# Down the Rabbit Hole of Investment Arbitration and Ethics

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***Abstract***

*This article addresses the role of arbitrators and the everlasting tension amongst personal morals and interpretive rigour. Critiques of investment law have traditionally underscored the lack of balance in power between foreign investors and host states under BITs and FTAs and have especially emphasized how investment arbitration is a mechanism that aggravates imbalances and engenders inequitable outcomes. Frequent appeals for the reform of investment arbitration resonate amongst scholars, states, and international organizations, with the appointment of arbitrators and their conduct facing intense scrutiny. Arbitrators, endowed with powers akin to those of adjudicators, demonstrate at times a concerning attitude towards the rigorous interpretation of applicable laws, often overlooking the public international law nature of BITs and FTAs and, on occasion, approaching investment disputes as though they were merely commercial arbitration cases. The conflation of the two types of arbitration has had adverse effects, resulting in dubious awards and decisions. The increasing number of so-called mega-awards exacerbates the problem, as their significance for host states is not necessarily commensurate with the rigor of the legal reasoning underpinning them. This has progressively led to an erosion of trust in investment arbitrators and numerous calls for greater accountability of arbitrators. However, one may argue that even the most rigorous interpretations of BITs and FTAs unavoidably favour the interests of foreign investors due to the inherent nature of such agreements, which prioritize the rights and protections of foreign investors over the interest and welfare of host states and their populations.*

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## 1. Introduction

Imagine the locker room at Wembley Stadium.[2] There is a palpable mix of nerves and excitement that coats the air. Players sit on their bench, lacing up their boots and engaging in their respective pre-game rituals - some silent, eyes closed in meditation, others boisterous, pushing each other with playful shoves. The coach strides in, their presence commanding immediate silence. Their eyes, sharp and determined, sweep across the room, locking onto each player. They begin talking, their voice steady but filled with an undercurrent of fiery passion. Their words weave through the players,

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[2] Should the reader wish to give this scenario a more realistic look, Wembley's locker rooms can be seen at https://darcawards.com/portfolio/wembley-stadium-changing-facilities-uk/.

binding them together, amplifying the collective heartbeat of the team. They remind the team of their strategies, their strengths, and the weaknesses they have studied in the opponents. The players rise, a singular unit, a siblinghood forged in countless hours of training and sacrifice; they grab their jerseys, feeling the weight of the emblem on their chest, a symbol of pride and legacy. As they walk through the tunnel, the roar of the crowd grows louder with each step. The players can feel the vibrations under their boots, the anticipation of thousands ready to witness the spectacle of the beautiful game. The tunnel lights give way to the blinding brilliance of the stadium lights, and the pitch stretches out before the players' eyes. The crowd's energy hits the teams like a wave. Players glance at each other, every face a mask of focus and determination. They line up, the opposing team facing them, their expressions mirroring our own resolve. And at that moment, they realise that there is no goal behind their opponents: in fact, they do not even need a goalkeeper. The team can draw at best, or lose: the opponents can win, or in the worst-case scenario they will go home with a draw. And yet, the game begins.

*Mutatis mutandis*, this is what host states can routinely expect from sitting on the respondent's seat in investment arbitral proceedings: a mechanism that is activated by a foreign investor on the basis of a dispute settlement clause in a bilateral investment treaty (BIT) or a free trade agreement (FTA),[3] rules of the applicable law that are designed for the specific purpose of protecting the investor against the adverse consequences of acts – whether legitimate or not – of the host state,[4] and the awareness of the fact that, in the best possible outcome, they will have to pay their own legal fees for the sole purpose of not having to pay damages and compensation.[5]

While this is obviously an intendedly overdramatic picture (the reality is far more complex and not as rigged as it may appear), it is hardly questionable that investment arbitration is a mechanism that may not be fit to settle disputes that not only involve a state, but the consequences of which may also have troublesome effects on the population of such state.[6] The question arises in light of the fact that investment arbitration shares quite a few features with commercial arbitration – a mechanism, however, the outcomes of which only concern two private parties;[7] there are, in investment arbitration, concerns of public law and policy that should not be overlooked

[3] See generally Jean-Marc Loncle, *The arbitration option in protection of investments treaties: treaty claims vs. contracts claims*, International Business Law Journal, Volume 6, Issue 1, 2005, pp. 3-12; Christoph Schreuer, *Jurisdiction and applicable law in investment treaty arbitration*, McGill Journal of Dispute Resolution, Volume 1, Issue 1, 2014, pp. 1-26; Dana Freyer, *Commentary: Drafting arbitration clauses in contracts involving sovereigns*, Arbitration International, Volume 18, Issue 3, 2014, pp. 263-267.

[4] Jeswald W. Salacuse, Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and their Grand Bargain*, in Karl P. Sauvant, Lisa E. Sachs, *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows*, Oxford University Press, 2009, pp. 109-170; Mavluda Sattorova, *Return to the Local Remedies Rule in European BITs? Power (Inequalities), Dispute Settlement, and Change in Investment Treaty Law*, Legal Issues of Economic Integration, Volume 39, Issue 2, 20120, pp. 223-247.

[5] Gabriel Bottini, Catharine Titi, Facundo Pérez Aznar, Julien Chaisse, Marko Jovanovic, Olga Puigdemont Sola, *Excessive Costs and Recoverability of Costs Awards in Investment Arbitration*, The Journal of World Investment & Trade, Volume 21, Issue 2-3, 2020, pp. 251-299.

[6] José Daniel Amado, *Intersection Between International Investment Law and Host State Population*, in Proceedings of the ASIL Annual Meeting, Volume 109, Cambridge University Press, 2015, pp. 234-238

[7] On the relationship between commercial and investment arbitration see the excellent work of Joel Dahlquist, *The Use of Commercial Arbitration Rules in Investment Treaty Disputes - Domestic Courts, Commercial Arbitration Institutions and Tribunal Jurisdiction*, Brill Nijhoff, 2021.

when addressing questions of law the consequences of which may lead to radical changes in one state's economy and welfare.

Lawyers, however, cannot but look for a legal basis: in this case, it is not easy to find one that justifies the consideration of such policy and economic aspects of an investment dispute when addressing something that, from a legal perspective, is none other than a treaty violation. Is it a matter of mechanism, or a matter of applicable law? And if it is the latter, should the arbitrators be tasked with adding external factors to their considerations on the claims they are called to hear? This article addresses the role of arbitrators in the broader system of investment law, and questions the calls for reform of investment arbitration that see in the conduct of arbitrators the key to tackle the many issues of inequality, exploitation of resources, and neocolonialism that affect international investment law.[8] The argument I suggest is that, if the rules of the game are imbalanced and favour one team, it is not appropriate to ask the referee to tilt the scale towards the other team just to reach a level playing field *a posteriori*: it is the game itself that is to be reformed, if needed. To build this argument, the article begins with a very short overview of the most recent critiques of international investment law, to then address the role of arbitrators in practice and in theory, with the aim of answering the question of whether arbitrators should indeed add a certain level of creativity to their interpretation of treaties, or they should stick to the letter of the law in spite of the often problematic consequences. The article is aimed at providing a theoretical contribution to the debate on the reform of the system of investment law and arbitration; for this reason, and preserve conciseness, the focus of the research has been placed on the relevant scholarship, keeping the references to the case-law to a minimum.

## 2. Critiques of Investment Law: a short overview

Investment arbitration has come under intense public scrutiny in the last two decades, revealing significant systemic flaws within international investment law and prompting widespread criticism.[9] This wave of disparagement underscores the growing concerns about the inherent imbalances characterizing the system of investment arbitration, which appears to disproportionately favour the rights and obligations of investors over those of host states. At the core of this discontent lies the observation that

[8] Antonius R. Hippolyte, *Foreign investment law and developing countries*, in Markus Krajewski, Rhea Tamara Hoffmann (eds.), *Research handbook on foreign direct investment*, Edward Elgar Publishing, 2019, pp. 72-125.

[9] See among others Michael Waibel, Asha Kaushal, Kyo-Hwa (Liz) Chung, Claire Balchin, *The Backlash against Investment Arbitration: Perceptions and Reality*, Kluwer Law International, 2010; Petra Butler, *Human Rights in International Commercial and Investment Arbitration*, in Stefan Kröll, Andrea K. Bjorklund, Franco Ferrari, *Cambridge Compendium of International Commercial and Investment Arbitration*, Cambridge University Press, 2023, pp 139-185; Marc Bungenberg, *Democracy and International Investment Law*, *ibid*. at pp. 186-210; August Reinisch, *Investment Arbitration and the Rule of Law*, *ibid*. at pp. 211-243; Alec Stone Sweet, Florian Grisel, *The evolution of international arbitration: judicialization, governance, legitimacy*, Oxford University Press, 2017; Julian Arato, *The private law critique of international investment law*, American Journal of International Law, Volume 113, Issue 1, 2019, pp. 1-53; Steven Ratner, *International investment law through the lens of global justice*, Journal of International Economic Law, Volume 20, Issue 4, 2017, pp. 747-775; Charles N. Brower, Stephan W. Schill, *Is arbitration a threat or a boom to the legitimacy of international investment law?*, Chinese Journal of International Law, Volume 9, Issue 1, 2008, pp. 471-498

the current dispute settlement mechanisms fail to provide adequate protection for host states, leaving them vulnerable to the exploitation of applicable laws and jurisdiction by foreign investors. Such exploitation manifests itself in a *de facto* erosion of sovereignty and a diminished capacity for host states to regulate in the public interest effectively.[10] Indeed, the dispute settlement mechanisms enshrined in investment agreements are primarily crafted to safeguard investor interests, and do so, in practice, at the expense of the regulatory autonomy of host nations. This investor-centric focus has profound implications, not only for the fairness and equity of the system but also for its overall legitimacy and acceptance. The backlash against this perceived injustice extends to encompass the arbitrators and the broader architecture of the system of investment arbitration. Arbitrators find themselves under increasing scrutiny regarding their role in the maintenance of the inequality caused, or perpetuated, by international investment agreements. The general discontent with the system is also fuelled by the lack of transparency in arbitral proceedings, which are perceived to often occur behind closed doors, excluding public participation.[11]

This perceived opacity undermines the trust on arbitration as a mechanism, and feeds into the broader narrative of a system that is skewed in favour of powerful multinational corporations at the expense of sovereign states and their citizens. Additionally, the financial burdens imposed on host states by lengthy and costly arbitral proceedings exacerbate the power imbalances, as states with limited resources find it increasingly challenging to defend their regulatory measures. This financial strain is further compounded by the potential for significant monetary awards against states, which can deter them from enacting legitimate regulatory measures for fear of triggering costly disputes. The chilling effect on regulatory sovereignty is palpable, as states become wary of introducing or enforcing policies aimed at protecting public health, the environment, or social welfare. This regulatory chill undermines the very essence of democratic governance and the ability of states to serve the public interest.[12]

In response to these criticisms, there have been calls for comprehensive reforms to the investment arbitration system. Proposals include the establishment of a permanent multilateral investment court to replace the ad hoc arbitration panels,[13] the introduction of an appellate mechanism to ensure consistency and correctness in arbitral decisions,[14]

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[10] Gábor Hajdu, *Investment Arbitration and the Public Interest*, Hungarian Yearbook of International Law & European Law (2020), pp. 75-91.

[11] August Reinisch, Christina Knahr, *Transparency versus confidentiality in international investment arbitration–the Biwater Gauff compromise*, The Law & Practice of International Courts and Tribunals, Volume 6, Issue 1, 2007, pp. 97-118; Loretta Malintoppi, Natalie Limbasan, *Living in glass houses? The debate on transparency in international investment arbitration*, BCDR International Arbitration Review, Volume 2, Issue 1, 2015, pp. 31-57.

[12] Kyla Tienhaara, *Regulatory Chill and the Threat of Arbitration: A View from Political Science*, in Chester Brown, Kate Miles (eds.), *Evolution in Investment Treaty Law and Arbitration*, 2011, Cambridge University Press, pp. 606-628; Eckhard Janeba, *Regulatory chill and the effect of investor state dispute settlements,* Review of International Economics, Volume 27, Issue 4, 2019, pp. 1172-1198.

[13] Marc Bungenberg, August Reinisch, *From bilateral arbitral tribunals and investment courts to a multilateral investment court: options regarding the institutionalization of investor-state dispute settlement*, Springer, 2020; Julian Scheu, Lisa Schöttmer (eds.), *Creation and implementation of a multilateral investment court*, Nomos, 2022.

[14] See *ex multis* Barton Legum, *Options to establish an Appellate Mechanism for Investment Disputes*, in Karl Sauvant, (ed.), *Appeals Mechanism in International Investment Disputes*, Oxford University Press,

and the enhancement of transparency and public participation in arbitral proceedings.[15] Such reforms are aimed at restoring balance and fairness to the system, ensuring that the rights and obligations of both investors and host states are equitably addressed. Furthermore, there is a growing recognition of the need to recalibrate the substantive provisions of investment treaties to better reflect the public interest and the regulatory autonomy of states.[16] This includes redefining the scope of investment protections to prevent their abuse and ensuring that legitimate regulatory measures are not unduly penalized.

The shift towards a more balanced and transparent system of investment arbitration is crucial not only for the protection of state sovereignty but also for maintaining the legitimacy and sustainability of the international investment regime. With the backlash against the current system continuing to gain momentum, it is essential that stakeholders engage in constructive dialogue to address these systemic flaws and restore confidence in the fairness and efficacy of investment arbitration. This endeavour requires a concerted effort from states, investors, arbitrators, and civil society to forge a new consensus on the principles and practices that should underpin international investment law. Only through such comprehensive and inclusive reforms can the system hope to regain its legitimacy and ensure that it serves the interests of both investors and host states in a balanced and equitable manner.

### 3. Investment arbitrators under the microscope

Arbitrators in the field of investment arbitration hold a unique and powerful position, endowed with both powers and duties. I would argue, contrary to the views that equate commercial and investment arbitrators, that the latter are *quasi*-judges, as their role is not that of private adjudicator of a contract dispute between two private parties, but that of deciding upon a question of interpretation and application of an agreement between two states, the rights of which are conferred – or transferred – to a private law entity, while the duties remain upon a subject of public law such as the host state.[17]

The role of arbitrators in writing awards and designing their effects, in particular, is critical. Arbitrators are tasked with not only with resolving the specific dispute at hand, but also with writing awards that provide clear and reasoned justifications for their decisions that show their interpretation of treaty provisions within the broader context

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2008, pp. 231-240.

[15] United Nations, United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, General Assembly resolution 69/116, December 10, 2014. See also Andrea J. Menaker, Eckhard R. Hellbeck, *Piercing the Veil of Confidentiality: the Recent Trend towards Greater Public Participation and Transparency in Investment Treaty Arbitration*, in Katia Yannaca-Small (ed.), Arbitration Under International Investment Agreements - A Guide to the Key Issues, Oxford University Press, 2018, pp. 183-219.

[16] The 2004 US Model BIT served as an immediate template for several other nations, including the Netherlands (2004), Canada (2004), France (2006), Germany (2008), Austria (2008), the United Kingdom (2008), and Colombia (2008, now replaced). These and subsequent model agreements post-2008 can be found on the UNCTAD website at https://investmentpolicy.unctad.org/international-investment-agreements/model-agreements.

[17] Andrea K. Bjorklund, *Private Rights and Public International Law: Why Competition Among International Economic Law Tribunals is Not Working*, Hastings Law Journal, Volume 59, 2007, pp. 241-307.

of international law.[18] The reasoning behind an award must be cogent and transparent, as it serves as the basis for the enforceability of the decision. Moreover, the design of the effects of an award involves (or at least should involve) a careful consideration of the practical and financial implications for the disputing parties. For investors, a favourable award can mean substantial compensation for the claimed breaches of treaty obligations, but for host states the impact can be far-reaching, potentially affecting public budgets and regulatory policies.

This rightly places the role of arbitrator under the proverbial microscope. Unlike judges in domestic courts, arbitrators are typically appointed by the parties to the dispute, either directly or through a process involving arbitral institutions. This appointment mechanism, while providing parties with a degree of control over the composition of the tribunal, on one hand, allows for flexibility and specialization in dispute resolution, as parties can select arbitrators with specific expertise relevant to their case; on the other hand, it requires robust safeguards to ensure that arbitrators uphold the highest standards of impartiality, integrity, and professionalism, akin to those expected of judicial officers.[19]

Moreover – and more importantly with regard to the topic of this article – it is due underscoring that arbitrators contribute to the development of the *de facto* system of precedent in investment arbitration: their interpretation of treaty provisions can and does influence future cases and treaty negotiations.[20] This quasi-judicial role should place a significant responsibility on arbitrators to approach their duties with a sense of public accountability and a commitment to the principles of justice. The legitimacy of the investment arbitration system hinges on the perception that arbitrators are acting not merely as private adjudicators serving the interests of the disputing parties but as impartial guardians of the rule of law in the international investment regime.

Nevertheless, investment arbitrators have occasionally exhibited a concerning attitude towards the interpretation of applicable law, an issue that has been historically troublesome and dates back to notable cases such as the *Amco Asia* saga of the 1980s.[21] The case involved a foreign investor's local business partner in Indonesia, who, with military and police support, took over a hotel and a commercial complex. Subsequently, Indonesian authorities revoked the investor's investment license, citing alleged breaches

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[18] As clearly stated in Article 52(1) of the ICSID Convention, according to which 'Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: […] (e) that the award has failed to state the reasons on which it is based.' On this topic see Guillermo Aguilar, W. Michael Reisman, *The reasons requirement in international investment arbitration: critical case studies,* Martinus Nijhoff Publishers, 2008.

[19] Chiara Giorgetti, *Who decides who decides in international investment arbitration*, University of Pennsylvania Journal of International Law, Volume 35, Issue 3, 2014, pp. 431-486; Michael Waibel, Yanhui Wu, *Are Arbitrators Political? Evidence from International Investment Arbitration*, in ASIL Research Forum Working Draft, January 2017, pp. 2-3; Magdalene D'Silva, *Dealing in power: gatekeepers in arbitrator appointment in international commercial arbitration*, Journal of International Dispute Settlement, Volume 5, Issue 3, 2014, pp. 605-634. On the duties of arbitrators see Katia Fach Gómez, *Key Duties of International Investment Arbitrators: a Transnational Study of Legal and Ethical Dilemmas*, Springer, 2019.

[20] Lucy Reed, *The "De Facto" Precedent Regime in Investment Arbitration: a Case for Proactive Case Management*, ICSID review - Foreign Investment Law Journal, Volume 25, Issue 1, 2010, pp. 95-103; Richard C. Chen, *Precedent and dialogue in investment treaty arbitration*, Harvard International Law Journal, Volume 60, Issue 1, 2019, pp. 47-94.

[21] *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1.

of obligations. Indonesian courts largely upheld these actions. The investor then pursued arbitration under the auspices of the International Centre for the Settlement of Investment Disputes (hereinafter "ICSID", both with reference to the Centre and the Convention) based on a clause in the investment license.[22] This case raised significant issues in investment law and arbitration, such as the applicable law in ICSID arbitration, international expropriation principles, state responsibility for harm to foreigners, denial of justice, the legal nature of investment licenses, and damages for their breach. The initial arbitral award on was partly annulled by an ad hoc Annulment Committee under Article 52 of the ICSID Convention. Ultimately, the case was resolved by a second arbitral tribunal, as the application to annul the second award was unsuccessful.

This case highlighted significant interpretative challenges, with the bottom of the problem lying in the tendency of arbitrators to overlook the public international law nature of BITs and FTAs and frequently interpret treaty provisions as if they were akin to contractual clauses, thus approaching investment disputes with the mindset of resolving commercial arbitration cases.[23] This approach fundamentally misconstrues the nature and purpose of BITs and FTAs, which are designed not merely to facilitate commercial transactions but to regulate the relationships between sovereign states and foreign investors under the broader framework of international law. The interpretation of BITs and FTAs through a commercial lens rather than a public international law perspective is not a merely stylistic choice, as it can lead to significant misapplications of law and inequitable outcomes. Investment treaties are embedded within the public international law system and are intended to balance the rights and obligations of investors and host states, with due consideration for public policy objectives and the sovereignty of states. When arbitrators treat these treaties as simple commercial contracts, they risk undermining the regulatory autonomy of host states and disregarding the broader implications of their decisions on state governance and public welfare.

Awards not based on the interpretive principles of public international law are even more concerning as they display a concerning neglect of the broader social and economic impacts of their awards on the populations of host states. By focusing narrowly on the legal and financial aspects of disputes, the far-reaching consequences of their decisions on public services, environmental protection, and social welfare are clearly overlooked. This narrow focus can exacerbate existing inequalities and hinder sustainable development efforts in host states. Large compensatory awards against states can deplete public resources, and the fear of potential arbitration claims can create a chilling effect on regulatory actions, where states may become hesitant to enact necessary regulations to protect public health, the environment, or social equity, fearing costly litigation and significant financial penalties. The phenomenon of so-called mega-awards in investment arbitration presents a particularly troubling issue, as the magnitude of these awards often far exceeds the robustness of the legal reasoning underpinning them.[24] Mega-awards, typically defined as those involving compensation claims in the

[22] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), March 18, 1965, 575 U.N.T.S. 159. See generally Antonio Parra, *The History of ICSID*, Oxford University Press, 2012.

[23] *Amco Asia v. Indonesia*, Ad hoc Committee Decision on the Application for Annulment of 16 May 1986, pp. 27-39 in particular.

[24] See generally Martins Paparinskis, *A Case Against Crippling Compensation in International Law of State*

billions of dollars, pose significant challenges for host states, both financially and in terms of their regulatory sovereignty. These awards can have devastating impacts on the public finances of host states, especially those with limited economic resources, effectively diverting funds away from crucial public services such as healthcare, education, and infrastructure development. The imposition of such large financial burdens on states can exacerbate socio-economic inequalities and undermine efforts towards sustainable development and the alleviation of poverty. Moreover, as stated beforehand, the threat of mega-awards can create a chilling effect on state regulatory actions

The underlying legal reasoning for these mega-awards is often called into question, as the complexity and ambiguity of investment treaties leave ample room for varied interpretations. The legal standards applied in investment arbitration are inherently flexible and open to broad interpretation. Arbitrators, therefore, have considerable discretion in determining whether the actions of a state constitute a breach of its treaty obligations and in quantifying the resulting compensation. This discretion can lead to inconsistencies and unpredictability in arbitral awards, raising concerns about the equity and fairness of the process; and it is quite worrisome that in certain cases resulting in mega-awards the legal reasoning behind mega-awards has been criticized for lacking rigorous analysis.[25] The problematic nature of mega-awards is further exacerbated by the perceived lack of transparency and accountability in arbitral proceedings.[26]

All these issues have led to a progressive erosion of trust in investment arbitrators and numerous calls for greater accountability. The concerns about mega-awards, the perceived bias in favour of foreign investors, and the opaque nature of arbitral proceedings have collectively undermined confidence in the fairness and impartiality of the investment arbitration system. Stakeholders from various sectors, including host states, civil society, and even some investors, have increasingly voiced their dissatisfaction, calling for reforms that enhance the transparency, accountability, and balance of arbitral proceedings. These calls for reform, as stated beforehand, often include proposals for establishing a permanent investment court, introducing an

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*Responsibility*, Modern Law Review, Volume 83, Issue 6, 2020, pp. 1246–1286; *id.*, *Crippling compensation in the International Law Commission and investor-state arbitration*, ICSID Review - Foreign Investment Law Journal, Volume 37, Issue 1-2, 2022, pp. 289-312; Jonathan Bonnitcha, Sarah Brewin, *Compensation Under Investment Treaties: What are the problems and what can be done?*, International Institute for Sustainable Development, 2020.

[25] See the exemplary dissenting opinion of Georges Abi Saab in the Decision on Respondent's Request for Reconsideration in *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30.

[26] See *ex multis* Esmé Shirlow, David D. Caron, *The multiple forms of transparency in international investment arbitration: their implications, and their limits*, in Thomas Schultz, Federico Ortino (eds.), *Oxford Handbook of International Arbitration*, Oxford University Press, 2020, pp. 469-490; Jason W. Yackee, Jarrod Wong, *Transparency, accountability, and influence in the international investment law system*, University of Wisconsin Legal Studies Research Paper no. 1770, 2023, at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4408341; Christina Knahr, *Transparency, third party participation and access to documents in international investment arbitration*, Arbitration International, Volume 23, Issue 2, 2007, pp. 327-356; Emily F. Ariz, *Does the Lack of Binding Precedent in International Arbitration Affect Transparency in Arbitral Proceedings?*, University of Miami International and Comparative Law Review, Volume 29, Issue 1, 2022, pp. 356-378.

appellate mechanism, and ensuring greater public participation in arbitral proceedings. However, despite these well-intentioned suggestions, it is doubtful that even the most appropriate conduct by arbitral tribunals would re-balance the cards and make investment arbitration a level playing field. This scepticism stems from the fundamental nature of BITs and FTAs, which, even under the most rigorous interpretations, inherently favour the interests of foreign investors.

The core issue lies in the intrinsic design and objectives of BITs and FTAs. These agreements are primarily crafted to provide robust protections for foreign investors, ensuring that their investments are safeguarded against unfair treatment, expropriation, and other forms of state interference. While such protections are vital for encouraging cross-border investments and fostering economic growth, they inevitably create a framework that prioritizes investor rights over the regulatory autonomy of host states. The language of these treaties often includes broad and vaguely defined standards, such as the requirement for "fair and equitable treatment" or "full protection and security", which arbitrators are tasked with interpreting. Given the investor-centric origin of these provisions, their application tends to tilt the balance in favour of protecting investor interests, sometimes at the expense of the host state's ability to pursue legitimate public policy objectives.[27]

This inherent bias is aggravated by the very nature of investment arbitration, where the disputing parties are on unequal footing. Treaties, as previously mentioned, offer in practice rights to investors without balancing obligations, and obligations to state without corresponding rights – and this is obviously reflected in arbitral proceedings. Moreover, the private and confidential nature of arbitral proceedings contributes to the perception of an imbalanced system. The lack of transparency in how arbitrators are appointed, how decisions are made, and the absence of public oversight create an environment where the interests of powerful investors are seen as largely overshadowing broader public interests. Even the most well-meaning arbitrators, committed to impartiality and fairness, ultimately operate within a system that structurally favours one side. As such, their decisions, no matter how carefully reasoned, are constrained by the pro-investor bias embedded in the very fabric of BITs and FTAs.

Given these considerations, the ethical duties of arbitrators come sharply into focus.[28] In light of the inherent bias within the system, arbitrators face a difficult ethical conundrum. On one hand, they have to upholding the specific legal obligations set out in BITs and FTAs, without considering the broader implications of their decisions on the host states and their populations; on the other, they have to live with the possible consequences of issuing awards that severely impact on the economic welfare of host

[27] Despite the significant contributions of case law and scholarly work to the understanding of the substantive content of these expressions, the textual provisions in most treaties remain sparse and susceptible to varied interpretations. See generally Roland Kläger, *"Fair and equitable treatment" in international investment law*, Cambridge University Press, 2011; Velimir Živković, *Fair and equitable treatment and the rule of law*, Edward Elgar Publishing, 2023; Martins Paparinskis, *The international minimum standard and fair and equitable treatment,* Oxford University Press, 2013; Sebastian Mantilla Blanco, *Full protection and security in international investment law*, Springer, 2019; August Reinisch, Stephan Schill (eds.), *Investment protection standards and the rule of law*, Oxford University Press, 2023.

[28] Alexandre Marques Da Silva Martins, *Challenges to Transparency and Ethics in Alternatives to Arbitration in the Realm of International Investments*, Revista de Direito Internacional Econômico e Tributário, Volume 11, Issue 1, 2016, pp. 321-376; Katia Fach Gómez, *supra* note 19 at pp. 1-22.

states and their populations. Therefore, in light of the structural flaws of the system of investment arbitration and the impulses for reform of the scholarship, an important question arises: what are the ethical duties of arbitrators besides their professional ones? Should arbitrators push the boundaries of their mandate to address the broader equity concerns, or should they strictly adhere to the letter of the law as set out in BITs and FTAs, even if it perpetuates the existing imbalances? These questions highlight the need for a fundamental rethinking of the role and responsibilities of arbitrators in the international investment regime.

## 4. What should arbitrators do?

The professional duties of arbitrators are well-known, as they are comprehensively outlined in the ICSID Convention and the principal arbitration rules, which include frameworks such as the UNCITRAL Arbitration Rules,[29] the ICC Arbitration Rules,[30] and others.[31] These duties encapsulate a range of obligations critical to the conduct and successful outcome of arbitral proceedings. To sum up the main responsibilities very briefly, arbitrators must decide on the tribunal's competence, which entails determining whether the tribunal has the jurisdiction to hear and adjudicate the dispute at hand;[32] to decide on the claims brought before the tribunal 'in accordance with such rules of law as may be agreed by the parties' or, in the absence of such agreement, 'the host state's law and such rules of international law as may be applicable';[33] to take the necessary evidence appropriately, which involves managing the evidentiary process, including the collection, presentation, and assessment, adopting a fair and balanced approach to ensure that all relevant facts and arguments are considered before reaching a decision.[34] Furthermore, arbitrators are endowed with the 'gap-filling' power under Article 44 of the ICSID Convention, which allows them to resolve procedural issues that are not explicitly addressed in the arbitration rules or the parties' agreement.[35] This discretionary power enables arbitrators to adapt the procedural framework to the specific

[29] Available at https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration.

[30] International Chamber of Commerce, 2021 Rules of Arbitration, Art. 13(2), available at https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/ (last visited 15 November 2022).

[31] For example, the Arbitration Institute of the Stockholm Chamber of Commerce, Arbitration Rules, Art. 18(1) and (2), available at https://sccinstitute.com/media/1407444/arbitrationrules_eng_2020.pdf, or the London Court of International Arbitration, Arbitration Rules 2020, Art. 5(3), available at https://www.lcia.org/media/download.aspx?MediaId=837.

[32] See *ex multis* William W. Park, *The Arbitrator's Jurisdiction to Determine Jurisdiction*, 13 ICCA Congress Series, Vol. 55, 2007, pp. 17-33; Phillip Landolt, *The Inconvenience of Principle: Separability and Kompetenz-Kompetenz*, Journal of International Arbitration, Volume 30, Issue 5, 2013, pp. 511-530; Debora Visconte, *Competência Arbitral. Princípio Kompetenz-Kompetenz. Alegação de Contrato de Adesão*, Revista Brasileira de Arbitragem, Volume 9, Issue 35, 2012, pp. 93-109.

[33] ICSID Convention, Article 42(1); the language of the Convention reflects the commonly applicable rules of international law.

[34] May I refer the reader to the international standard of the IBA Rules on the Taking of Evidence in International Arbitration, at https://www.ibanet.org/MediaHandler?id=def0807b-9fec-43ef-b624-f2cb2af7cf7b.

[35] Article 44 of the ICSID Convention states that '[i]f any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.' This rule also reflects the commonly adopted standard in investment arbitration outside of the ICSID framework.

needs of the case; and to decide on additional claims and counterclaims that arise during arbitral proceedings, as well as for ruling on provisional measures. Finally, *ça va sans dire*, the arbitrators must provide the reasoning upon which their award is based.[36]

Beyond these procedural and substantive duties, arbitrators are also subject to stringent personal requirements, which can be synthesized with the declaration of independence, impartiality, availability, and commitment to confidentiality. The declaration of independence ensures that arbitrators are not influenced by any external interests or relationships that could compromise their impartiality at the time of the appointment. This declaration must be made at the outset of the proceedings and must be upheld throughout arbitral proceedings. Impartiality is equally crucial, requiring arbitrators to remain unbiased and fair in their conduct and decision-making, ensuring that all parties are treated equitably. The commitment to confidentiality obligates arbitrators to protect the confidentiality of arbitral proceedings, safeguarding sensitive information from unauthorized disclosure. Arbitrators are also under an obligation to promptly disclose any change of circumstances that may affect their independence, impartiality, or availability. This duty of continuous disclosure is essential for maintaining the integrity of arbitral proceedings and for preserving the trust of the parties involved.[37]

In addition to these well-established duties, a number of arbitral institutions have issue pledges and codes of ethics that have *de facto* formalized the so-called 'implied duties' of arbitrators, which focus on the relationship between the arbitrators and the parties within the proceedings. These implied duties encompass several key aspects. Firstly, arbitrators are expected to engage in open and constructive communication with the parties, ensuring transparency and fostering a cooperative environment. This includes keeping the parties informed about procedural developments and providing clear and reasoned explanations for procedural and substantive decisions. Secondly, arbitrators are obliged to manage the proceedings efficiently, balancing the need for thoroughness with the imperative of avoiding unnecessary delays and costs. This involves setting realistic timelines, encouraging the timely submission of documents, and making prompt decisions on procedural matters. Thirdly, the implied duties emphasize the importance of respect and courtesy, requiring arbitrators to treat all parties and their representatives with dignity and professionalism. This duty extends to managing the conduct of hearings and interactions in a manner that upholds the decorum of arbitral proceedings. The formalization of these implied duties underscores the evolving standards of ethical conduct expected of arbitrators. It highlights the need for arbitrators to go beyond the mere technical application of procedural rules and to

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[36] As required by Article 52(1)(e) of the ICSID Convention. See generally Marc Sturzenegger, *ICSID Arbitration and Annulment for Failure to State Reasons*, Journal of International Arbitration, Volume 9, Issue 4, 1992, p. 173; Justice Bingham, *Reasons and reasons for reasons: differences between a court judgment and an arbitration award*, Arbitration International, Volume 4, Issue 2, 1988, pp. 141-154.

[37] Bruno Manzanares Bastida, *The independence and impartiality of arbitrators in international commercial arbitration,* Revista E-Mercatoria, Volume 6, Issue 1, 2007, pp. 1-15; Alan Redfern, *The Importance of Being Independent: Laws of Arbitration, Rules, Guidelines-and a Disastrous Award*, Indian Journal of Arbitration Law, Volume 6, Issue 1, 2007, pp. 9-23; Audley Sheppard, *Arbitrator independence in ICSID arbitration,* in Christina Binder, Ursula Kriebaum, August Reinisch, Stephan Wittich (eds.), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*, Oxford University Press, 2009, pp. 131-156.

embrace a holistic approach to their role, one that considers the broader implications of their conduct and decisions on the fairness and integrity of arbitral proceedings.[38]

Should arbitrators concern themselves with "external" inputs and considerations? In light of the structural imbalance of investment arbitration, one may argue that they should consider the needs and positions of the peoples of host states in their decisions. However, this expectation lacks a legal basis within the applicable investment treaties and arbitration rules. The primary duty of arbitrators is to interpret and apply the provisions of these treaties and agreements as they stand, without overstepping into areas that are not explicitly covered by the law. Furthermore, it is suggested that arbitrators should avoid issuing mega-awards due to their potentially devastating financial impact on host states. Yet, this stance is more rooted in moral reasoning than legal mandates. There are no specific rules within the existing legal frameworks that obligate arbitrators to cap the value of awards; their primary concern is to ensure that the compensation is commensurate with the harm suffered by the investor, as per the treaty terms. Additionally, there have been calls for arbitrators to incorporate human rights and environmental concerns into their deliberations, irrespective of the specific stipulations of the BITs or FTAs involved. The very fact that only a few agreements explicitly mention such considerations indicates that arbitrators are not generally required to take these issues into account unless explicitly stated in the governing treaty. This selective inclusion of human rights and environmental provisions underscores that, in the absence of explicit directives, arbitrators are bound by the terms of the treaties as they are written. Lastly, it is often argued that arbitrators should consider the positions of civil society in their decision-making processes. While arbitrators have the discretion to accept *amicus curiae* briefs, which can provide valuable insights and perspectives from civil society, they are under no legal obligation to factor these submissions into their final decisions. The procedural rules grant arbitrators the flexibility to accept such briefs, but this is a permissive power rather than a mandatory requirement. Consequently, arbitrators can choose whether or not to incorporate these external viewpoints into their rulings, depending on the relevance and utility of the information provided.

### 5. An ethical dilemma: to act or not to act?

Calls for arbitrators to apply "personal" ethics in their arbitral work might initially appear justified given their role in performing a public law function. Investment arbitration is distinct from commercial arbitration; it is not a private matter but rather an expression of the public law nature inherent in BITs rather than the private law nature of investment or concession contracts. Despite investment arbitration being an alternative to court proceedings, the process retains a quasi-judicial character because states, as subjects of public law, offer arbitration in place of domestic court proceedings as a

[38] Dario Alessi, *Enforcing Arbitrator's Obligations: Rethinking International Commercial Arbitrators' Liability*, Journal of International Arbitration, Volume 31, Issue 6, 2014, pp. 735-784; Margaret L. Moses, *Inherent and Implied Powers of Arbitrators*, Loyola University Chicago School of Law Research Paper No. 2014-015, Available at SSRN: https://ssrn.com/abstract=2501046; Michael Hwang, Katie Chung, Fong Lee Cheng, *Claims Against Arbitrators For Breach Of Ethical Duties*, in Arthur W. Rovine (ed.), Contemporary Issues in International Arbitration and Mediation: The Fordham Papers (2007), Brill, 2008, pp. 225-246.

concession to investors, which is transformed into a right through international treaties. This right, however, is not inherent to investors.

However, there is a significant limitation to the ethical considerations arbitrators can incorporate into their decisions. The ICSID Convention, the ABA Guidelines, or most other codes of conduct do not permit arbitrators to consider concerns external to the claim or the applicable law. In fact, deviating from the applicable law can lead to the annulment or setting aside of an award, with the form and shape of this action varying depending on whether the ICSID Convention or the New York Convention applies. Therefore, there is no professional requirement - and it is debatable whether there is even an ethical one - for arbitrators to apply anything other than the applicable law to the dispute. They are mandated to consider only the interests of the investor as outlined in BITs and FTAs or, at the very least, the party presenting the claim. While fairness and justice are undeniably significant concerns that are frequently neglected in international investment law, the power of arbitrators is substantially limited. They wield considerable influence, but their hands are ultimately tied by the constraints of the law and the boundaries of their mandate. The problem lies not with investment arbitration itself, as its critics may suggest, but with the investment law framework. Asking arbitrators to address and rectify the inherent flaws of this system without a comprehensive rethinking of the regime is fundamentally unfair.

The analogy of investment arbitration to a football game, where the team of the investor can either win or draw, and the host state can only draw or lose, aptly illustrates the inappropriateness of asking the referee, *i.e.* the arbitral tribunal, to tilt the scales in favour of one team over the other. Arbitrators are bound by the rules of the game, and expecting them to adjust these rules based on personal ethics or external concerns undermines the foundational principles of their role. The arbitrators' primary duty is to apply the law as it stands, ensuring that their decisions are grounded in the legal framework governing the dispute. Introducing personal ethical considerations or external factors would compromise their impartiality and the integrity of arbitral proceedings.

This situation underscores the need for a broader reassessment not solely of investment arbitration, as the UNCITRAL Working Group III is currently undertaking, but of the investment law regime itself.[39] Reforming the system to address issues of fairness and justice more comprehensively would alleviate the undue burden placed on arbitrators and ensure a more balanced and equitable approach to resolving investment disputes. While the application of personal ethics by arbitrators in their arbitral work may seem warranted, the existing legal framework and professional guidelines significantly restrict their ability to do so. The quasi-judicial nature of investment arbitration and the specific requirements of BITs and FTAs compel arbitrators to adhere strictly to the applicable law. The broader issues within international investment law necessitate systemic reform rather than placing the onus on arbitrators to rectify its flaws.

## 6. Concluding remarks

As it has been hinted in various parts of this article, arbitrators as a category are hardly innocent when one thinks about the troublesome effects of investment arbitral

[39] All the documents on the works of the UNCITRAL Working Group III (Investor-State Dispute Settlement Reform) are available at https://uncitral.un.org/en/working_groups/3/investor-state.

awards on the populations of the host states. Questionable interpretations of BITs and FTAs, the application of commercial law principles to public international law instruments, and the narrow focus on the impacts of state actions on investors, without equally considering the broader societal and environmental consequences, has led to the criticism that the system of investment arbitration prioritizes corporate interests at the expense of national sovereignty and public welfare. The cases that could be criticized for debatable approaches to the interpretation of the applicable law adopted by the arbitrators are in fact a minority and are rather well-known in the arbitral community; however, even when cases are decided based on the appropriate legal and interpretive principles, the outcomes are often in favour of investors. This perceived imbalance stems from the inherent design of the applicable laws, which are specifically structured to protect investors, sometimes at the expense of state sovereignty and regulatory autonomy. Investment law is primarily crafted to safeguard the interests of investors. BITs and FTAs treaties are aimed at providing a stable and predictable investment environment, ensuring protection against expropriation, unfair treatment, and other risks that might deter or affect investment. While these provisions are essential for encouraging foreign investment, they can also lead to situations where states are penalized for undertaking legitimate regulatory measures.

The imbalance in the rules of investment arbitration leaves arbitrators in a constrained position. Their role is to interpret and apply the law as it stands, not to reshape it. Arbitrators are bound by the treaties and legal frameworks in place, which are heavily investor-centric, and any attempt by arbitrators to employ "creative" interpretations to balance interests more equitably would likely lead to annulments and setting aside of awards. The focus for achieving a more balanced system should instead shift from investment arbitration to investment law itself. Calls for reform should target the substantive rules governing investment protection rather than the arbitral process. It is not the role of arbitrators to act as lawmakers; their mandate is to adjudicate disputes based on existing laws. However, there is ample scope for states to renegotiate and amend BITs and FTAs to strike a better balance between protecting investors and preserving regulatory space for states. Recent trends in treaty-making reflect a growing awareness of the need for a more balanced approach. Some new treaties incorporate provisions that explicitly recognize the right of states to regulate in the public interest, including for health, safety, and environmental protection, and also include mechanisms to enhance transparency and public participation in arbitration, aiming to rebuild trust in the system. The path to reform is and undoubtedly long and rugged trail, and it requires concerted efforts from multiple stakeholders, including states, investors, legal practitioners, and international organizations.[40] However, it is a necessary journey to ensure that the investment legal regime evolves in a way that is fair and sustainable for all parties involved. By recalibrating the rules of the game through renegotiated treaties, the international community can create a more balanced and equitable system that respects both the rights of investors and the sovereignty of states.

[40] Stephan Schill, *MFN Clauses as Bilateral Commitments to Multilateralism: a Reply to Simon Batifort and J. Benton Heath*, American Journal of International Law, Volume 111, Issue 4, 2017, pp. 934.

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