CHAPTER 14

Transparency and Independence of Arbitrators in Investment Arbitration: Rule of Law Implications

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Abstract

This article picks up the debate on transparency and independence of arbitrators in investment arbitration prominently taking place in Europe since the beginning of the negotiations of the Transatlantic Trade and Investment Partnership (TTIP) between the EU and the US. With a view to the rule of law it is argued that its elements transparency and independence can be implemented in different but still compliant ways. Regarding the current status of transparency and independence of arbitrators in investment arbitration the author takes the position that with certain modifications both elements still comply with the rule of law. Critical questions are raised about concepts introduced in the current debate with respect to the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration as means of increasing transparency and regarding a permanent investment court system under TTIP to allegedly foster independence of arbitrators. For the first it is argued that the rules should be handled with care to comply with the fair trial and due process; the latter concept raises various concerns regarding the rule of law as well as practical aspects.

1 Introduction

The topics of this article, transparency and independence of arbitrators, have been presented at the Annual Conference of EFILA entitled “Investment Arbitration 2.0?” on a panel dealing with the “Rule of Law and Investment Arbitration: promoting or holding back its advancement?”. They certainly raise at least three interesting questions. What is the state of the rule of law in the second decade of the 21st century in the international theatre regarding
transparency and independence of arbitrators in general? What is the state of play of investment arbitration or even broader investment protection today with respect to these topics? Is there a necessity from the perspective of the rule of law to enhance the two topics and if so in what way? The following article will address these three questions which are undoubtedly related to the current debate on investment arbitration in particular in the context of the negotiations between the EU and the US regarding TTIP. The second and the third question will be addressed together regarding each topic.

2 State of the Rule of Law in the 21st Century Regarding Transparency and Independence of Arbitrators in General

It seems common sense in constitutional law on the national level that a definition of the rule of law does not exist but the rule of law is rather considered to be a number of fundamental principles which, taken all together, form the rule of law. Transparency and independence in general have certainly been considered such fundamental principles of the rule of law as traditionally reflected in national constitutional laws and the jurisprudence of national constitutional courts.

However, already on the national level it seems obvious that different legal systems take different approaches to implement these principles of the rule of law into national jurisdictions. With respect to transparency for example typically European procedural rules take a different approach than rules governing court procedures in the UK and in the US. This might be illustrated by the following few examples: the transparency of documents such as memorials as well as the transparency of hearings differs quite substantially. While in Europe the case as such is transparent to the public, memorials and witness

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1 In this article the term ‘investment arbitration’ is used also as synonym for the term ‘investor state dispute settlement’ or its abbreviation ‘ISDS’ more commonly known from the TTIP debate.


3 Ibid., para. 12.