importance of a neutral decision-maker for a fair trial. The mechanisms by which the rule of law is incorporated into international investment law and how it is ensured sheds light on the potential constitutionlization currently occurring within the international investment law framework.

This paper attempts to identify the dominate approaches to allegations of arbitrator intimidation in international investment law. Section B identifies those within the process exposed to the possibilities of intimidation, highlighting several specific instances. The next section highlights general standards in domestic and international law for protecting witnesses and the judiciary as part of ensuring fairness in the process and general ideals of the rule of law. Section D turns to the specific issue of intimidation of arbitrators in investment arbitration proceedings, noting protections, duties for disclosure, and possibilities for recourse available within the system. Section E turns to two distinct possibilities for intimidation – either 1) from another arbitrator or unrelated actors or 2) from one of the parties – noting the distinct approaches that would need to be taken to ensure due process. This part of the contribution also confronts the particular problem of post-arbitration interference. The final section considers how these approaches to intimidation impact the idea of constitutionalization within international investment law from the vantage point of rule of law and independence of decision makers. The conclusion offers an outlook for issues of arbitrator intimidation in investment arbitration.

B. Intimidation of Participants in ISDS

All players in an arbitral dispute, like in a domestic judicial action, could be exposed to intimidation: witnesses, counsel, experts, and arbitrators. Witness intimidation is the most developed aspect of intimidation with extensive domestic, as well as international, laws in place to ensure that trials move forward in due process and necessary witnesses are not dissuaded from testifying due to outside pressures.[1] Counsel could theoretically be intimidated by either the opposing party or a third party interested in the outcome of the dispute. Expert witnesses similarly risk being coerced into providing a certain opinion, either through physical or monetary intimidation – theoretically from either party. Finally, and most importantly for the present contribution, arbitrators can be subjected to intimidation. In most cases, the intimidating actions come from one party, using tactics to secure a certain result. The intimidation can occur before, during, or after the proceedings – with the aim of achieving different ends.

Judicial or arbitral intimidation may take the form of physical actions, monetary retaliation, or the threat of embarrassment or revealing incriminating information, there is a potential for both more modern, i.e. cyber intimidation[2], as well as more subtle forms that are less easily detected. This intimidation can be notably difficult to control. Certain protections exist within the realm of international law as well as domestic law; these protections have been applied in investor-state dispute settlement through the available mechanisms. A lack of clarity, however, persists regarding how to approach the more delicate cases.

1 UK, Criminal Justice and Public Order Act of 1994, Section 51; 18 United States Code, Section 1512; Strafprozeßordnung (German Code of Criminal Procedure) Section 68:3. Generally on the issue of witness intimidation and legal responses particularly in the international realm see also, e.g., *Trotter*, George Washington International Law Review 44 (2012), 521 *et seq.*; *Wilske*, Contemporary Asia Arbitration Journal 3 (2010), 211 (224 *et seq.*); *Marx*, Chicago Journal of International Law 7 (2007), 675 *et seq*., each with further references.

2 *Eltis*/*Mersel*, National Journal of Constitutional Law, 2018 (forthcoming), draft available at <https://ssrn.com/abstract=2992244> (accessed 12 November 2018), at 3: “[T]he question of judicial cyber intimidation raises a broader institutional dimension, one related to the protection of democratic institutions, their future and diversity, which extends far beyond the merely distasteful personal attacks visited on an individual member of the judiciary.”; *Bright*, New York University Law Review 72 (1997), 325 (noting the particular problem of coercion to judges seeking re-election or re-appointment).

The following are examples of known arbitrator interference in international arbitration. They provide a range of examples of how arbitrators are intimidated and highlight some approaches for dealing with such breaches in the system. In the first two examples, the intimidation occurred during and shortly before the proceedings, with the more deliberate intention to specifically impact the outcomes of the proceedings. The second two examples are post-proceeding intimidation—possibly actions intended to create a broader, systemic impact through the intimidation.

In the first example, in an *ad hoc* arbitration under the UNCITRAL rules, an arbitrator was detained by Indonesian authorities at the Amsterdam airport to prevent his attendance at the arbitration between Himpurna and an Indonesian energy supplier in the late 1990s.[3] The arbitration was initiated by a US investor following the state energy company's refusal to pay an earlier arbitral award.[4] The award was rendered against the Indonesian company by a truncated panel of two arbitrators, thus eliminating the possibility of the arbitrator's position. This outcome only worked as both arbitrators agreed to a decision that was contrary to the offending party. Although the arbitrator had not officially disclosed the circumstances of his retention at the airport, the situation became known to another arbitrator.

In a second example, during a 1984 hearing, a neutral member of the US-Iran Claims Tribunal was attacked by two Iranian-appointed members.[5] The physical nature of the attack allowed its existence to be known to the others. The United States proceeded to challenge the two Iran-appointed arbitrators who had perpetrated the attack. The presiding judge issued several orders that would serve to suspend the proceeding until a proper course of action could be determined. In the end, the two Iranian arbitrators were simply replaced without the need for further action.

As an example of post-hearing intimidation, the next example involves a highly publicized case against a former Secretary-General of the China International Economic Trade Arbitration Commission (CIETAC). Following the rendering of a commercial arbitration award at the CIETAC, the arbitrator was jailed based on an allegation of non-disclosure of earnings.[6] The state alleged that he had earned significant profits from his involvement, while the arbitrator considered the actions to be retaliation for an adverse award against the state. The fact that this occurred following the rendering of the award – in particular, the rendering of an award against China – indicates issues for the general ability for arbitrators to take decisions without government recourse as well as issues regarding annulment of the award in the place of arbitration.

In a final investor-state example related by *Jacques Werner*, an arbitrator from a harsh dictatorship, appointed by that state, was shot and killed shortly after attending a hearing in Geneva – a hearing that was moved as a result of state interference.[7] Notably, in Geneva, he had revealed to the chair of the panel that he had to withdraw from any further involvement in the case for fear of being considered a traitor in his home state. The death was said to be linked to an ethnic conflict but the timing suggested a questionable connection to the proceeding.

3 *Kolo*, Arbitration International 26 (2010), 43 (49); *Werner*, Journal of World Investment 1 (2000), 321 (322 *et seq*.).

4 *Werner*, Journal of World Investment 1 (2000), 321 (323).

5 See *Brower/Brueschke*, The Iran-US Claims Tribunal, 169-171; *Toope*, Mixed International Arbitration, 358-359.

6 *Jones/Batson*, Concerns About China Arbitration Rise, Wall Street Journal, 9 May 2008; *Weiss*, Chinese Arbitration Concerns Some U.S. Companies, ABA Journal, 9 May 2008.

7 *Werner*, Journal of World Investment 1 (2000), 321-322.

C. Rules for the Protection of Participants from Intimidation

The normative rules for dealing with the intimidation of an arbitrator involve both rules to punish the perpetrator and rules to maintain the integrity of the arbitral process, discussed below. Both of these aspects contribute to a general sense of justice in the individual proceeding and a general sense that the rule of law has been upheld.

Regarding the perpetrator of the actions, the criminal statutes of the place of the action, the state of citizenship, or the laws of the seat (or place) of the arbitration would be relevant to controlling the actions. In certain extreme examples, international criminal statues may come into consideration. The arbitral tribunal would lack jurisdiction over this criminal element, but nonetheless possess the authority to take these irregularities into account when taking a decision based on general competence over the dispute as well as the interplay with general principles of international law – in particular, due process, good faith, and abuse of right. The panel would also have the power to refer the criminal elements to national prosecutors. In this regard, there remains a more general question as to whether a tribunal's decision – in particular with the participation of the intimidated arbitrator – to refer the misconduct to national prosecutors enjoying jurisdiction in a matter entails the danger of compromised impartiality. This question specifically extends to a situation where the decision targets the perpetrator who might be a party representative or somebody closely connected to one of the parties.

Domestic laws on witness protection aim to prevent obstruction of justice in the process of the dispute.[8] This idea of preventing the obstruction of justice can extend to intimidation and interference with any player in the dispute. Indeed, beyond witness protection, most legal systems also provide for some rules guiding intimidation of the judiciary. These measures protect judges from physical threats either for the purposes of influencing the outcome of a case or following an unfavorable decision.[9] The acts of intimidation, however, would be considered criminal in most jurisdictions even disregarding their intended purpose of influencing the judiciary.

D. Rules to Protect the Process of Investment Arbitration from Intimidation

Beyond the approach taken towards the offending action or other players in an arbitral proceeding, essential here, are the substantial considerations that must be taken regarding the arbitrator – namely with regard to any compromised impartiality. In the first sense, there is a general protection of the arbitrator. In the second, there is the need to ensure continued impartiality in the process through the arbitrator's own disclosure. Drawing from procedural fairness and due process, which supports the ideal that the decision-maker is impartial and does not benefit

8 See for example, Victim and Witness Protection Act of 1982; see also 18 United States Code § 1512.

9 See for example, amongst others, the respective statute on judicial intimidation for Washington State which provides that "[a] person is guilty of intimidating a judge if a person directs a threat to a judge because of a ruling or decision of the judge in any official proceeding, or if by use of a threat directed to a judge, a person attempts to influence a ruling or decision of the judge in any official proceeding." The definition provided in another statute for 'threat' provides that *inter alia* bodily injury, physical damage to property, or physical confinement constitute a threat in the respective context.

from taking a decision, these domestic and international standards can be imported to reach similar ends in international investment law. The approach draws on general ideas of rule of law within an international legal system.

I. Protection of Intimidated Arbitrators

When approaching the question how to address situations where an arbitrator is physically threatened or otherwise intimidated, it seems appropriate to start with the observation that they most certainly enjoy in this regard a certain protection under public international law and domestic legal regimes. Nevertheless, the protection provided by the respective legal rules applies only to specific types of investment arbitration proceedings and/or suffers from other deficiencies. The ICSID Rules provide guidance and protection to arbitrators only where the actions against it arise from legitimate state acts, namely criminal or other proceedings within the respondent state. The ICSID Convention grants functional immunity from legal process like civil lawsuits, criminal prosecution and administrative proceedings to arbitrators,[10] but provides this legal protection obviously only in the context of ICSID proceedings and, at least equally important, only where the actions against them arise from in principle legitimate state acts. Article 21 of the ICSID Convention provides that "[t]he Chairman, the members of the Administrative Council, persons acting as conciliators or arbitrators or members of a Committee [...] shall enjoy immunity from legal process with respect to acts performed by them in the exercise of their functions, except when the Centre waives this immunity [...]". In addition, the protection enjoyed by arbitrators against acts of intimidation under domestic criminal law and thus the at least indirect involvement of national prosecutors as well as criminal courts with the investment arbitration proceedings is for a variety of reasons usually not the arbitrator's first choice and, even more relevant, requires, in order to be effective, access to courts and prosecutors that are willing and able to successfully initiate proceedings against the perpetrator in question.

II. Disclosure Requirements

When illegitimate means have been used against an arbitrator, the arbitrator him- or herself should disclose those actions, should they affect impartiality. Indeed, any of the available instruments assume that the arbitrator reveals that the intimidation has occurred. In 2006, the ICSID Arbitration Rules and Additional Facility Rules expanded disclosure to "any other circumstance that might cause [the arbitrator's] reliability for independent judgment to be questioned by a party." This includes a continuing obligation for disclosure. Requirements for disclosure are not always overtly contained in these rules. However, in order to make this requirement more effective by way of transparency, there is generally a procedural obligation on the side of arbitrators to disclose – as for example stipulated in Article 11 of the 2013 UNCITRAL Arbitration Rules – "any circumstances likely to give rise to justifiable doubts as to his or her impartiality".

10 *Schreuer/Malintoppi/Reinisch/Sinclair*, The ICSID Convention, Article 21, para. 3.

Thereby, it seems in the present context of intimidation of arbitrators particularly noteworthy that this duty to disclose does with regard to its temporal scope of application not only cover the time prior to appointment but usually imposes a continuing obligation to reveal, without delay, respective newly emerging facts to the parties, the other arbitrators and, if applicable, to the arbitration institution at all stages of the arbitral proceedings. In addition to the second sentence of Article 11 of the 2013 UNCITRAL Arbitration Rules, such subsequent duties to disclose can be found, *inter alia*, in Rule 6(2) ICSID Arbitration Rules, Article 11 of the 2012 Permanent Court of Arbitration Rules (PCA Arbitration Rules), Article 18(4) SCC Arbitration Rules as well as – in the realm of codes of ethics – for example in Paragraph C of Canon II of the 2003 American Arbitration Association (AAA)/American Bar Association (ABA) Code of Ethics for Arbitrators in Commercial Disputes.

Soft law instruments that approach the issue of conflicts of interests, such as the IBA Guidelines on Conflicting Interests in International Arbitration, provide some guidance in situations where intimidation has occurred. The conflicts of interests contained in the guidelines generally refer to the positive aspects of relationships that create conflicts. Contained in the orange list, however, meaning that the arbitrator must disclose but can remain if no timely challenge is made, is the existence of 'enmity' between the arbitrator and counsel or other related parties.[11] It is noted that the list of relationships is not exhaustive. As such, issues of intimidation could be included under this general category of behavior, thus requiring disclosure, but only subject to dismissal should a successful objection be made.

The regulation and approach of intimidating behavior is not straightforward, in part because disclosure may either not happen or may be impossible under the circumstances. Moreover, the resignation or removal of that arbitrator may be precisely in line with the interests of the perpetrator of the illegitimate acts.

III. Inherent Powers of Investment Tribunals: Public International Law and Systemic

When there has been intimidation and assuming that the compromised arbitrator discloses these actions, tribunals possess the power to take decisions on procedural irregularities that occur during a proceeding. With regard to arbitrator challenges, arbitral rules leave the power to the remaining arbitrators[12] or the appointing authority.[13] Under ICSID Rules, challenges to arbitrators, however, may be decided by the Chairman of the Administrative Council should the majority of the panel be challenged.[14]

Other irregularities regarding intimidation, where there is no guidance provided by the relevant laws, could fall under the scope of Article 42(1) of the ICSID Convention, thus allowing the applicability of both domestic laws as well as "rules of international law as may be

11 International Bar Association, Guidelines on the Conflicts of Interest in International Arbitration, Adopted by Resolution of the IBA Council on 23 October 2014, paras. 3.3.7 and 3.4.4: "Enmity exists between an arbitrator and counsel appearing in the arbitration."; "Enmity exists between an arbitrator and a manager or director or a member of the supervisory board of: a party; an entity that has a direct economic interest in the award; or any person having a controlling influence in one of the parties or an affiliate of one of the parties or a witness or expert.". Generally on a previous version of these IBA Guidelines see also, e.g., *Shetreet*, The Law and Practice of International Courts and Tribunals 2 (2003), 127 (130 *et seq.*).

12 ICSID Convention, Article 58; Arbitration Rule 9(4).

13 UNCITRAL Arbitration Rules 13(4).

14 See ICSID Convention, Article 58; *Giorgetti*, World Arbitration and Mediation Review 7 (2013), 303.

applicable." When the intimidation is considered to violate basic principles, powers derived from sources of public international law inform any decisions taken. The principle of good faith could play an integral part in ensuring the procedural integrity; denial of justice could also come into play in any part of the intimidation process. The relevance of general principles of law required for ensuring the broader protections of procedural fairness provide the tribunal with additional powers in taking these decisions.

IV. Independence and Impartiality Standards

Ultimately, any intimidating action against an arbitrator puts that arbitrator's ability to decide a dispute impartially into question. Although not infrequently used interchangeably with the term and – at least in part complementary – concept of 'independence' and despite the difficulties connected with defining its precise meaning,[15] impartiality should and can be regarded as an autonomous normative principle that "denotes the absence of prejudice or bias".[16] Summarizing its settled case law on the requirement of an 'impartial tribunal' within the meaning of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Court of Human Rights more recently held that the "existence of impartiality […] must be determined according to a subjective test where regard must be had to the personal conviction and behaviour of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case; and also according to an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality".[17] The adoption of the Basic Principles on the Independence of the Judiciary by the United Nations Congress on the Prevention of Crime and the Treatment of Offenders reinforced the needed independence of the judiciary: "The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected."[18] The Council of Europe similarly reinforces the need for independence.[19]

15 See, e.g., *Cleis*, The Independence and Impartiality of ICSID Arbitrators, 20 *et seq*., with further references.

16 European Court of Human Rights (ECHR), *Ramos Nunes de Carvalho E SÁ v. Portugal*, Appl.-No. 55391/13, 57728/13 and 74041/13, Judgment of 21 June 2016, para. 71; see also, e.g., *Suez et al. v. Argentina*, ICSID Case No. ARB/03/19 et al., Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal of 12 May 2008, para. 28 ("Impartiality, […], concerns the absence of a bias or predisposition toward one of the parties."). Generally on the difference between the concepts of "independence" and "impartiality" see also for example *Luttrell*, Bias Challenges in International Commercial Arbitration, 21 *et seq.*

17 ECHR, *Ramos Nunes de Carvalho E SÁ v. Portugal*, Appl.-No. 55391/13, 57728/13 and 74041/13, Judgment of 21 June 2016, para. 71; see also subsequently for example ECHR, *Ramljak v. Croatia*, Appl.-No. 5856/13, Judgment of 27 June 2017, para. 26 with further references. On the meaning of impartiality in the present context see also, e.g., *Cleis*, The Independence and Impartiality of ICSID Arbitrators, 21; *Park*, San Diego Law Review 46 (2009), 629 (635 *et seq*.); *Donahey*, Journal of International Arbitration 9 (No. 4, 1992), 31 (32).

18 Basic Principles on the Independence of the Judiciary, Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, available at <https://www.un.org/ruleoflaw/blog/document/basic-principles-on-the-independence-of-the-judiciary/> (accessed 12 November 2018), para 6.

19 Recommendation CM/Rec (2010) 12 of the Committee of Ministers to Member States on Judges; Independence, Efficiency and Responsibilities, Adopted by the Committee of Ministers on 17 November 2010, at the 1098th meeting of the Ministers' Deputies.

Impartiality of arbitrators is universally – and rightly – considered as a fundamental component of due process and thus an, in principle, indispensable prerequisite for a fair trial.[20] However, this requirement is not only of immanent importance to the respective parties of an individual investment dispute but – viewed from an overarching perspective – first and foremost also to the integrity of, and confidence in, the today (again) increasingly disputed system of international investor-state arbitration as a whole.[21]

1. Specific Arbitral Rules and Practices

Against this background, it is hardly surprising that impartiality of arbitrators is regularly stipulated in major arbitration rule regimes either explicitly, such as in Article 18(1) of the 2017 Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC Arbitration Rules), Articles 5(3) and 14(4) of the 2014 London Court of International Arbitration Rules (LCIA Arbitration Rules) as well as Article 11(1) of the 2017 Rules of Arbitration of the International Chamber of Commerce (ICC Arbitration Rules). The requirement for impartiality may be more implicit, as for example in the formulation "who may be relied upon to exercise independent judgment" in accordance with Article 14 (1) ICSID Convention.[22] The high threshold in this respect was noted by the panel in the *Vivendi v. Argentina* Annulment challenge to *Yves Fortier*.[23]

Concerning enforcement and sanctioning mechanisms aimed at ensuring the observance of impartiality in the arbitration context, three types of regulations are of particular importance. The most well-known among them is the challenge procedure which grants each party the right to propose and request the disqualification of an arbitrator on account of any fact that give rise to justifiable doubts as to the arbitrator's impartiality. This procedural option is provided for in, among others, Articles 12-13 of the 2013 UNCITRAL Arbitration Rules, in Article 14 ICC Arbitration Rules as well as in Articles 57-58 ICSID Convention. Challenges specifically under the ICSID Convention require a "manifest lack of the qualities required"[24] by Article 14.[25]

Second, once an award has been issued by the investment tribunal, the arbitration regime

20 See, e.g., International Commission of Jurists, International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors, Practitioners Guide No. 1, 2007, 27 *et seq.*; *Olbourne*, The Law and Practice of International Courts and Tribunals 2 (2003), 97 *et seq.*; *Guillaume*, The Law and Practice of International Courts and Tribunals 2 (2003), 163; *Brown*, The Law and Practice of International Courts and Tribunals 2 (2003), 63 *et seq.*; *Shelton*, The Law and Practice of International Courts and Tribunals 2 (2003), 27; *Giorgetti*, George Washington International Law Review 49 (2016), 205 (231 *et seq.*).

21 Generally on this perception see also already, e.g., *Reinisch*/*Knahr*, in: Peters/Handschin (eds.), Conflict of Interest in Global, Public and Corporate Governance 103 (104); *Bottini*, Suffolk Transnational Law Review 32 (2009), 341.

22 On the implicit obligation of impartiality included in this wording see, e.g., *Commission/Moloo*, Procedural Issues in International Investment Arbitration, 51-52; *Malintoppi/Yap*, in: Yannaca-Small (ed.), Arbitration under International Investment Agreements, 153 (155-156); *Malintoppi*, in: Muchlinski/Ortino/Schreuer (eds.), Oxford Handbook of International Investment Law, 789 (793); *Schreuer/Malintoppi/Reinisch/Sinclair*, The ICSID Convention, Article 14, para. 5; Article 40, paras. 17 *et seq*. (noting that there is little guidance in the ICSID Convention or the *travaux préparatoires* for decisions based on such a challenge, but the requirements impose a significant burden on the proposing party).

23 *Compañiá de Aguas del Aconquija S.A., Vivendi Universal S.A. v. Argentina*, Decision on Challenge to the President of the Committee, 3 October 2001 (hereafter, *Vivendi v. Argentina*, Decision on Challenge), para. 25.

24 ICSID Convention, Article 57: "A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14. A party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV.".

25 Article 14(1) requires that arbitrators "shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment." This final point requiring independent judgment is the most frequent of challenges, see thereto also for example *Sasson*, in: Bungenberg/Griebel/Hobe/Reinisch (eds.), International Investment Law, 1288 (1331).

established by the ICSID Convention allows in Article 52 for either party to request annulment of the award if certain prerequisites are fulfilled. This possibility to initiate annulment proceedings also serves to sanction a lack of impartiality during the arbitration proceedings since it is overwhelmingly recognized that an impermissible bias on the side of one of the arbitrators constitutes "a serious departure from a fundamental rule of procedure" within the meaning of Article 52(1) lit. d ICSID Convention and thus provides a legitimate ground for annulment;[26] at least if the respective party had no prior notice of the defect and was therefore unable to seek the disqualification of the arbitrator under Article 57 ICSID Convention.[27]

Finally, in line with the legal standards well-recognized regarding judges,[28] the concept of impartiality also creates a correlative obligation for arbitrators to resign if they come to the conclusion that they will not be able to continue to act impartially in the case at issue. This stands independently of a party's right to challenge. This is a normative expectation that finds its manifestation in the realm of the codes of ethics for example in the General Standards 2(a) and 4(d) of the Guidelines on Conflict of Interest in International Arbitration as adopted by the International Bar Association Council in October 2014.

2. *Tribunal Responses*

When turning to the actual practice of proposing a disqualification of arbitrators on the basis of an alleged lack of independence and/or impartiality in the context of international investor-state arbitration, it should be recalled that although the challenges to arbitrators have apparently increased considerably in recent years,[29] many investor-state arbitrations still remain confidential. Despite increasing efforts in many parts of the world aimed at enhancing the transparency of this dispute settlement venue,[30] it thus remains difficult to draw a comprehensive picture of the number of, and legal reasoning in, decisions dealing with these types of challenges.[31] Yet, from what we know about the previous and current practice, challenges against arbitrators in investment proceedings based on doubts as to their impartiality and/or independence are until now primarily concerned with issues like closer relationships between an arbitrator and a party or counsel, issue conflicts, role switching between arbitrator and counsel as well as repeat appointments.[32]

26 See for example *Klöckner Industrie-Anlagen GmbH et al. v. Cameroon*, ICSID Case No. ARB/81/2, Decision on Annulment of 3 May 1985, para. 95, 2 ICSID Reports 95, 130; *Schreuer/Malintoppi/Reinisch/Sinclair*, The ICSID Convention, Article Article 52, paras. 293 *et seq*.

27 On this qualification of right to request annulment see, e.g., *Schreuer/Malintoppi/Reinisch/Sinclair*, The ICSID Convention, Article 52, para. 60.

28 See, e.g., ECHR, *Indra v. Slovakia*, Appl.-No. 46845/99, Judgment of 1 February 2005, para. 49 ("Accordingly, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw."); International Commission of Jurists, International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors, Practitioners Guide No. 1, 2007, 30-31.

29 On this perception see, e.g., *Reinisch/Knahr*, in: Peters/Handschin (eds.), Conflict of Interest in Global, Public and Corporate Governance, 103.

30 Generally on these efforts see more recently for example *Menaker/Hellbeck*, in: Yannaca-Small (ed.), Arbitration under International Investment Agreements, 183 *et seq.*

31 On this finding see also already *Cristani*, The Law and Practice of International Courts and Tribunals 13 (2014), 153 (164).

32 For a more in-depth discussion and respective examples see, e.g., *Sheppard*, in: Binder/Kriebaum/Reinisch/Wittich (eds.), International Investment Law for the 21st Century, 131 (138 *et seq*.); *Cleis*, The Independence and Impartiality of ICSID Arbitrators, 56 *et seq*.; *Vasani/Palmer*, ICSID Review 30 (2015), 194 *et seq*.; *Cristani*, The Law and Practice of International Courts and Tribunals 13 (2014), 153 (165 *et seq*.); *Malintoppi*, in: Muchlinski/Ortino/Schreuer (eds.), Oxford Handbook of International Investment Law, 789 (794 *et seq*.).

Nevertheless, experiencing a threat or another form of intimidation in the course of the investment arbitration proceedings, in particular if undertaken by somebody whose behavior can be attributed to one of the parties, has, first, at least the potential to negatively affect the respective arbitrator's impartiality. And as a consequence, second, it might subsequently result in a proposal to disqualify this arbitrator by the concerned party. In addition, the plausibility of such a scenario and its materialization in arbitral practice is further supported by the fact that respective procedural constellations are not infrequently observable in domestic settings of civil and criminal proceedings involving national judges.[33]

Previous appointment on a tribunal against or by the same state have been other grounds for challenges as well as concurrent work by the arbitrator's law firm.[34] These are typically not upheld.[35] Although other decisions on challenges have similarly relied on this 'manifest' standard,[36] there is an evolution in these challenges. Notably, this 'manifest' standard in ICSID is being relaxed to more closely align with the less strict requirements for dismissal in UNCITRAL.[37] A reasonable third party standard is becoming more acceptable. This standard was applied by the Chairman of the ICSID Administrative Council in *Blue Bank v. Venezuela*.[38] An appearance of bias standard has been employed by the Chairman of the Administrative Council.[39] An arbitrator was dismissed in a decision based on the arbitrator's appointment by Kazakhstan in a similar case that relied on similar facts.[40] The remaining arbitrators took the

33 For respective examples in the judicial practice of Germany see, e.g., OLG Frankfurt am Main, NJW-RR 2017, 191 (192); OLG Koblenz, BeckRS 2002, 30280716; BVerfG, NJW 1996, 2022; BGH, NJW 1962, 748 (749); OLG Dresden, OLG-NL 2001, 255.

34 *Vivendi v. Argentina*, Challenge to Yves Fortier, para. 26 (dismissing the challenge despite the work by colleagues of the challenged arbitrator with the claimant).

35 See for example, *Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19 (formerly *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*), Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal of 22 October 2007, para. 12 (Professor Gabrielle Kaufmann-Kohler's appointment was challenged based on her appointment in the second *Compañia de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3 tribunal); *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Claimants' Proposal to Disqualify Professor Brigitte Stern, Arbitrator, of 23 December 2010, paras. 9, 72 (challenge to the appointment of Professor Brigitte Stern based on her repeated appointment by Venezuela; the challenge was dismissed); *Universal Compression International Holdings, S.L.U. v. The Bolivarian Republic of Venezuela*, ICSID Case No. Arb/10/9, Decision on the Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Santiago Tawil, Arbitrators, of 20 May 2011, paras. 96, 107 (The Chairman of the Administrative Council dismissed the challenge to Professor Stern's independence and impartiality as well as the challenge to Professor Tawil's manifest lack of independence or impartiality); *OPIC Karimum Corporation v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/14, Decision on the Proposal to Disqualify Professor Philippe Sands, Arbitrator, of 5 May 2011, paras. 50-57 (multiple appointment of Professor Sands by the same responding party and the same law firm were dismissed as supporting manifest lack of impartiality or independence).

36 *ConocoPhillips Company et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator, of 27 February 2012, para. 56.

37 *Caratube International Oil Company LLP & Mr. Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch of 20 March 2014, para 62; *Chiara Giorgetti*, 'Caratube v. Kazakhstan: For the First Time Two ICSID Arbitrators Uphold Disqualification of Third Arbitrator', American Society of International Law Insights, 29 September 2014, available at <http://www.asil.org/insights/volume/18/issue/22/caratube-v-kazakhstan-first-time-two-icsid-arbitrators-uphold> (accessed 12 November 2018).

38 *Blue Bank Int'l & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, 12 November 2013, paras. 22-26.

39 *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña of 13 December 2013; see also *ConocoPhillips Petrozuata B.V., Petrozuata B.V., ConocoPhillips Hamaca B.V., ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify a Majority of the Tribunal of 5 May 2014, para. 56; *Repsol S.A. and Repsol Butano S.A. v. República Argentina*, ICSID Case No. ARB/12/38, Decisión Sobre la Propuesta de Recusación a la Mayoría del Tribunal (Decision on the Proposal to Disqualify a Majority of the Tribunal) of 13 December 2013, para. 86.

40 *Caratube International Oil Company LLP & Mr. Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No.

decision to disqualify the arbitrator.

Assuming that a compromised arbitrator has disclosed, it could be assumed that many of the same high standards would be applied to limit the potential dismissal unless it could be demonstrated that the arbitrator either directly took part or agreed to the said requests.

E. Dealing with Particular Sensitive and Challenging Scenarios: Intimidation of Arbitrators

The analysis has so far illustrated that the inherent powers are generally bestowed upon investment tribunals with the aim to preserve the fairness and integrity of arbitration proceedings. Arbitrators possess the competence to adopt remedial measures in order to cope with intimidations of participants like witnesses, party representatives, counsel and experts. The remedies that exist – despite the undeniable existence of certain shortcomings – can be in principle regarded as effective. However, as already indicated above by way of (in-)famous cases, anecdotal reporting and fictitious examples,[41] also arbitrators themselves can and regrettably in fact more or less sporadically are the recipients of intimidations as manifested in various direct and indirect forms. Those scenarios involving an intimidation of arbitrators as well as the resulting need to identify suitable remedies to be taken recourse to in this regard are for a variety of reasons particularly sensitive and challenging. Not only is the intimidating act in these cases directed against the category of actors in international investment arbitration that is at the same time also entrusted with the overarching task of securing the effective operation as well as integrity of the proceedings and thus occupies a quite central position in this system of investor-state dispute settlement. Rather, intimidation of arbitrators first and foremost also entails the potential to pose challenges concerning on of the fundamental principles of fair trial, namely the impartiality of those who steer as well as control the proceedings and ultimately render the arbitral award.

I. Consequences of Intimidation for Arbitrator's Impartiality: Two Main Scenarios

In an attempt to assess the effects of, and consequences arising from, intimidations of arbitrators for their continued impartiality in the arbitration proceedings and the suitable remedies available to investment tribunals to address these incidents, it is useful to broadly distinguish between two main scenarios. In the first scenario, the respective threats and pressures have been made by a co-arbitrator or a third party. In the second main scenario, the intimidation originates from a party representative or somebody whose conduct can be legitimately attributed to one of the parties.

ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch of 20 March 2014, paras. 24 *et seq*.

41 See *supra* under A. and B.

1. *Intimidation by Co-Arbitrators or Actors Unrelated to the Proceedings*

A considerable number of actors can cause through their conduct – or rather misconduct – an intimidation of arbitrators in the course of the proceedings. A rather peculiar – and apparently comparatively rare – class of perpetrators are other members of the investment tribunal. One example is the already above-mentioned case-related physical assault on a neutral member of the Iran-US Claims Tribunal by two Iranian arbitrators in September 1984 aimed at forcing him to withdraw from the proceedings.[42] Since the misconduct can usually be regarded as evidence of a biased attitude towards one of the parties, in such cases of intimidation by a co-arbitrator, a likely and appropriate remedy would be the disqualification of the intimidating member of the tribunal at the request of the respective party based on a demonstrated lack of impartiality.[43] Moreover, and of particular importance in the present context, at least if the misconduct of the co-arbitrator cannot be attributed to one of the parties, in particular the party that has appointed him,[44] it seems – in the absence of indications to the contrary – reasonable to (rebuttably) presume[45] that the impartiality of the intimidated arbitrator vis-à-vis the parties themselves is not compromised. Consequently, the affected arbitrator would not only be in principle immune from successful challenges with regard to his continued participation in the investment arbitration proceedings. Rather, under those arbitration regimes like the one established by the ICSID Convention where the other members of the tribunal decide upon a challenge (Article 58 ICSID Convention), the intimidated arbitrator would also normally participate in the decision whether to disqualify the misbehaving co-arbitrator.

An in principle equally unchallenging situation from the perspective of impartiality arises out of those cases where the intimidation of an arbitrator results from the case-related (mis-) conduct of a third independent actor who is neither directly involved in the arbitration proceedings nor related to a party in a way that his conduct would be attributable. Third parties arguably falling into this category are for example journalists, other media representatives or "overzealous" members of civil society groups having the means to create and facilitate a heightened – and in certain circumstances potentially hardly tolerable – public pressure not only on the parties and their legal counsels but also on individual arbitrators.

While such scenarios appear at first sight rather unusual, attention could be drawn in this connection for example to the respective concerns voiced by the claimant in an investor-state case with regard to the envisioned seat of arbitration based on the argumentation that "the regular course of the proceedings may be affected by potential social and media pressure due to the strong political essence of the arbitration".[46] And indeed, especially in light of more recent developments in investment treaty-making indicating an growing emphasis on transparency in investor-state arbitration as well as of the overall changing character of international investment law as an increasingly political law, its seems not too far-fetched to assume that the number of respective situations – potentially also involving intimidations of arbitrators – are likely to increase in the foreseeable future.

Already because of the fact that the intimidation would be caused by a private actor bearing

42 See already *supra* under B.

43 On the respective challenge initiated by the US against the two Iranian arbitrators in the just mentioned 1984 case see, e.g., *Brower/Brueschke*, The Iran-US Claims Tribunal, 170-171; *Toope*, Mixed International Arbitration, 359.

44 In case the behavior of the co-arbitrator is attributable to one of the parties, the considerations related to the second main scenario apply. See thereto *infra* under E.I.2.

45 Generally on the relevance of legal presumptions in the context of investor-state dispute settlement proceedings see, e.g., *Sourgens/Duggal/Laird*, Evidence in International Investment Arbitration, 111 *et seq.*, with further references.

46 *City Oriente Ltd. v. Ecuador*, ICSID Case No. ARB/06/21, Decision on Revocation of Provisional Measures and Other Procedural Matters of 13 May 2008, para. 111.

no relationship to one of the parties, however, negative effects on the impartiality of the affected arbitrator vis-à-vis the claimant or respondent cannot be easily and lightly insinuated. Therefore, the intimidated arbitrator could also normally participate in the tribunal's deliberations and decision how to address and remedy the situation, among them the option to move the venue of the proceedings to a less "agitated" place[47] and/or to issue a statement noting or even deploring the respective circumstances.

2. *Intimidation of Arbitrators by one of the Parties during the Arbitral Proceedings*

a) The Challenge and the Insufficiency of Classical and Alternative Remedies

Unfortunately at least as likely a scenario as an interference by a fellow arbitrator or a third independent actor is the intimidation of arbitrators, in the course of the proceedings, by a party representative or some other persons whose (mis-)conduct can be attributed to one of the parties. It is in the context of this kind of constellation that the issue of the continued impartiality of the affected arbitrator becomes most obvious and pressing. While it could be argued that an experienced arbitrator can be to a certain extent expected to control – and ultimately suppress – an emerging negative perception of the party in question for the purposes of the proceedings and whereas some arbitrators might also actually be successful in this regard, human experience rather indicates that a good amount of caution is warranted. As already stated above, it seems surely not implausible that being confronted for example with a serious insult, a threat or any other form of intimidation will have a more than minor negative effect on the impartiality of more than a few investment arbitrators.

Against this background, the question obviously arises as to the appropriate course of action to be taken by the tribunal in general as well as by the intimidated and thus now potentially biased arbitrator in particular. The at least at first sight probably most natural option would be the resignation or disqualification of the respective arbitrator in order to preserve the impartiality of the proceedings. Upon closer inspection, however, this solution might not be as straightforward as it initially appears; in particular bearing in mind that such a resignation or removal may be precisely in line with interests of the perpetrator of the illegitimate acts. Nevertheless, the alternative course of action of retaining the intimidated arbitrator might entail the danger of compromising the requirement of impartiality vis-à-vis both parties. Viewed from this last-mentioned perspective, the investment tribunal thus could not legitimately for example issue a decision to address the misconduct with the involvement of the intimidated member. Moreover, also the other arbitrators might become suspectable of no longer being impartial once they are informed and aware that their colleague was intimidated by one of the parties. Consequently, and again at least if viewed from the last-mentioned perspective, under these circumstances even actions taken by a truncated investment tribunal, as happened for example in case of *Himpurna v. Indonesia*,[48] could potentially be considered as giving rise to certain procedural challenges involving the issue of impartiality.

47 Generally on this option in the present context see also, e.g., *Kolo*, Arbitration International 26 (2010), 43 (79 *et seq.*); *Mourre*, Arbitration International 22 (2006), 95 (114).

48 See already *supra* under B.

Overall, there are apparently – as it is not infrequently the case – no easy and straightforward answers to the rather complex and thorny legal questions arising from the intimidation of arbitrators by one of the parties during international investment arbitration proceedings. This is further confirmed by the observation that additional possible alternative remedies or "sanctions", which one might envision in this connection, seems at least equally unsuitable to convincingly cope with such scenarios. Reporting the situation to competent domestic criminal authorities, the most well-known and quite common option in cases involving intimidations of domestic judges, proves itself for a variety of reasons in the context of investment arbitration proceedings – as already indicated above – as often not a very practical and promising remedy.[49]

Furthermore, relying for example on the indirect and overarching "sanction" of a foreseeable loss of confidence on the side of present and in particular also future investors considering investments in the respective respondent host state suffers at least from three main deficits. First, it serves at best and at most as a kind of *ex ante* deterrence that apparently has failed in cases where the intimidation by the host state or its representatives has already taken place. Second, even with regard to possible *ex ante* effects, such an indirect mechanism obviously only works in those situations where the host state is the perpetrator and thus completely fails if – and this appears to be far from an unlikely scenario[50] – the respective misconduct is committed by the investor or persons whose conduct is attributable to him. Third, and closely related to these two deficits, reliance on respective negative effects does not offer any procedural guidance as to the continuation of the ongoing arbitration proceeding itself.

The same basically applies to the conceivable option of the respective arbitration institution, if there is one involved, making the misconduct public and issuing a statement of protest. Disregarding its effectiveness as a deterrence against future misconduct, this "naming and shaming" approach also provides no orientation with regard to appropriate answers to the question how to proceed with the affected investor-state dispute settlement. Finally, the possibility of sanctioning the misconduct by re-politicizing the dispute, in particular on the basis of a revival of the right of diplomatic protection – a remedy recourse to which is in principle precluded for example by Article 27(1) ICSID Convention – on the side of the investor's home state without a prior exhaustion of local remedies, suffers from certain notable flaws when taken recourse to in the present context. Aside from the well-known uncertainties arising in connection with diplomatic protection for the private investor,[51] let it suffice here to recall that this remedy could again only apply in those cases where the host state is the perpetrator.

b) The Solution: Activating the Good Old Principles of Estoppel and Abuse of Rights – Impartiality as a Forfeitable Entitlement

In light of these challenges and the insufficiency of alternative remedies, it is submitted that we should – in our search for appropriate answers – once again return to the initial observation that a resignation or disqualification of the intimidated arbitrator would presumably be precisely in conformity with the interests of the party that has committed the intimidation in the first place. This solution appears to reasonable persons as an undesirable outcome because it would result in the perpetrator ultimately benefiting from his own wrongdoing; a concern that might be

49 See thereto *supra* under C.

50 On this perception see also, e.g., *Wälde,* Arbitration International 26 (2010), 3 (18-19).

51 See thereto for example *Schreuer/Malintoppi/Reinisch/Sinclair*, The ICSID Convention, Article 27, paras. 2 *et seq.*

termed the "undue reward"-objection. In order to avoid this objectionable consequence, from a legal perspective recourse can be taken to the concept of estoppel based on the argumentation that a party that has previously consented to a fair – and thus also impartial and independent – arbitration of an investment dispute by unintimidated arbitrators is prevented from subsequently contesting before the arbitration tribunal a situation, here in the form of proposing the disqualification of a potentially biased arbitrator, that it has itself created by intimidating an arbitrator contrary to its representation previously made to the other party and, potentially, the arbitration institution in question.

An alternative – albeit closely related – line of legal reasoning would rely in the present context on the doctrine of abuse of rights, forbidding a party to the arbitration proceedings from exercising a right, in the present context the right to challenge an arbitrator, solely for malicious purposes or contrary to its intended operation to the detriment of the other party. Estoppel and abuse of rights are both good faith related principles[52] and well-recognized general principles of law in the sense of Article 38(1) lit. c Statute of the International Court of Justice.[53] Against this background, their applicability in the modern context of treaty-based investor-state arbitration is in principle beyond reasonable doubt, already when taking into account that also this legal regime "cannot be read and interpreted in isolation from public international law and its general principles".[54] As a consequence of applying the concept of estoppel or of abuse of rights to scenarios involving an intimidation of arbitrators by one of the parties in the course of the proceedings, the party to whom the wrongdoing is attributable is thus to be prevented from challenging the affected arbitrator based on an alleged – and in fact potentially given – lack of impartiality. In sum, the respective party at least partially – namely as far as the effects of his own misconduct are concerned – forfeits its general legal entitlement to an impartial tribunal.

The approach suggested here is highly likely to appear at least to some readers as a quite far-reaching sanction, especially when taking into account the status of impartiality as a fundamental element of due process and therefore an in principle indispensable prerequisite for a fair trial. Such an initial discomfort is most certainly understandable and further underlines the important status rightly to be attached to the requirement of impartiality in all types of judicial and quasi-judicial dispute settlement mechanisms. Nevertheless, in an attempt to substantiate and further illustrate our proposition, we would like to draw attention to three main observations and considerations.

First, it seems appropriate to recall that the principle of impartiality is also in the context of international investment arbitration not an absolute principle but not infrequently subject to certain well-defined limitations. This applies in particular to the procedural entitlement of the parties to propose the disqualification of arbitrators. To mention but three different examples in this regard: Article 12(2) of the 2013 UNCITRAL Arbitration Rules proscribes, in the same way as other arbitration regimes, that a "party may challenge the arbitrator appointed by it only for reasons of which it becomes aware after the appointment has been made".

52 On the qualification of these legal doctrines as good faith related concepts see, e.g., *Kotzur*, Good Faith (Bona fide), paras. 22 and 24, in: Wolfrum (ed.), Max Planck Encyclopedia of Public International Law, available under: <www.mpepil.com/> (accessed 12 November 2018).

53 Generally on the concepts of estoppel and abuse of rights in public international law see for example *Jennings/Watts*, Oppenheim's International Law, Vol. I, Introduction and Part 1, 407 *et seq*.; *Crawford*, Brownlie's Principles of Public International Law, 420 *et seq*., 562 *et seq*.; *Shaw*, International Law, 76 *et seq*.; *Cheng*, General Principles of Law as Applied by International Courts and Tribunals, 121 *et seq*., 143 *et seq*.

54 *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award of 15 April 2009, para. 78; see also, e.g., *Urbaser S.A. et al. v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award of 8 December 2016, para. 1200.

Consequently, if the respective party subsequently attempts to challenge "his" arbitrator – for example on the basis of an alleged lack of independence and/or impartiality – it is prevented from successfully making such a proposal if the underlying facts were previously known to it; and this preclusion applies irrespective of whether the allegations of impartiality are true or not. Furthermore, Article 19(3) of the SCC Arbitration Rules stipulates that the failure by a party to challenge an arbitrator within the timeframe of merely 15 days provided for in the first sentence of this provision[55] "constitutes a waiver of the party's right to make the challenge"; thus not only indicating the potential waiverability of certain circumstances that could constitute a conflict of interest[56] but in particular also specifically taking recourse to a legal fiction aimed at limiting, on the basis of deadlines, the possibility of a party to initiate a challenge procedure based, *inter alia*, on grounds of partiality. Finally, Rule 27 in connection with Rule 53 ICSID Arbitration Rules arguably prevents a party, which had prior knowledge of circumstances indicating a lack of impartiality on the side of an arbitrator but failed to seek the disqualification of this member of the tribunal under Article 57 ICSID Convention during the proceedings, from subsequently requesting an annulment on the otherwise legitimate ground of "a serious departure from a fundamental rule of procedure" in the sense of Article 52(1) lit. d ICSID Convention.[57]

These three and various other provisions potentially applicable to investor-state dispute settlement proceedings not only illustrate the existing procedural limitations with regard to the rights of the parties to preserve and enforce the principle of impartiality. Rather, and at least equally noteworthy, they also serve as an indication for the appropriateness of the approach suggested here in connection with intimidations of arbitrators by the parties. If mere prior knowledge is in itself sufficient to preclude the possibility of a successful challenge, the same consequence can legitimately be drawn all the more – taking recourse to an *argumentum a fortiori* or an *argumentum a minori ad maius* – in those situations where the respective party has even herself created the ground for the challenge through her own improper conduct.

Second, it needs to be stressed that the forfeiture of the right to an impartial tribunal argued for here is – and has to be in the interest of reasonableness – itself subject to certain limitations. This sanction does surely not amount to a kind of *carte blanche* for the intimidated arbitrator. In particular, the reasonableness of the reactions of, and subsequent conduct displayed by, the affected arbitrator plays an important role in determining the degree to which the misbehaving party has forfeit her respective legal entitlement.[58] If it becomes obvious in the course of the following arbitration proceedings that the arbitrator for example displays now an open hostility towards the party in question or engages in other forms of excessive negative behavior during the oral hearings thus indicating an obvious and even open bias vis-à-vis this party, the requirement of impartiality must again prevail since it seems unacceptable – also with regard to the integrity of the arbitration proceedings as a whole – to expose one party to an openly prejudiced member of the tribunal. Under these – exceptional – circumstances, it thus appears appropriate to revive the right of this party to propose a disqualification of the arbitrator in

55 See Article 19(3) SCC Arbitration Rules (2017): "A party wishing to challenge an arbitrator shall submit a written statement to the Secretariat stating the reasons for the challenge, within 15 days from the date the circumstances giving rise to the challenge became known to the party.".

56 On the possibility of respective waivers by the parties see also, e.g., General Standard 4 of the Guidelines on Conflict of Interest in International Arbitration as adopted by the International Bar Association Council in October 2014.

57 On this line of reasoning see, e.g., *Schreuer/Malintoppi/Reinisch/Sinclair*, The ICSID Convention, Article 52, para. 60.

58 See thereto also already from the perspective of international commercial arbitration *Froitzheim*, Die Ablehnung von Schiedsrichtern wegen Befangenheit in der internationalen Schiedsgerichtsbarkeit, 147 and 197; as well as for the realm of German civil law the analyses by *Taubner*, Der befangene Zivilrichter, 129 *et seq.*; *Horn*, Der befangene Richter, 102 *et seq.*; *Schneider*, Befangenheitsablehnung im Zivilprozess, 38 *et seq.*, 132, each with further references.

question.

In addition, it should be born in mind that the sanction suggested here only applies to the entitlement of the party to challenge the intimidated arbitrator based on "self-made" grounds. Neither does it limit the right of the other party to propose – for whatever reasons – a disqualification of the affected arbitrator under these circumstances nor does it prevent the misbehaving party from challenging all arbitrators on different grounds. Furthermore, in case the award as subsequently issued suffers from other deficits like a failure to state reasons in the sense of Article 52(1) lit. e ICSID Convention, such shortcomings entitle all the parties to request annulment under Article 52 ICSID even if they eventually turn out to be an indirect consequence of the illegitimate acts committed against one of the arbitrators.

Third, and finally, the approach suggested here is highly likely to serve as a quite effective deterrence against an intimidation of arbitrators by the parties and this finding applies equally to both, the private investor as applicant and the host state as respondent in the case in question. As a consequence of the application of the general principles of estoppel and abuse of rights, the affected arbitrator would thus be in principle entitled to continue serving on the tribunal, most certainly including the tribunal's deliberations and decisions on how to appropriately address the respective misconduct by the party in question on the basis of statements, interim decisions and/or the allocation of costs to the parties in the final award.[59]

II. Facing the Heart of Darkness: Post-Arbitration Interferences with Arbitrators

Whereas international investment tribunals seem to be in the fortunate position to potentially take recourse to legal concepts and remedies in order to adequately address the sensitive and challenging situations where one of their own members has been the subject of intimidation by co-arbitrators, independent actors or even one of the parties during the arbitral proceedings, it should not be left unmentioned that other unfortunate scenarios exist in which there appear to be no means easily and readily available to uphold the integrity of the international (investment) arbitration system. This applies in particular to actions taken by states against individual arbitrators once the award has been issued. Two of the above-mentioned examples – the jailing of an arbitrator following the rendering of a commercial arbitration award in China as well as the shooting of an arbitrator after his return to the respondent home state[60] – at least serve as an appalling illustration, irrespective of whether these events really bear a relationship to the prior proceedings or not, of the possible scenarios in this regard.

Such situations constitute complicated post-arbitration interferences by a state that would be beyond the scope and powers of any individual arbitration tribunal. However, since they undoubtedly set a threatening example for future arbitration proceedings and thus clearly have the potential to also impair the independence and impartiality of certain individual arbitrators by way of intimidation, the possibility of such scenarios should be of concern for the international arbitration community as a whole. The fact that there seems to be at least in the short

59 On the last-mentioned option of cost sanctions see, e.g., *Kolo*, Arbitration International 26 (2010), 43 (70 *et seq.*). See thereto – as well as on the considerably more far-reaching option of adopting a decision to exclude the misbehaving party from the proceedings – also *Wälde*, in: *Yannaca-Small* (ed.), Arbitration under International Investment Agreements, 161 (182 *et seq.*) with further references.

60 See thereto already *supra* under B.

run unfortunately no effective remedy in sight, is hardly surprising. After all, the respective problems are far from unique to international commercial and investment arbitration. Rather, and regrettably, they constitute general challenges that for example at the domestic level also judicial as well as quasi-judicial organs and their members frequently face in authoritarian regimes.

F. Aspects of Constitutionalization: Independence and Impartiality as Components of the Rule of Law

The above discussion acts as a signifier of the possibility of broader constitutionalism occurring within the international investment realm. The growing legitimacy in the sphere of international investment law can be understood within the framework of global constitutionalism. Constitutionalism has been recognized by the way in which power is exercised within the institutional design and how the system approaches illegality. Global constitutionalism recognizes the application of these constitutional principles into a more global framework – emerging within specific spheres of international law.[61] Within this framework, rule of law has long been considered a central component of the core constitutional values.[62] Its relevance in light of intimidation of arbitrators is deeply connected to the basic needs for impartiality of decision makers in order to maintain a true rule of law, of more specifically, judicial independence. Whether the system sufficiently regulates itself points to a level of constitutionalization.

The idea of rule of law protecting the political order against overreach can be traced to *Aristotle*, *Locke*, and *Kant*.[63] The further connection between rule of law and constitutionalism has been long recognized, particularly on the domestic level.[64] In the Human Development Report of 1992, the UN Development Programme included an independent and impartial judiciary as one of the five indicators of rule of law. The OECD and World Bank consider fair and impartial justice as an essential element of the rule of law. These central ideas can be transformed into the broader theoretical understanding of global constitutionalism.

In the same way that witness intimidation is a clear challenge to the rule of law,[65] judicial – or in this case, arbitral – intimidation similarly sharply threatens the ideal of fairness and due process. Both are equally difficult to regulate and control within any established judiciary,[66] in part due to the clear desire of a victim to not disclose instances of intimidation. Indeed the etymology of intimidation is to make timid – deterred from acting.[67]

In this context of arbitrator intimidation, the narrative with which the potentially compromised impartiality is approached, reveals the developing surfaces of a constitutionalization process within the field. The value placed on ensuring an impartial judiciary is the first side,

61 *Peters*, Indiana Journal of Global Legal Studies 16 (2009), 397-398.
62 See for example *Kumm*, in: Lang/Wiener (eds.), Handbook on Global Constitutionalism, 197 *et seq.*
63 *Frank*, Theoretical Inquiries in Law 8 (2007), 37.
64 *Mansfield*, Harvard Journal of Law & Public Policy 8 (1985), 323 (326) (noting that "[t]he constitution, our [US] Constitution in particular, establishes a law that is above law. It allows us to make law as the realists want, but requires us to make law lawfully as legalism desires. […] Constitutionalism is the best available solution to the question of the best man versus the best laws when it makes us aware that no true solution exists.").
65 See generally, *O'Flaherty/Sethi*, Journal of Legal Studies 39 (2010), 399.
66 See generally, *O'Flaherty/Sethi*, Journal of Legal Studies 39 (2010), 399 (425).
67 Oxford English Dictionary, electronic edition, Third Edition, 2018, 'intimidate, v.'.

and the process by which any impartiality is dealt with displays the more tangible aspects to any possible constitutionalism.

Although the rules guiding the decision-making process where there has been intimidation of one of the arbitrators are not written rules in a centralized format, there is a certain care taken for decisions to be guided by similar requirements and reasoning. The written rules – soft law – provide for disclosure of any potential or arising conflicts of interest. The rules also provide that the decisions be taken by the remaining members of the tribunal, leaving – as investment arbitration rules typically do – wide discretion to the members of the tribunal to take the decision as necessary to the circumstances. There is no binding authority providing that these rules are followed. Indeed, there is no way to track whether the rules are followed to a desirable extent. The knowledge of instances of intimidation are confined solely to instances where the victim has disclosed, or where the intimidating circumstances have become known through other means. As such, it is difficult to come to a definitive conclusion on either the success or effectivity of these guiding rules.

The dialogue used by arbitrators to indicate a potential conflict of interest points to a general belief in one's ability to be impartial. In this regard, *Gabrielle Kaufmann Kohler* insisted that previous ties would have no impact on her ability to fairly decide a dispute.[68] However, when intimidation occurs, because of a – typically forced – desire to not disclose such conflict, it remains uncertain how a comprised arbitrator would perceive their ability to remain neutral. In effect, it is the arbitrator that chooses to disclose who fully emits an ability to remain impartial.

Although there may not be wide control over the manner in which the tribunal uses this discretion, there is a high incentive for the tribunal to respond in a specific and deliberate manner. On the other hand, there may also be financial incentive to respond in a manner that is contrary to the more just solution. The desire for re-appointment by the same party or other parties with similar interests may guide the arbitrators in an undesired manner.

The fact that fellow arbitrators on a panel take decisions on intimidation as well as the lack of a uniform approach to issues of intimidation demonstrate a certain prematurity to classifying the rule of law fully constitutionalized in this sense. The legitimacy of the approach remains substantially deficient in comparison to the thorough approach taken in domestic legislation to regulate any offensive behavior against a judge as well as to protect the integrity of the judiciary.

68 *Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19 (formerly *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*), Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal of 22 October 2007, para. 15 (noting that Professor Kaufmann-Kohler indicated in her response that "I do not wish to comment on the merits of the proposal, but to state that I have always considered it my duty as an arbitrator to be impartial and exercise independent judgment and that I intend to comply with such duty in these arbitrations as in all others in which I serve.").

G. Outlook: Systemic Changes

Finally, it is important to consider this issue from the now pressing perspective of fundamental changes in the investor-state dispute settlement model. These discussions often first and foremost focus on a range of circumstances that might potentially affect the independence and integrity of the party-appointed arbitrators.[69] Looking towards the structure of the system, one might legitimately ask – as also the fictitious example that we gave in the introduction indicates – whether the aspect that one might refer to as the "re-appointment factor" exposes investment arbitrators to risks not faced by other types of judicial decision-makers. This aspect might speak in favor of establishing a permanent international investment court or at least investment tribunals whose composition is not left to be decided by the parties; a topic that is at present not only intensively and controversially debated but also occasionally sees attempts aimed at an implementation in practice.[70] However, the known scenarios involve disclosure, often by the affected arbitrator, indicating that the arbitrator was not influenced by the intimidation effort. As the practice currently stands, significant influence from public international law and the rule of law in general have maintained a practice of integrity in the face of intimidation by arbitrators, indicating an underlying growth of constitutionalism influencing the system of international investment law.

69 From the numerous contributions see for example *Dimitropoulos*, Northwestern Journal of International Law & Business 36 (2016), 371; *Cleis*, The Independence and Impartiality of ICSID Arbitrators, 188 *et seq*., both with further references. From the perspective of international commercial arbitration see also already *Smith*, Arbitration International 6 (1990), 320.

70 From the numerous contributions see, e.g., European Parliament, In Pursuit of an International Investment Court – Recently Negotiated Investment Chapters in EU Comprehensive Free Trade Agreements in Comparative Perspective, Study prepared by Steffen Hindelang and Teoman M. Hagemeyer, July 2017, 84 *et seq*.; *Reinisch*, European Yearbook of International Economic Law 8 (2017), 247 *et seq.*

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