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TRANSPARENCY ISSUE IN THE AMEDMENT OF ICSID ARBITRAITON RULES - PUBLIC RIGHT TO INFORMATION VS PUBLIC CONFIDENCE?

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Abstract: The International Centre for Settlement of Investment Disputes (ICSID) began its fourth-time Arbitration Rules amendment process[1] on 7 October 2016. One of the issues currently being looked into is the scope of transparency and its expansion in the upcoming amendment. The public consultation for the process reveals that consultees are keen to see a greater level of transparency be brought into this arbitration dispute mechanism. In particular, the dispute process can involve host states, investors, home states and the public. Many speculations were expressed on this issue. However, not until April 2018, one gets a glimpse of how the working paper group may address the issue of transparency at the Charles N.Brower Lecture on International Dispute Resolution on 5 April 2018 given by, and at a later interview[2] with Ms. Meg Kinnear, the Secretary General of ICSID. The speech indicates that the consideration on the issue of transparency is "public confidence". This is different from the ethos of "the public's right to know" instilled in the Transparency Rules. This article analyses the transparency issue from the language used in the interview to formulate a view on how this issue would be and could be treated in the amendment.

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[1] 2017 The ICSID Rules Amendment Process, at 1. https://icsid.worldbank.org/en/Documents/about/ICSID%20Rules%20Amendment%20Process-ENG.pdf <accessed on 23 June 2018>

[2] Crina Baltag (Acting Editor), Interview with Meg Kinnear, Secretary General of the International Centre for Settlement of Investment Disputes, Kluwer Arbitration Blog, 15 April, 2018

On 5 April 2018, the ICSID Secretary-General, Ms. Meg Kinnear, delivered a speech at the Charles N. Brower Lecture on International Dispute Resolution.[3] The speech provides the clearest indication so far the direction the ICSID amendment may take for its investment Arbitration Rules. It is said that the purpose of the amendment is to provide a tangible system for resolution of investment disputes. The amendment is aimed to be a practical and positive change to deliver a modern and efficient system using simplified language for easy understanding of the rules. With a broad consultation conducted, there may be hope for consistent consensus building. Her speech also provides an insight into how working paper may address transparency issues raised at the consultation stage. In her speech, Ms. Kinnear firstly highlighted several areas which are currently considered in the working paper. These include: public access to hearings, public access to case documents, participation of non-disputing party, mandatory publication of awards and an early dismissal for lack legal merits. She also stressed that in order to deliver a smooth amendment at the ICSID Annual Conference in October 2019, the importance of ensuring a high level of consensus among 66% of 153 ICSID Member States is paramount. The consensus can only be achieved by maintaining the balance between the interests of investor and host state through a pragmatic approach of improvement of dispute settlement. Among others, the most important message arising from the speech reflecting the scale of amendment is that there will not no radical changes. Instead there should be an incremental reform accompanied by a pragmatic and an efficient approach. Hopefully, this will ensure an approval required for the amendment. This is because, in her own words, most States require clarity and certainty about the direction the amendment will take. Particularly, many rules in the current version already provides a basis for a systematic

[3] Ms. Meg Kinnear, 2018 Charles N. Brower Lecture on International Dispute Resolution, https://www.youtube.com/watch?v=xDUtMVejidI&feature=youtu.be&list=PLTPAfLBOjfQLSs3s8Nx5Jj94Guj3goxCs <accessed on 23 June 2018>

reform which delivers the capacity to allow States and investors to move with the direction led by ICSID.

In her speech, she spoke about the ground rules followed in the Working Paper. They are: Commitment to keep balance between investors and Member States, avoiding over regulation, and using plain and gender-neutral language in its drafting style. Due to the difficulties associated with amendment to a Convention, the working paper will not seek amendment to the ICSID Convention.[4] Instead, the working paper will only suggest amendment to the ICSID Arbitration Rules. To resist the temptation to over-regulate, the amendment will be aided by guidance papers, sample precedent, and soft law. It is also pointed out that the working paper group would welcome interaction between the ICSID amended Arbitration Rules and modern BITs to allow states space to adopt newer procedural rules. The working paper is also said to contain an awareness of an overlap between the amended Rules and other conventions, such as the Mauritius Convention. However, it was pointed out that the so-called opt in / opt out technique in the Mauritius Convention will not be incorporated in the ICSID amendment.

Besides transitional provision and others,[5] the Secretary-General pointed out that the most delicate issue which requires to be considered carefully is the issue of transparency. In her view, this issue is further linked to the amendment in relation to allocation of costs and tribunal's

[4] Although Convention amendment is not sought, Ms. Meg Kinnear indicated that future convention changes will be flagged up, such as the enlargement of the panel of arbitrators and conciliators.

[5] The possible amendment includes: simple worded rules, requirement of more factual and appointment details from claimant when a request for arbitration is made, designated request for arbitration at the first memorial, duty to proceed in an efficient manner, 100% electronic filing, tribunal's duty of disclosure and disqualification and transparency. The areas of appeal facilities and tribunal, mandatory list of arbitrator's appointments will not be addressed but the double hatting and third party funding are hoping to be indirectly regulated through the duty of an early disclosure and avoidance of conflict of interest.

duty of disclosure and disqualification. This may include an elaborated tribunal's duty of disclosure and declaration in relation to its relationship to the parties, to the counsels, to co-arbitrator and to funders. However, the method was not specified during the speech, though her mention of soft law may provide some indication. She made it clear that Mauritius Convention and the Transparency Rules (The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, hereinafter Transparency Rules)[6] is only to supplement the ICSID Rules on transparency. She indicates that mandatory publication of award, orders and decisions will be included to promote consistency and coherence in the decision-making, whereas, other documents will still be subject to the treaty obligations and parties' consent.

This article intends to analyse the transparency issue from the language used in the interview to formulate a view how this issue would be and could be treated in its amendment. To that end, this paper will proceed as follows. In the first part, the author will contextualise the issue of transparency by reference to the current ICSID Arbitration Rules. The author will summarise the differences and issues related to access to hearing and documentation, *amicus curiae* briefs, and publication of awards. From this perspective, the issues will be examined against the speech made by the Secretary – General of ICSID to illustrate how the issue of transparency may currently be viewed in the working paper. The examination will be followed by an assessment of the link between transparency and "public confidence" mentioned in the speech and the interview on the ICSID amendment. The assessment will query who the public may be in the eye of the working paper group. From the assessment of "the public", the paper will

[6] https://icsid.worldbank.org/en/Pages/about/Amendment-of-ICSID-Rules-and-Regulations.aspx <accessed on 23 June 2018>

argue that the transparency considered in the ICSID amendment covers not only privacy and documentation but also more immediate issues of third party funding and double-hatting, which are currently considered to be regulated by means of soft law and relevant BITs mechanisms. I will conclude this paper with a critical analysis on whether a soft law like the IBA Guidelines are equipped to address these issues to achieve transparency.

CURRENT TRANSPARENCY PROVISIONS UNDER ICSID ARBITRATION RULES AND THE TRANSPARENCY RULES AND THEIR DIFFERENCES

Current ICSID Arbitration Rules – Parties' Consent And Tribunal's Discretion

Prior to Ms Kinnear's speech delivered in April 2018, ICSID states on its website that the amendment seeks expansion of transparency provisions with an interaction between the amendment and the Mauritius Convention and the Transparency Rules. It states that open hearings, publication of awards and submission of *amicus curiae* briefs will be sought. Currently, these practices are regulated under the ICSID Arbitration Rules and the Arbitration (Additional Facility) Rules. For instance, the opening hearing may be possible under ICSID Arbitration Rule 32. Rule 48 of the ICSID Arbitration Rules provides publication of excerpts of award or publication of awards with parties' consent. Similarly, Rule 37 provides a legal basis for the submission of *amicus curiae* briefs in the ICSID investment arbitration.

In terms of access to hearing, though the 2006 ICSID Arbitration Rules amendment provides an opportunity for the public to access to an investment arbitration which is generally closed to non-parties, three hurdles are in place for the public to overcome before any non-parties can

gain access to part or all of the hearing. The three hurdles are consultation with the Secretary-General, parties' consent and tribunal's discretion. Furthermore, it has to be subject to the possibility of logistic arrangements.

The closeness of ICSID arbitration is evidenced in the language applied in Rules 32 (1) of the ICSID Arbitration Rules and Article 39(1) of the Arbitration (Additional Facility) Rules, where the participants of the arbitration proceedings are limited to the tribunal, officers of the tribunal,[7] parties, parties' agents, counsels and advocates as well as witnesses and experts who are invited by the disputing parties to give testimony.[8] Non-parties' access to the hearings can only be granted by the tribunal (1) without parties' objection and (2) after consultation with the Secretary-General.

The phrase used in Rule 32(2) "the Tribunal, after consultation with the Secretary-General" does not seem to suggest that the Tribunal must obtain the Secretary-General's consent before exercising its discretion. However, what it suggests is that the tribunal's discretion does not arise until the consultation has taken place. Supposing, the tribunal's discretion does not rely on the consent of the Secretary-General, one question which will be taken up in the later discussion on the current amendment is whether the removal of "after consultation with the Secretary-General" would be desirable since arguably the phrase does not serve a significant purpose in terms of tribunal exercising its discretion provided within both Rules.

[7] ICSID Arbitration Rules, Rule 32(2) and ICSID Arbitration (Additional Facility) Rules, Article 39(2).
[8] Ibid.

However, this interpretation cannot be said for the requirement of parties' consent before the tribunal exercises its discretion. It is essential to point out that the tribunal's initiative to open up hearings to non-parties can be overruled by the disputing parties' objection. In other words, it is clear that a hearing can only be opened up to non-parties following parties' approval. This approval does not have to be indicated jointly, but can be done unilaterally by either party. Disputing parties can expressly approve such an access or passively approve it without making objections to the discretion. Whatever way the disputing parties take to indicate their approval, it is clear that "access to hearing" is an issue led by the parties. The public's desire to know the information related to the disputes or arbitration proceedings does not play any part in this matter. Even with parties' approval, the public's access to an oral hearing can be rejected by the tribunal on the grounds of the lack of appropriate logistic arrangements. If the tribunal decides in favour of public access to hearings, arrangements to protect privileged information must be made, despite the fact that no definition of "privilege information" is provided in Rule 32(2) of both Rules.

Publication of awards is considered by the working paper. The possibility of expanding the scope of publication of awards in responding to the call for greater transparency provisions is further confirmed in Ms. Kinnear's speech. The current ICSID provisions on publication of awards are provided in Article 48(4) of the ICSID Arbitration Rules and Article 53(3) of the Arbitration (Additional Facility) Rules which is operated on the combination of parties' consent and tribunal's inherent duty. Under both provisions, the full publication of an award can only be made with parties' consent. The interpretation of this provision is that the parties must give the Centre or the Secretariat an express consent to enable the publication of the full

award. Any objections from one party would only provide both the Centre and the Secretariat a legal duty to publish the excerpts of the legal reasoning of the Tribunal.

The topic of amicus curiae briefs is also under review. The potential transparency provisions the amendment may maintain is the opportunity for non-disputing parties to file submissions, the so-called "*amicus curiae* briefs".[9] In terms of this practice, different from the wordings used in "access to hearings" and "publication of awards", though the provisions emphases the importance of "[a]fter consulting both parties", the decision allowing *amicus curiae* briefs seems to lie in the tribunal's discretion. This can be seen from the differences in the use of words of "[u]nless either party objects" provided for access to oral hearing,[10] "without the consent of the parties" for publication of awards[11] and "after consulting both parties" in Rules 37(2) of the Arbitration Rules and Article 41(3) of the Arbitration (Additional Facility) for submission of *amicus curiae* briefs. For the latter, the language does not suggest any consequences of parties' objection in relation to the tribunal's discretion.

However, the tribunal's discretion is subject to some justifications on its part. The tribunal has a duty to demonstrate that the submission made by non-disputing party, who has a significant interest in the proceeding,[12] is within the scope of the dispute.[13] Additionally, the submission must also have the value which "would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight

[9] https://icsid.worldbank.org/en/Pages/about/Amendment-of-ICSID-Rules-and-Regulations.aspx <accessed on 23 June 2018>
[10] (n 7)
[11] ICSID Arbitration Rules, Article 48(4) and ICSID Arbitration (Additional Facility) Rules, Article 53(3).
[12] Arbitration Rules, Rule 37(2) (c) and ICSID Arbitration (Additional Facility) Rules, Article 41(3) (c).
[13] Arbitration Rules, Rule 37(2) (b) and ICSID Arbitration (Additional Facility) Rules, Article 41(3) (b).

that is different from that of the disputing parties."[14] Furthermore, the tribunal has a duty to control the arbitration proceedings in ensuring that the submission of *amicus curiae* briefs "does not disrupt the proceeding or unduly burden or unfairly prejudice either party".[15] Most importantly, the tribunal has a duty to delivery due process provisions offering both parties an equal opportunity to present their observations on the briefs.

The Transparency Rules – Public Interest To Know

The ICSID's cureent approcah on transparency is different from the provisions provided by the Mauritius Convention and the Transparency Rules which are highlighted as international instruments which emulated the ICSID amendment in 2006. Research[16] has shown that the transparency provisions provided by these two instruments have already achieved a much higher degree of transparency than those provided under the current ICSID Arbitration Rules. The transparency provisions provided by the Transparency Rules are based on "public rights to know". This is evident in the design of default position and the removal of parties' consent element. The compulsory nature of the Rules is evident in various provisions of the Transparency Rules, such as applicability of the Rules to any investment arbitration subject to the UNCITRAL Arbitration Rules,[17] non-derogation of the Rules from disputing parties,[18] establishment of tribunal's power to conduct arbitration in a manner which is consistent with the transparency objectives.[19]

[14] Arbitration Rules, Rule 37(2) (a) and ICSID Arbitration (Additional Facility) Rules, Article 41(3) (a).
[15] Arbitration Rules, Rule 37(2) and ICSID Arbitration (Additional Facility) Rules, Article 41(3).
[16] H. Yu & M.B. Olmos Giupponi 'The Pandora Box Effects under the UNCITRAL Transparency Rules' 2016 (5) Journal of Business Law 347-372
[17] The Transparency Rules, Article 1(1).
[18] The Transparency Rules, Article 1(3)(a).
[19] The Transparency Rules, Article 1(3)(b).

Different from current ICSID limited transparency provisions which are based on parties' consent and tribunal's discretion (subject to certain conditions), the default position of the Transparency Rules is the disclosure of information related to the disputes and arising from arbitration proceedings. In the case of the tribunal's discretionary authority which requires the tribunal's consultation with the disputing parties,[20] the tribunal must consider "public interest in transparency"[21] and disputing parties' interest in a fair and efficient manner. A tribunal is also required to conduct arbitration in a manner with the promotion of transparency in mind[22] to the extent that the transparency objectives provided in the Rules always prevail over any conduct, measure or other actions having the effect of wholly undermining the objectives.[23] Furthermore, except the mandatory rules,[24] the Transparency Rules should prevail in the case of conflict of rules.[25]

Following the overarching objective of transparency, the Rules introduces the transparency provision in access to hearing, submission of *amicus curiae* briefings and publication of documentations and awards.[26] Apart from the submission of *amicus curiae* briefings, the default position taken in the Transparency Rules is the duty to ensure transparency. For instance, in relation to publication of documents, the documentations submitted to arbitration,

[20] The Transparency Rules, Article 1(3)(b).
[21] The Transparency Rules, Article 1(4)(a).
[22] The Transparency Rules, Article 1(5).
[23] The Transparency Rules, Article 1(6).
[24] The Transparency Rules, Article 1(8).
[25] The Transparency Rules, Article 1(7).
[26] Maria Nicole Cleis, *The Independence and Impartiality of ICSID Arbitrators* (Brill, 2017) 89.

documentations arising from arbitration and awards is subjected to the duty of transparency.[27] The exception to such a duty is confidential or protected information defined in Article 7 of the Transparency Rules. Similarly, in the efforts to ensure procedural transparency, apart from public hearing,[28] the tribunal has a duty to allow the submission by a non-disputing party to the treaty (home state) to provide treaty interpretation. Returning to the issue of *amicus curiae* briefings, though the tribunal's discretion to allow such submissions can only be initiated "after consultation with the disputing parties",[29] the parties' consent is not required. Furthermore, a third person only has to demonstrate its own significant interest in the arbitral proceedings and the submission would assist the arbitral tribunal in its determination with the different perspective or particular knowledge being brought to the proceedings. This applies to any submissions which are made outside the scope of the dispute.[30] In the tribunal's exercise of discretion in this matter to adapt the requirements of this Rules, the tribunal must observe the overarching transparency objective of the Rules provided in Article 1(3)(b) as well as avoidance of the transparency objective being undermined.[31]

The changes brought in by the Transparency Rules is the recognition of public right to know which was undermined by the ICSID "parties' consent" approach. In investment disputes, due to the nature of foreign investment activities, the people who can have a significant interest in the projects, the disputes, the conduct of the proceedings and the result of the arbitration are not limited to the disputing parties. The stakeholders who may have interest in the dispute

[27] The Transparency Rules, Articles 2 and 3(1).
[28] The Transparency Rules, Article 6(1).
[29] The Transparency Rules, Article 4(1).
[30] This condition is prescribed in Rule 37(2)(b) of the ICSID Arbitration Rules and Article 41(3)(b) of the Arbitration (Additional Facility) Rules).
[31] The Transparency Rules, Article 1(6).

includes the parties, the host state, the home state, the local business communities, and, most importantly, the public. Among the big players with financial resources, the general public can be the most vulnerable group whose rights can be easily sacrificed due to their lack of resources to present the negative impact on their livelihood in front of the tribunal. The lack of access to the proceedings will affect their right to know in order to protect their own social and economic rights. Standing from the viewpoint of the public's interest, it is not difficult to understand why the Transparency Rules introduces very different provisions from those provided in the ICSID Arbitration Rules in terms of publication of arbitration information and access to hearings.

MOST RECENT INDICATIONS GIVEN BY THE ICSID SECRETARY-GENERAL IN RELATION TO THE ISSUEOF TRANSPARENCY - PUBLIC CONFIDENCE

While there is no desire for any radical changes on the issue of transparency, the Secretary-General's speech expressed a limited dissatisfaction concerning the current provisions over privacy. Ms. Kinnear's concerns over transparency are the links between publication of awards, duty of disclosure and "public confidence". This leads to speculation that there would be no changes to the current provisions in Rule 32 (2). The current approach of "parties joint consent" could still be the key determining factor in the authorisation of attendance of a third person to the hearings. Nevertheless, the *amicus curiae* practice provided in Rules 37 was raised as an urgent issue in the current amendment. Under these circumstances it is very likely that one may not see the tribunal being imposed with a procedural duty to consider any *amicus curiae* submission made by a person or entity that is not a part to the dispute.

The "delicate issue" in relation to transparency mentioned in Ms. Kinnear's speech and interview is linked to "access to case-related documents / information". She takes the view that the most important aspects related to transparency in documents is "making decision and awards public" to increase public confidence.[32] The only issue raised in her speech is the likelihood of departing from "parties' consent" approach in relation to the publication of awards, orders and decisions to achieve "public confidence" in ICSID arbitration mechanism. To achieve public confidence, it is pointed out that the working paper group will suggest a mandatory publication of tribunal's awards, orders and decisions. Through the publications of awards, ICSID hopes to achieve a high level of consistency and coherence in the tribunal's decision-making and jurisprudence. This is intended to provide transparency to disputants with a clear guidance of the jurisprudence and legal reasoning. It will also allow the disputants to appreciate the operation of arbitration procedures and understand the jurisprudence and interpretation of foreign investment law. The words used by the Secretary-General at the interview were: '[t]he working paper therefore proposes mandatory publication of awards (or extracts of awards), decisions and orders.'

Contextualising the point on "public confidence" and transparency within the current ICSID provisions and Ms Kinnear's speech, the author's speculation is that there will be some changes to the current provisions. It is speculated that the current wording "extracts of awards" will not make its way into the amendment. This differentiates between the new ICISD amendment and the current Rule 48(4) of the ICSID Arbitration Rules, which already imposes mandatory duty

[32] Baltag, (n 2) point 6.

of publications of excepts of the legal reasoning of the Tribunal. Possibly, the words "mandatory publication of awards, decisions and orders" could be included in the current amendment. Following this, Rule 48(4) of the Arbitration Rules would have to be redrafted to reflect this change. The new provision may read: "The Centre shall publish the awards, decisions and orders of the Tribunal promptly." The word "shall" corresponds with the consideration of "mandatory publication" mentioned in the speech. This change will increase the understanding of the jurisprudence of foreign investment arbitration through the publication of awards, as well as leave the parties with no doubt to what information is to be released into the public domain at the end of arbitration proceedings.

However, in relation to other case-related information, it is the working paper group's intention to have them subject to the relevant treaty obligations and parties' consent. Because of this, it is not expected to see a full disclosure provision as the one stipulated in Article 3 of the Transparency Rules to be included in the amendment.[33] The adoption of limited transparency on the case-related material may have the advantage of not placing the tribunal in a goalkeeper's position in judging who and what should be admitted in proceedings[34] to achieve the efficiency of arbitration proceedings. Nevertheless, at the same time, the public's right to know what may impact on their interest seems to be omitted.

[33] The provision covers: 'the notice of arbitration, the response to the notice of arbitration, the statement of claim, the statement of defence and any further written statements or written sub- missions by any disputing party; a table listing all exhibits to the aforesaid documents and to expert reports and witness statements, if such table has been prepared for the proceedings, but not the exhibits themselves.'
[34] Yu and Olmos Giupponi (n 16).

This limited level of transparency is set to achieve the goals of amendment; modernise the ICSID Arbitration Rules, address the practical issue arising from case experience, increase effectiveness and due process, maintain a balance of rights and duties between investors and member states. However, it is clear that the ICSID amendment seems to exclude the right to know of the public who are now viewed as a stakeholder in foreign investment disputes. In other words, the confidence of the "public" referred in the Secretary-General's speech seems to point to the "public" who are engaged in ICSID Investment Arbitration. They are: "the parties, their agents, counsel and advocates, witnesses and experts during their testimony and officers of the Tribunal"[35] as the current provision provides. The confidence of "the public" refers the confidence of "the users" of the ICISD arbitration.

Supposing, it is "the users" meant in the speech and the interview, the general public would be excluded from the arbitration proceedings. This is due to the current transparency provisions where the general public could only be viewed as users when the parties and the tribunal allow them to become part of the proceedings as examined. Unfortunately, this is an inward-looking approach which ensures that the due process and balance of rights related to the "internal players" are observed. Such an approach is drastically different from the outward approach adopted in the Transparency Rules where "the public" means the general public who has a significant interest to the disputes or the result of the disputes. Under the Transparency Rules, "the public" can be a local farmer whose livelihood may be lost due to the investment activities/disputes between the disputing parties. Alternatively, it can also be an international / local NGO which may be able to assist the tribunal 'in the determination of a factual or legal

[35] ICSID Arbitration Rules, Rule 32(2).

issue related to the proceedings by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties'.[36]

Sornarajah states that the focus of international investment law has been shifted from the protection of single individuals or groups of individuals whose goal was to make quick profits to the protection of the process of investment made by multinational corporations.[37] Nevertheless, the development of foreign investment law is moving to address the rights and obligations of all stakeholders who may be impacted upon by the activities carried out by multinational corporations, States, State corporations, international institutions, non-governmental organisations and the general public.[38] This demands the outward looking approach taken by the Transparency Rules. Taking as an example, the requirement of "a particular public interest" set out in *Vivendi*,[39] in the tribunal's order responding to a petition for transparency and participation in the form of *amicus curiae* briefs, the tribunal held that the result of the disputes arising from the water distribution and sewerage system of the city of Buenos Aires and surrounding municipalities would have a wider impact on the public. This wider impact on non-parties provides a legitimate "public interest" for involvement of non-party. This is especially the case for public-private partnerships projects (PPPs) where both private party and government body agree to provide a public asset or service[40] by means of a

[36] Ibid.
[37] M. Sornarajah, *The International Law on Foreign Investment* (3rd edn, CUP 2012) 60.
[38] Ibid, 60-68
[39] *Aguas Argentinas SA, Suez Sociedad General de Anguas de Barcelona SA and Vivendi Universal SA v Argentine Republic* (Order in Response to a Petition for Transparency and participation as amicus curiae) ICSID Case No ARB/03/19.
[40] The World Bank, Asian Development Bank and the Inter-American Development Bank, 'Public –Private Partnership Reference Guide Version 2.0' (2014) https://ppp.worldbank.org/public-private-partnership/library/public-private-partnerships-reference-guide-version-20, 14 <accessed on 23 June 2018>; The PPPs can be carried out in the areas of tourism, housing projects, school projects or the fundamental infrastructures.

long-term investment contract. The impact of management, remuneration, performance and consequent dispute resolution would have been extended to the "public" who would have a significant interest to the dispute as required by ICSID Arbitration Rules.

CONSEQUENCES OF AN INWARD-LOOKING APPROACH IN TRANSPARENCY - TRIBUNAL DUTY OF DISCLOSURE AND THE PRACTICE OF DOUBLE HATTING

Taking such an inward-looking approach, it may not come as a complete surprise to learn that the Secretary-General raised the issue of tribunal's duty of disclosure under the heading of transparency. In practice, this issue has a significant impact on the due process of investment arbitration. The impact does affect not only the direct users of investment arbitration, but also the indirect users whose rights may be impacted upon by the result of the dispute. While the Transparency Rules are silent on this issue, the Secretary-General specifically raised the concerns over double hatting and third party funding in the practice of international investment arbitration in her response to transparency. It is understood that an elaborated tribunal's duty of disclosure, declaration, in relation to the parties, to the counsels, to co-arbitrator, to funders, calendar and availability will be on the cards. Nevertheless, her talk also gives out the clearest indication that the amendment will not seek a hard-line regulatory framework but seeking resources providing regulation through soft law and the duty of an early disclosure and avoidance of conflicts of interest.[41]

[41] 2017 The ICSID Rules Amendment Process, 1. https://icsid.worldbank.org/en/Documents/about/ICSID%20Rules%20Amendment%20Process-ENG.pdf <accessed on 23 June 2018>

To have these two matters regulated indirectly, in terms of duty of disclosure, one may have to look into the IBA Guidelines on Conflicts of Interest in International Arbitration[42] which are referred and considered by most arbitrators in deciding this matter.[43] It is claimed that 'the Guidelines have gained wide acceptance within the international arbitration community.'[44] The duty of disclosure under the Guidelines applies to a party who is aware of the relationship between the arbitrator and any person or entity with a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration.[45] The Guidelines operate on the basis of advance waivers on the issues of disclosure, conflicts of interest, the independence and impartiality of arbitral or administrative secretaries and third–party funding. In this part of the research, the researcher will argue that a total reliance on the IBA Guidelines in addressing transparency and its associated issues, such as third party funding and double hatting, must proceed with caution due to its inherent nature and the lack of complete regulatory framework.

No compulsory application of the Guidelines

It is important to highlight that taking the Guidelines into consideration is not without its own problem, even though '[t]he Guidelines reflect the understanding of the IBA Arbitration Committee as to the best current international practice'.[46] This is because the Guidelines document is an opt-in instrument, i.e. the parties have to expressly opt in to incorporate its application. Goeler holds the view that the IBA Guidelines is nothing more than a reminder for the arbitrators[47] as '[t]hese Guidelines are not legal provisions and do not override any

[42] Adopted by resolution of the IBA Council on Thursday 23 October 2014.
[43] Nigel Blackaby, Constantine Partasides, Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) 5.80
[44] IBA Guidelines 2014, page i.
[45] IBA Guidelines 2014, General Standards (7)(a).
[46] IBA Guidelines 2014, Introduction para 4.
[47] von Goeler, *Third Party Funding in International Arbitration and Its Impact on Procedure* (Kluwer Law International 2016) 253.

applicable national law or arbitral rules chosen by the parties.'[48] The parties must express their wishes to incorporate the Guidelines into their procedural rules in order to have a compulsory application.[49] This will apply to the amendment if ICISD intends to have this issue dealt with by soft law and outside of its hard-line regulatory regime. To ensure the maximised compulsory application, the amendment could insert an opt-out provision in its amendment to maximise the application of IBA Rules. It may be in the wording of 'Unless parties express their objection, the matters such as third party funding, tribunal's duty of independence and impartiality as such will be regulated by the IBA Guidelines on Conflicts of Interest in International Arbitration.'

The other way to include the Guidelines to supplement the ICSID regulatory framework is to encourage to parties to opt in its application by treaty duties or agreement. Although it is possible to introduce a new provision signposting the parties to look into the relevant BITs provision on this issue, generally speaking, most BITs will not fit for such a purpose. This is because most BITs only prescribe the types of dispute resolutions mechanisms, rather than a detailed prescription of duty of disclosure or third-party funding. For these two issues, the disputing parties will have to resort to the relevant arbitration rules. Following this approach, one would see little difference between the amendment and the system which is currently operated under ICSID. Consequently, the joint efforts of the signatory parties to the treaties and the disputing parties to include the Guidelines to ensure its application would be essential.

[48] IBA Guidelines 2014, Introduction para 6.
[49] Anne Richardson Oakes and Haydn Davies, 'Justice Must Be Seen To Be Done: A Contextual Reappraisal' (2016) 37 *Adelaide Law Review* 461, 463.

Supposing the Guidelines are included into the ICSID regulation framework in the amendment through either method mentioned above, they may still not be able to address various situations related to the issues of duty of disclosure and third-party funding because, the Guidelines state that 'the lists do not purport to be exhaustive, nor could they be'.[50] Consequently, the General Principles Regarding Impartiality, Independence and Disclosure in the Guidelines only provide a "general guidance". For instance, every arbitrator[51] shall remain impartial and independent from the parties during the process of arbitration.[52] Any doubts over his or her own ability to act independent or impartial should prompt the tribunal to decline to accept the appointment.[53] Unless the parties exercise their advance waiver after the appointment,[54] any facts or circumstances which may have affected this issue should be viewed from a reasonable third person. A reasonable third person is defined as a person who has knowledge of the relevant facts and circumstances 'would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.'[55] Corresponding to the tribunal's duty, the parties also have a duty to inform the arbitrator, the arbitral tribunal, the other parties and the arbitration institution or other appointing authority of any direct or indirect relationship between the party and the arbitrator. Potential conflicts of interest are deemed to be waived by parties if no forthcoming objections are raised within 30 days after the receipt of any disclosure by the arbitrators concerned or after a party otherwise learns of facts or circumstances of potential conflicts.[56]

[50] IBA Guidelines 2014, Introduction para 7.
[51] IBA Guidelines 2014, General Standards (5) provides that the Guidelines apply to tribunal chairs, sole arbitrators and co-arbitrators and arbitral secretaries and administrative secretaries. The tribunal has a duty to ensure that such duty is respected at all stages of the arbitration.
[52] IBA Guidelines 2014, General Standards (1).
[53] IBA Guidelines 2014, General Standards (2)(a).
[54] IBA Guidelines 2014, General Standards (4).
[55] IBA Guidelines 2014, General Standards (2)(c).
[56] IBA Guidelines 2014, General Standards (4)(a).

Furthermore, the parties should not have unilateral discretion to waive any grounds listed in the Non-Waivable Red List.[57] For others, the waiver can only be supported with parties' express agreement [58] and if both parties, co-arbitrators, arbitration institutions or the appointment authority have full knowledge of the conflict of interest.[59]

Paragraph 7 of the General Standards Regarding Impartiality, Independence and Disclosure requires the parties to perform a duty to conduct reasonable enquiries and provide any relevant information available to them. The level required for performance of such a duty is "reasonable effort" in terms of ascertainment and disclosure.[60] Similar duty was also imposed upon an arbitrator to enquire into his own independence and impartiality. Such a duty is not excused by lack of knowledge.[61]

If ICSID prescribes to the Guideline, the arbitrator's duty to disclose conflicts of interest will trigger the enquiries into arbitrator's competence. The working paper group must stress (1) the nature of the non-exclusive lists[62] and non-detailed situations constituting conflicts of interest in the Guidelines and (2) the preventive and non-presumptive nature of the Guidelines which expressly state that '[d]isclosure does not imply the existence of a conflict of interest, nor should it be itself a result either in a disqualification of the arbitrator, or in a presumption regarding disqualification.'[63] The disclosure requirement is to afford the parties an opportunity

[57] IBA Guidelines 2014, General Standards (2)(d).
[58] IBA Guidelines 2014, General Standards (4)(c)(ii).
[59] IBA Guidelines 2014, General Standards (4)(c)(i).
[60] Explanation to general Standard 7(c), IBA Guidelines 2014, General Standards (7)(c).
[61] IBA Guidelines 2014, General Standards (7)(d).
[62] Non-waivable Red list, Waivable Red list, Orange list and Green list, Practical Application of the General Standard of the IBA Guidelines.
[63] para 4 Part II of Practical Application of the General Standard of the IBA Guidelines.

to objectively review the appointment of arbitrators from the viewpoint of "a reasonable third person" when the relevant facts and circumstances are made available to them. Instead of solely relying on the tribunal's self-determination of the principle of competence/competence[64] behind a closed door, the inclusion of the IBA Guidelines will provide the parties an opportunity to exercise advance waivers to increase the transparency in independence and impartiality of the appointed arbitrators. It would potentially reduce the number of challenges based on the lack of independence and impartiality.

However, the working paper group should consider whether the position of "nondisclosure cannot by itself make an arbitrator practical or lacking independence" adopted in the IBA Guidelines is ideal. Currently, the emphasis placed by the IBA Guideline is "the failure to disclosure the facts and circumstance" which leads to disqualification as the determining factor. However, such an approach would cause delay in the arbitral proceedings where the tribunal will have to invest time and energy to deal with such a preliminary issue where a full proof is required. To address such an issue, the working paper should consider whether the requirement of a full disclosure being made prior to the appointment would make better sense in dealing with non-assumption of automatic non-appointment discussed in paragraph five of the Practical Application.

Transparency In Third Party Funding

Third party funding involving a third person who provides financial resource to a direct party to international investment dispute has become an international phenomenon[65] in international

[64] ICSID Convention, Article 41(1) and (2); ICSID Arbitration Rules, Rule 41.
[65] See generally R. Mulheron and P. Cashman, 'Third-Party Funding of Litigation: A Changing Landscape' (2008) 27 C.J.Q. 312; W. Kirtley and K. Wietzykowski, 'Should an Arbitral Tribunal Order Security for Costs

investment arbitration. Due to the high legal costs the parties have to be burdened with and the attractiveness of high rewards to the funders, funders are keen to provide funds to the litigants but remain a wire puller[66] to ensure his investment return.[67] It is indicated that 35% of practitioners experienced third party funding in their practice.[68] However, the practice is also criticised for its lack of transparency and a comprehensive regulatory framework.[69] The concerns over third party funding are its lack of disclosure mechanism, unlevel playing field, controlling exercised by the funders, privity, distortion of procedural justice and effects of provisional awards and final awards.

All of these are due to the fact that the operation of third party funding does not represent the actual equilateral triangle relationship between parties and the arbitral tribunal.[70] With third party funder as the wire puller who may use its financial resources to distort the equilateral triangle relationship and procedural justice between the main players of arbitration to maximise

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when an Impecunious Claimant is Relying on Third Party Funding?' (2013) 30(1) J. Int. Arb. 17, 28; M. Scherer 'Third-Party Funding in International Arbitration Towards Mandatory Disclosure of Funding Agreements?' in A. Dimolitsa and B. M. Cremades Román (eds), *Third-Party Funding in International Arbitration, Dossiers of the ICC Institute of World Business Law* (Kluwer Law International 2013), 95; A. Goldsmith, M. Scherer and C. Fléchet, 'Third-Party Funding in International Arbitration in Europe: RDAI/IBLJ Roundtable 2012' (2012) 2 (Part I) International Business Law Journal / Revue de Droit des Affaires Internationales 207; A. Goldsmith, M. Scherer and C. Flechet, 'Third-Party Funding in International Arbitration in Europe: RDAI/IBLJ Roundtable 2012' (2012) 6 (Part II) International Business Law Journal / Revue de Droit des Affaires Internationales 649; E. De Brabandere and J. Lepeltak, 'Third-Party Funding in International Arbitration' (2012) 27 ICSID Rev. 379; A. Goldsmith and L. Melchionda, 'Third-Party Funding in International Arbitration: Everything You Ever Wanted to Know (But Were Afraid to Ask)' (2012) 1 International Business Law Journal 53.

[66] Such as *S & T Oil Equipment and Machinery Ltd. v Romania (S&T Oil v Romania),* ICSID Case No.ARB/07/13) funded by Juridica; *Ron Fuchs v The Republic of Georgia (Fuchs and Kardassopoulos v Georgia),* (ICSID Case No.ARB/07/15) funded by Allianz Litigation Funding, *Oxus Gold plc v Republic of Uzbekistan*, the State Committee of Uzbekistan for Geology & Mineral Resources, and Navoi Mining & Metallurgical Kombinat (Oxus Gold v Uzbekistan) and *Rusoro Mining Ltd. v Bolivarian Republic of Venezuela*, ICSID Case No.ARB(AF)/12/5 (Rusoro v Venezuela) funded by Calunius Capital, Teinver S.A.; *Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v The Argentine Republic*, ICSID Case No.ARB/09/1 (Teinver v Argentina) funded by Burford, ATA Construction.

[68] V. Sahani, 'Judging Third Party Litigation in Funding' (2016) 63(1) UCLA Law Review 1, 41.

[69] F. Blavi, 'Towards a Uniform Regulation of Third Party Funding in International Arbitration' (2015) 32 IALR 143, 143.

[70] Hong-Lin Yu, 'Can Third Party Funding Deliver Justice in International Commercial Arbitration?' (2017) 20(1) International Arbitration Law Review 20, 25-26

its financial rewards. Consequently, the delivery and integrity of procedural justice in international investment arbitration would be questioned. The relationship between parties and their counsels may also be subject to changes with the involvements of third party funders.

It was revealed that 76 per cent of practitioners surveyed supports mandatory disclosure of third party funding agreement.[71] The disclosure of third party funding agreements will serve the purposes of ensuring the integrity of arbitration process and awards, levelling the playing field between the parties, avoiding unwitting conflicts of interest on the arbitrators'' part. The lack of parties' duty to disclose the identities of third party funders to the opposing party and the tribunal may lead to possible conflicts of interest on arbitrators who are required to continuously declare their independence and impartiality throughout the proceedings.[72] Seidel stresses that such a disclosure is "pertinent in the early stages." During the process of appointment, arbitrators should also have a "distinct desire" to be notified about the identities of the funders. The information will allow them to declare their own independence and impartiality in order to avoid a situation where the proceedings are aborted due to a later detected conflicts of interest on their part.[73]After all, '[t]he impact could be catastrophic.'[74]

The upcoming ICSID amendment would be the best opportunity for ICSID to tackle this issue and introduce the best practice related to third party funding. Unfortunately, the speech indicates that this matter will not be part of the amendment, whereas a support from soft law

[71] Queen Mary School of International Arbitration and White & Case, International Arbitration Survey: Improvements and Innovations International Arbitration (2015) 52
[72] Sahani (n 68) 41.
[73] Seidel, 'Third-Party Investing in International Arbitration Claims to Invest or Not to Invest? A Daunting Question' in Dimolitsa and Cremades Román (eds), *Third-Party Funding in International Arbitration, Dossiers of the ICC Institute of World Business Law*, Vol. 10 (2013) 22.
[74] Ibid.

may be sought. While the Transparency Rules are silent on this matter, the only possible source of soft law is the IBA Guidelines. If the ICSID amendment wishes to rely on the IBA Guidelines to provide a regulatory framework for third party funding, the working paper group would need to look into General Standard 6(b) of Part One of the Guidelines. General Standard 6(b) reads: 'If one of the parties is a legal entity, any legal or physical person having a controlling influence on the legal entity, or a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration, may be considered to bear the identity of such party.' In identifying "controlling influence" and "direct economic interest", this provision directly addresses the issue of third party funding.

One of the issues debated in relation to third party funding in arbitration is whether a funder should be treated as a party or a third party. The Explanation to General Standard 6(b) clarifies this point. According to the explanation, subject to an individual assessment on the nature of relationship, the general position of the Guidelines is that any legal persons and individuals who may have "a controlling influence" and "direct economic interest in the award", such as third party funders and insurers, may be considered as equivalent to the principal party. This would cover the practice of contributing funds or other material support to the prosecution or defence of the dispute.[75] However, the working paper group may wish to clarify that the current wording in the explanation "the equivalent of the party" actually means "the equivalent of the principal party". If a funder is viewed as a party, the relevant provisions on the impact of the provisional measures contained in Article 47 the ICSID Convention and the ICSID Arbitration Rules must be amended to extend their effects to third party funders. Although there is no

[75] Explanation to General Standard 6(b),

intention to amend the Convention for the reason discussed above, any future amendment should consider replacing "the respective rights of either party" with "the respective rights of parties".[76] Similarly, Rule 39 of the ICSID Arbitration Rules on Provisional Measures would also be required to insert a provision to specify that the third party funder is viewed as a party in the context of provisional measures for fairness and a level playing field for all parties in arbitration proceedings.

The Issue Of Double Hatting And Transparency Under The ICSID Amendment

It is clear from Ms Kinnear's speech that the amendment will not provide a hard-line regulatory framework to address the issue of double hatting, where one sees a group of highly influential "power brokers" regularly play multiple roles as arbitrators and counsels in investment arbitration. This controversial practice is known as "double hatting".[77] It is said that "double hatting" exists in international investment arbitration and it is not unusual to see an individual representing a party in an arbitration and at the same time, or later, serving as an arbitrator in another matter submitted to arbitration.[78]

[76] Article 47 of the Convention reads: 'Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.'

[77] https://globalarbitrationreview.com/article/1142550/"double-hatting"-under-new-scrutiny <accessed on 23 June 2018>

[78] Dennis H. Hranitzky and Eduardo Silva Romero, The Double Hatting debate international arbitration – Should advocates and arbitrators be in separate bars? (14 June 2010) The New York Law Journal, https://www.dechert.com/content/dam/dechert%20files/publication/2010/6/the-double-hat-debate-in-international-arbitration/070101031Dechert.pdf <accessed on 23 June 2018>

Calls for new hard-line regulations prohibiting counsels who represent parties in arbitrations from serving as arbitrators in other cases have been made.[79] The main concern over double hatting in relation to transparency is the potential impact on arbitrator's impartiality in terms of different interpretations of the same issue advocated by them in their capacity of different roles. Such a concern is not unwarranted. In international investment arbitration, one frequently sees the parties submit different interpretations of the similar or identical provisions in bilateral investment treaties. These issues are raised by parties, argued by counsels and decided by a small pool of arbitrators repeatedly. It is pointed out that this small pool of arbitrators who are experienced in arbitrating investment disputes has also taken or will later take a position as counsels in other cases. [80] Consequently, conflicts arise where, wearing an advocate's hat, the counsel cites an award delivered by himself in the capacity as an arbitrator, or *vice versa*. The seriousness of this issue is further clouded by the concerns over whether 'an arbitrator acting as legal counsel is coloured by their arbitral role or uses his or her pleadings in one case for the purpose of being picked up and used by the same individual in their work as an arbitrator in another.'[81] Linking such practice with the public concerns over investment disputes, Hranitzky and Romero succinctly put:

> Fears that such scenarios (or others like them) could raise questions about the arbitrator's impartiality, or at least the appearance of impartiality in the eyes of an objective observer, are exacerbated by the fact that investment disputes commonly raise

[79] Ibid.
[80] Ibid; Philippe Sands, 'Developments in Geopolitics: The End(s) of Judicialization?' Closing speech at European Society of International Law Conference, 12 September 2015; Reprinted in EJIL Talk!, 12 October 2015 ; https://www.ejiltalk.org/2015-esil-annual-conference-final-lecture-developments-in-geopolitics-the-ends-of-judicialization/; Reflections on International Judicialization, European Journal of International Law (2016) 27(4) 885-900, 894 <accessed on 23 June 2018>
[81] Malcolm Langford, Daniel Behn and Runar Hilleren Lie, The Ethics and Empirics of Double Hatting, (2017) 6(7) ESIL Reflections1, 8.

> issues of public concern, and the fact that, in contrast to most commercial arbitration, the awards in investment arbitrations are available to the public.[82]

The figure for double hatting practice was said to be 47% among "small, tightly knit, network power" [83] of arbitrators who is also called "power brothers"[84] in a total of 391 investment arbitrations. This figure is three times that of double hatting in 118 counsel only cases which took 11% of overall practice. These two figures occupy a majority of the cases surveyed. Excessive fees are said to be charged to the disputants to investment arbitrations. Investment arbitration has become a business as '[t]he investment arbitrator of today resembles nothing of the traditional and genteel picture of the moonlighting arbitrator in the occasional dispute.'[85] This persistent practice of double hatting saw the arbitrator being challenged in *Telekom Malaysia v Ghana* (*Telekom Malaysia*)[86] and later resigned from the role of counsel in *Consortium RFCC v Morocco*[87] following the ruling made by the District Court of the Hague. Acting as the legal counsel for Consortium RFCC, Gaillard sought annulment of the award favouring Morocco[88] which was relied upon by Ghana in *Telekom Malaysia*.[89] Similarly being challenged, though unsuccessful, Judge Stephen Schwebel's impartiality and his role as the

[82] Hranitzky and Romero (n 78).
[83] Tori Loven Kirikebø, 'Lawyers in Problematic Dual Role As Arbitrators' (5 September 2017)Science Nordic, http://sciencenordic.com/lawyers-problematic-dual-role-arbitrators <accessed on 23 June 2018>
[84] Ibid.
[85] Langford et al. (n 81) 7.
[86] Professor Emmanuel Gaillard was challenged in *Telekom Malaysia Berhad v The Republic of Ghana*, PCA Case No 2003-03 UNCITRAL Settled.
[87] *Consortium R.F.C.C. v Kingdom of Morocco*, ICSID Case No. ARB/00/6, Decision on Annulment (18 January 2006); After his resignation from the role of counsel in *Consortium RFCC*, the challenge was overruled and he was entrusted with open-mindness in his defence in the legal points.
[88] Ibid.
[89] District Court of the Hague, Challenge No. 13/2004, HA/RK 2004.667, Decision of October 18, 2004, reprinted in ASA Bulletin (Kluwer Law International (2005) 25(1) 186, 192

arbitrator in *Eureko v Poland* [90] were also questioned by Argentina in *Vivendi v Argentina*[91]about his role as the counsel for Vivendi.

Warning has been made about double hatting which is protected due to the lack of transparency within the investment arbitration system. It is said to significantly impact the integrity of the system.[92] The perception of the so-called "clubbiness" in allowing judge or arbitrator to appear as counsel before their fellow judges or arbitrators is said to 'create ... a perception ... that the presiding judge [or arbitrator] would or could not be impartial if a fellow judge [or arbitrator] is acting as counsel for the opposing party.'[93] Hence, separate bars for arbitrators and counsels has been advocated to 'improve arbitrator's perceived capacity to adjudicate with an open mind.'[94] While questions over whether practitioners can be forced to choose between the roles of arbitrators and counsels may be raised, on the balance of the integrity of investment arbitration, one has to enquire into whether such a practice with ethical concerns[95] would cause

[90] *Compañía de Aguas del Aconquija, S.A. & Compagnie Générale des Eaux, v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, https://www.italaw.com/sites/default/files/case-documents/ita0206.pdf <accessed on 23 June 2018>

[91] Ibid.

[92] Sands, 'Conflict of Interest for Arbitrators and /or Counsel' in M Kinnear et al (eds) *Building International Investment Law: The First 50 Years of ICSID* (2015) 655, Maria Nicole Cleis, The Independence and Impartiality of ICSID Arbitrators (Brill, 2017) 104.

[93] Georgia Judicial Qualifications Commission, Opinion No. 200 (April 26, 1995); Hranitzky and Eduardo Silva Romero (n 78); This was discussed in the context of Court of Arbitration for Sport (CAS) and American Bar Association (ABA). Section 11 of CAS Statutes of the Bodies Working for the Settlement of Sports-Related Disputes 2017 reads: "A member of ICAS or the Board may be challenged when circumstances allow legitimate doubt to be cast on her/his independence *vis-à-vis* a party to an arbitration which must be the subject of a decision by ICAS or the Board pursuant to Article S6, paragraph 4. She/he shall pre-emptively disqualify herself/himself when the subject of a decision is an arbitration procedure in which a sports-related body to which she/he belongs appears as a party or in which a member of the law firm to which she/he belongs is an arbitrator or counsel." Rule 3.10 of the ABA Model Code of Judicial Conduct 2011, "A judge shall not practice law. A judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family, but is prohibited from serving as the family member's lawyer in any forum."

[94] Anthony Sinclair and Matthew Gearing, 'Partiality and Issue Conflicts,' (2010) 5(4) Transnational Dispute Management 14, https://www.transnational-dispute-management.com/article.asp?key=1284 <accessed on 23 June 2018>

[95] Similar concerns are also expressed in Malcolm Langford et al. (n 81) 1.

"legitimacy crisis of international investment law."[96] In particular, one has seen an arbitrator give out rulings in favour his own arguments put forward as a legal counsel in another proceeding. It is especially alarming that the jurisprudence of foreign investment law is allowed to be developed in such a fashion, potentially without objective interpretation of legal points. A strong feeling was expressed by Fernández-Armesto who states: 'if this requires that the roles of arbitrators and lawyers be separated, then let's assume it as a necessary cost for the survival of investment arbitration.'[97]

Judge Buergenthal[98] expresses concerns over ICSID's vulnerability to the practice of double hatting due to its remits in interpreting similar treaty duties on a regular basis. The strong view invoked by him requires arbitrators and counsel 'to decide to be one or the other, and be held to the choice they have made, at least for a specific period of time.' He vividly puts:

> I also believe that repeated designations by counsel of the same arbitrator should be avoided. These revolving-door problems —counsel selecting an arbitrator who, the next time around when the arbitrator is counsel, selects the previous counsel as arbitrator —

[96] Kirikebø (n 83).
[97] Juan Fernández-Armesto, IBA Arbitration Day 2012 Stockholm, Counsel and Arbitrator in Investment Arbitration: Does The Mixing of The Rule Nix Neutrality, 6 http://jfarmesto.com/wp-content/uploads/2016/01/Counsel-and-Arbitrator-in-Investment-Arbitration-Does-the-mixing-of-the-roles-nix-neutrality.pdf <accessed on 23 June 2018>
[98] Thomas Buergenthal, 'The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law' (2006) 22(4) Arbitration International 495, 498. He states: "I have long believed that the practice of allowing arbitrators to serve as counsel, and counsel to serve as arbitrators, raises due process of law issues. In my view, arbitrators and counsel should be required to decide to be one or the other, and be held to the choice they have made, at least for a specific period of time. That is necessary, in my opinion, in order to ensure that an arbitrator will not be tempted, consciously or unconsciously, to seek to obtain a result in an arbitral decision that might advance the interests of a client in a case he or she is handling as counsel. ICSID is particularly vulnerable to this problem because the interpretation and application of the same or similar legal instruments (the bilateral investment treaties, for example) are regularly at issue in different cases before it."

> should be avoided. *Manus manum lavat,* in other words 'you scratch my back and I'll scratch yours', does not advance the rule of law.[99]

Judge Buergenthal's concerns are not being listened to. One sees the arbitrator panels are moving away from manifest apparent bias in Article 57 of the ICSID Convention to a more 'a fair minded and informed observer would have reasonable apprehension that the arbitrators are biased' expressed by Lord Hewart in his dictum.[100] Unfortunately, Ms Kinnear is clear that the working paper will rely on soft law and will not directly address this issue in the upcoming amendment. If it is the IBA Guidelines the working paper wishes to rely on to provide guidance on this issue, one may have to ask whether IBA Guidelines indicates an appearance or perception of bias or conflict or justifiable doubts of a reasonable third person, or even real danger of bias. The IBA Guidelines characterizes doubts as 'justifiable if a reasonable and informed third party would reach the conclusion that there was a likelihood that the arbitrator may be influenced by factors other than the merits of the case presented by the parties in reaching his or her decision.'[101] Under the umbrella of "justifiable doubts", one sees an arbitrator or his or her firm regularly advising the party or an affiliate of the party, and deriving significant income from the party are placed under the Non-Waivable Red List.[102] This is even with arbitrator's declaration on his independence or impartiality. Compared to giving advice, acting as a counsel is far a more serious relationship with the party, hence the double hatting

[99] Ibid. 498.
[100] Lord Hewart CJ, *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256, 259 ('*R v Sussex Justices*') , Also see *Richardson and Davies* (n 49) 461.
[101] The *IBA Guidelines on Conflicts of Interest in International Arbitration*, Part I Article 2.
[102] IBA Guidelines, 1.4 of Non-Waivable Red List.

should fall into the Non-Waivable Red List. In the case where the arbitrator has given legal advice or[103] currently represents one of the parties,[104] it is placed under Waivable Red List.

Perhaps, the most direct provision applying to double hatting under the IBA Guidelines is paragraph 3.1 of Orange List on arbitrator's previous services for one of the parties or other involvement in the case. Under paragraph 3.1, within the past three years, an arbitrator is advised to declare conflicts of interest if he has acted as counsel for[105] or against[106] one of the parties or affiliate of one of the parties in an unrelated matter, has advised or been consulted by one the parties,[107] has been appointed as an arbitrator by one of the parties on two or more occasions by one of the parties, or an affiliate of one of the parties,[108] or has been appointed or currently serving as an arbitrator by one of the parties on a related matter.[109] The period of three years is clearly intended to eliminate the so-called revolving door practice criticised in Judge Buergenthal's article[110] and decrease the chance of the appearance of bias. Currently, ICSID sees repeated appointments of arbitrators who also work in the capacity of counsels. Paragraph 3.1 may provide an opportunity to reduce double hatting on appointments if both parties and arbitrators are required to declare such a conflict. Nevertheless, unfortunately, it has limited effects on an appointed arbitrator citing the legal arguments put forwarded by himself in the role as a counsel in another case. After all, arbitrators' previously expressed legal opinions

[103] IBA Guidelines, 2.1.1 Waivable Red List.
[104] IBA Guidelines, 2.3.1 Non-Waivable Red List.
[105] IBA Guidelines, 3.1.1 Orange List.
[106] IBA Guidelines, 3.1.2 Orange List.
[107] IBA Guidelines, 3.1.1, Orange List.
[108] IBA Guidelines, 3.1.3 Orange List.
[109] IBA Guidelines, 3.1.5 Orange List.
[110] Buergenthal (n 98) 498. The period of three years also applies to the arbitrator's law firm, see The IBA Guidelines, 3.1.4.

concerning similar or same issue are listed under the Green List. Being placed under the Green List means that there is not a need for the arbitrator to declare this factor which may concern the parties.

CONCLUSION

Langford stated that the perception of bias or conflict alone should be enough for a reconsideration of such a practice.[111] The issue is whether such practice should be regulated through self-regulation or institution reform. In the process of the ICSID amendment, Ms. Kinnear's speech clearly indicates that publication of full awards, decisions and orders made by arbitrators will be recommended in the working paper to promote public confidence in the ICSID arbitration mechanism through transparency. It is hoped to resolve the discord and strengthen the rule of law through the amendment by removing arbitrariness from tribunal's decision making. However, the debates and current development on transparency should have gone beyond publication of awards, decisions and orders. The public's right to know sees the release of information used in arbitration and public participation under the Transparency Rules. As demonstrated in this article, Ms. Kinnear's public confidence is very different from the public's right to know. Whether the transparency measures to be recommended in the working paper and the use of soft law will successfully deliver public confidence remains to be seen. Ms. Kinnear's speech interestingly highlights that transparency is also linked to conflicts of interest, third party funding and double hatting. This is beyond the scope identified in the

[111] Langford et al. (n 81) 7; Judith Levine, 'Dealing with Arbitrator "Issue Conflicts" in International Arbitration' 61 Disp. Res. J. 60 (2006); Joseph Brubaker, 'The Judge Who Knew Too Much: Issue Conflicts in International Adjudication' (2008) 26(1) Berkeley J. Int'l Law 111.

Transparency Rules. While the amendment will not tackle third party funding and double hatting through a hard-line regulatory framework, ICSID must ensure transparency addressed in the amendment is what is required in international investment arbitration and by the public. It must carefully consider whether IBA Guidelines serve as the best starting point or practice for regulating these issues in its delivery of a mechanism with integrity and legitimacy where both the public and the users can see that justice is being done.