

# **Private Procedure to Protect Public Interests - *Selection of Arbitrators in Treaty-based Investment Arbitration***

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**Kyoto Seminar on International Investment Law**

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# Topics

1. Arbitration vs. Permanent Court
2. Qualities of Arbitrators
3. Conflicts of Interest
4. Selection by the Institutions



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# ***Arbitration or Permanent Court ?***

# Arbitration and the public interest - *skepticism*

## *Criticism*

- Skepticism towards neutrality of arbitrators.
- Incoherent development of international investment law.
- Public interests compromised over private interests

Call for *permanent court* for investment treaty disputes

-- Will this be a silver bullet?

- Practical issue : who supplies judges? States?
- Inherent issue: the court formed by respondents/states?
- Serious issue: permanent judges more efficient?

# Arbitration - *imperfect but better means?*

- “Free from” any national legal system
- Convergence of common law & civil law
- Flexibility
- Party autonomy: select judges of parties’ choice and confidence
  - *Better means to resolve cross-board disputes and disputes against state*



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# ***Who should be Arbitrators?***

# Qualities under ICSID Convention

## ICSID Convention

- **Article 40 (2)** Arbitrators appointed from outside the Panel of Arbitrators shall possess the qualities stated in paragraph (1) of Article 14.
- **Article 14 (1)** Persons designated to serve on the Panels shall be persons of **high moral character** and recognized **competence in the fields of law, commerce, industry or finance**, who may be **relied upon to exercise independent judgment**. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.

## ICSID Arbitration Rules

- **Rule 6(2)** requires arbitrators to sign a declaration.
- **Rule 1(4)** not eligible if previously acted as an arbitrator for the same matter.

**Investment treaty arbitrator**

***vs.***

**Commercial arbitrator**

***any difference in qualities?***



# Treaty arbitration v. Commercial arbitration

- **Similarities**: expertise of both procedure (arbitration) and substance (law/industry/practice) are required
- **Differences** on emphasis reflecting differences in investment treaty arbitration and commercial arbitration proceedings.

	Investment treaty arbitration	Commercial arbitration
Fact patterns	Some similarities	Varied
Legal issues	Similarities (similar provisions under BITs)	Varied
Rule making aspect	High	Low
Needs for consistency	High	Low
Reference to previous decisions	Frequent	Almost none
Procedures	More tactical and complex	Could be simple

# Treaty arbitration v. Commercial arbitration

- Importance of expertise of public international law and investment treaty cases.
  - Coherent development of international investment law
- Importance of experience in international commercial arbitration.
  - Due process
  - Proper case management
- Public international law expertise and international commercial arbitration expertise are equally imperative.



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# ***Who sits as an arbitrator?***

# Investment treaty arbitrators in high demand



**Name:**

L. Yves Fortier

**Nationality:**

Canada

**Title:**

- An independent arbitrator
- Canada's Ambassador and Permanent Representative to the United Nations in New York (July 1988 until January 1992).

**Area of expertise:**

Arbitration and mediation

<http://www.20essexst.com/member/yves-fortier>

# Investment treaty arbitrators in high demand



**Name:**

Francisco Oregon Vicuña

**Nationality:**

Chile

**Title:**

- Professor of law at the Heidelberg University Center for Latin America
- The Honorary Director of the Joint LL. M. Program with the University of Heidelberg *and the* Max Planck Institute, which specializes in international law, international trade, investment and arbitration

[http://www.arbitration-icca.org/about/governing-board/MEMBERS/Francisco\\_Orrego\\_Vicuna.html](http://www.arbitration-icca.org/about/governing-board/MEMBERS/Francisco_Orrego_Vicuna.html)

# Investment treaty arbitrators in high demand



**Name:**

Gabrielle Kaufmann-Kohler

**Nationality:**

Switzerland

**Title:**

- Partner, Levy Kaufmann-Kohler Attorneys-at-law
- Professor (international arbitration & private international law), Faculty of Law, the University of Geneva

**Area of Practice:**

International commercial, investment and sports arbitration, acting primarily as arbitrator

[http://www.lk-k.com/uk/our-team.html?team\\_id=3](http://www.lk-k.com/uk/our-team.html?team_id=3)

# Investment treaty arbitrators in high demand



**Name:**

Brigitte Stern

**Nationality:**

France

**Title:**

Professor of Law - University of Panthéon-Sorbonne (Paris I)

**Area of Practice:**

Public international law, International administrative law, Nationality issues, State responsibility, State succession, Disputes settlements especially in international arbitration, WTO case law, International criminal responsibility, State immunity.

<http://www.iaiparis.com/profile/brigitte.stern>

[http://www.arbitrationacademy.org/?page\\_id=3985](http://www.arbitrationacademy.org/?page_id=3985)

# Investment treaty arbitrators in high demand



**Name:**

Charles N. Brower

**Nationality:**

USA

**Title:**

Lawyer at 20 Essex Street Chamber

**Area of Practice:**

Public international law, International arbitration, Investment disputes, Oil and gas, Infrastructure projects, General commercial matters, Construction disputes, Treaty-based disputes.

<http://www.20essexst.com/member/charles-brower>

<http://www.iaiparis.com/profile/charles.brower>





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# ***Conflicts of Interest***

# 3. Conflicts of Interest

- Independence and Impartiality
- Disqualification/Challenge
  - ICSID Convention: Manifest lack of qualities set forth under Art. 14(1). (Art. 57) Reliability to exercise independent judgment (Art. 14(1)) .
  - UNCITRAL rules: Circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence (Art. 12(1)).
- A conflict of interest: an *objective* criterion and subjective belief of an arbitrator to be capable of independent judgment is not sufficient.
- “manifest” excludes speculative assumptions.

# Issue Conflict

## *“How Many Hats Can a Player Wear?” (Nassib Ziade)*

### ■ **Arbitrator & Counsel**

- “To argue a point does not mean that one necessarily believes in its soundness.” (Ziade)
- Concerns that the arbitrator may have attempted to render an award that would aid his arguments as counsel. *Eureko v. Poland*

### ■ **Arbitrator & Arbitrator**

- Concerns that the arbitrator has already prejudged the recurring legal issues.
- *“Lack of impartiality requires much stronger evidence than that such arbitrator participated in a unanimous decision with two other arbitrators in a case which a party in that case is currently a party in a case now being heard by that arbitrator or judge. To hold otherwise would have serious negative consequences for any adjudicatory system.” Suez et al v. Argentina*

# Writing and speeches

- Preconceived positions (academic writings and speeches)
  - An arbitrator's opinions expressed in the abstract without reference to any particular case do not affect the arbitrator's impartiality and independence (*Saipem v. Bangladesh*).
  - "...mere showing of an opinion...is not sufficient to sustain a challenge for lack of independence or impartiality of an arbitration...[contrary] position would be incompatible with the proper functioning of the arbitral system under the ICSID Convention... the consequence would be that no potential arbitrator of an ICSID Tribunal would ever express views on any such matter...." (*Urbaser SA v Argentine*)
  - Exceptional situations:
    - Usage of extreme and unbalanced terms and the context may give rise to justifiable doubts as to the arbitrator's impartiality.
    - "recalcitrant host countries" in *Perenco*.



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# ***Selection by the Institutions***



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Thank you!

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