Kluwer Arbitration Blog

The Threshold for Challenges in ICSID Arbitration: Interpreting the 'Manifest Lack' Standard

Riddhi Joshi · Thursday, May 7th, 2020

The strength of any dispute settlement mechanism will depend upon its consistency with the requirements of independence and impartiality. Disclosures made by adjudicators prior to adjudicating a dispute, and challenges raised against adjudicators during the course of dispute settlement, target a perceived absence of independence or impartiality. The purpose of this post is to juxtapose the standards of independence and impartiality applicable to adjudicators in international commercial arbitration *vis-à-vis* those followed in WTO dispute settlement proceedings. The post examines this issue in order to propose an acceptable standard for the purposes of investment arbitration.

Generally speaking, arbitration rules guiding international commercial arbitration permit the removal of arbitrators on the demonstration of '*justifiable doubts*' about their independence and impartiality. The WTO Dispute Settlement Understanding (hereinafter, "DSU") presents a higher threshold requiring a '*material violation*' of the criteria. By contrast, investment arbitration under the ICSID Convention and Rules adheres to a standard of a '*manifest lack*' of competence, character, and/or independent judgment; a standard which is neither as stringent as '*material violation*' in the DSU nor as lenient as '*justifiable doubts*' in commercial arbitration (and investment arbitration under the UNCITRAL Rules). It is my argument that the '*manifest lack*' threshold in the ICSID regime should be interpreted in line with the higher WTO standard, rather than the lower threshold generally applicable in the international commercial arbitration context.

The ICSID Regime

Article 57 read with Article 14 of the ICSID Convention mandate disqualification only in circumstances where there is a *'manifest lack'* of character, competence or independent judgment. While it is only the 'independence' requirement which finds mention in the English version of the Convention, the equally authentic Spanish version requires 'impartiality' as well, thereby necessitating analysis of both qualities for a finding of bias.

Arbitral awards in the ICSID regime either attempt to interpret the '*manifest lack*' standard in line with that of '*justifiable doubts*', or acknowledge the distinction and attribute a higher threshold.

An example of the former instance can be seen in *Blue Bank v. Venezuela*. The Chairman of the

ICSID Administrative Council noted that the phrase '*manifest*' in Article 57 does not require material evidence to demonstrate a lack of independence and impartiality. Rather, even the *appearance of dependence or bias* was deemed sufficient to remove a party-appointed arbitrator. This line of argument was adopted in *Burlington Resources v. Ecuador* and *Caratube v. Kazakhstan* as well. However, the Tribunal in *Caratube* qualified the requirement by conceding that any challenge under the ICSID Convention imposed a heavy burden of proof on the challenging party.

On the other hand, some tribunals have acknowledged the uniqueness of ICSID arbitration in giving a different shape and form to the '*manifest lack*' requirement. For instance, in *Suez v. Argentina*, the Tribunal applied a four-part test to determine whether an alleged conflict of interest demonstrates a manifest lack of independence and impartiality: proximity, intensity, dependence, and materiality. The unchallenged arbitrators, in this case, followed the reasoning of the decision in *Amco v. Indonesia*: "*The challenging party must not only prove facts indicating the lack of independence, but also that the lack is 'manifest' or 'highly probable', and not just 'possible' or 'quasi-certain'*". Subsequently, the challenge in *Total v. Argentina* upheld the same criteria.

Finally, as part of the ongoing Rules and Regulations Amendment Process of the ICSID, the Third Working Paper on Proposals for the ICSID Arbitration Rules Amendment did contain a proposal to amend the grounds and standard for disqualification. However, this was ultimately rejected by the Secretariat. It remains to be seen how the UNCITRAL Working Group III on Investor-State Dispute Settlement Reform influences the Rules Amendment process of the ICSID. A noteworthy development is the recent release of the first draft of the Code of Conduct for Adjudicators in Investor-State Dispute Settlement addressing issues of independence and impartiality of adjudicators in ISDS – discussed here on the blog.

Approaches in International Commercial Arbitration

Article 11 of the UNCITRAL Arbitration Rules 2010 sets out the standard for disclosures to be made by arbitrators prior to and during the continuance of the arbitral proceeding. Article 12 stipulates situations in which the appointment of an arbitrator may be challenged by a party. In both, the circumstances meriting disclosure or challenge *must give rise to 'justifiable doubts' regarding the arbitrator's independence and impartiality*. A similar requirement can be seen in the LCIA Arbitration Rules as well as the ICC Rules. The IBA Guidelines on Conflict of Interest in International Arbitration supplement this threshold and contemplate circumstances that could lead to '*justifiable doubts*' of independence or impartiality. Part II of the Guidelines consists of four non-exhaustive lists signifying the gravity of the conflict of interest- Green, Orange, Waivable Red and Non-Waivable Red.

In international commercial arbitration, this '*justifiable doubts*' threshold has been interpreted by tribunals to imply an objective standard from a rational, third person's point of view. The broad and permissive interpretation of the term can subject a party-appointed arbitrator to disqualification on even less-severe grounds, such as the mere appearance of bias as was in the case of *Commonwealth Coatings v. Continental Casualty*. While this standard might be suitable in international commercial arbitration, it is the author's opinion that introducing the *'justifiable doubts'* understanding into the *'manifest lack'* requirement would be misplaced. It could lead to the dilution of the disclosure and challenge standard, and potentially exclude capable and highly-

qualified arbitrators from an already small pool of experts.

The following case was governed by the ICSID Convention and Rules and left no scope for applying the UNCITRAL Arbitration Rules. Yet, the standard adopted in *EDF International S.A. v. Argentine Republic* was whether 'reasonable doubts' could exist about the arbitrator's capacity to exercise independent judgment. This case (in addition to those in the previous section) demonstrates how the incorrect application of standards obfuscates the matter. By importing the practice prevalent in international commercial arbitration, the requirement for a grave or severe bias under the ICSID regime is eliminated.

In a similar vein, the IBA Guidelines were framed with the intention that their applicability to the field of investment arbitration would be minimal. As discussed above, the consequence of incorporating the lower UNCITRAL – IBA standard into ICSID proceedings is that the higher '*manifest lack*' standard is misconstrued. Given that the investment arbitration community is tight knit and issues that arise in disputes are often repetitive, the borrowing of the lower standards in the IBA Guidelines and other arbitration rules would hamper the dispute resolution process and permit the removal of arbitrators on frivolous grounds.

WTO's Dispute Settlement Understanding

Dispute settlement under the aegis of the WTO shares a number of similarities with investment arbitration – stakeholders are similarly numerous, risks are similarly high, and consequences are similarly grave. Additionally, both fall under the broader realm of 'international economic law'. Members of the WTO are party to the DSU which provides for members to submit disputes for resolution. Article 8 of the DSU addresses the composition of the Panel while Article 17 addresses the composition of the Appellate Body. Common to both are certain requirements to eliminate conflict of interest and ensure that highly qualified individuals with requisite experience are appointed.

While impartiality is not specifically a pre-requisite, other stipulations such as absence of common nationality between members of the panel and the parties guarantee both independence and impartiality. Supplementing the DSU are the Rules of Conduct, Section VIII of which permits parties to challenge the appointment of an individual to a Panel or Appellate Body.

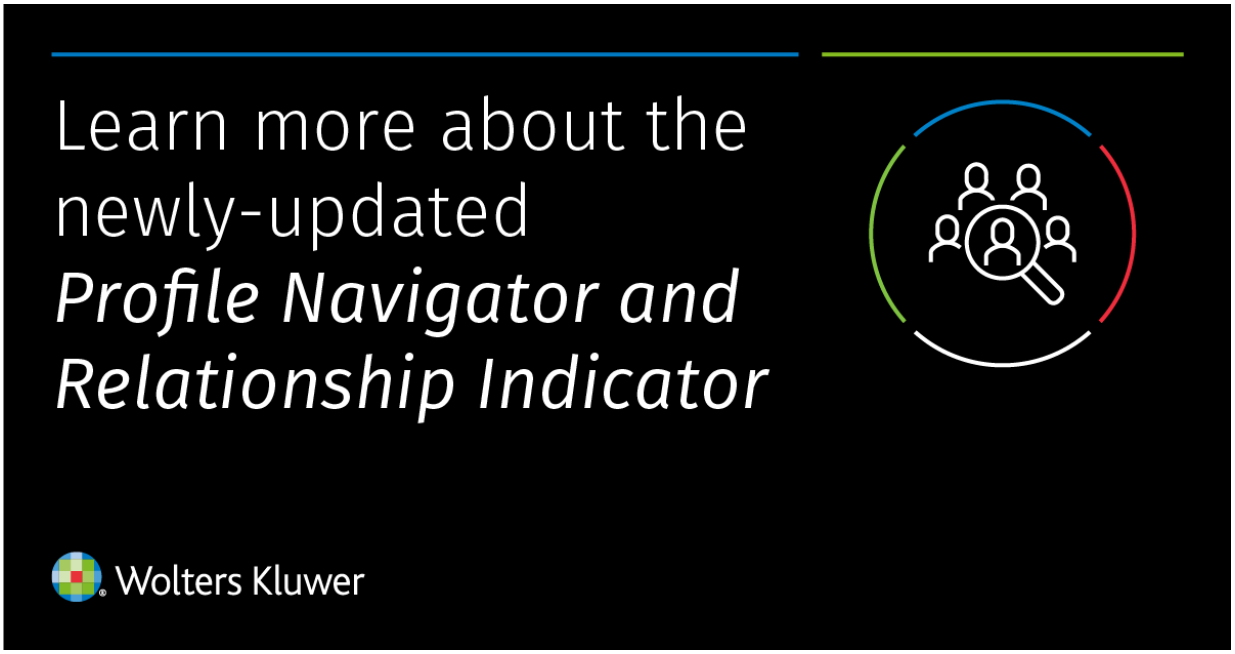
The threshold for challenging an appointment is that of providing evidence to establish a '*material violation*' of the obligations of independence, impartiality, or confidentiality. As of the time of writing this post, no appointment to a Panel or Appellate Body has ever been formally revoked. However, after the submission of evidence showing a '*material violation*', there have been some instances of voluntary resignations.

Given that discussions surrounding the challenge to a member are confidential, the understanding of the term '*material violation*' is nebulous. However, it can be said that such a threshold implies that any allegation of conflict of interest must be backed by substantial evidence, and not merely create a suspicion in the mind of an objective, third party observer. It is also important to note that this higher threshold requiring a '*material violation'* of the criteria is apposite in light of the nature of the disputes and the limited availability of individuals possessed with the expertise to resolve them.

Conclusion

Investment arbitration, WTO dispute settlement, and international commercial arbitration facilitate dispute resolution stemming from various aspects of transnational commerce, trade and investment. Investment arbitration, however, is unique. As it deals with States' obligations under public international law, the effects of the award are often felt beyond the two parties to the dispute. The above analysis also reveals that there exists great congruity between investment arbitration and WTO dispute settlement with respect to the qualities required of arbitrators and the prominent nature of the disputes. It follows that similar standards of disclosure and challenge could be adopted in both, bearing in mind the high degree of analogous considerations. It must also be borne in mind that frivolous challenges permitted through a lower standard of independence and impartiality would be costly, delaying, and even put the award at risk.

Cases such as *Total* and *Amco* are landmark as they acknowledge the nuances involved in investment arbitration. They lay the ground for an elevated construction of '*manifest lack*'. *Burlington Resources, EDF International* and *Blue Bank,* on the other hand, must be distinguished in the developing ICSID jurisprudence for including '*justifiable doubts*' within the regime. In the coming years, efforts must be made to increase consistency in the understanding of '*manifest lack*' to reduce chances of injustice or delay, and retain the relevance of ICSID in changing times.



This entry was posted on Thursday, May 7th, 2020 at 8:00 am and is filed under Disclosure, Independence and Impartiality, International Commercial Arbitration, Investment Arbitration, Working Group III, WTO
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