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SHOULD ARBITRATORS "LIVE" IN PUBLIC LAW ARBITRATION? THE CASE FOR A MORE DEMANDING STANDARD OF INDEPENDENCE AND IMPARTIALITY

DEVEM OS ÁRBITROS DEVEM "VIVER" NA ARBITRAGEM DE DIREITO PÚBLICO? POR UM PADRÃO MAIS EXIGENTE DE INDEPENDÊNCIA E IMPARCIALIDADE

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Resumo: O texto analisa a necessidade de um standard de independência e de imparcialidade mais exigente na arbitragem de direito público. Esse standard justifica-se em razão das caraterísticas funcionais, substantivas e processuais deste tipo de arbitragem, em particular a circunstância de nela se proceder ao controlo da validade de atos de autoridade, o facto de as decisões serem públicas e a semelhança das questões a decidir. O texto avalia se as regras vigentes em matéria de arbitragem de direito público (de uma perspetiva de direito interno) estão em linha com esse standard mais exigente. Visto que na arbitragem do investimento está a decorrer um debate próximo, o texto procura perceber se as propostas avançadas para eliminar a (alegada) aparência de parcialidade desses árbitros se mostram eficazes e se, à luz da jurisprudência do Tribunal de Justiça da União Europeia, terá emergido uma nova regra segundo a qual não há (não deve haver) arbitragem de direito público sem garantias institucionais de independência.

Abstract: The text intends to make the case for a more demanding standard of independence and impartiality in public law arbitration. Such standard is grounded on its functional, substantive, and procedural features, namely the fact that public law arbitrators review the validity of sovereign action, the non-confidentiality of the awards and the similarity of the claims. We explore whether the existing rules on public law arbitration (from a Portuguese standpoint) are fully in line with such more-demanding standard. Since a similar debate is also taken place in investment treaty arbitration, the text analyses the suitability of the proposals which have been put forward to address investment arbitrators' (alleged) bias and if pursuant to the ECJ there is a new rule under EU law: no public law arbitration without

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guarantees of institutionalized independence.

Palavras-chave: direito público, arbitragem do investimento, arbitragem do desporto, independência, imparcialidade, aparência de parcialidade, Convenção CIRDI;

Keywords: public law, investment arbitration, sports arbitration, independence, impartiality, appearance of bias, judicial review, ICSID Convention;

1. Introduction

The text aims to discuss whether the principle of due process and the requirement of an independent and impartial tribunal has the same legal content in private or public law arbitration. From the perspective of the Portuguese legal system, public law arbitration encompasses administrative law arbitration, tax law arbitration and (partially) sports law arbitration, at least when the TAD (Arbitral Tribunal for Sport) reviews disciplinary decisions taken by sports federations and other sports governing bodies.[2]

Making use of arbitration to settle public law disputes is not a straightforward issue. This is why some scholars claim that administrative law arbitration, even if admissible, should abide by a tailored set of rules, ending subsidiary application of LAV (Law on voluntary arbitration).[3] Whereas others believe that public law arbitration should not significatively deviate from the traditional traits of arbitration as an alternative dispute resolution mechanism.[4]

The debate about arbitrators' independence and impartiality is also taken place in the international sphere, particularly in investment treaty arbitration. Investment treaties give investors the right to bring action against the State hosting the investment in an (international) arbitral tribunal. Said tribunal reviews the validity of the Host state's (legislative, administrative, and jurisdictional) conduct in light of the substantive standards enshrined in the treaty, such as the expropriation clause, the fair and equitable treatment standard and the principle of non-discrimination. Some scholars claim, thus, that investment tribunals deal with public law issues. The continuity of party-appointed arbitrators in investment arbitration, coupled with *de facto* (in some cases, *de jure*) non-confidentiality of awards and dissent opinions – therefore enabling the parties to know whether the arbitrator they have selected has won the case for them[5] – are currently under intense

2. Article 4 of Law no. 74/2013, of September 6, in the version assigned by Law no. 33/2014, of June 16 (the law that creates TAD). Following the Portuguese Regime on Sports Federations (Decree-Law no. 24-B/2008, of December 31, in the version assigned by Decree-Law no. 93/2014, of June 23, sports federations are given, by public delegation, administrative powers to regulate and exert disciplinary action in the field of sport. For other cases of public law arbitration, see J. C. Vieira de Andrade, *Justiça Administrativa*, 19th ed., Almedina, Coimbra, p. 79.

3. Article 181 of CPTA (Code of administrative courts procedure) states that "[T]he arbitral tribunal is established and operates according to the law on voluntary arbitration, with the necessary changes" (translation is ours). Among the critics, see eg. M. Aroso de Almeida, "Arbitragem de direito administrativo: que lições retirar do CPTA?, in C. Amado Gomes / R. Pedro (org.) *A arbitragem administrativa em debate: problemas gerais e arbitragem no âmbito do Código dos Contratos Públicos*, Lisboa, AAFDL, 2018, pp. 13-21; and A. C. Carvalho / A. P Pinto Monteiro / J. D. Coimbra / M. Caldeira / R. Pedro / T. Serrão, *Arbitragem Administrativa: Uma proposta*, Coimbra, Almedina, 2019.

4. R. Medeiros, "Nem oito nem oitenta...A propósito da proposta de uma LAV para as arbitragens administrativas", *Revista de Direito Administrativo*, 2020, pp. 68-74. The Author anticipates no advantages in creating a law on administrative arbitration. Indeed, bringing administrative arbitration nearer to state jurisdiction would de characterize arbitration.

5. On this topic, see eg. S. D. Franck, *Arbitration costs*, Oxford University Press, Oxford, 2019, p. 70, explaining that «[T]here is concern that the availability of a dissent

scrutiny.[6] From the European Court of Justice's perspective, it is fair to say that party-appointed arbitrators undermine the legitimacy of the system (of investment treaties) and compromise the right to an independent and impartial tribunal under article 47 of the CFREU (Charter of Fundamental Rights of the European Union).[7]

Independence and impartiality are key to every system of justice, irrespective of its institutionalized or non-institutionalized character. Notwithstanding, Section 2 of this text makes the case for a more demanding standard of independence and impartiality in public law arbitration (*lato sensu*), arguing that the latter displays differentiated and less flexible features *vis-a-vis* private law arbitration. Section 3 explores whether existing rules on public law arbitration (from a Portuguese standpoint), enshrined namely in RJAT (Tax arbitration regime), CPTA (Code of administrative courts procedure) and the Law of TAD are fully in line with that more-demanding standard of independence and impartiality.

Section 4 analyses the current debate around party-appointed arbitrators in investment treaty arbitration, particularly the issues of arbitrators' bias *vis-a-vis* the appointing party, double hatting (usually understood as the practice by which one individual acts simultaneously as an international arbitrator and as a counsel in separate investor-state arbitration proceedings) and repeated appointments. In fact, said debate shifts between those who argue that there is no independence and impartiality in investment arbitration without institutional or organizational guarantees such as secure of tenure, and those who promptly refuse to move away from party-appointed arbitrators, arguing that independence and impartiality requires nothing but small adjustments to arbitrators' functional guarantees and institutional design.

We intentionally leave aside the rules governing challenging or disqualification proceedings, particularly articles 14 and 57 of the ICSID Convention. This is

(or some separate opinion) may be used by party-appointed arbitrators who feel pressured to express support for an appointing party (...)».

6. Although confidentiality remains the default rule under article 34.5 of UNCITRAL Arbitration Rules 2010 and article 48.5 of the ICSID Convention, one must bear in mind the UNCITRAL Rules on Transparency in Treaty-based Investor-state arbitration, which entered into force in April 2014, and also the Mauritius Convention on Transparency, which entered into force in October 2017. The latter establishes that transparency rules enshrined in the former also apply to investment treaties concluded before April 2014. It is the Author's point of view that confidential investment arbitration awards should not be recognized nor enforced by Portuguese courts, because they violate the procedural dimension of our international public policy. On the other hand, international norms, such as article 54 of the ICSID Convention, requiring State parties to enforce confidential (public law) arbitration awards are unconstitutional, for violating the principle of due process and the independence and impartiality of the tribunals (articles 20 and 202 of the Portuguese Constitution). About the centrality of transparency on investment arbitration, see M. Wolkewitz, "Transparency and independence of arbitrators in investment arbitration: Rule of Law implications", *European Investment Law & Arbitration Review*, vol. 1, 2016, 288-304.

7. See Opinion 1/17 of the Court (Full Court), 30.04.2019, on the compatibility of CETA (Comprehensive Economic and Trade Agreement) with European Union primary law.

a topic where there is large room for improvement as well, regarding the standard of impartiality (actual bias / appearance of bias), the intensity of such standard (serious doubts / justifiable or reasonable doubts) and the question of who should decide challenging proceedings (unchallenged arbitrators / other authorities).[8] Arguably, though, the occurrence of challenging proceedings is the result of the institutional and deontological features of investment arbitration. We will focus on the latter, not on the former.

2. A more demanding standard of independence and impartiality in public law arbitration

The case for a non-univocal (and more demanding) standard of independence and impartiality in public law arbitration is grounded on its function: public law arbitrators – irrespective of the field of application – act as *judicial reviewers* of State's conduct, solving disputes about the legality of sovereign measures. In other words, public law arbitration is still an embodiment of the principles of constitutionality, the prosecution of public interest and the rule of law. Contrary to commercial arbitration, there is no good argument for *flexibility* of arbitrators' independence and impartiality under said scenario, because the State cannot waive its duties to fully abide by the law and the constitution. The State has no fundamental rights to waive and the *trade-offs* between expertise and impartiality should therefore be minimal or non-existing in public law arbitration.

In other words, independence and impartiality in public law arbitration go beyond equality of arms and the protection of the parties from procedural injustices: procedural impartiality is a *necessary but not sufficient condition* to achieve due process in public law arbitration.[9]

The case-law of the ECHR (European Court on Human Rights) on article 6 right to due process stresses the same argument, although grounded in different criteria. From the ECHR's standpoint, recourse to arbitration to solve a dispute, provided it is based on a voluntary agreement unequivocally accepted by the applicant, amounts to a "waive" of his right to have disputes settled by and independent and impartial tribunal.

As the Court stressed in Mutu and Pechstein:

> «[T]he Court accepts that in matters of commercial and sports arbitration to which consent has been given freely, lawfully and unequivocally, the notions of independence and impartiality may be construed flexibly, in so far as the very essence of the arbitration system is based

8. On this topic, see the works of F. Cristani, "Challenge and disqualification of arbitrators in international investment arbitration", *The Law and Practice of International Courts and Tribunals*, vol. 13, 2014, pp. 153-177; and C. Giorgetti, *The selection and removal of arbitrators in investor-state dispute settlement*, Brill, Leiden / London, 2019.

9. On procedural impartiality, see G. Hernandéz, *The International Court of Justice and the Judicial function*, Oxford University Press, Oxford, 2014, p. 131.

> on the appointment of the decision-making bodies, or at least part of them, by the parties to the dispute».[10]

On the contrary, when arbitration is compulsory, no such flexibility exists, meaning that requirements laid down in article 6 fully apply.[11] Transposing this reasoning to public law arbitration would of course be abusive. Nevertheless, the ECHR's decisions uphold that there is a non-univocal concept of due process in arbitration and that said concept is more demanding when non-commercial arbitration is at stake.[12] Same reasoning may also be found in the Constitutional Court's rulings on the creation of the Arbitral Tribunal for Sport:[13] «Plus, as already pointed out, the fact that arbitration is mandatory, therefore not grounded on the will of the parties, demands the arbitration proceedings to include further guarantees, also because the dispute is between an individual and a public power».

However, other traits of public law arbitration raise special concerns. First, the laws allowing individuals to bring action against the State (or other public authorities) in an arbitral tribunal contain an *ex ante* offer to arbitration, enabling multiple claims dealing with the same regulation or interpretation of the law. Think, for instance, about the annulment of liquidation of the ISV (Vehicle Tax) owing to the incompatibility with article 110 of the TFUE (Treaty on the functioning of the European Union).[14] Or disciplinary decisions issued by the Portuguese Football Federation sanctioning clubs for the illegal behavior of their supporters.

Plus, contrary to what usually happens in commercial arbitration, public law arbitration awards (and dissenting opinions) are available to the public.[15] These assertions bring forth some concerns. First, situations giving rise to "appearance of bias" tend to expand, as public awards and dissents might work as a vehicle for arbitrators to express preferences that might secure future appointments. In order words, arbitrators might have a career

10. Mutu and Pechstein v. Switzerland, Applications nos. 40575/10 and 67474/10, Judgment, Third Section, 02.10.2018, par. 146.

11. Ali Riza c. Suisse, Requête n.º 74989/11, Arrêt, Troisième Section, 13.07.2021, par. 76 [«En autre, il convient de distinguer entre arbitrage voluntaire et arbitrage forcé. S'agissant d'un arbitrage forcé, en ce sens que l'arbitrage est imposée par la loi, les parties n'on aucune possibilité de soustraire leur litige à la décision d'un tribunal arbitral. Celui-ci doit offrir les garanties prévues par l'article 6, 1 de la Convention»].

12. It is worth mentioning that, apart from sports arbitration, neither administrative nor tax law arbitration are strictly mandatory (mandatory arbitration refers to situations where, irrespectively of the will of the parties, the law requires the disputes to be settled through arbitration). Nevertheless, article 182 of CPTA and article 4 RJAT confer upon individuals the right to an arbitration agreement, which, from the ECJ's standpoint, is enough to conclude that these arbitral tribunals have compulsory jurisdiction and to distinguish said arbitration from contractual arbitration [see Ascendi Beiras Litoral, Case C-377/13, Judgment of Court (Second Chamber), 12.06.2014, par. 27-29].

13. See Constitutional Court's Ruling no. 230/2013, Process no. 279/2013, 09.05.2013 (translation is ours); defining independence and impartiality, see Ruling no. 52/92, Process no. 10/89, 05.02.1992.

14. Commission v. Portugal, Case C-169/2020, Judgment of the Court (Ninth Section), 02.09.2021.

15. By legal imposition, as results from article 16, g) of RJAT, article 185-B of CPTA and article 34, f) of Law of TAD.

interest in expressing certain legal opinions. Second, public powers, while acting in the guise of appointing authorities, can cherry-pick arbitrators, reappointing solely those who have previously won the case for them, which was precisely why secure of tenure was established in the first place.[16] Third, if disputes cover the same legal questions, issues conflict arise more often, raising the level of threat to arbitrators' impartiality. Following the ECHR in Mutu and Pechstein, «[F]or there to have been bias, it would be necessary to find that the arbitrator in question successively dealt with *identical facts* and that he had to answer the *same question* or, at least, that the difference between the questions that he had to address was tenuous».[17]

Lastly, as pointed out, the applicable standard used in assessing adjudicators' impartiality is appearance of bias, not actual bias. One does not have to prove that the adjudicator holds any personal prejudice or bias in a given case, only that there are justifiable doubts as to his or her impartiality and independence.[18] Appearance of bias is also the standard under the ECHR, the IBA Guidelines and in ICSID and non ICSID investment arbitration. Of course, there are no reason to suspect that public law arbitrators' have less ability to "reduce" themselves to the function of the judge and to limit their subjectivity.[19] Public law arbitrators are as impartial as any other adjudicators.[20]

16. Explaining this reasoning, see G. Van Harten, "Perceived bias in investment treaty arbitration", in M. Waibel / A. Kaushal / K. Chang / C. Balchin (ed.), *The backlash against Investment Arbitration: Perceptions and reality*, Kluwer Law International, London, 2010, pp. 433-453 [«The origins of secure of tenure thus lie in the separation of the judiciary from the executive and the legislature. However, its purposes extend beyond the internal workings of power of the state. Security of tenure also insulates the judge from potential influences that may be brought to bear by executive officials or other states or of international organizations or by private interests»].

17. Mutu and Pechstein, supra note no. 9, par. 162 (italic is ours).

18. That is why the ECHR draws a distinction between subjective and objective impartiality. See eg. Ali Riza and Others v. Turkey, Application no. 30226/10 and 4 others, Judgement (Second Section), 28.01.2020, par. 197: «Impartiality normally denotes absence of prejudice or prejudice or bias. According to the Court's settled case-law, the existence of impartiality for the purposes of article 6(1) must be determined according to a subjective test where regard must be had to the personal conviction and behavior of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case; and also according to an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality». Appearance of bias is also the standard under the IBA Guidelines and in ICSID and non ICSID investment arbitration. See eg. Perenco v. The Republic of Ecuador, PCA Case no. IR-2009/1, 08.12.2009, par. 48 (applying the IBA Guidelines in non-ICSID arbitration), and Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic (ICSID Case No. ARB/97/3), Decision on a challenge to the President of the Committee, 03.10.2001, par. 11, and more recently Eiser Infrastructure v. The Kingdom of Spain, ICSID Case no. ARB/13/36, Decision on the Kingdom of Spain's application for annulment, 11.06.2020, par. 206-208, 239.

19. G. Hernandéz, *The International Court of Justice*, p. 135, quoting F. Mégret [«(...) a judge is called upon to strive to decide in a principled, objective manner, with the absence of prior emotional attachment to a given case, either by direct personal interest or through strong political or ideological views that would predetermine the outcome. Fréderic Mégret calls this a *dédoublement*, the ability of the individual to reduce him/helself to the function of the judge, and to limit the subjectivity of the person»].

20. S. D. Franck / A. van Aaken / J. Freda / C. Guthrie / J. Rachlinski, "Inside the

However, in commercial arbitration, the objective third-party assesses appearance of bias to protect the parties and the principle of equality of arms, bearing in mind that the parties have accepted some trade-off between expertise and impartiality while resorting to arbitration. The fair-minded observer is aware that arbitrators are not «disembodied spirits dwelling on Mars, who descend to earth to arbitrate a case and then immediately return to their Martian retreat to await inertly the call to arbitrate another». Arbitrators are a small-size community, where some interaction is inevitable and built-in to the system.[21]

Yet any such considerations should have stage in public law arbitration. Here, the fair-minded observer represents the community that might be affected by the arbitrators' decision on the validity of the State's conduct. The objective third-party embodies the public interest in having impartial and independent tribunals reviewing public powers' action. Plus, the requirement of independence and impartiality in public law litigation should not be a requirement contingent upon whether previous familiarities with arbitrators are accidental or inherent to the system.[22] For instance, the fact that the TAD's roaster includes a maximum of forty arbitrators (article 20.1 of the Law of TAD) cannot work as an excuse for repeated appointments and affiliation bias (particularly when said affiliation bias is also connected with a certain football club or sports federation).[23]

3. Rules ensuring independence and impartiality in public law arbitration

Sports arbitration, administrative law arbitration and tax law arbitration evince some sensitivity towards a more demanding standard of independence and impartiality in public law disputes. Besides, both CAAD (Centre for administrative arbitration) and TAD have their own code of

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arbitrator's mind", *Emory Law Journal*, vol. 66, 2017, p. 1135.

21. This argument is quite common in investment treaty arbitration, as evinced by Suez v. The Argentine Republic, ICSID Case No. ARB/03/19, Decision on the second proposal for the disqualification of a member of the arbitral tribunal, 12.05.2008, ruling on the disqualification of Professor Gabrielle Kaufmann-Kohler, particularly par. 32; and renewed, yet with a different outcome, in Eiser Infrastructure, supra note no. 17, par. 217 [«The Committee has carefully reviewed the uncontested facts, as well as other decisions in such cases. As pointed out in the Suez Case, it is true that arbitrators, lawyers and experts doing investment arbitrations live on the same planet. Some interaction is, therefore, inevitable. Nevertheless, it is obvious and it is to be expected that the more "connections" there are between them, across cases and it is to be expected that the more "connections" there are between them, across cases and, particularly, in different roles, the more chances there are that these may give rise to conflicts. For the sake of the fair and objective conduct of the arbitral proceedings, these should, therefore, be declared and specifically brought to the attention of the parties and other arbitrators»].

22. Stressing this point regarding arbitrators' disqualification proceedings in investment arbitration, M. N. Cleis, *The independence and impartiality of ICSID arbitrators,* Brill, Leiden, 2017, p. 87: «In other words, the argument of system inherence does not justify the dismissal of arbitrator challenges, if the established facts raise justifiable doubts about an arbitrator's lack of independence and impartiality. The standard is not whether a connection is accidental, or whether a circumstance is built-in the system, but whether it raises justifiable doubts about the arbitrator's ability to evaluate the merits of the case open-mindedly, rationally and objectively».

23. Affiliation effect is a type of bias whereby arbitrators tend to side with the nominating party. See *infra* section 4.2.

conduct for arbitrators.

It is worth mentioning that article 24 of the Law of TAD establishes an all-encompassing prohibition of double hatting, by preventing arbitrators whose name is on the list from being counsels in other proceedings under the auspices of the TAD.

Under RJAT, disputes between taxpayers and tax administration are settled either by a sole arbitrator or by a three-arbitrator panel, depending on the value of the action. When the tribunal functions as a panel, the arbitrators are normally appointed by the parties, the President of the tribunal being selected by the latter. Parties are prevented from appointing persons working as counsels in tax arbitration proceedings or persons integrating law firm whose members are currently working as counsels in tax arbitration proceedings (article 6.2, b), *in fine* and article 6.4 of RJAT).

In addition, article 7 of RJAT places heavy requirements as to who can be President. There is a list of President arbitrators (who cannot be appointed as wing arbitrators),[24] who are required to have been judicial officers or to have a PhD in tax or economic law. Their nomination is contingent upon the fact that in the last two years they have not provided legal services to any of the disputing parties (article 7.4 RJAT).

Yet under article 25.4 of the Law of TAD, following article 13.4 of the Law on Voluntary arbitration (LAV), arbitrators shall be disqualified provided there are circumstances giving rise to *serious doubts* as to their impartiality and independence. Therefore, article 25.4 requires a high threshold to be met (serious doubts) in order to disqualify an arbitrator, setting aside less demanding thresholds such as "justifiable doubts" upheld by the IBA Guidelines and by article 12 of UNCITRAL Arbitration rules.[25] To put it simply, under article 25.4 of Law of TAD it is hard to disqualify an arbitrator.

Sports arbitrators shall disclose any circumstances which may raise *serious doubts* as to their impartiality, including any professional or personal relationship with the parties (al. a), any direct or indirect economic interest on the outcome of the dispute (al. b), and any previous knowledge the arbitrator might have had about the dispute (al. c). Previous appointments by the parties (mainly by sports federations and by football clubs) as well as academic publications or interventions in sports matters (which are rather common since arbitrators cannot work as counsels in sports

24. Wing arbitrators are the arbitrators appointed by the parties to the dispute.

25. See Article 12.1 of the UNCITRAL Arbitration Rules: «Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence»; and General standard no. 2 (conflicts of interest), al. b) of the IBA Guidelines: «The same principle applies if facts or circumstances exist, or have arisen since the appointment, which, from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances, would give rise to justifiable doubts as to the arbitrator's impartiality or independence, unless the parties have accepted the arbitrator in accordance with the requirements set out in General standard 4». Worth mentioning, though, that according to article 1.2 of the Deontological statute of TAD's arbitrators, the rules of conduct enshrined in such statute should be interpreted in line with the IBA Guidelines.

arbitration) are not specifically mentioned. There are, however, stricter rules on disclosure obligations, such as those enshrined in article 6.5 of the CAAD Deontological Code, requiring arbitrators to reveal (to the parties, to the fellow arbitrators and to the CAAD) previous personal and professional relationship with the parties and with their legal representatives, including whether said arbitrators have previously been appointed by the same party.

Finally, although article 8.2 of RJAT upholds a lower threshold as to under what circumstances an arbitrator should be disqualified (reasonable doubts, not serious doubts), articles 5, al. a) and 6 of CAAD Deontological Code state that arbitrators should only be disqualified in case of circumstances giving rise to "serious doubts" as to their independence and impartiality. Again, this is a rather high threshold to be met and the differences between the wording of the law and the wording of the code are hardly innocent, given the debate around the two standards currently going on in international arbitration.

To sum up, though some provisions of public law arbitration regimes and deontological codes reveal more demanding requirements in comparison with commercial arbitration (eg. double-hatting provisions), some concerns still come out regarding repeated appointments and the so-called affiliation effect. For instance, acknowledging that questions of fact and law in sports arbitration (again, dealing with public law disputes) are much the same, and that article 20.2 requires TAD's arbitrators to be persons of *recognized expertise in sports law*, it is hard to understand the reasons behind the legal possibility of wing arbitrators, instead of aleatory panels.

4. The quest for arbitrators' impartiality and independence in investment treaty arbitration: shift of paradigm?

As previously stressed, arbitrators' impartiality in investment treaty arbitration is a most contentious subject. The question currently going in said arbitration is whether further reinforcing arbitrators' functional guarantees of independence and impartiality is enough to ensure due process and legitimacy. Or whether said concerns might only be addressed by means of organizational or institutional guarantees, usually absent from arbitration, such as secure of tenure and fixed non-renewable terms for adjudicators.

Of course, "[g]etting rid of party-appointed would *denaturalize* the core of international investment arbitration and transform it into a different system".[26] Roberts has already provided a most accomplished taxonomy of reform strategies, ranging between incremental, systemic, and paradigmatic.[27] Yet this is a rather descriptive statement. The point

26. Italic is ours. C. Giorgetti, "Who decides who decides in international investment arbitration?", *University of Pa. Journal of International Law*, vol. 35, no. 2, 2014, pp. 431-486 (p. 464).

27. We will not further develop this topic. See, however, the major contributions of A. Roberts, "Incremental, systemic, and paradigmatic reform of investor-state arbitration",

of concern – normatively speaking – should not be whether said reform will "denaturalize" investment arbitration, but rather whether said reform is indispensable to ensure an acceptable standard of independence and impartiality in investment arbitration.

The next lines approach two main paths of reform. On the one hand, attention must be paid to the European Union's stance on investment arbitration reform, especially the creation of a Multilateral Investment Court (MIC) and the inclusion of an Investment Court System (ICS) in post-Lisbon investment and commercial treaties concluded by the EU with third states. But there are less radical stances of reform as well, arguing against abolishing party-appointed arbitrators.

4.1. The EU's quest for institutionalized independence in investment arbitration

Concerns about the desirability of reform in investment treaty arbitration have been brought forth by the EU in UNCITRAL Working Group III (on ISDS reform).[28] Said concerns are related to the lack or apparent lack of independence and impartiality of decision making in ISDS, to the adequacy, effectiveness and transparency of the disclosure and challenge mechanisms available under many existing treaties, and to the lack of appropriate diversity amongst decision-makers in investor-state dispute settlement.

Inspired by Van Harten's pioneer proposal on a permanent court, the EU has made the case for a "systemic response", built upon a two-level jurisdiction standing mechanism, comprising a first instance tribunal and an appellate tribunal, full-time adjudicators (having no activity outside the adjudicative marketplace) aleatorily selected to a particular dispute. Independence from government is ensured through long-term non-renewable term of office. This proposal was enshrined in CETA (Comprehensive and economic trade agreement) and in other investment treaties (*rectius*, free-trade agreements with investment chapters) concluded by the EU under its new external competence over foreign direct investment.[29]

According to article 8.30 [Ethics] of CETA, adjudicators shall comply with the International Bar Association Guidelines on Conflicts of interest in International Arbitration or any supplemental rules adopted pursuant to article 8.44.2. Interestingly, the European Commission understood that supplemental rules were needed, as she drafted a proposal for a Council

The American Journal of International Law, vol. 112, no. 3, 2018, pp. 410-432, and S. Puig / G. Shaffer, "Imperfect alternatives: institutional choice and the reform of investment law", *The American Journal of International Law*, vol. 112, no. 3, 2018, pp. 361-409.

28. ISDS means Investor-State dispute settlement.

29. See EU-Singapore Investment Protection Agreement, which entered into force on 21 November 2019, and EU-Vietnam Investment Protection Agreement, which entered into force on 1 August 2020. See also the EU text proposal for the modernisation of the Energy Charter Treaty, presented on 19 May 2020, which also approaches such possibility.

decision on a code of conduct for members of the CETA tribunals.[30] These rules embody stricter ethical requirements for adjudicators than those laid down in the IBA Guidelines, such as a broader disclosure of past interests (encompassing the last five, instead of the last three years). No waivable situations of conflict of interests are admissible.[31]

Additionally, article 8.30 [Ethics] of CETA (*in fine*) clearly addresses double-hatting, stating that adjudicators shall refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment dispute under this or any other international agreement».[32]

The EU's submission to UNICTRAL ISDS reform group includes an annex, which is endorsed by the EU, entitled "Possible reform of investor-state dispute settlement". The proposal is grounded on the assumption that investment treaty arbitration:

> «[d]eal with the sovereign capacity of states to regulate, by providing certain protections which are enforceable by investors. This creates a situation similar to public or constitutional law, in which individuals are protected from acts of the State and can act to enforce those protections. It is important to recall that the state is acting in its sovereign capacity, both in approving these treaties and as regards acts challenged».[33]

The same standpoint seems to be shared by the ECJ in Opinion 1/17,[34] on the compatibility of CETA with EU primary law and with the "constitutional" principle of the autonomy of EU legal order. Here, it was recognized that the jurisdictional mechanism (the so-called ICS) set out in the treaty exert some sort of judicial review over EU's (or EU member states') legislation (par. 138). Having said this, the ECJ moved on to analyze whether the ICS respects article 47 of the CFRUE, particularly the right to an independent and impartial tribunal, currently a subject of the utmost sensitivity for the

30. European Commission's Proposal for a Council Decision on the position to be taken on behalf of the European Union in the Committee on Services and Investment established under the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part of the other part as regards the adoption of a code of conduct for Members of the Tribunal, the Appellate Tribunal and mediators, COM(2019) 459 final.

31. The IBA Guidelines contain a red list, meaning a list of situations where a conflict of interests exists from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances. The red list consists of two parts: a non-waivable red list and a waivable red list. The non-waivable list covers situations necessarily raising justifiable doubts as to the arbitrators' impartiality or independence. The waivable red list covers situations that are serious but not as severe. These situations should be considered waivable, but only if and when the parties, being aware of the conflict-of-interest situation, expressly state their willingness to have such person act as arbitrator.

32. Italic is ours.

33. Submission of the European Union and its Member States to UNCITRAL Working Group III, 18 January 2019, Annex - Reproduction of "Possible reform of investor-state dispute settlement (ISDS). Submission from the European Union A/CN.9/WG.III/WP.145 (12 December 2017)" (point 5).

34. Opinion 1/17, supra note no. 6.

EU.[35] One might doubt the importance of said opinion for the object of this paper, considering that Opinion 1/17 assesses the validity of the new ICS and not the traditional *ad hoc* arbitration model. The findings of this ruling are, however, highly relevant.

First, the ECJ reminds what an independent and impartial tribunal is meant to be under EU law. Accordingly,

> «[t]he requirement of independence comprises two parts: it has, first, an external aspect, which presupposes that the body concerned exercises its functions wholly autonomously (…). It has, second, an internal aspect, which is linked to impartiality and seeks to ensure that an equal distance is maintained from the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings, an aspect that requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application from the rule of law».[36]

Assessing whether the ICS respects both the internal and the external aspects of independence, the Court highlighted that equal distance is guaranteed by articles 8.27.6 and 8.27.7 of CETA, which ensure that cases are to be heard by a division, the composition of which is to be aleatory and therefore unpredictable for the parties. This suggest that, for the ECJ, the fact that adjudicator abide by the IBA Guidelines (as article 8.30.1 disposes) or other codes of conduct *is not enough to ensure impartiality*. Impartiality is contingent upon the aleatory character of the division who should hear the case or, in other words, upon the fact that there are no party-appointed arbitrators. As Castellarin puts it, «[S]ome features of the EU's ISDS model cannot be seen as the result of a mere policy choice anymore, but also correspond to requirements of EU primary law as interpreted by the CJEU».[37]

Furthermore, it means that, while interpreting EU law, the ECJ is placing higher hurdles regarding the resort to traditional arbitration in public law issues. In fact, the same criticism has been directed towards intra-EU investment arbitration, starting with Achmea[38] and closing (so far) with

35. A. Melikyan, "The legacy of Opinion 1/17: to what extent is the autonomous EU legal order open to new generation ISDS?", *European Papers*, vol. 6, no. 1, 2021, pp. 645-673 (p. 665) – available online.

36. Opinion 1/17, supra note no. 6, par. 202. See also, on this subject, Vindel, C-49/18, Judgement of the Court (Second Section), 07.02.2019, par. 66; Associação Sindical de Juízes Portugueses, C-64/16, Judgment of the Court (Grand Chamber), 27.02.2018; Commission v. Republic of Poland, C-619/18, Judgment of the Court (Grand Chamber), 24.06.2019.

37. E. Castellarin, "The implications of Opinion 1/17 for the European Union's External Policy regarding Investor-State Dispute Settlement", *Revue des affaires européens*, no. 4, 2020, pp. 881-901 (p. 885), exploring the consequences of Opinion 1/17 for the future of EU's external policy, particularly the loss of flexibility on negotiations with third states.

38. Achmea, C-284/16, Judgment of the Court (Grand Chamber), 06.03.2018. In Achmea, the ECJ ruled that ISDS clauses set out in intra-EU bilateral investment treaties violate the principle of autonomous EU legal order, as the arbitral tribunal, being outside

Komstroy[39] and PL Holdings.[40]

In light of this scenario, it remains to be seen whether the ECJ's remarks on the indispensability (under article 47 of the CFREU) of adjudicators' aleatory divisions in EU arbitration with third states should be transposed to purely domestic public law arbitration, whenever said arbitration deals with matters falling under the scope of application of EU law. To put it simply, we wonder whether there is a new rule under EU law: *no public law arbitration without guarantees of institutionalized independence*.

4.2. Less radical trends of reform in investment arbitration

A different path of reform is to approve a special code of conduct for adjudicators (including the new ICS) or to introduce *debiasing* mechanisms in investor-state arbitration. This path of reform is remarkedly different from the latter, since it addresses the "perceived bias" of investment arbitrators at an individual level,[41] without introducing any institutional safeguards, such as secure of tenure, aleatory divisions or exclusivity. In fact, it intends to preserve party-appointed arbitrators, not to abolish them.

Given the features of investment treaty arbitration (eg. non-confidentiality, similarity of the claims, political character), there is considerable room for "appearance of bias".[42] Most common types of bias in international

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of the Member States' legal system, is not entitled to make a preliminary reference to the ECJ. On Achmea and the principle of autonomous EU legal order, see eg. K. Lenaerts/ J. Gutiérrez-Fons/ S. Adam, "Exploring the autonomy of the European Union legal order", ZaörRV, vol. 81, 2021, pp. 47-87, or C. Contartese/ M. Andenas, «EU autonomy and investor-state dispute settlement under inter se agreements between EU: Achmea», *Common Market Law Review*, 56, 2019, pp. 157-192, among many others.

39. Komstroy, C-741/19, 02.09.2021. In the long-awaited Komstroy decision, the ECJ applied the reasoning of Achmea to article 26 of Energy Charter Treaty, stating that investor-state arbitration in energy matters (which curiously exists since April 1998) is after all incompatible with the essential characteristics of EU law. Anticipating Komstroy, see eg. A. Lacson, "What happens now: The future of intra-E.U Investor-state dispute settlement under the Energy Charter Treaty", *New York University Journal of International Public Law & Politics*, vol. 51, 2019, pp. 1327-1346, or J. Basedow, "The Achmea Judgment and the Applicability of the Energy Charter Treaty in Intra-EU Investment Arbitration", *Journal of International Economic Law*, vol. 23, 2020, pp. 271-292, among many others.

40. PL Holdings, C-109/20, Judgment of the Court (Grand Chamber), 26.10.2021. PL Holdings is the ultimate death sentence of intra-EU investor-state arbitration, stressing that *ad hoc* arbitration between an EU investor and an EU member state, meaning an agreement to arbitration outside the scope of an investment treaty, circumvents the obligations arising for member states under the Treaties, especially article 4.3 of TEU and articles 267 and 344 of TFEU. Therefore, such contractual agreement to arbitrate also undermines the principle of autonomous EU legal order and the principle of sincere cooperation.

41. G. Van Harten, "The European Commission and UNCTAD Reform Agendas", in S. Hindelang / M. Krajewski (ed.), *Shifting paradigms in International Investment Law: more balanced, less isolated, increasingly diversified*, Oxford University Press, Oxford, 2016, p. 134.

42. As E. Voeten reminds, «the subjectivity inherent to rights review invites politics into the equation». One interesting point of the debate going on in investment-treaty

adjudication are home-state bias – positing that adjudicators who are nationals of a country are biased in favour of their home-state[43] – and regime bias – meaning that adjudicators of a court or tribunal established by a (functional) international regime tend to favour the values and interests of said regime.[44] Dimitropoulos argues that investment arbitration reform should address a different type of bias, "cognitive bias", defined as a systemic failure to decide impartially owing to cognitive particularities in the decision-making process. It occurs because investment arbitration is designed in a way that fails to counteract human cognitive limitations.

Puig labels these limitations as *affiliation effect*, a type of bias whereby arbitrators tend to side with the nominating party, and *compensation effect*, meaning that, in the absence of secure of tenure, arbitrators tend to decide in a way that secures future reappointments.[45] Some data support these effects. Van den Berg has demonstrated that 100% of dissenting opinions in investment treaty arbitration were issued by the arbitrator appointed by the losing side.[46]

Yet some authors argue data demonstrate nothing but a *selection effect,* which is not and should not be equated to bias.[47] The selection effect

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arbitration is whether there are noteworthy signs of affiliation or compensation bias (meaning party-appointed arbitrators trying to secure future appointments by deciding in favour of the appointing party) or simply of what Waibel & Wu have labelled political bias, as arbitrator policy preferences bias their decision towards one party in an arbitration. See E. Voeten, "Politics, judicial behaviour and institutional design", in J. Christoffersen / M. Madsen (ed.), *The European Court of Human Rights between law and politics*, Oxford University Press, Oxford, 2011, pp. 61-76 (p. 61); and M. Waibel / Y. Wu, "Are arbitrators political? Evidence from International Investment Arbitration", *ASIL Research Forum Working Paper,* 2017 (available online).

43. Home-state bias explains eg. article 26.3 of the ECHR («When sitting as a single judge, a judge shall not examine any application against the High Contracting Party in respect of which that judge has been elected») and article 39 of the ICSID Convention («The majority of the arbitrators shall be nationals of State other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute; provided, however, that the foregoing provisions of this article shall not apply if the sole arbitrator or each individual member of the Tribunal has been appointed by agreement of the parties»).

44. According to the taxonomy established by G. Dimitropoulos, "Investor-state Dispute Settlement Reform and Theory of Institutional design", *Journal of International Dispute Settlement*, vol. 9, no. 8, 2018, pp. 535-569. In investment treaty arbitration, the regime bias has been associated with the good governance programme, which intends to foster foreign investment by locking-in investor's rights. Critically, see eg. D. Schneiderman, "How to govern differently: neoliberalism, new constitutionalism and international investment law", in S. Gill / A. C. Cutler (ed.), *New Constitutionalism and World Order* Cambridge University Press, Cambridge, 2014, pp. 165-178; and N. Perrone, *Investment treaties and legal imagination*, Oxford University Press, Oxford, 2021, p. 96 ss.

45. S. Puig, "Blinding international justice", *Va. Journal of International Law*, vol. 56, no. 3, pp. 647-700 (p. 661). Additionally, the Author also mentions an "epistemic effect", arguing that «[a] professional culture may filter some arbitrators out, skewing the view of the law, for instance, to certain values (predictability) over others (fairness)».

46. A. J. Van den Berg, "Charles Brower's Problem with 100% - Dissenting opinions by party appointed arbitrators in investment arbitration", in D. Caron / S. Schill / A. Smutny / E. Triantafilou (ed.), *Practicing virtue*, Oxford University Press, Oxford, 2015, pp. 504-513.

47. C. Giorgetti, *Who decides who decides*, p. 466.

consists of selecting a suitable arbitrator, i.e. an arbitrator that understands the parties' position and that will win the case for them.[48] Waibel & Wu's study argues no affiliation nor compensation effects exists in investment arbitration. There is room, though, for political or epistemic effect, as «[t]he characteristics that may cause decision bias are not those selected by the disputing parties when they choose their own arbitrators but are mostly related to arbitrators' policy preferences». So, wing arbitrators decide in favour of the appointing party, not to secure further reappointments, but because they share the same political preferences, which was why parties selected them in the first place. Giorgetti shares the same mindset.[49]

Nevertheless, the differences between affiliation effect, compensation effect and selection effect are hard to notice.[50] If one bears in mind that the standard for assessing arbitrators' impartiality is not actual bias, but appearance of bias, then it becomes straightforward that party-appointed arbitrators, as well as role-switching between wing arbitrators and the President of the Tribunal, are at least problematic. The fair-minded observer, who represents the public in public law arbitration, is not concerned – nor should be – with repeated appointments occurring because of selection effect or compensation effect.

Several proposals have been put forward to address these concerns without eliminating party-appointed arbitrators. Said proposals intend to *debias* investment arbitration through changes in its institutional design. Puig, for instance, wants to neutralize affiliation and compensation effects by "blinding" arbitrators as to whom has nominated them.[51] Other stance would be to abolish dissenting opinions, similarly to what happens in the ECJ, keeping the parties in the dark as to whether appointed arbitrators tried to win the case for them and preventing arbitrators to build a partisan reputation towards one side of the dispute.[52]

On the other hand, creating special rules of conduct for investor-state

48. N. M. Cleis, *The independence*, p. 24.

49. C. Giorgetti, *Who decides who decides*, p. 466 [«Parties make a selection and appoint an arbitrator who is "philosophically inclined to decide along with the views of the claimant or of the respondent. Thus, an arbitrator does not decide in a certain way because of the specific appointment by a party, but because he or she shares the same *Weltanschauung* as the party that appointed them»].

50. This point is made by S. Puig, *Blinding*, p. 685.

51. S. Puig, *Blinding*, p. 688 ss. The Author explores different alternatives do party appointments, such as appointment of sole arbitrator (instead of two wing arbitrators and a third arbitrator selected by the former), appointments by agreements and appointments by a neutral party. The author prefers, though, the blinding solution, as «[I]t may, indirectly, mitigate the strength of selection effects by curtailing the opportunities of arbitrators to act strategically on response to such information, i.e. catering to the appointing party in order to develop a partisan reputation». See, also, C. Giorgetti, *Who decides who decides*, p. 474 ss., for different alternatives.

52. G. Dimitropoulos, *Investor-state Dispute Settlement*, p. 557 ss. The Author assumes that the introduction of debiasing and behavioral mechanisms is more important than the eventual organizational form of the dispute settlement (i.e. than EU' ICS or MIC proposals). Making non-publication or non-issuance of dissent opinions the default rule in investment arbitration would be a step forward because it «[r]educes government ability to use *ex post* punishments and rewards against dissenting judges».

arbitration comes from the assumption that existing rules on conflicts of interest developed for international commercial arbitration should not be unconditionally transposed to investment arbitration.[53] We share this reasoning, as it is line with our view that there is no unitary concept of due process in arbitration. Due process demands vary according to the substantive issues under dispute, particularly when arbitration is expected to conduct some sort of judicial review of sovereign conduct. For instance, the IBA Guidelines openly state that they do not intend to discourage the service as arbitrators of lawyers practicing in large firms or legal associations, allowing double-hatting to pursue.

The Draft Code of conduct for adjudicators in international investment disputes, created by a joint task force between ICSID and UNCITRAL, follows closely the deliberations of UNCITRAL Working Group III on investor-state dispute settlement. Contrary to the IBA Guidelines, the Draft Code shall be binding and contains concrete rules rather than guidelines.[54] It looks auspicious that the Draft Code does not encompass a "waivable red list", meaning a list of non-exhaustive situations giving rise to justifiable doubts as to the arbitrators' impartiality, which notwithstanding the affected party may accept. As previously stated, there should be no waivable due process guarantees in public law arbitration, since *the parties cannot waive what is not theirs to wave*, i.e. the public interest of having impartial and independent tribunals reviewing the public powers' action.

Plus, version one of the Draft Code has a special provision on "limit on multiple roles" (article 6). It is not clear whether the final version of said provision will encompass a clear-cut prohibition of double-hatting, similar to article 18 of the Code of Sports-related Arbitration and to article 24 of the Law of TAD, or a more tailored version, which only prohibits concurrently acting as counsel/expert/witness/adjudicator where the cases involve the same factual background and at least one of the same parties or their subsidiary, affiliate or parent entity (version two).[55] Version three adds an option of "full disclosure (with option to challenge)", under which «[A]djudicators shall disclose whether they concurrently act as a legal representative, expert, or in any other role on cases involving the same or related parties, the same

53. See G. Bottini, "Should arbitrators live on mars – Challenge of arbitration in investment arbitration", *Suffolk Transnational Law Review*, vol. 32, no. 2, pp. 341-366 (p. 346, note no. 26). Also, G. Dimitropoulos, "Constructing the independence of international investment arbitrators: Past, present and future", *Nw. Journal of International Law and Business*, vol. 36, 2016, pp. 371-434 (p. 408).

54. The Draft Code has three versions so far – version one, version two and version three.

55. Version two addresses an uttered concern regarding a clear-cut prohibition of double hatting, which is the risk of further reducing the lack of diversity (of arbitrators) in investment arbitration. In fact, Puig, relying on data until 2016, has demonstrated that 39 arbitrators account for nearly 80% of all the cases decided. See S. Puig, *Blinding*, pp. 681, S. Puig, "Social capital in the Arbitration market", *The European Journal of International Law,* vol. 25, no. 2, pp. 387-424, arguing that investment arbitrators are structurally organized as a network, where most people assigned to the list (of article 12 of the ICSID Convention) are never appointed as arbitrators; and B. Remy, "Chronique des sentences arbitrales – Centre Internationale pour le réglement des differends rélatifs aux investissements", *Journal du Droit International*, no. 1, 2021, pp. 287-344 (p. 291).

measures, or [substantially] the same legal issues as are at issue in the IID». It is regretful, though, that under versions two and three, limits on multiple roles become contingent upon the will of the parties, forgetting, again, that *the parties cannot waive what is not theirs to wave*.

Version one of the Draft Code also grappled with the so-called "issues conflict". According to the Code, «[i]ssues of conflict may exist when an adjudicator has taken a position on a legal matter relevant to the case or has prior factual knowledge relevant to the dispute at hand (...). The concern is that an adjudicator might not address issues at stake in the proceedings with an open mind, as they may have prejudged such issues».[56] Version one extended disclosure obligation to encompass "a list of all relevant publications by the adjudicator or candidate ant their relevant public speeches" (article 5.2., d) of version one). However, versions two and three have eliminated such specific disclosure provision, a move which is, again, worth of criticism.

We agree that, if versions two or three of the Code of Conduct are to prevail, it becomes harder to understand the need for a new code of conduct, since the differences between the latter and the existing rules of conduct, such as the IBA Guidelines, are minor and almost irrelevant.[57]

5. Conclusions

The text intended to make the case for a more demanding independence and impartiality standard in public law arbitration. We grounded our argument on functional, substantive, and procedural features of such arbitration, namely the fact that public law arbitrators review the validity of sovereign action, the non-confidentiality of the awards and the similarity of the claims. It is the Author's view that, contrary to commercial arbitration, where some trade-offs between expertise and impartiality are normally admitted (explaining, for instance, the "waivable red list" set out in the IBA Guidelines), in public law arbitration the State cannot waive its duties to fully abide by the law and the constitution. The objective third-party criteria used in assessing "appearance of bias" embodies the public interest in having impartial and independent tribunals reviewing the public powers' action.

56. Draft Code of conduct for adjudicators in investor-state dispute settlement (version one), par. 59. For an example of such conflict, see Urbaser v. The Argentine Republic, ICSID Case No. ARB/07/26, Decision on Claimant's proposal to disqualify Professor Campbell McLachlan, 12.08.2010, because of Professor McLachlan's previous academic contributions on the most favoured nation clause.

57. See also B. Remy, Chronique, p. 302 [«Il faut d'abord s'interroger de ce texte. Il existe en effet dejà sur le thème des conflits d'intérêts et sur l'obligation de déclaration, des instruments qui bénéficient d'une réputation solide. On pense tout naturellement aux directives de l'Association internationale du Barreau (International Bar Association – IBA) sur les conflits d'intérêts devant les tribunaux d'arbitrage international dont le derniére version a été adoptée en 2014 (...). Il faut des sérieuses raisons pour proposer un nouveau texte (...)»].

Our research evinced that a similar debate is currently taking place in the international sphere, notably in investment treaty arbitration. Hinging on Opinion 1/17, on the compatibility of CETA with EU primary law, we believe that the ECJ is placing higher hurdles regarding the resort to traditional ad hoc arbitration in public law issues. It remains to be seen whether the ECJ's remarks on the indispensability (under article 47 of the CFREU) of adjudicators' aleatory divisions in EU arbitration with third states should have impact on purely domestic public law arbitration.

Although EU's proposal of abolishing party-appointed arbitrators in investment arbitration seems a bit rush, we doubt that alternative rules of conduct or institutional design currently under discussion might address the concerns regarding arbitrators' independence and impartiality. This is because, irrespective of whether investment arbitration produces affiliation effect, compensation effect or (solely) selection effect, there is considerable room for "appearance of bias", given the functional, substantive, and procedural features of public law arbitration. The fair-minded observer, who represents the public in public law arbitration, is not concerned – nor should be – with repeated appointments occurring owing to similarity of political preferences between wing arbitrators and the appointing parties or because arbitrators are trying to secure future reappointments.

In light of this scenario, analysis conducted to the Portuguese public law arbitration regimes and deontological codes concluded that, although more demanding requirements were enacted (in comparison with commercial arbitration), some concerns still come out regarding repeated appointments and the so-called affiliation effect.

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