

# Deficiencies and Perfection of Arbitrator Withdrawal System in ICSID Convention: ICSID Arbitration Practice as a Perspective

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**Abstract:** The system of arbitrator withdrawal is the key to ensure the independence and impartiality of arbitrators in international investment arbitration. ICSID arbitration practice reflects ICSID Convention's lack of arbitrator independence and impartiality, fails to address the "Conflict of Identity" of arbitrators and fails to balance conflicting issues of law in arbitral tribunals. To improve the ICSID Convention, three measures should be taken to clarify the connotation of arbitrator independence and impartiality, improve the arbitrator disclosure system, and improve the decision method of withdrawal application.

**Keywords:** Withdrawal of Arbitrators; Independence and Impartiality of Arbitrators; ICSID Convention

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## Introduction

The arbitrator withdrawal system in international investment arbitration can maximize the independence and impartiality of arbitrators and safeguard the credibility of arbitral awards and the authority of arbitral institutions. The International Centre for Settlement of Investment Disputes (ICSID) remains an important institution for the resolution of international investment disputes.

### 1. ICSID Convention only provides for the independence of arbitrators

Article 14(1) of the ICSID Convention requires arbitrators to be of "high moral character and recognized competence in the legal, commercial, industrial and financial fields, and to be able to adjudicate independently". This provision does not define the meaning of arbitrator independence and the criteria for proving independence, nor does it require the arbitrator to be impartial. This leaves the claimant without effective guidelines for preparing evidentiary materials to prove the arbitrator's independence. Arbitrator independence and impartiality are not equivalent. Independence is a necessary prerequisite for impartiality. Independence is a requirement for the arbitrator's qualifications, and impartiality is a requirement for the arbitrator's ability to exercise his or her arbitral powers fairly and impartially.

### 2. ICSID arbitration practice needs to further improve the arbitrator withdrawal system of ICSID Convention

#### 2.1 ICSID arbitration practice fails to improve the connotation of arbitrator independence

Article 57 of the ICSID Convention provides two ways to apply for withdrawal of an Arbitrator: first, by proving that the arbitrator clearly lacks the ethics and competence to arbitrate under Article 14(1) of the ICSID Convention. The second is to prove that

the arbitrator does not meet the requirements for the composition of the arbitral tribunal as set out in Chapter 4, Section 2 of ICSID Convention. ICSID Convention is clear and practical on the second method, but does not set out the meaning of independence and the standard of proof in the first method. ICSID arbitration practice also provides no answer. In *Vivendi*, the Argentine province of Tucuman terminated a water concession agreement with the French company Vivendi, and Vivendi filed a claim for arbitration with the ICSID. The respondent Argentine government filed a motion for withdrawal against Fortier on the grounds that a lawyer from Fortier's law firm, the lead arbitrator, had been employed by the claimant Vivendi. The tribunal in this case rejected the claimant's request, holding that the lack of independence of the arbitrator had to be serious and the lack of independence had to be substantiated. The tribunal in *Vivendi* only added to the "manifest lack" of Article 14(1) of the ICSID Convention by stating that "reasonably clear" facts were required to establish a "manifest lack of independence". The tribunal in *Vivendi* only further added to the "manifest lack" of ICSID Convention Article 14, paragraph 1, by suggesting that the "manifest lack" needs to be supported by "reasonably clear" facts.

## **2.2 ICISD arbitration practice fails to address the "Conflict of Identity" of arbitrators**

International investment arbitrations often involve a "conflict of identity" where an arbitrator appointed by one party in the current investment dispute was once a lawyer representing the other party in other disputes or where the same arbitrator is repeatedly chosen by the same party to arbitrate different areas of the investment dispute. In *urbaser v Argentina*, the Argentine Government caused economic damage to AGBA and AGBA filed a claim against ICSID. The AGBA disputed the qualifications of the McLachlan arbitrator appointed by the Argentine government, arguing that McLachlan had expressed a biased opinion on two key issues in the case and that there was a "conflict of identity". The arbitral tribunal rejected the claimant's application for withdrawal: it was legitimate and unavoidable for each person to express some views based on his moral, educational and other backgrounds, and the key to judging whether an arbitrator could make an independent decision on the case was whether the arbitrator could independently hear the case on the basis of facts. The arbitral tribunal's award lacked broad criteria of judgment, exacerbating the parties' distrust of the arbitral award.

## **2.3 ICISD practice fails to balance conflicting issues of law in arbitral tribunals**

A conflict of law issue is a conflict between an arbitrator's preference, as demonstrated by his or her previous comments on a legal issue, and his or her responsibility to resolve the legal issue independently and impartially in the arbitral tribunal. In *InterAguas v. Argentine case*, the Claimant for the Challenge of arbitrator the Government of Argentina proposed that the Kaufmann-Kohler arbitrator had previously been an arbitrator in the *Vivendi* case. The arbitral tribunal held that the fact that the arbitrator was involved in an arbitral award was not sufficient to demonstrate his lack of independence. The arbitral tribunal did not analyze the arbitrator's different legal views from an objective point of view.

# **3. Perfecting measures of arbitrator withdrawal system in ICSID Convention**

## **3.1 Provide for the connotation of arbitrator independence and impartiality**

### **3.1.1 An arbitrator shall have both independence and impartiality**

It is clearly stipulated in the ICSID Convention that arbitrators must satisfy both independence and impartiality to avoid disagreement between the claimant and the arbitrator on whether the arbitrator should recuse himself or herself during the arbitration proceedings, which is conducive to maintaining the authority and prestige of the ICSID.

### **3.1.2 The concrete connotation of arbitrator's independence and impartiality**

Independence means that the arbitrator must not have any interest, such as economic, social or professional, with the claimant and his or her representative. The impartiality of the arbitrator is related to the subjective circumstances of the arbitrator. The connotation of impartiality of an arbitrator can be drawn from the relevant provisions of the International Bar Association (IBA). The IBA Guidelines on Conflicts of Interest in International Arbitration define impartiality of an arbitrator in the opposite sense, i.e., lack of impartiality of an arbitrator is the conduct of an impartial arbitrator who is biased in favor of a party in the arbitration or who is biased

with respect to the matter in dispute. This definition provides guidance for ICSID Convention to clarify the meaning of impartiality of arbitrators.

### **3.1.3 Authorize the specialized body of ICSID to summarize the application and decision of arbitrator withdrawal**

ICSID Convention can authorize the specialized institution of ICSID to summarize the applicable standards of proof for withdrawal decisions made by arbitral tribunals in individual cases, and then summarize the standards that can be universally applied, compile them into a book and publish them on ICSID's website or publications, and use them as the basic guidelines for arbitral tribunals to handle similar cases. This will help maintain the uniformity of arbitral awards, facilitate the assessment of withdrawal applications by applicants, reduce unnecessary withdrawal applications, and promote the efficiency of the arbitration process.

## **3.2 Improving ICSID Convention's arbitrator disclosure system**

ICSID Convention's disclosure obligation only requires arbitrators to disclose facts that affect the independence of the adjudication, and ICSID Convention can be improved as follows: First, the scope of disclosure matters by arbitrators should be specified. Add a list of disclosure matters to ICSID Convention's existing system of withdrawal of arbitrators, and list the content of information to be disclosed. Second, to propose different disclosures according to different cases. Disclosures should be made according to the degree of relevance of the arbitrator to the case, subject to the "maximum knowledge of the arbitrator". IBA Guidelines has divided the grounds for withdrawal of arbitrators into three different colored lists. The red list includes a non-waivable red list and a waivable red list; the orange list, which enumerates the circumstances that may cause the arbitrator not to be independent and impartial from the applicant's perspective; and the green list, which enumerates the circumstances where there is no conflict of interest.

## **3.3 Improve the decision method of arbitrator withdrawal application in ICSID Convention**

Article 58 of ICSID Convention provides that the arbitrator withdrawal is decided by the other arbitrators of the arbitral tribunal who have not been recused. This withdrawal application system makes it difficult for parties to successfully apply for withdrawal and increases the parties' distrust of ICSID arbitration awards. The Permanent Court of Arbitration (PCA) in The Hague's rules on withdrawal of arbitrators can be drawn upon in this regard. The PCA provides that the Secretary-General of the PCA shall personally request the withdrawal of an arbitrator, and if an arbitrator is to be appointed, the Secretary-General shall seek the assistance of the PCA's Bureau of International Affairs. This practice is conducive to promoting consistency in arbitrator withdrawal decisions and the fairness of arbitral awards. In view of the inadequacy of the regulation of withdrawal decisions under ICSID Convention, consideration may be given to placing the decision on withdrawal at the disposal of the President of ICSID, or establishing a special body to hear withdrawal applications, so as to ensure the fairness and impartiality of withdrawal decisions.

## **4. Conclusion**

The independence and impartiality of arbitrators as stipulated in ICSID Convention is the value of the arbitrator disqualification system, and the criteria for determining the conditions for disqualification of arbitrators in ICSID should be substantially adjusted so that the arbitration process is fair and efficient. The field of international investment arbitration should strive to form a universally applicable standard for the withdrawal of arbitrators, so as to establish the consistency of the withdrawal system and the predictability of the results of international investment arbitration, and to highlight the value of the independence and impartiality of arbitrators.

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