Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals

Edited by

Chiara Giorgetti

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Preface

This book builds on a panel I organized and chaired at the Annual Meeting of the American Society of International Law in April 2014. The panel sparked an important conversation among participants and highlighted the importance of issues related to challenges and recusals of judges and arbitrators for international dispute resolution. After the panel, Marie Sheldon, Publishing Director of International Law at Brill/Nijhoff Publishers, suggested I collect the presentations made at the panel in a book. I was intrigued by the idea and—so, this book was born.

I asked the panelists and other experts to join the dialogue on this key issue and I was gratified by the positive response I received. This book now combines expertise from academia as well as from all realms of practice, from law firm practitioners, to former judicial clerks, arbitrators and members of several secretariats. I am grateful to all contributors to this book for their excellent work. Of course, their contributions are made on a personal note only and do not represent the positions of any of the institutions to which they are or may have been affiliated.

My deep gratitude also goes to Sheherezade Malik, a Juris Doctor student from Richmond University School of Law, for her impeccable research and editorial assistance. She has done a great job.

I am also sincerely and profoundly grateful to my family, Andre, Alex and Charlotte, without whom nothing has meaning.

C.G.
Washington D.C.

List of Abbreviations

ABA	American Bar Association
BIT	Bilateral Investment Treaty
CAFTA	Central American Free Trade Agreement
DSB	Dispute Settlement Body (WTO)
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes (WTO)
EC	European Communities
ECCC	Extraordinary Chambers in the Court of Cambodia
EU	European Union
GATT	General Agreement on Tariffs and Trade
IBA	International Bar Association
ICC	International Chamber of Commerce (see also below)
ICC	International Criminal Court (see also above)
ICJ	International Court of Justice
ICSID	International Center for the Settlement of Investment Disputes
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILA	International Law Association
LCIA	London Court of International Arbitration
NAFTA	North American Free Trade Agreement
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
SCLS	Special Court for Sierra Leone
STL	Special Tribunal for Lebanon
UNCITRAL	United Nations Commission on International Trade Law
WTO	World Trade Organization

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Introduction

Chiara Giorgetti

The possibility of challenging and recusing judges and arbitrators provides a fundamental control mechanism for parties engaged in international dispute resolution. Indeed, as international courts and tribunals have increasingly become the preferred choice to resolve international disputes, this control function has also become of paramount importance to the normative and sociological legitimacy of international courts and tribunals.

Yet, not much has been written in a systematic way about the mechanisms that parties—and tribunals and courts themselves—have to correct the composition of the bench when such a correction is needed. This books seeks to provide that systematic analysis and also to sparkle a dialogue on the important issue of challenges and recusals of arbitrators and judges, and specifically on reasons for such challenges, the procedures to raise them and the issue of who is tasked to finally decide on such requests.

The chapters of this book can be divided in four groups.

The first seven chapters provide a thorough analysis of challenges and recusal procedures in specific forums. In the first chapter, I start the discussion with an assessment of challenges and recusals at the International Court of Justice, the principal judicial organ of the United Nations, which rely mostly on self-recusal. Meg Kinnear and Frauke Nitschke explain, in the second chapter, disqualification of arbitrators under the ICSID Convention and Rules, and provide a unique insight and assessment of arbitrator challenges in international investment disputes. In the third chapter, Sarah Grimmer describes the determination of arbitrators challenges by the Secretary General of the Permanent Court of Arbitration, which uniquely includes both State to State and investor—State disputes. Lee Caplan explores, in chapter four, arbitrator challenges at the Iran-United States Claims Tribunal, and thus provides an important historical record still relevant today. Next, in chapter five, Loretta Malintoppi and Andrea Carlevaris discuss challenges of arbitrators under the rules of the International Chamber of Commerce and discuss lessons learnt there. In chapter six, Gregory Spak and Ron Kendler examine selections and recusals in the WTO Dispute Settlement System and ponder on reasons why recusals and challenges are rare under that regimen. Finally, Makane Mbengue considers, in chapter seven, challenges of judges in International Criminal Courts and Tribunals and provides some useful comparative analysis with other forum.

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These initial chapters provide a essential foundation for the analysis of challenges and recusal of judges and arbitrators. As such, they assess several specific issues, including the available procedures, reasons asserted to initiate a challenge procedure, who decides the challenges and results of the challenge procedures. Importantly, they also allow for a comparison among different forums.

The following three chapters analyze challenges from a different prospective. Namely, they examine specific issues that are often reasons for parties to begin a challenges procedure. In chapter eight, Romain Zamour considers issue conflicts and the reasonable expectation of an open mind, specifically in the context of the challenge decision in *Devas v. India*. Judith Levine, in chapter nine, examines the important issues of late-in-the game challenges and spurious challenges and resignations within the context of tactical challenges. In chapter ten, Luke Sobota assesses repeat arbitrator appointments in international investment disputes, a oft-cited reason to challenge arbitrators.

In the next three chapters, the analysis shift to personal perspectives. In chapter eleven, Charles Brower, Sarah Melikian and Michael Daly recount tall and small tales of a challenged arbitrator from a first-hand experience. Next, in chapter twelve, Andrew Loewenstein describes the approach and consideration of counsel to challenges in international disputes. Finally, in chapter thirteen, Hansel Pham and Imad Khan examine challenges to party representatives and counsel before international courts and tribunals a unique mechanism at times used as an alternative to challenge the decision-maker.

The final two chapters analyze challenges from a geographical prospective and seek to determine whether there is a regional variation to challenges. In chapter fourteen, Lucy Reed, John Choong and Chan Yong Wei explain challenges to arbitrators in Asia, and especially the position before the Singapore and Hong Kong Courts. Finally, in chapter fifteen, Jonathan Hamilton, Francisco Jijon and Ernesto Corzo consider arbitrators challenges in Latin America.

CHAPTER 1

The Challenge and Recusal of Judges of the International Court of Justice

Chiara Giorgetti

1 Introduction

The rules and mechanisms to challenge and recuse a judge of the International Court of Justice ("ICJ") are unique and pertain to the control mechanisms proper to permanent international dispute resolution bodies, characterized by a plurality of representative, elected judges.

Indeed, the Statute of the ICJ ("Statute")[1] provides a series of control mechanisms aimed at ensuring the independence and impartiality of its judges.[2] The drafters of the Statute adopted a multi-tiered approach, relying first on self-control of each judge, and then envisaging a subsidiary control role for the President and the Court as a whole. Third-party requests for recusals are provided for in the Statute, but are extremely rare. The Court relies mostly on a self-regulation system, by which it is for a judge to recuse him or herself when the case so requires. The President of the Court and the Court as a whole only step in to provide a back-up and ensure that the framework is respected. Thus, should reasons exist for which a judge should be removed or not sit in a case, the President and the Court retain the power to take the final decision, sua sponte or as requested by a party, to remove the judge.

This approach is understandable, not only because it follows the tradition established by the predecessor of the ICJ, the Permanent Court of International Justice ("PCIJ"), but also because the situation at the ICJ is intrinsically

* I am grateful to Saud Aldawsari from Richmond University School of Law for his excellent research assistance for this chapter.

1 Statute of the International Court of Justice, *concluded* June 26, 1945, 3 Bevans 1179, 59 Stat. 1031, T.S. 993 [hereinafter ICJ Statute].

2 The applicable legal framework can be found in Arts. 2, 13–20, 24 of the Statute of the Court and in Arts. 1–14 and 34 of the Rules of the Court and Practice Directions VII and VIII. *See* ICJ Statute; The ICJ Rules of Procedure, *adopted* April 14, 1978, 17 I.L.M. 1286 (1978) [hereinafter ICJ Rules]; Practice Direction VII, *adopted* Oct. 2001, ICJ, http://www.icj-cij.org/documents/index.php?p1=4&p2=4&p3=0; Practice Direction VIII, *adopted* Oct. 2001, ICJ, http://www.icj-cij.org/documents/index.php?p1=4&p2=4&p3=0.

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different from that of arbitration: the ICJ is a permanent court, which acts as the principal judicial organ of the United Nations in inter-states disputes, its the bench is composed of fifteen elected judges who serve for relatively long terms.[3] Thus, differently from arbitration, judges do not know what cases they will be called to decide and incompatibilities could arise after their election to the bench.

Though self regulation has to a large extent be sufficient, the existing control system calls for examination, especially in light of the increased caseload of the Court and the fact that the judges of the ICJ remain active members of the international legal community, including as international arbitrators.

This chapter first briefly explains how the ICJ judges are elected and nominated. It then explores the issues of relative and functional incompatibilities of judges. Next, it describes and assesses existing mechanisms of control, including resignation, self-recusal and disqualification of judges. Finally, it assesses the three publicly known cases of recusals. The chapter concludes with a brief assessment of the practice.

2 The Judges of the International Court of Justice

The bench of the ICJ, the principal judicial organ of the United Nations, comprises fifteen judges elected for a renewable term of nine years.[4] Article 3(1) of the Statute of the Court, the instrument that regulates the constitution and the function of the ICJ, provides that no two judges may be nationals of the same state.[5]

Article 2 of the Statute specifies the requirements that each member of the Court must fulfill in order to be elected. It provides that:

> The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries

3 ICJ Statute Art.3

4 ICJ Statute Arts. 3, 13. *See generally* Robert Kolb, The International Court of Justice 109–118 (2013); 1 Shabtai Rosanne, The Law and Practice of the International Court of Justice 1920–2005, at 408 (2nd ed., 2006); *Statute of the Court*, Int'l Ct. Just.[ICJ], http://www.icj-cij.org/documents/?p1=4&p2=2 (last visited Apr. 5, 2015) ("Statute of the International Court of Justice is annexed to the United Nations, of which it forms an integral part.").

5 ICJ Statute Art. 3(1).

> for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.[6]

The Statute further specifies that members of the Court elected by the General Assembly and by the Security Council of the United Nations should come from a list of persons nominated by the national groups in the Permanent Court of Arbitration ("PCA") or in cases of Members of the United Nations not represented in the PCA, by national groups appointed for this purpose by their governments under the same conditions as those prescribed for PCA members.[7] It is recommended that in making their nominations, national groups consult their highest court of justice, legal faculties and schools of law, and their national academies and national sections of international academies devoted to the study of law. Groups may not nominate more than four persons, not more than two of whom shall be of their own nationality.[8] The number of candidates nominated by a group should not be more than double the number of seats to be filled.[9]

In electing members, the General Assembly and the Security Council proceed independently of one another. Candidates are then elected when they obtain an absolute majority of votes in both the General Assembly and in the Security Council.[10] During the election, electors are required to bear in mind two considerations, and namely "not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a

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6 ICJ Statute Art. 2. *See generally* Aznar-Gomez, *Article 2, in* The Statute of the International Court of Justice, A Commentary (Andreas Zimmermann, Karin Oellers-Frahm & Christian Tomuschat eds., 2nd ed., 2012).

7 ICJ Statute Art. 4.

8 *Id.* Art. 6.

9 *Id.* Art. 5.

10 *Id.* Arts. 8, 10. Article 10 provides that candidates who obtain an absolute majority of votes in both the General Assembly and the Council are elected. If no candidate receives an absolute majority on the first ballot in either the General Assembly or the Council, a second ballot is held. Balloting continues until a candidate has obtained the required majority in both bodies. Articles 11 and 12 of the Statute provide that if the General Assembly and the Council do not select the same candidate, they will proceed to a second meeting and, if necessary, a third meeting, following the same procedures. If by then the position is not filled, the Council and General Assembly may decide to convene a conference of six members (three from each body) to recommend a candidate for acceptance by both bodies. *Id.* Arts. 11–12.

whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured."[11]

2.1 *The Duties of Elected Judges*

Judges at the ICJ serve in their personal capacity and not on behalf of any government. Judges of the nationality of each of the parties in a case retain their rights to sit in the case before the Court, unless a specific incompatibility exist.[12]

All judges are required, upon taking up their duties, to make a solemn declaration in open court that they "will perform [their] duties and exercise [their] powers as judge honourably, faithfully, impartially and conscientiously."[13] This declaration is along the lines of the declarations that judges make in other international courts.[14]

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11 ICJ Statute Art. 9. In practice, this requirement is satisfied with the convention of equitable geographical distribution. The practice is to have one judge each from each of the permanent members of the Security Council (China, France, Russia, UK and the US) and the remaining ten seats distributed as following: five for Western Europe and Other States, three for Africa, three for Asia, two for Easter Europe and two for Latin America and Caribbean countries. *See* Ruth MacKenzie et al., Selecting International Judges: Principle, Process and Politics 28 (2010).

12 ICJ Statute Art. 31(1).

13 Article 4 of the Rules of the Court specifies the text of the declaration to be read in court. Judges are required to state that: "I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously." ICJ Rules Art. 4. This declaration is to be made at the first public sitting at which the Member of the Court is present.

14 For example, judges at the International Criminal Court (ICC) take a public oath declaring: "I solemnly undertake that I will perform my duties and exercise my powers as a judge of the International Criminal Court honourably, faithfully, impartially and conscientiously, and that I will respect the confidentiality of investigations and prosecutions and the secrecy of deliberations". ICC Rules of Procedure and Evidence, *adopted* Sept. 9, 2002, ICC Doc. ICC-ASP/1/3 (Part. II-A); *see* Press Release, Int'l Criminal Court, Six Newly Elected ICC Judges to be Sworn in on 10 March 2015 (Mar. 6, 2015), http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/ma178.aspx. At ICSID, arbitrators make a declaration that states, in the relevant part, that: " 'I shall keep confidential all information coming to my knowledge as a result of my participation in this proceeding, as well as the contents of any award made by the Tribunal. 'I shall judge fairly as between the parties, according to the applicable law, and shall not accept any instruction or compensation with regard to the proceeding from any source except as provided in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States and in the Regulations and Rules made pursuant thereto." ICSID Arbitration Rules of Procedure r. 6, *adopted* Apr. 2006, https://icsid.worldbank.org/ICSID/StaticFiles/

Members of the Court need to hold themselves permanently at the disposal of the Court, unless they are on leave or are prevented from doing so by illness or by another serious reason duly explained to the President.[15] Judges become international civil servants and are entitled to diplomatic privileges and immunities when engaged on the business of the Court.[16] Judges are remunerated as decided by the UN General Assembly.

Additionally, as explained below, the Statute provides for certain relative and absolute incompatibilities with the function of judge.

2.2 *Relative Incompatibility to Serve as Judge in the Court*

Under the Statute of the Court, judges must refrain from sitting in certain cases. Thus, Article 17(1) of the Statute provides that no member may act as agent, counsel, or advocate in any case.[17] Further, Article 17(2) also dictates that members may not participate in the decision of any case in which they have previously taken part "as agent, counsel, or advocate for one of the parties, or as a member of a national or international court, or of a commission of enquiry, or in any other capacity."[18]

Relative incompatibility relates to the impartiality and independence of a judge in particularly cases, and is temporary.[19] Thus, a judge who acted as legal advisor to her government in a particular case before her election to the Bench, or was consulted and acted as an advocate when he was in academia before joining the Court is barred from serving as judges in the case on which they have worked. As a matter of legal policy, this is a fundamental guarantee for a fair process. Similar incompatibility guidelines are found in most provisions related to judicial independence.[20] Indeed, the provision should be interpreted

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basicdoc/partF-chap01.htm; *see also* Chapter 2 by Meg Kinnear and Chapter 7 by Makane Mbengue in this volume.

15 ICJ Statute Art. 23.

16 ICJ Statute Art. 19. *See generally* Gleider I. Hernández, *Impartiality and Bias at the International Court of Justice*, 3 Cambridge J. Int'l & Com. l. 183 (2012).

17 ICJ Statute Art. 17.

18 *Id.*

19 *See* JD Morely, *Relative Incompatibility of Function in the International Court*, 19 Int'l & Comp. L.Q. 316 (1970); Philippe Couvrer, *Article 17, in* The Statute of the International Court of Justice, A Commentary (Andreas Zimmermann et al. eds., 2nd ed., 2012); *see also* Shabti Rosenne, *International Court of Justice: Practice Directions on Judges Ad Hoc; Agents, Counsel and Advocates; and Submission of New Documents*, 1 L. & Prac. Int'l Cts. & Tribunals 223 (2002).

20 *See, e.g.*, Chapter 7 by Makene Mbengue in this volume (discussing challenges of judges in International Criminal Courts).

quite openly so as to include all situations that could create a reasonable doubt of lack of impartiality and of pre-judgment of a certain case.[21]

The Court, however, has historically accepted situations that would be seen as problematic in the present context of international litigation.[22] For example, Judge Helge Klaestad (Norway) continued to sit in the 1951 *Norwegian Fisheries* case (Norway v. UK) even though he had been a member of the Supreme Court of Norway that had given a decision invoked in the ICJ proceedings and relevant to them.[23] Similarly, Judges Jules Basdevant (France) and Green Hackworth (US) sat in the 1952 *Case Concerning the Rights of Nationals of the United States of America in Morocco* (France v. US), though they had been legal advisers to their respective ministers of foreign affairs at the time the case was under diplomatic discussion.[24] This tollerant interpretation of relative incompatibility appear to more prevalent in the initial days of the court, and followed closely the liberal practice adopted in this matter by the Permanent Court of International Justice.[25] Nowadays, ICJ judges are more likely to adopt a stricter interpretation of the incompatibility provision, and have in numerous occasions recused themselves in certain cases.[26] Indeed, of the thirty-six known cases of self-recusals, twenty-one occurred after the

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21 *See, e.g.*, Chapter 8 by Romain Zamour in this volume (discussing prejudgment and open-minded requirements).

22 Kolb, *supra* note 4, at 136; *see* Couvreur, *Article 17, supra* note 17, at 379–81 (providing an overview of the practice of the PCIJ).

23 Kolb, *supra* note 4, at 136; *see Fisheries* (U.K. v. Nor.), Judgment, 1951 I.C.J. 116, 134 (Dec. 18) (referencing a Supreme Court case in which the Court relied to interpret the Decree that delimitated the exclusive fishery zone at issue in the ICJ case).

24 Kolb, *supra* note 4, at 136. Green Haywood Hackworth served as the first U.S. judge on the International Court of Justice and was the longest running Legal Adviser to the US Department of State, serving from 1925 to his elevation to the bench in 1946. *See* Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.), Judgment, 1952 I.C.J. 176 (Aug. 27).

25 *See* Kolb, *supra* note 4, at 136 ("As regards Article 17, paragraph 2 of the Statute, the PCIJ's attitude was highly restrictive: normally it preferred to allow the judges in question to sit.").

26 Couvreur, Art*icle 17, supra* note 17, at 382 ("Whenever a member of the Court, has, before taking office, acted as agent, counsel or advocate of one of the parties to a case, has had always disqualified himself from the case without this ever becoming an issue. The same has applied to any judge taking part in arbitration proceeding which have become the subject of proceedings before the Court."); *see, e.g.*, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosn.& Herz. v. Serb. & Montenegro), Verbatim Record, 6 (Apr. 29, 1996, 10 a.m.), http://www.icj-cij.org/docket/files/91/5105.pdf (showing the self-recusals of Judge Higgins and Judge Fleischhauer by informing the

year 2000.[27] Thus, for example, Judge Rosalyn Higgins (UK) chose not to sit in the *Application of the Genocide Convention* case because she had been a member of the UN Committee of Human Rights and as such had previously dealt with certain matters likely to be material in the case.[28] Similarly, Judge Mohammed Bedjaoui (Algeria) recused himself from the bench in *Arbitral Award of 31 July 1989* case because he had been a member of the Arbitral tribunal in question.[29] Likewise, Judge Christopher Weeramantry (Sri Lanka) decided not to sit in the *Phosphate Lands in Nauru* case because he had previously acted as the Chair of a Commission of Enquiry that reported on the matters and could be pertinent in the case.[30]

This stricter approach to the relative incompatibility provision is preferable, and is better suited to the role and work of the Court. Indeed, in light of the increased workload of the Court, the important past professional experiences of each judge and the delicate balance ensuing from the right for judges of the nationality of the parties to sit in the case before the court,[31] the issue of relative incompatibility continues to be crucial. Moreover, while judges are barred from acting as counsel, advocate, or as members of a national or international court, they are routinely appointed as arbitrators in *ad hoc* investment and other international arbitrations which increases the possibility of the existence of relative incompatibility. A more detailed account of self-recusals in situations of relative incompatibility follows below, in section 3.3.

2.3 *Absolute* (*Functional*) *Incompatibility to Serve as Judge in the Court*

Article 16 of the Statute provides that members of the Court "may not exercise any political or administrative functions, or engage in any other occupation of a professional nature."[32] Given the membership of the bench, which includes academics and high ranking international and national civil servants, this

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President that they have dealt in their previous capacities with certain matters likely to be material to that case).

27 See infra, table 1.

28 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Verbatim Record, *supra* note 25, at 6; *see also* Rosanne, *supra* note 4, at 1064.

29 I.C.J. Yearbook 1989–1990, at 157 (1990); *see also* Rosanne, *supra* note 4, at 1064.

30 I.C.J. Yearbook 1991–1992, at 198 (1992); *see also* Rosanne, *supra* note 4, at 1064.

31 ICJ Statute Art. 31(1).

32 ICJ Statute Art. 16. *See generally* G. Guillaume, *De L'independence des Membres de la Cour International de Justice, in* Boutros-Boutros-Ghali Amicorum Discipulorumque Liber 475 (1998); L.V. Prott, *The Role of the Judge in the International Court of Justice*, 10 Revue Belge de Droit International [RBDI] 473 (1974); G. Scwarzernberger, *The Problem of Functional Incompatibilities Before International Courts*, 27 Y.B. World Aff. 434 (1973).

functional incompatibility is at the core of the judicial function. Thus, once elected, Members of the Court routinely resign from all previous professional positions, including academic professorships and legal advisor or civil service positions, including with the United Nations.[33]

Because of its importance to guarantee a fair and independent process, all issues related to functional incompatibility and of the kind of activities that are allowed and prohibited by the Statute have retained the attention of the Court since its establishment, and have been analyzed by the Court in details. The Court established a three-member committee on the incompatibility of functions twice, in 1947 and 1967. The Committees' full reports are not published, though the ICJ Yearbooks confirmed similar guidelines to judges in four broad categories of possible professional activities, and namely: other forms of peaceful settlement of dispute (such as arbitration), scientific activities, public functions and occupation of a professional nature, and private activities. Judges retain a degree of discretion and in the event of a doubt should consult the President of the Court for guidance on acceptable and unacceptable activities.[34] A 1994 Report of the ICJ Advisory Committee on Administrative and Budgetary Questions delved deeper into functional incompatibility and concluded that, under Article 16, judges are prohibited from exercising any political or administrative function, irrespective to whether it is international, national or local ad commercial or not.[35] Judges are also barred from holding positions in any commercial concerns, engaging in the practice of law,

33 For example, Judge James Crawford was Whewell Professor of International Law at Cambridge before joining the Court. Judge Bruno Simma was also Professor at the European University Institute. Judges Ronny Abrahams and Joan Donahue were civil servants, respectively with the French and US governments. Judge Abdulqawi Yusuf servered for a long time with the United Nations. They all resigned from these posts upon taking office. *See Judge James Richard Crawford*, ICJ, http://www.icj-cij.org/court/index.php?p1=1&p2=2&p3=1&judge=200 (last visited Apr. 4, 2015); *Judge Bruno Simma*, ICJ, http://www.icj-cij.org/court/?p1=1&p2=2&p3=1&judge=14 (last visited Apr. 4, 2015); *President Ronny Abraham*, ICJ, http://www.icj-cij.org/court/?p1=1&p2=2&p3=1&judge=136 (last visited Apr. 4, 2015); *Judge Joan E. Donoghue*, ICJ, http://www.icj-cij.org/court/?p1=1&p2=2&p3=1&judge=171 (last visited Apr. 4, 2015); *Vice-President Abdulqawi Ahmed Yusuf*, ICJ, http://www.icj-cij.org/court/index.php?p1=1&p2=2&p3=1&judge=168 (last visited Apr. 4, 2015).

34 Philippe Couvreur, *Article 16, in* The Statute of the International Court of Justice, A Commentary 365–366 (Andreas Zimmermann et al. eds., 2nd ed., 2012).

35 U.N. GAOR, 49th Sess., Supp. No. 7, Add.11, U.N. Doc. A/49/7/Add.11 (Mar. 8, 1995); *see also* Couvreur, *Article 16, supra* note 32, at 368.

maintaining membership in a law firm or rendering legal or expert opinions or holding any permanent teaching or administrative position.[36]

Interestingly, the 1994 Report also highlighted accepted practice, including the fact that judges could continue to "participate in other judicial or quasi-judicial activities of an occasional nature as well as scholarly pursuits in the sphere of international law as members of learned societies or as occasional lectures, provided that they give the fullest precedent to the duties of the court."[37] The Court explicitly and definitively took up the question in its annual report to the General Assembly, where it confirmed that "the practice of the Court in permitting its members to engage in occasional activities outside of the Court that may be remunerated" included "acting as arbitrators in inter-State and private international arbitrations, serving in administrative tribunals or quasi-judicial organs of specialized agencies, lecturing, [and] writing."[38] The Court observed that this kind of occasional practice went back to "the origins of the Permanent Court of International Justice" and observed that not only it was

> in conformity with the Statute of the Court; the repeated endorsement by the international organs and by the States that appointed members of the Court as arbitrators shows their awareness of the contribution that the members of the Court may, by this function, make to the development of international law, and of the benefits deriving therefrom for all institutions concerned.[39]

The Court remarked that the practices involved a very limited number of judges for a very limited amount of time and that no adverse effect of the work of the court. In practice, several judges have served as arbitrators in *ad hoc* arbitrations, including in the *Eritrea/Yemen—Question of Territorial Sovereignty and Maritime Delimitation over a Group of Islands in the Red Sea* (Awards of 1998

36 Couvreur, *Article 16, supra* note 32, at 367.

37 *Id.*

38 Annual Report to the General Assembly for the Period 1 August 1995 to 31 July 1996, U.N. GAOR, 51st Sess., Supp. No. 4, at 199, U.N. Doc. A/50/7/Add.11 (Dec. 12, 1995); *see also* Couvreur, *Article. 16, supra* note 32, at 368.

39 Annual Report to the General Assembly, *supra* note 39; *see also* Couvreur, *Article 16, supra* note 32, at 368.

and December 17, 1999),[40] the *Abyei Arbitration*,[41] and the *Croatia/Slovenia* boundary disputes.[42] Moreover, a growing number of judges also act as arbitrators in international investment proceedings.[43]

Additionally, the President of the Court is also occasionally asked to serve as the appointing authority in *ad hoc* arbitrations.[44] Similarly, occasional invitations to deliver a speech or a class in a course or to address the public on the

40 Former Judges Stephen Schwebel and Rosalyn Higgins were members of the arbitral tribunal in both phases of the Eritrea/Yemen dispute. *See Award of the Arbitral Tribunal in the First Stage of the Proceedings* (*Erti./Yemen*)*, Territorial Sovereignty and Scope of the Dispute* (Oct. 9, 1998), http://www.pca-cpa.org/showfile.asp?fil_id=458; *Award of the Arbitral Tribunal in the Second Stage of the Proceedings* (*Erti./Yemen*)*, Maritime Delimitation* (Dec. 17, 1999), http://www.pca-cpa.org/showfile.asp?fil_id=459.

41 Former Judges Shawkat Al-Khasawneh and Stephen Schwebel were members of the arbitration tribunal. *See* The Government of Sudan / The Sudan People's Liberation Movement/Army (Abyei Arbitration), Final Award (July 22, 2009), http://www.pca-cpa.org/showfile.asp?fil_id=1240.

42 Former Judges Gilbert Guillaume and Bruno Simma are members of the arbitral tribunal for the currently pending Croatia/Slovenia arbitration. *See Arbitration Between the Republic of Croatia and the Republic of Slovenia*, Pending Case, http://www.pca-cpa.org/showpage.asp?pag_id=1443 (last visited Apr. 4, 2015).

43 For example, current member, Judge Peter Tomka is a member of an investor-state arbitration tribunal related to a bilateral agreement between Germany and the Czech Republic. *See Antaris Solar GmbH* (*Germany*) *& Dr. Michael Göde* (*Germany*) *v. The Czech Republic*, Pending Case, http://www.pca-cpa.org/showpage.asp?pag_id=1548 (last visited Apr. 19, 2015). Former member, Judge Bernardo Sepúlveda-Amor, is the presiding arbitrator in three investor-state proceedings related to bilateral agreements between the governments of Cypress and Russia and the government of India. *See* (*1*) *Tenoch Holdings Limited* (*Cyprus*) (*2*) *Mr. Maxim Naumchenko* (*Russian Federation*) (*3*) *Mr. Andrey Poluektov* (*Russian Federation*) *v. The Republic of India*, Pending Cases, http://www.pca-cpa.org/showpage.asp?pag_id=1552 (last visited Apr. 19, 2015). Former Judge Stephen Schwebel was a member of three investor-state arbitral tribunals between private companies and the Russia. *See Hulley Enterprises Limited* (*Cyprus*) *v. The Russian Federation*, Final Award (July 18, 2014), http://www.pca-cpa.org/showfile.asp?fil_id=2722; *Yukos Universal Limited* (*Isle of Man*) *v. The Russian Federation*, Final Award (July 18, 2014), http://www.pca-cpa.org/showfile.asp?fil_id=2723; *Veteran Petroleum Limited* (*Cyprus*) *v. The Russian Federation*, Final Award (July 18, 2014), http://www.pca-cpa.org/showfile.asp?fil_id=2724.

44 *See, e.g.*, CC/*Devas* (*Mauritius*) *Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. Republic of India*, Decision on the Respondent's Challenge to the Hon. Marc Lalonde as Presiding Arbitrator and Prof. Francisco Orrego Vicuna as Co-Arbitrator, 1 (Sept. 30, 2013), http://www.italaw.com/sites/default/files/case-documents/italaw3161.pdf.pdf ("By the Appointing Authority: H.E. Judge Peter Tomka[,] President, International Court of Justice[.]").

activities of the Court are routinely accepted by judges and do not create any incompatibility.[45]

2.4 *Ad Hoc* Judges

In addition to the elected Members of the Court, the Statute provides that if the Court does not include in the Bench a judge of the nationality of one of the parties, the other party may chose a person to sit as a judge.[46]

The presence of national and ad hoc judges originated in the PCIJ Statute and is not uncommon in international judicial proceedings by standing courts.[47] That said, *ad hoc* judges in international litigation are somehow an anomaly, as all judges are deemed to be independent and impartial and should by themselves be able to provide comfort to all parties that their case will be decided fairly. Further, elected judges are also elected partially because of their nationality, but are then required to forgo that link once elected. Once the Bench is constituted, it is peculiar that nationality should play a role again when specific cases enter the docket.

Judges *ad hoc* are required to make the solemn declaration required from elected members under Article 20. They take part in the decision on terms of complete equality with their colleagues.[48]

Several of the provisions applicable to elected members are also applicable to *ad hoc* judges. In particular, all conditions of independence, of high moral

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45 Kolb, *supra* note 4, at 133–34; Couvrer, *Article. 16, supra* note 32, at 366.

46 ICJ Statute Art. 31 ("1. Judges of the nationality of each of the parties shall retain their right to sit in the case before the Court. 2. If the Court includes upon the Bench a judge of the nationality of one of the parties, any other party may choose a person to sit as judge. Such person shall be chosen preferably from among those persons who have been nominated as candidates as provided in Articles 4 and 5. 3. If the Court includes upon the Bench no judge of the nationality of the parties, each of these parties may proceed to choose a judge as provided in paragraph 2 of this Article. . . . 5. Should there be several parties in the same interest, they shall, for the purpose of the preceding provisions, be reckoned as one party only. Any doubt upon this point shall be settled by the decision of the Court. . . .").

47 European Convention for the Protection of Human Rights and Fundamental Freedoms Art. 26, *concluded* Nov. 4, 1950, 213 U.N.T.S. 221 ("(1)To consider cases brought before it, the Court shall sit in a single-judge formation, in committees of three judges, in Chambers of seven judges and in a Grand Chamber of seventeen judges. The Court's Chambers shall set up committees for a fixed period of time. . . . (4) There shall sit as an *exofficio* member of the Chamber and the Grand Chamber the judge elected in respect of the High Contracting Party concerned. If there is none or if that judge is unable to sit, a person chosen by the President of the Court from a list submitted in advance by that Party shall sit in the capacity of judge.").

48 *See* ICJ Statute Arts. 20, 31(6).

character and of being either a jurisconsults of recognized competence in international law or possessing the qualification required in their respective countries for appointments to the highest judicial offices must also be fulfilled by *ad hoc* judges.[49] Additionally, Article 17(2), prohibiting members to participate in any case in which they have previously participated as agent, counsel or advocate for one the parties or as a member of a national or international court, or of a commission of enquiry, or in any other capacity is also applicable.[50]

To reconcile the freedom of the parties to select *ad hoc* judges of their choosing with the requirement that all judges act independently, the Court addressed possible instances of functional incompatibility of judge in its two recent practice directions.[51] Specifically, Practice Direction VII provides that:

> The Court considers that it is not in the interest of the sound administration of justice that a person sit as judge *ad hoc* in one case who is also acting or has recently acted as agent, counsel or advocate in another case before the Court. Accordingly, parties, when choosing a judge *ad hoc* pursuant to Article 31 of the Statute and Article 35 of the Rules of Court, should refrain from nominating persons who are acting as agent, counsel or advocate in another case before the Court or have acted in that capacity in the three years preceding the date of the nomination. Furthermore, parties should likewise refrain from designating as agent, counsel or advocate in a case before the Court a person who sits as judge *ad hoc* in another case before the Court.[52]

Additionally, Practice Direction VIII provides that:

> The Court considers that it is not in the interest of the sound administration of justice that a person who until recently was a Member of the Court, judge *ad hoc*, Registrar, Deputy Registrar or higher official of the

49 ICJ Rules Art. 1; ICJ Statute Art. 2.

50 ICJ Statute Art. 31(6) ("Judges chosen as laid down in paragraphs 2, 3, and 4 of this Article shall fulfill the conditions required by Articles 2, 17 (paragraph 2), 20, and 24 of the present Statute. They shall take part in the decision on terms of complete equality with their colleagues.").

51 Loretta Malintoppi, *Independence, Impartiality, and Duty of Discloser of Arbitrators, in* International Investment Law 796, 813–14 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008).

52 Practice Direction VII, *supra* note 3.

> Court (principal legal secretary, first secretary or secretary), appear as agent, counsel or advocate in a case before the Court. Accordingly, parties should refrain from designating as agent, counsel or advocate in a case before the Court a person who in the three years preceding the date of the designation was a Member of the Court, judge *ad hoc*, Registrar, Deputy Registrar or higher official of the Court.[53]

These directions are applicable for any choice or designation taking place after February 7, 2002, and they are meant to exclude any possible instance of functional incompatibility arising from prior or current service at the ICJ.[54]

3 Mechanisms of Control: Resignation, Self-Recusal and Disqualification of Judges

In an effort to maintain the independence and impartiality of its judges and the stature proper of the principal judicial organ of the United Nations and its role as the *primus inter pares* of the standing courts, the ICJ Statute adopts a tiered procedure to challenges and recusals of judges of the court.

Thus, as explained in details below, it is at first incumbent upon each judge to recuse him or herself if some reason exists to do so. When this does not happen and the reasons that preclude them to serve continue to exist, it is the role of the President of the Court, possibly informed by one of the parties, and of the entire Court to ensure that no functional or relative incompatibility exists in the course of proceedings.

3.1 *Resignation from the Bench*

Once elected, the judges of the ICJ are irremovable and serve for renewable terms of nine years.[55] As detailed in the next section, only a unanimous vote of the other members of the Court can relieve a judge of his or her function in situation where he or she has ceased to fulfill the required conditions to serve.

It is relatively more common for judges to resign from the Bench before the end of their terms if a reason exists that precludes them to exercise their functions. Article 13 of the ICJ Statute does not require that judges provide reasons

53 Practice Direction VIII, *supra* note 3.

54 For the limits of the practice directions see Chapter 13 by Hansel Pham and M. Imad Khan in this volume.

55 ICJ Statute Art. 13.

for their resignations, which are to be addressed to the President of the Court for transmission to the Secretary-General.

In general, however, such resignations occur either for serious health issues or because of the existence of a new superseding long-term incompatibility. Thus, for example, Judge Awn Shawkat Al-Khasawneh resigned from the Bench on December 31, 2011, after being appointed Prime Minister of Jordan.[56] Similarly, Judge Mohammed Bedjaoui resigned on September 30, 2001, when he was appointed President of the Constitutional Council of Algeria.[57] Vacancies created by resignation are filled in the same method used to fill in the first election.[58] Health related resignations are rarer, and judges may either wish to serve for the entire remainder of their term and then simply not seek re-election, or may just prefer not to disclose the reasons for their resignation. The newly elected judge serves for the remaining of the term of the judge he or she replaces.[59]

It has also become customary for judges of certain veto-holding powers that always have a judge of their nationality of the Bench to resign before the end of their terms, possibly to allow an easier election for their successors, who will run in a special election, and will then also have the time to prove themselves as judges before running in general elections.[60]

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56 *See* Press Release No. 2012/1, Int'l Court of Justice, The Security Council Has Fixed the Date for the Election of a Successor to Mr. Awn Shawkat Al-Khasawneh, Former judge and Vice-President of the International Court of Justice (Jan. 20, 2012), *available at* http://www.icj-cij.org/presscom/files/1/16861.pdf.

57 *See* Press Release No. 2001/20, Int'l Court of Justice, Judge Mohammed Bedjaoui, Former President of the Court, Will resign as a Member of the Court as of 30 September 2001 (July 6, 2001), *available at* http://www.icj-cij.org/presscom/index.php?pr=115&pt=1&p1=6&p2=1&PHPSESSID=5c407. Kolb points out that other Judges that resigned from the Court or its predecessor the PCIJ include: Moore (1928), Hughes (1930), Kellog (1935), Wang (1936), Urrutia (1942), Nagaoka (1942), Golunski (1953), Morozov (1985), Jennings (1995), (Schwebel) and Guillaume (2005). Kolb, *supra* note 4, at 133.

58 ICJ Statute Art. 14.

59 ICJ Statute Art. 15.

60 See for example the resignations of the two most recent US judges: Stephen Schwebel, who was elected in 1981 and resigned in 2000, and Thomas Buergenthal, who was elected in March 2000 and resigned in September 2010. *See Judge Buergenthal Resigns; U.S. National Group Nominates Joan Donoghue for Election to International Court of Justice*, 104 Am. J. Int'l L. 489 (2010); Peter Kooijmans, *Two Remarkable Men Have Left the International Court of Justice*, Leiden J. Int'l L. 343 (2000) (discussing the resignation of President Stephen Schwebel and Judge Christopher G. Weeramantry in 2000).

3.2 *Removal of Judges from the Bench by the Court*

Article 18 of the Statute provides that judges can be removed by a unanimous vote of the other members of the Court in situation where he or she has ceased to fulfill the required conditions to serve.[61]

In such eventuality, Article 6 of the Rules of the Court provides that the President, or, if the circumstances so require, the Vice-President, informs the relevant member of the Court with a written statement that includes the grounds for the proposed removal and any relevant evidence.[62] At a private meeting of the Court specially convened for the purpose, the member of the Court is then afforded an opportunity of making a statement, of furnishing any information or explanations he wishes, and of supplying answers, orally or in writing, to any questions put to him. The matter will then be discussed in a private meeting, without the presence of the member of the Court concerned, at which each member of the Court shall state his or her opinion. A vote is taken if requested.[63]

Formal notification of the decision of removal that creates the vacancy is to be made to the UN Secretary General by the ICJ Registrar.[64]

The threshold for this procedure is high and would require some serious failings, in terms of either work-related or personal conflict or serious health issues that incapacitate the judge to exercise her functions.[65] Indeed, as it is to be expected, in the history of the Court, there is "no recorded instances of Article 18 being applied in order to dismiss a Judge" or even of the question of formal dismissal of a judge ever been formally entertained by the Court.[66]

3.3 *Voluntary (or Self) Recusals for a Specific Case*

Voluntary (or self) recusals are by far the most common method to control the composition of the ICJ bench and ensure its independence and impartiality.

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61 ICJ Statute Art. 18 ("No member of the Court can be dismissed unless, in the unanimous opinion of the other members, he has ceased to fulfill the required conditions. 2. Formal notification thereof shall be made to the Secretary-General by the Registrar. 3. This notification makes the place vacant.").

62 ICJ Rules Art.6.

63 *Id.*

64 ICJ Statute Art. 18.

65 *See* Kolb, *supra* note 4, at 132 n. 76.

66 David Anderson & Samuel Wordsworth, *Article 18, in* The Statute of the International Court of Justice, A Commentary 392 (Andreas Zimmerman et al. eds., 2nd ed., 2006); *see also* Kolb, *supra* note 4, at 132–33.

Article 24 (1) provides that if a member of the Court considers that "for some special reasons" he should not take part in the decision of a particular case, he should inform the President. The language of the provision is very general so as to allow its application in a variety of circumstances and to ensure that any possible appearance of bias is voluntary addressed by the judge.

This form of relative incompatibility relates to the impartiality of a judge for a particular case, and relates to the advisability for a judge to be part of the bench for a particular case only, which does no result in the necessity for the judge to resign and permanently leave the ICJ. In the history of the Court, a number of judges have recused themselves for a variety of reasons. For example, a judge who was involved as a legal adviser to a government which is now party to a case could be reasonably seen as biased, despite the judge's best effort. Similarly, there may be personal relationship at issue that could create the appearance of a bias. Thus, Judge Benegal Rau recused himself in the *Anglo-Iranian Oil Co*. case because he was the Indian representative in the Security Council when the dispute was discussed.[67] Similarly, Judge Hersch Lauterpacht recused himself in the *Nottebohm* case noting that he had been consulted by one of the parties before joining the Court.[68] In another case, Judge Jules Basdevant recused himself in the advisory opinion on the *Judgments of the UNAT* because the President of the Tribunal whose judgments were to be reviewed by the Court was her daughter, Suzanne Bastid.[69]

Table 1.1 summarizes the instances of self-recusals at the ICJ and the reasons asserted by the judges in those situations.

TABLE 1.1 *Summary of Judges' self-recusal at the ICJ and reasons asserted*[70]

Judge	Case	Reason
Sir Benegal Rau	*Anglo-Iranian Oil Co.* (*United Kingdom v. Iran*) (*July 22, 1952*)	Having regard to the fact the he had represented India in the Security Council in

67 I.C.J. Yearbook 1951–1952, at 89–90 (1952); *see also* Rosanne, *supra* note 4, at 1063.

68 I.C.J. Yearbook 1954–55, at 88 (1955); *see also* Rosanne, *supra* note 4, at 1064. Note also that his son, Elihu Lauterpacht acted as counsel to Liechtenstein in the preliminary objection phase.

69 *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Oral Statements, 281 (June 10, 1954, 10:30 a.m.); *see also* Rosanne, *supra* note 4, at 1063.

70 Note that this table also include cases in which no reason was given for a judge's absence in the decision.

Judge	Case	Reason
		1951 when it had dealt with the UK complaint against Iran for failure to comply with the interim measures indicated by the Court
Judge Basdevant	*UNAT advisor opinion* (*July 13, 1954*)	He was closely related to the President of the Tribunal
Judge Sir Hersch Lauterpacht	*Second phase of Notterbohm case* (*Liechtenstein v. Guatemala*) (*Apr. 6, 1955*)	Having previously advised one of the parties and felt that Article 17 applied
Judge Jessup	*Either phase of Temple of Preah Vihear case* (*Cambodia v. Thailand*) (*May 26, 1961 & June 15, 1962*)	No reason given in Judgement.[71]
Judge Zafrulla Khan	*Barcelona Traction* (*Belgium v. Spain*) (*July 24, 1964 & Feb. 5, 1970*)	No reason given in Judgement.[72]
Juges Petren and Ignacio-Pinto	*Review of UNAT Judgment No. 158 Advisory Opinion* (*July 12, 1973*)	Informed President (Zufrulla Khan) that having contributed as members of the Administrative Tribunal to the establishment of the jurisprudence of the Tribunal referred to in the case, they considered that they should not take part in the proceedings. The action was taken under Article 24 of the Statute and the President agreed with them.[73]

71 Rosanne, *supra* note 4, at 1064.

72 *Id.*

73 *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal*, Reading of the Advisory Opinion, 179 (July 12, 1973), http://www.icj-cij.org/docket/files/57/9435.pdf; Rosanne, *supra* note 4, at 1064.

TABLE 1.1 *Summary of Judges' self-recusal* (cont.)

Judge	Case	Reason
Sir Robert Jennings and Judge Evensen	*Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf* (*Tunisia/Libyan Arab Jamahiriya*) (*Dec. 10, 1985*)	They gave prior notice to the President (Nagendra Singh) that they would not take part in the case.[74]
Judge Bedjaoui	*Arbitral Award of 31 July 1989* (*Guinea-Bissau v. Senegal*) (*Nov. 12, 1991*)	Since he had been a member of the Arbitral Tribunal in question.[75]
Judge Weeramantry	*Phosphate Lands in Nauru* (*Nauru v. Australia*) (*June 26, 1992*)	Having previously been Chairman of a commission of Enquiry which had reported on matters which might be pertinent in the case.[76]
Judge Fleischhauer Judge Higgins	*Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*) (*July 11, 1996*)	Judge Fleischhauer and Judge Higgins informed the President that having previously dealt in their previous capacities with certain matters likely to be material to the case, they felt that they could not take part in the case, pursuant to the applicable provisions of the Statute.[77]

74 I.C.J. Yearbook 1984–1985, at 177 (1990); *see also* Rosanne, *supra* note 4, at 1064.

75 I.C.J. Yearbook 1989–1990, at 157 (1990); *see also* Rosanne, *supra* note 4, at 1064.

76 I.C.J. Yearbook 1991–1992, at 198 (1992); *see also* Rosanne, *supra* note 4, at 1064.

77 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosn.& Herz. v. Serb. & Montenegro), Verbatim Record, 6 (Apr. 29, 1996), http://www.icj-cij.org/docket/files/91/5105.pdf; see also Rosanne, supra note 4, at 1065 n. 22.

Judge	Case	Reason
Judge Tomka	*Gabčíkovo-Nagymaros Project* (*Hungary/Slovakia*) (*Sept. 25, 1997*)	"Judge Tomka . . . recused himself under Article 24 of the Statute of the Court."[78]
Judge Simma	*All of Legality of Use of Force* (*Preliminary Objections*) *cases* (*June 2, 1999*)	Considered that pursuant to Article 24(1) he should not take part in the cases.[79]
Judge Simma	*Certain Property* (*Liechtenstein v. Germany*) (*Feb. 10, 2005*)	Considered that pursuant to Article 17(2) he should not take part in the cases
Judge Abraham	*Certain Criminal Proceedings in France* (*Republic of the Congo v. France*) (*June 17, 2003*)	"Judge Abraham having recused . . . under Article 24 of the Statute of the Court."[80]
Judge Abraham	*Certain Questions of Mutual Assistance in Criminal Matters* (*Djibouti v. France*) (*June 4, 2008*)	"Judge Abraham . . . recused himself under Article 24 of the Statute of the Court,[81]
Judge Owada	*Pulp Mills on the River Uruguay* (*Argentina v. Uruguay*) (*Apr. 20, 2010*)	In 2006, the judges did not participate in the hearing "concerning Argentina's request for provisional measures for serious reasons they informed the Court of []". Consequently the Judges did not participate in the final judgement.[82] "President Owada, who sat on previous phases of the case, informed Vice-President Tomka that, for compelling reasons, he was

78 Report of the International Court of Justice, 1 August 2006–31 July 2007, at 6 (2007), available at http://www.icj-cij.org/court/en/reports/report_2006-2007.pdf.

79 Rosanne, *supra* note 4, at 1064.

80 *Id.* at 7.

81 *Id.*

82 I.C.J. Yearbook 2005–2006, at 278 (2006).

TABLE 1.1 *Summary of Judges' self-recusal* (cont.)

Judge	Case	Reason
		unable to attend the oral proceedings on the merits held between 14 September and 2 October 2009. He did not participate further in the case."[83] Note that Judges Shi and not Buergenthal did not sit in case for health reasons.
Judge Parra-Aranguren; Judge Buergenthal	*Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*) (*Feb. 26, 2007*)	Judge Parra-Aranguren "attended the hearings in the case and participated in some of the deliberations, but not the final stages, informed the President of the Court that, pursuant to Article 24, paragraph 1, of the Statute, he considered he should not take part in the decision of the case."[84] Moreover, Judge Buergenthal, under Article 24(1) of the Statute, "informed the President the he considered he should not take part in the case.[85]
Judge Jiuyong; Judge Parra-Aranguren; Judge Simma	*Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals* (*Mexico v. United States of*	"Two Members of the Court informed the President that they considered that they should not take part in the case concerning Request

83 I.C.J. Yearbook 2009–2010, at 309 (2010).

84 I.C.J. Yearbook 2006–2007, at 277 (2007).

85 I.C.J. Yearbook 2005–2006, at 278 (2006); I.C.J. Yearbook 2006–2007, at 277 (2007).

Judge	Case	Reason
	America) (*Mexico v. United States of America*) (*Jan. 19, 2009*)	for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America) (Mexico v. United States of America). For serious reasons duly explained to the Court, another Member of the Court was unable to take part in the hearings on the request for the indication of provisional measures submitted by the Applicant in the case. Consequently, he did not take part in the drafting of the Court's decision on that request."[86]
Judge Simma; Judge Parra-Aranguren	*Maritime Delimitation in the Black Sea* (*Romania v. Ukraine*) (*Feb. 3, 2009*)	"One Member of the Court, for reasons duly explained to the President, was unable to sit in the case. . . . One other Member of the Court recused himself from participating in the case, referring to Article 17, paragraph 2, of the Statute."[86]
Judge Parra-Aranguren	*Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Georgia v. Russian Federation*)	Under Article 23(3) and Article 24(1) of the Statute, "[o]ne Member of the Court, for reasons duly explained to the President

86 I.C.J. Yearbook 2007–2008, at 328–2 (2008).

87 I.C.J. Yearbook 2008–2009, at 348 (2009).

TABLE 1.1 *Summary of Judges' self-recusal* (cont.)

Judge	Case	Reason
	(*Provisional Measures*) (*Oct. 15, 2008*)	of the Court, was unable to sit in the case."[88]
Judge Simma; Judge Tomka	*Dispute regarding Navigational and Related Rights* (*Costa Rica v. Nicaragua*) (*July 13, 2009*)	"One Member of the Court, for reasons explained under Article 24, paragraph 1, of the Statute, informed the President that he would not sit in the case concerning the Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)."[89]
Judges Shi; Judge Buergenthal; Judge Koroma	*Ahmadou Sadio Diallo* (*Republic of Guinea v. Democratic Republic of the Congo*) (*Nov. 30, 2010*)	On Monday 19 April 2010, at the start of the morning hearing on preliminary objections in the case, President Owada noted that, for reasons duly communicated to him, Judges Shi and Buergenthal, who had both sat in previous phases of the case, were unable to sit in that phase of the proceedings. They did not participate further in the case.[90] Additionally, "Judge Koroma had informed President Owada that he was recusing himself from the case. Judge Koroma did not participate further in the case."[91]

88 *Id.* at 348.

89 *Id.* at 348–49.

90 I.C.J. Yearbook 2009–2010, at 309 (2010).

91 *Id.* at 309.

Judge	Case	Reason
Judge Higgins	*Sovereignty over Pedra Branca/ Pulau Batu Puteh, Middle Rocks and South Ledge* (*Malaysia/ Singapore*) (*May 23, 2008*)	Prior to her election as President of the Court, Dame Higgins, referring to Article 17, paragraph 2, of the Statute, recused herself from participating in the case.[92]
Judge Hanqin	*Accordance with international law of the unilateral declaration of independence in respect of Kosovo* (*Request for Advisory Opinion*) (*July 22, 2010*)	Judge Hanqin was council for the Republic of China in the case.[93]
Judge Greenwood	*Maritime Dispute* (*Peru v. Chile*) (*Jan. 27, 2014*)	No reason given in judgement.
Judge Simma	*Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development* (*Request for Advisory Opinion*) (*Feb. 1, 2012*)	No reason given in judgement.

As Shabtai Rosenne notes, the provisions of the Statute regarding self-recusation "are normally applied as a matters of routine"[94] and in fact self-recusals are quite common.

As a matter of legal policy, this provision makes sense. Judges are elected amongst persons qualified to serve in their country's highest judicial offices and from among persons of high moral character. It is justified to have them decide, in the first instance, whether a conflict exists that should prevent them for sitting in a specific case. Moreover, with fifteen sitting judges, and a required quorum of nine judges, the ICJ's Bench is sufficiently large to accommodate

92 I.C.J. Yearbook 2010–2011, at 234 n. 5 (2011).

93 *Id* at 411.

94 Rosenne, *supra* note 4, 1062.

the potential of one or two judges being unable to sit without impacting the final outcome of a thoughtfully decided judgment.[95]

Importantly, while it is primarily a decision of each judge whether to seek to recuse him or herself, further control mechanisms exist to ensure an independent bench should a judge be recalcitrant to opt for self-recusal.

3.4 *The Role of the Court's President*

The President of the Court plays a fundamental role in ensuring that the independence of the Court is maintained. Thus, Article 24 provides that "if the President considers that for some special reasons one of the Members of the Court should not sit in a particular case, he shall give him [or her] notice accordingly."[96]

This power has been used rarely; indeed only one instance is known. In the *South West Africa* case (Ethiopia & Liberia v. South Africa), the President, Sir Percy Spender, announced in the opening of the substantive hearings that Sir Mohammed Zafrullah Khan would not participate in the case. Though there is no public record, it appeared from subsequent declarations by Judge Khan that the President himself had asked Judge Khan not to participate in the case, as he had at one point been nominated as an *ad hoc* judge by one of the parties, though he had not acted in that capacity.[97]

Article 34 of the Rules of the Court further provides that in case of any doubt arising as to the application of Article 17(2) of the Statute or in case of a disagreement as to the application of Article 24 of the Statute, the President shall inform the Members of the Court, who retain the final power of decision.[98]

3.5 *The Role of the Court*

The ultimate arbiter for all issues related to the composition of the Court remains the Court itself. Under Article 24, for example, it is for the Court to settle by decision on any disagreement between a member of the Court and the President on whether a special reason exists as a consequence of which a member should not sit in particular case.[99]

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95 ICJ Statute, Art. 25.3 ("A quorum of nine judges shall suffice to constitute the Court").

96 ICJ Statute Art. 24.

97 Sir Robert Jennings & Philippe Couvreur, *Article 24, in* The Statute of the International Court of Justice, A Commentary 461–62 (Andreas Zimmerman et al. eds., 2nd ed., 2006); *see also* Rosanne, *supra* note 4, at 1058.

98 ICJ Rules Art. 34.

99 ICJ Statute Art. 24.

The Court is also involved in all final decisions related to relative or functional incompatibility of a judge to hold office. Thus, under Article 16(2) of the Statute, the Court decides on any doubt related to the exercise of political or administrative functions or engagement in other professional occupation by the any of its Members.[100] Similarly, the Court is also the ultimate decision maker on any doubt related to a Member's acting as agent, counsel or advocate or past activities as agent, counsel, or advocate for one of the parties, or as a member of a national or international court, or of a commission of enquiry, or in any other capacity.[101] Article 34(1) of the Rules also provides that it is for the Court as a whole to decide any doubt about the application of Article 17(2) of the Statute.[102]

3.6 *Third Party Disqualification Requests*

Disqualification proceedings can also be initiated by one of the parties. Under Article 34(2) of the Rules, a party can communicate confidentially to the President in writing "any facts which it considers to be of possible relevance" to the application of Article 17 and Article 24 of the Statute, and which the parties believe may not be known to the Court.[103]

4 Grounds for Disqualification

Grounds for disqualifications of judges at the ICJ are not specified separately in the Statute. Rosenne points out that there "seem to be no standing grounds for recusation beyond the provisions of Articles 16 and 17 of the Statute. . . ."[104] These grounds, analyzed in details above, provide certain limited cases of relative and absolute (or functional) incompatibility.[105]

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100 *Id.* Art. 16(2).

101 *Id.* Art. 17.

102 ICJ Rules Art. 34.

103 Article 34 of the Rules provides that "1. In case of any doubt arising as to the application of Article 17, paragraph 2, of the Statute or in case of a disagreement as to the application of Article 24 of the Statute, the President shall inform the Members of the Court, with whom the decision lies. a. If a party desires to bring to the attention of the Court facts which it considers to be of possible relevance to the application of the provisions of the Statute mentioned in the previous paragraph, but which it believes may not be known to the Court, that party shall communicate confidentially such facts to the President in writing." *Id.*

104 Rosenne, *supra* note 4, at 1062.

105 *See supra* Section 2.2 and Section 2.3.

Thus, under these provisions, there are three grounds for recusal that derive from the ICJ Statute:

(1) *Judge exercising political or administrative function*. The restriction is derived from Article 16.
(2) *Acting as agent, counsel, or advocate in any case*. The prohibition is derived from Article 17(1) and applies only to elected members.
(3) *Past participation in a case as agent, counsel, or advocate for one of the parties, or as a member of a national or international court, or of a commission of enquiry, or in any other capacity*. This provision derives from Article 17(2), which applies to both elected and, by operation of Article 31(6), *ad hoc* judges.

4.1 *Instances of Attempted Disqualification of Judges*

A party's attempts to disqualify judges of the ICJ are rare. Since its inception, the Court only dealt with three formal attempts to have the Court find members of the Court ineligible in a particular case in three different cases.[106] All three cases relate to alleged prejudgment of the case and relate to past diplomatic actions at the United Nations. In one case, one party also alleged that certain declarations made by one of the judges allegedly demonstrated possible bias. All three challenges were unsuccessful. Only in one case the motivations for rejecting the challenge are public. Interestingly, two of the three cases refer to instance of alleged bias in advisory opinions, which are not binding, and only one was brought during contentious proceedings.

4.1.1 South West Africa Case (Ethiopia v. South Africa & Liberia v. South Africa)

In the second phase of the *South West Africa Cases* (Ethiopia & Liberia v. South Africa), South Africa notified the Court "of its intention to make an application to the Court relating to the composition of the Court relating to the composition of the Court."[107] The Court rejected the application after hearing the contentions in closed hearing. Both the members and the judge *ad hoc* took part in that decision.[108] The details of the recusal application by South Africa have never been revealed. However it was known to refer to Judge Luis Padilla Nervo (Mexico), who had been President to the 1951 session of the General

106 Rosenne, *supra* note 4, at 1059.
107 *South West Africa Cases* (Ethi & Liber. v. S. Afr.), Order Relating to Composition of the Court, 4 (Mar. 18, 1965), http://www.icj-cij.org/docket/files/47/2718.pdf.
108 *Id.* at 5.

Assembly and had been a member of the Mexican delegation to the General Assembly from 1947 to 1963.[109] South Africa filed an application to the Court Relating to the Composition of the Court on March 14, 1965. The Court notified the Agents for the Applicants and heard the contentions of the Parties with regard to the application in closed hearings on March 15 and 16, 1965.[110] It rejected the challenge by eight votes to six by formal order made under Article 48 of the Statute.[111] Judge Padilla Nervo did not participate in the vote of the order, but then participated in the Judgment. Interestingly, the judges *ad hoc* also participated in that vote.[112]

4.1.2 Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)

In the related advisory opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (*South West Africa*) *Notwithstanding Security Council Resolution 276* (*1970*) [*Namibia* Advisory Opinion], South Africa attempted to disqualify three members of the Court.[113] The government of South Africa filed written statements on November 19, 1970 where it objected to the participation of certain members of the Court in the proceedings. The Court issued three separate orders on January 26, 1971. The Orders were made under Article 48 of the Statute and were unreasoned.

> Order No. 1: In relation to President Sir Muhammad Zafrulla Khan—the court unanimously decided not to accede to the objection that had been raised. The vote was taken by all twelve non-challenged Judges. President Khan, Judge Padilla Nervo, Judge Morozov did not participate.[114]
>
> Order No. 2: With regard to Judge Padilla Nervo. The Court unanimously decided not to accede to the objection that had been raised. Judges Padilla Nervo and Morozov did not participate in the vote.[115]

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109 Rosenne, *supra* note 4, at 1059.

110 *Id.*

111 *Id.*

112 *Id.*

113 *Id.*

114 *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (*South West Africa*) *notwithstanding Security Council Resolution 276* (1970) [*Namibia* Advisory Opinion], Order No. 1, 1971 I.C.J. 3 (Jan. 26).

115 *Namibia* Advisory Opinion, Order No. 2, 1971 I.C.J. 6 (Jan. 26).

> Order No. 3: With regard to Judge Morozov. The Court by ten votes to four decided not to accede to the objection that had been raised. Judge Morozov did not participate in the vote.[116]

On the same date, the Court also issued Order No. 4 denying South Africa's request to appoint a Judge *ad hoc*.[117] In its advisory opinion the Court explained that the objections were made under Article 17(2) of the Statute.[118] In the opinion, the Court also explained that South Africa's objections were based "on statements made or other participation by the Members concerned, in their former capacity as representatives of their Governments, in United Nations organs which were dealing with matters concerning South Africa."[119] The Court gave careful consideration to South Africa's objection but found no reason, for Order no. 2, to depart from the decision it had taken in its order of March 18, 1965 in the South West Africa cases.[120] In deciding the other two cases, the Court found that the Members' activities in the UN organs prior to their election to the Court did not "furnish grounds for treating these objections differently" from those raised in its 1965 decision.[121] The Court also specified that, as for Oder no. 3, the participation of the Member, prior to his election to the Court, in the formulation of a Security Council resolution that took into consideration in its preamble GA Res. 2145 (XXI) did not justify a different conclusion.[122] In explaining its decision on the challenges, the Court also specifically refers to the precedents established by the PCIJ "wherein judges sat in certain cases even though they had taken part in the formulation of texts the Court was asked to interpret."[123]

4.1.3 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory

The challenge brought against Judge Nabil Elaraby (Egypt) by Israel in the *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [Wall Opinion] is the most recent case of a party requesting the recusal of a judge because of his past professional experience.

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116 *Namibia* Advisory Opinion, Order No. 3, 1971 I.C.J. 9 (Jan. 26).

117 *Namibia* Advisory Opinion, Order, 1971 I.C.J. 12, 13 (Jan. 29).

118 *Namibia* Advisory Opinion, Advisory Opinion, 1971 I.C.J. 16, ¶ 9 (June 21).

119 *Id.*

120 *Id.*

121 Rosanne, *supra* note 4, at 1060.

122 GA Res. 2145(XXI) of 27 October 1966 (Question of South-West Africa).

123 *Id.*

It is also the first time that a party also uses public declarations by a judge as a ground for recusal.

In the *Wall Opinion*, Israel sent a confidential letter to the ICJ President to bring to his attention certain facts it considered possibly relevant to the participation of Judge Elaraby in the case.[124] Israel raised three issues. First, it claimed that Judge Elaraby should be recused because of his active, official and public role as an Egyptian diplomat. The Court rejected this claim and noted the experience of Judge Elaraby in the 1970s and 1980s as a legal adviser to the Egyptian Government, including his work at the Egyptian Ministry of Foreign Affairs and his involvement in the Camp David Middle East Peace Conference of 1978 and the Israel-Egypt Peace Treaty in 1979 "were performed in his capacity of a diplomatic representative of his country" and occurred "many years before the question of the construction of the wall in the occupied Palestinian territory, now submitted for advisory opinion, arose."[125] Second, Israel also claimed that Judge Elaraby had been involved in decisions at the General Assembly that were relevant for the case. The ICJ again dismissed the claim and concluded the question for the Court "was not an issue in the Tenth Emergency Special Session of the General Assembly until after Judge Elaraby had ceased to participate in that Session as representative of Egypt."[126] Finally, Israel complained that in an interview prior to his election to the Court, Judge Elaraby had made statements that could infer a prejudgment of some of the issues in the case.[127] The Court again dismissed the claim and concluded that Judge Elaraby's

124 *Legal Consequence of the Construction of the Wall in the Occupied Palestinian Territory*, Order of the Composition of the Court [Wall Opinion], 2004 I.C.J. 3 (Jan. 30).

125 *Id.* ¶ 8 ("Whereas however the activities of Judge Elaraby referred to in the letter of 15 January 2004 from the Government of Israel were performed in his capacity of a diplomatic representative of his country, most of them many years before the question of the construction of a wall in the occupied Palestinian territory, now submitted for advisory opinion, arose; whereas that question was not an issue in the Tenth Emergency Special Session of the General Assembly until after Judge Elaraby had ceased to participate in that Session as representative of Egypt; whereas in the newspaper interview of August 2001, Judge Elaraby expressed no opinion on the question put in the present case; whereas consequently Judge Elaraby could not be regarded as having 'previously taken part' in the case in any capacity.").

126 *Id.*

127 Joseph R. Brubaker, *The Judge Who Knew Too Much: Issue Conflicts in International Adjudication*, 26 Berkeley J. Int'l L. 111, 119 (2008) (citing Wall Opinion, 2004 I.C.J. 3, ¶ 8 (Jan. 30) (dissenting opinion of Judge Buergenthal)) ("that 'Israel is occupying Palestinian territory, and the occupation itself is against international law' and that Israel's territorial claims were fabricated to create 'confusion and gain[] time'.").

comments "expressed no opinion on the question put in the present case."[128] The Court hence concluded that Judge Elaraby had not previously taken part in the case, as required by Article 17(2) of the Statute for a finding of relative incompatibility. Israel's request was rejected thirteen to one (as it is customary, Judge Elaraby did not participate in the vote). Interestingly, Judge Buergenthal dissented on the last point and asserted that although this "formalistic and narrow" construction of Article 17(2) had not been violated, he was concerned that the interview created "an appearance of bias" that required the Court to preclude Judge Elaraby's participation in the proceedings.[129]

In sum, this limited practice shows that the Court has found that prior diplomatic activities as government representatives or at the United Nations would not generally be considered tantamount to a prior participation in the case and would therefore not create a reason to disqualify a judge under the applicable rules. Judge Buergenthal's dissent raises the important point of whether this application of the standard is too formalistic, and whether an "appearance of bias" standard, in line with other arbitral rules, is preferable. This is an important discussion to be had, especially because, on one side, judges are often selected among those who have significant experience as diplomats or as international law counsel, and, on the other side, the growing use of international dispute resolution mechanisms can result in increased instances of conflicts.

5 Conclusion

Requests for recusal and disqualification of judges of the ICJ are rare and none so far has been successful. The control mechanisms of the composition of the ICJ's Bench rely mostly on the individual decision not to participate in a case by each judge (self-recusal). This system has been largely successful, and several judges have over the years decided not to participate in certain cases because of their previous professional experiences. The President of the ICJ has used his power to request a judge not to participate in a case only once.[130] When a request for disqualification was filed by a party, the Court has adopted a strict reading of the applicable rules, and generally refused to consider that prior diplomatic functions at the UN or in one's Capital may create an

128 Wall Opinion, 2004 I.C.J. 3, ¶ 8.

129 *Id.* ¶ 14.

130 Though it is difficult to know if some instances of self-recusals may have resulted from an informal discussion with the President.

incompatibility. With the increase use of binding dispute resolutions mechanisms, the higher scrutiny of judges' behavior, and the fact that many judges acted as counsel, arbitrators or diplomats in a variety of cases or continue to act as arbitrators in international disputes, the discussion over the standard to apply to assess a party's recusal requests will be an important one.

CHAPTER 2

Disqualification of Arbitrators under the ICSID Convention and Rules

Meg Kinnear and Frauke Nitschke

1 Introduction

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention") is an international treaty that came into force in 1966. It established the International Centre for Settlement of Investment Disputes ("ICSID" or "the Centre") with the mandate of facilitating dispute settlement between States and foreign investors, thereby stimulating flows of private capital into the host State.[1] Since its creation, ICSID has been the world's leading facility for international investment disputes. It has hosted roughly 70% of all known international investment arbitrations, and administers cases under the ICSID Convention, the ICSID Additional Facility, and the United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules.[2]

This chapter provides an overview of challenges at ICSID, including the qualifications required for ICSID arbitrators, the procedure to bring a challenge, and the standard applied to decide challenges. Parties in an ICSID case may file a proposal to disqualify an arbitrator who manifestly lacks the necessary qualities for appointment or who is otherwise ineligible to be named to a tribunal or *ad hoc* Committee. To date, only eighty-four of the 1,620 arbitrator and *ad hoc* Committee member appointments made in ICSID cases have

* The authors would like to thank Daniela Arguello, Otylia Babiak, and Donna Robinson for their assistance with this article. A list of proposals to disqualify in ICSID cases and relevant citations is provided in Annex 1. The information cited is current to September 1, 2014.

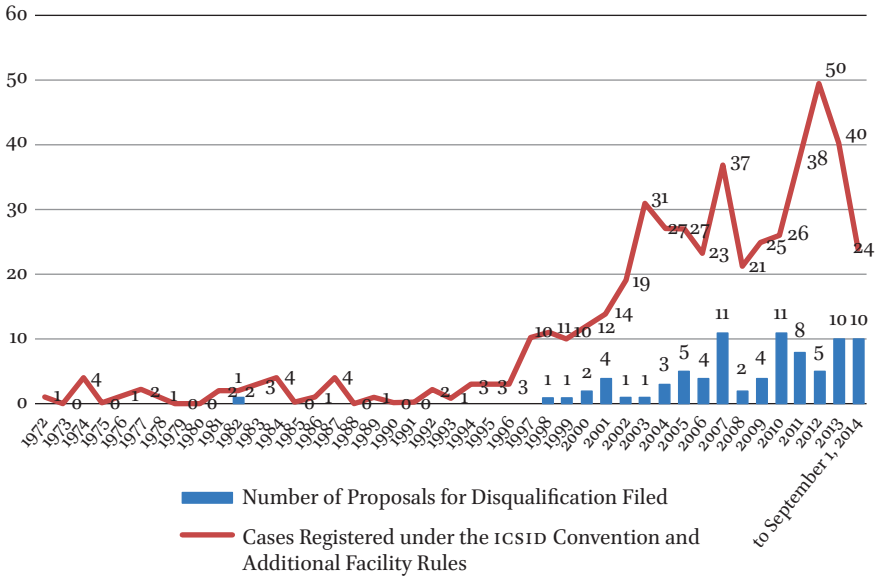
1 The text of the ICSID Convention, the arbitration rules under the ICSID Convention and ICSID Additional Facility, and further information about ICSID can be found at www.worldbank.org/icsid. This paper focuses on proposals to disqualify arbitrators under the ICSID Convention and Rules. The procedure for proposals to disqualify under the ICSID Additional Facility Rules is similar to the procedure described in this paper.

2 UNCTAD IIA Issues Note, No. 4, June 2013, 3; *see also* ICSID, *The ICSID Caseload—Statistics*, Issue 2014-2, *available at* www.worldbank.org/icsid.

 | DOI 10.1163/9789004302129_004

been subject to challenge, representing 5.2% of all appointments.[3] The first challenge to an arbitrator under the ICSID rules was not filed until 1982, in *Amco v. Indonesia*.[4] The next challenge was filed 16 years later (in 1998) in *Pey Casado v. Chile*.[5] However, an increasing number of proposals to disqualify an arbitrator have been filed since the early 2000s. The chart below shows that the increasing number of proposals to disqualify is broadly consistent with the general trend of increasing cases, although it does not correlate exactly with the number of cases filed in any given year.

The eighty-four disqualification proposals initiated to date were filed in fifty-seven different cases, reflecting the fact that in some cases, parties challenged more than one arbitrator or sought to disqualify the same arbitrator multiple times. Overall, fifty-seven individuals have been subject to disqualification proposals at ICSID. Fifty-six of the eighty-four challenges have named a



Proposals for disqualification and cases registered, by year.

3 Three disqualification proposals were filed between 1982 and 1999, thirty-seven disqualification proposals were filed between 2000 and 2009, and forty-four disqualification proposals were filed between 2010 and September 1, 2014.

4 *Amco Asia Corp. et al. v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on the Proposal to Disqualify an Arbitrator (June 24, 1982), cited in Decision on Jurisdiction, 1 ICSID Reports 399, ¶ 2 (Sept. 25, 1983).

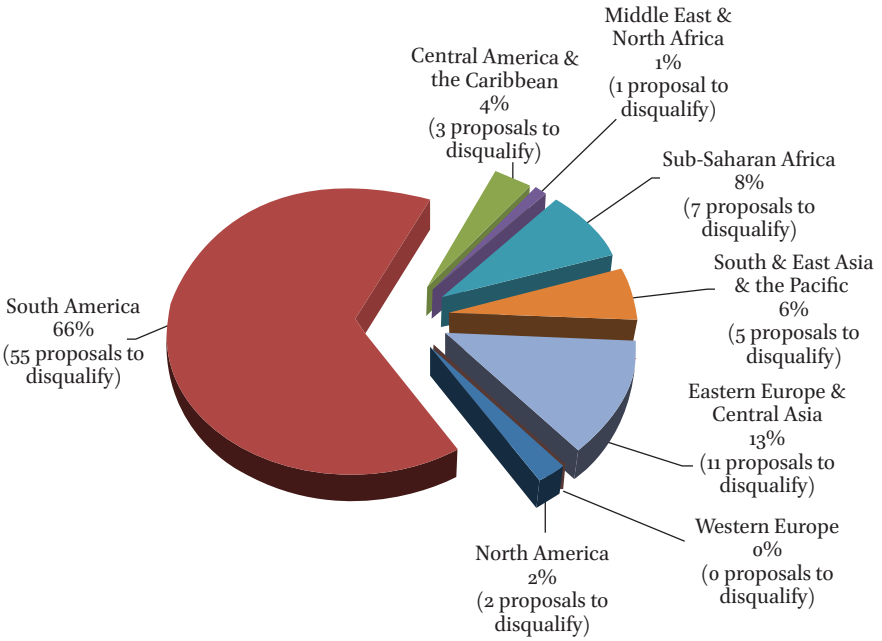
5 *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision (Feb. 21, 2006), cited in Award (May 8, 2008).

single arbitrator, while the remaining twenty-eight challenges have been to the majority of the tribunal or the entire tribunal.

Roughly half of the challenges have been commenced in cases involving South American States as respondents. The greatest number of challenges has been in cases involving Argentina and Venezuela, likely due to the large number of cases in which these States have been involved. The charts below demonstrate the number of arbitrators subject to a challenge by a State party involved in the dispute and by geographic region of the State party to the dispute.

Number of challenges, by state party to the dispute

State Party	Number of Arbitrators Challenged in Cases Involving State Party	State Party	Number of Arbitrators Challenged in Cases Involving State Party
1. Argentina	22	16. Gabon	1
2. Venezuela	21	17. Gambia	1
3. Chile	6	18. Georgia	1
4. Bolivia	3	19. Guatemala	1
5. Ukraine	3	20. Guinea	1
6. Ecuador	2	21. Hungary	1
7. Pakistan	2	22. Jordan	1
8. Panama	2	23. Kazakhstan	1
9. Paraguay	2	24. Malaysia	1
10. Tanzania	2	25. Mexico	1
11. Bangladesh	1	26. Romania	1
12. Bosnia & Herzegovina	1	27. Turkey	1
13. Central African Republic	1	28. Turkmenistan	1
14. Congo, Dem. Rep. of	1	29. USA	1
15. Estonia	1		



Challenges, by region of the state party to the dispute.

In terms of outcomes, eighty-three of the eighty-four challenges have been resolved, while one of the eighty-four challenges is pending in a suspended case. In the eighty-three resolved challenges, twenty-one arbitrators resigned from the case, three proposals were withdrawn or discontinued prior to a decision being rendered, and fifty-nine decisions were issued. Four of the fifty-nine decisions upheld the challenge and fifty-five declined the challenge. While only four decisions have disqualified an arbitrator, the composition of the tribunal changed in 30% of the cases where a disqualification application was brought. This reflects the fact that many arbitrators who are challenged elect to resign before a decision is issued, regardless of the merits of the disqualification proposal.

2 Arbitrator Qualifications

The fundamental qualifications for ICSID arbitrators are set out in Articles 14 and 40 of the ICSID Convention. Article 14(1) lists the basic qualifications of arbitrators on the ICSID Panel of Arbitrators as follows:

> 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.

Article 40(2) requires arbitrators appointed from outside the ICSID Panel of Arbitrators to meet the qualifications listed in Article 14.[6] As a result, parties have substantial flexibility in selecting tribunal members, but they must all meet the qualifications in the Convention.

The Centre's website maintains the list of persons nominated to the Panel of Arbitrators by each member State.[7] If a State has vacant or expired positions on the ICSID Panel, the Secretariat reminds them of their right to nominate candidates and the qualities stipulated by Article 14. In addition, the Centre advises States that additional relevant considerations in nominating Panel members include:

- knowledge of and experience with international investment law;
- knowledge of and experience with public international law;
- experience and expertise in international arbitration;
- the ability to conduct an arbitration and write an arbitral award in one or more of the Centre's official languages (English, French and Spanish);
- availability to accept appointments in cases as of the date of designation; and
- availability and willingness to travel for the purposes of case proceedings.

These suggestions reflect the requirements in Article 14 and the practical experience gained through case administration at the Centre.

3 The Procedural Steps in a Proposal to Disqualify an Arbitrator

3.1 *Steps Prior to Constitution and First Session of the Tribunal*

As a matter of practice, the disputing parties and the Centre take various steps before a tribunal is constituted to avoid nomination of an arbitrator who does not meet the requirements of Convention Article 14.

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6 Article 40(2) states, "Arbitrators appointed from outside the Panel of Arbitrators shall possess the qualities stated in paragraph (1) of Article 14."

7 ICSID, Members of the Panels of Conciliators and Arbitrators, Doc. No. ICSID/10, https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=MembersofPannel.

Roughly 71% of all arbitrator appointments are made by the parties without assistance from the Centre. It is usual for parties and their counsel to review the profile of potential tribunal members before suggesting a party-appointed arbitrator or agreeing to a tribunal President. Among the relevant considerations are whether a nominee would be conflicted, as it is not in the interest of any party to have their proposed arbitrator successfully challenged. Nor is it in the interest of potential tribunal members to allow their nomination to proceed when they have a conflict of interest. As a result, nominees either disclose a potential conflict so the parties may waive any objection, or decline the nomination.

If ICSID is asked to appoint a tribunal member, it does a preliminary conflicts check. If this review discloses no apparent conflict, ICSID asks the candidate whether they know of any conflict in the circumstances of the case and whether they are able to devote the time necessary to the proceeding. ICSID does not endorse the candidate if a conflict is disclosed or the candidate is unable to devote sufficient time. Before appointing the candidate, ICSID provides the disputing parties with the arbitrator's curriculum vitae and any disclosures from the arbitrator so that the parties have the opportunity to raise an evident conflict of interest.[8]

In addition to the practices outlined above, several ICSID rules help to filter potentially conflicted candidates before the constitution of the tribunal. ICSID Arbitration Rule 5 requires each arbitrator to formally accept their nomination within fifteen days of a request to do so by the Centre. This provides an additional opportunity to decline an appointment or disclose a potential conflict.

ICSID Arbitration Rule 6 requires a tribunal nominee to provide a signed declaration prior to the first session, disclosing any professional or other circumstance that might cause their reliability for independent or impartial judgment to be challenged. The obligation to disclose continues throughout the proceeding. Rule 6(2) states:

> Before or at the first session of the Tribunal, each arbitrator shall sign a declaration in the following form:
>
> To the best of my knowledge there is no reason why I should not serve on the Arbitral Tribunal constituted by the International Centre for Settlement of Investment Disputes with respect to a dispute between _____and_____.

8 Parties also have the option of waiving a potential conflict after disclosure.

> I shall keep confidential all information coming to my knowledge as a result of my participation in this proceeding, as well as the contents of any award made by the Tribunal.
>
> I shall judge fairly as between the parties, according to the applicable law, and shall not accept any instruction or compensation with regard to the proceeding from any source except as provided in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States and in the Regulations and Rules made pursuant thereto.
>
> Attached is a statement of (a) my past and present professional, business and other relationships (if any) with the parties and (b) any other circumstance that might cause my reliability for independent judgment to be questioned by a party. I acknowledge that by signing this declaration, I assume a continuing obligation promptly to notify the Secretary-General of the Centre of any such relationship or circumstance that subsequently arises during this proceeding.
>
> Any arbitrator failing to sign a declaration by the end of the first session of the Tribunal shall be deemed to have resigned.

The Centre gives the disputing parties copies of the Rule 6 declaration and any accompanying disclosure upon receipt. Similarly, the parties are immediately provided with any updated declaration and disclosure concerning a relationship or circumstance that arises.

Under Rule 6, arbitrators must disclose any fact that they reasonably believe would cause their reliability for independent judgment to be questioned by a reasonable person.[9] Thus, for example, an arbitrator was not required to declare that the counsel to one of the parties was a classmate many years prior.[10] The duty to disclose arises at the time the arbitrator has some basis to suspect a potential conflict or fact that would call his or her independence into question.[11]

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9 *Suez, Sociedad General de Aguas de Barcelona, S.A. and Interagua Servicios Integrales de Agua, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17 and *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal, ¶¶ 45–48 (May 12, 2008).

10 *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Decision on Respondent's Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz, ¶¶ 47–68 (Mar. 19, 2010).

11 *ConocoPhillips Company and others v. Bolivarian Republic of Venezuela*, ARB/07/30, Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator, February 27, 2012, ¶¶ 58–60, 67; *EDF International S.A., SAUR International S.A. and Leon Participaciones*

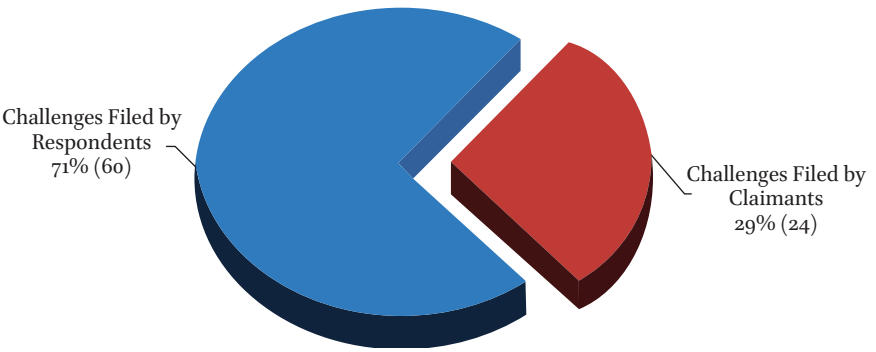
An arbitrator should disclose publicly available arbitral appointments out of an abundance of caution, but a good faith failure to do so does not establish a breach of Article 14.[12] Further, the mere fact of non-disclosure in the Rule 6 declaration is not a *prima facie* basis to disqualify; the non-disclosure must relate to facts that would be material to determining a reasonable likelihood of impartiality or lack of independence.[13]

3.2 *Initiation of Proposals to Disqualify*

Only parties may file a proposal to disqualify; members of tribunals, members of *ad hoc* committees, and ICSID have no standing to commence a challenge.[14]

To date, respondents have brought more challenges than claimants: 71% of all challenges in ICSID cases were filed by respondents (sixty of the eighty-four challenges), while 29% were filed by claimants (twenty-four of the eighty-four challenges).

The picture is slightly more complex when one considers which party appointed the challenged arbitrator. As shown in the chart below, all of the



Challenges, by party initiating challenge.

Argentinas S.A. v. Argentine Republic, ARB/03/23, Challenge Decision Regarding Professor Gabrielle Kaufmann-Kohler, June 25, 2008, ¶¶ 97–106.

12 *Universal Compression International Holdings, S.L.U. v. Bolivarian Republic of Venezuela*, ARB/10/9, Decision on Claimant's Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Tawil, Arbitrators, May 20, 2011, ¶¶ 89–96; *Tidewater Inc. and others v. Bolivarian Republic of Venezuela*, ARB/10/5, Decision on Claimant's Proposal to Disqualify Professor Brigitte Stern, Arbitrator, December 23, 2010, ¶¶ 45–56.

13 *See, e.g., ConocoPhillips v. Venezuela, supra* note 12, ¶ 60; *Nations Energy, Inc. and others v. Republic of Panama*, ARB/06/19, Decision Sobre la Propuesta de Recusacion del Dr. Stanimir A. Alexandrov, September 7, 2011, ¶¶ 70–78; *Tidewater v. Venezuela, supra* note 13, ¶ 40; *EDF International v. Argentine Republic, supra*, note 12, ¶ 123.

14 Schreuer, Christoph, Loretta Malintoppi, August Reinisch & Anthony Sinclair, The ICSID Convention: A Commentary 1199 (2d ed., Cambridge University Press, 2009).

challenges to claimant-appointees were brought by the respondent. However, nineteen of the challenges to respondent-appointees were brought by claimants, while the remaining eight were brought by the respondent (i.e., a challenge to its own nominee). Respondents also challenged four joint appointments (made jointly by the parties or by the co-arbitrators), while claimants challenged one joint appointment. Finally, fifteen challenges were brought to appointments made by ICSID, four of which were filed by the claimant and eleven of which were filed by the respondent.

Challenges, by identity of appointing party

	By Claimant (Number & Percentage of Claimant-Initiated Challenges)	**By Respondent (Number & Percentage of Respondent-Initiated Challenges)**	**Total Number**
Claimant Appointee Challenged	0 (0%)	37 (62%)	37
Respondent Appointee Challenged	19 (79%)	8 (13%)	27
Joint Party Nomination or Co-arbitrator Nomination Challenged	1 (4%)	4 (7%)	5
ICSID Nomination Challenged	4 (3 in annulment proceedings) (17%)	11 (1 in annulment proceedings) (18%)	15
TOTAL	24	60	84

3.3 *Procedure to File a Proposal to Disqualify*

Either disputing party can file a proposal to disqualify an arbitrator once the tribunal is constituted. While parties sometimes disclose their intent to challenge an arbitrator before the tribunal is constituted, a challenge cannot be made in advance.[15]

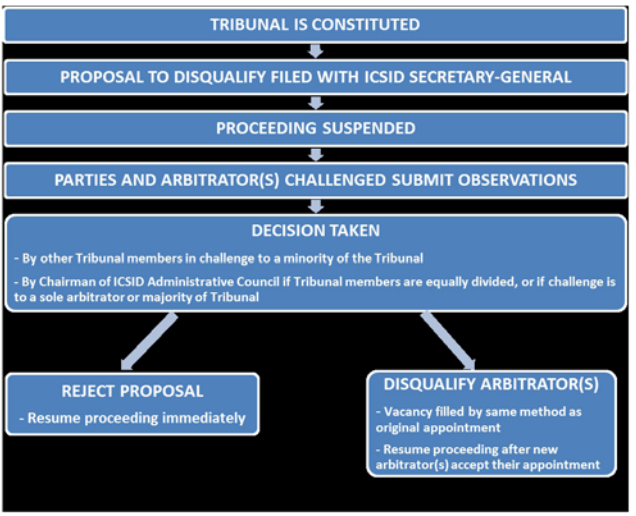
ICSID Arbitration Rule 9 establishes the procedure regarding a proposal to disqualify an arbitrator. Rule 9, entitled "Disqualification of Arbitrators," provides:

> (1) A party proposing the disqualification of an arbitrator pursuant to Article 57 of the Convention shall promptly, and in any event before the proceeding is declared closed, file its proposal with the Secretary-General, stating its reasons therefor.
> (2) The Secretary-General shall forthwith:
> (a) transmit the proposal to the members of the Tribunal and, if it relates to a sole arbitrator or to a majority of the members of the Tribunal, to the Chairman of the Administrative Council; and
> (b) notify the other party of the proposal.
> (3) The arbitrator to whom the proposal relates may, without delay, furnish explanations to the Tribunal or the Chairman, as the case may be.
> (4) Unless the proposal relates to a majority of the members of the Tribunal, the other members shall promptly consider and vote on the proposal in the absence of the arbitrator concerned. If those members are equally divided, they shall, through the Secretary-General, promptly notify the Chairman of the proposal, of any explanation furnished by the arbitrator concerned and of their failure to reach a decision.
> (5) Whenever the Chairman has to decide on a proposal to disqualify an arbitrator, he shall use his best efforts to take that decision within 30 days after he has received the proposal.
> (6) The proceeding shall be suspended until a decision has been taken on the proposal.

15 Article 57 of the ICSID Convention requires a party to propose disqualification "to a Commission or Tribunal," and hence it cannot be initiated before the Commission or tribunal is constituted. *See also* Participaciones Inversiones Portuarias (PIP) SARL v. Republic of Gabon, ICSID Case No. ARB/08/17, Decision, ¶ 5 (Nov. 12, 2009); Schreuer et al., *supra* note 15, at 1200.

Although Rule 9 refers only to proposals to disqualify members of a tribunal, it has been found to apply equally to challenges in annulment proceedings.[16]

The vast majority of proposals to disqualify in ICSID cases have been filed in original arbitrations (seventy-seven), with two challenges in interpretation proceedings, one challenge in a resubmitted case, and four challenges in annulment proceedings. Most challenges have been brought early in the process. Of the eighty-four challenges to date, thirty-eight were made upon tribunal constitution or just after the first session, twenty-seven were filed during the written phase of proceedings, four were filed after an interim decision, one was filed at the oral hearing, and thirteen were filed after the final hearing or after post-hearing briefs. The basic steps in bringing a challenge are shown in the following diagram, and detailed below.



Steps in the ICSID challenge procedure.

3.4 *Requirement to File Promptly*

Rule 9 requires a proposal for disqualification to be filed promptly, and in any event before the proceeding is declared closed. The proceeding is automatically

16 *Compania de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on the Challenge to the President of the Committee, ¶¶ 5–13 (Oct. 3, 2001); *Nations Energy v. Panama, supra* note 14, at, ¶¶ 41–50.

suspended on receipt of a challenge and remains suspended until a decision has been taken on the challenge.[17]

The Rules do not prescribe the number of days that will be considered prompt, and the question of promptness turns on the facts underlying the challenge. For this purpose, promptness is measured from the date the challenging party knew the facts underlying the challenge or the date on which such facts were publicly available to it.[18] A number of cases have addressed the promptness requirement, and these give a further indication as to the scope of this term. In *Urbaser v. Argentina*, the tribunal decided that filing a challenge within ten days of learning the underlying facts fulfilled the promptness requirement.[19] In *Suez v. Argentina*, the Tribunal held that filing a challenge fifty-three days after learning the relevant facts was too long.[20] In *Burlington v. Ecuador*, two grounds for challenge were dismissed because they related to facts that had been public for more than four months prior to filing the challenge.[21] The tribunal in *Azurix v. Argentina* found that a delay of eight months was not prompt filing.[22] In *CDC v. Seychelles*, a filing after 147 days was deemed untimely,[23] and in *Cemex v. Venezuela*, 6 months was considered too long.[24]

17 ICSID Arbitration Rule 9(6).

18 *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuna, ¶¶ 71–76 (Dec. 13, 2013).

19 *Urbaser S.A. and others v. Argentine Republic*, Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan, Arbitrator, ICSID Case No. ARB/07/26, ¶ 19 (Aug. 12, 2010).

20 *Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17 and *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, ¶¶ 22–26 (Oct. 22, 2007).

21 *Burlington v. Ecuador*, *supra* note 19, at ¶¶ 71–76.

22 Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Decision on the Challenge to the President of the Tribunal (Feb. 25, 2005), as reported in the Decision on Annulment, ¶¶ 33–36, 268–269 (Sept. 1, 2009).

23 *CDC Group PLC v. Republic of Seychelles*, ICSID Case No. ARB/02/14, Decision on Annulment, ¶ 53 (June 29, 2005) *reported in* Schreuer et al., *supra* note 15, at 1201.

24 *Cemex Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on the Respondent's Proposal to Disqualify a Member of the Tribunal, ¶ 41 (Nov. 6, 2009).

No challenge may be initiated after the proceeding is declared closed,[25] regardless of how promptly it is filed. If grounds for a challenge are discovered after the close of proceedings, the matter might be raised as a basis for annulment under Article 52 of the ICSID Convention.[26] If knowledge of these grounds was reasonably available before closure but the challenge was not raised, the challenge is likely to fail on annulment.[27]

The party requesting disqualification of an arbitrator files its proposal with the Secretary-General of ICSID. When ICSID receives the challenge, it transmits it to the parties and the Tribunal and confirms that the proceeding has been suspended. The challenge must then be briefed and decided.

3.5 *Who Decides a Challenge?*

Article 58 of the ICSID Convention addresses who decides a challenge. It provides, in part:

> The decision on any proposal to disqualify a conciliator or arbitrator shall be taken by the other members of the Commission or Tribunal as the case may be, provided that where those members are equally divided, or in the case of a proposal to disqualify a sole conciliator or arbitrator, or a majority of the conciliators or arbitrators, the Chairman shall take that decision. If it is decided that the proposal is well-founded the conciliator or arbitrator to whom the decision relates shall be replaced in accordance with the provisions of Section 2 of Chapter III or Section 2 of Chapter IV.

As a result, a challenge to a sole arbitrator or to two or more members of a tribunal is decided by the Chairman of the ICSID Administrative Council. A challenge to a single arbitrator is referred to the other two members of the tribunal.[28] In practice, if each party simultaneously files a proposal to disqualify, ICSID offers the parties the opportunity to consent to treat the two challenges as a proposal for the disqualification of a majority of the tribunal, to be

25 ICSID Arbitration Rule 46 requires that an award be rendered within 120 days of closing the proceeding.

26 Schreuer, et al., *supra* note 15, at 1200.

27 *Id.* at 1201; *CDC v. Seychelles, supra* note 24, at ¶ 53.

28 This applies to cases under the ICSID Convention and ICSID Additional Facility. It should also be noted that the Secretary-General of ICSID may be designated as the authority to decide a proposal to disqualify an arbitrator in proceedings not conducted under the ICSID Convention or ICSID Additional Facility Rules. This designation may be made by contract, law, treaty, agreement of the disputing parties to the dispute, or by the applicable arbitration rules.

decided by the Chairman of the Administrative Council under Article 58. If a party does not wish to consent to this, the challenge received first is decided by the other two members. Thereafter, the challenge received second is decided by the other two arbitrators (or a replacement arbitrator if the first challenge was upheld).

There is no case law on whether disputing parties in an ICSID case may agree to have an authority other than those persons referred to in Convention Article 58 to decide a challenge. The Centre is aware of this occurring in only one instance, where the parties agreed to nominate a person other than the Chair of the Administrative Council or the non-challenged arbitrators to decide the challenge. In this instance, the challenged arbitrator ultimately resigned and the question of the jurisdiction of the outside authority was not addressed by a tribunal. This practice appears inconsistent with the ICSID Convention and the results of it likely would not be cognizable by an ICSID tribunal. As a result, parties considering such an option should weigh the risk of the decision taken on the challenge ultimately being without jurisdiction.

3.6 *Submissions on the Challenge*

The next step is for the authority deciding the challenge (the non-challenged arbitrators or the Chairman of the Administrative Council) to fix a schedule for briefing by the parties on the proposed disqualification. If the challenge proposal includes a comprehensive record and argument, this schedule might commence with the opposing party's reply to the merits of the challenge. If the challenge proposal does not include the relevant evidence and argument, the briefing will begin with a submission by the challenging party and a reply by the opposite party. Briefing schedules typically allow a party five to ten days to file their submission. In some (but not all) cases, a reply and rejoinder submission on the challenge is permitted. Typically the reply and rejoinder submission must be filed within a very short time period and they are both limited to new matters raised in the prior submission.

ICSID Arbitration Rule 9(3) offers the challenged arbitrator an opportunity to provide explanations. This allows the arbitrator to provide facts within his or her knowledge that are pertinent to making an informed decision on the challenge. An arbitrator is not required to submit such explanations, and indeed, many simply reply by reaffirming that they are able to decide the matter in an impartial manner and that the relevant facts have been placed on record by the parties. The use of the phrase "explanations" in Rule 9(3) arguably indicates that the arbitrator's observations should focus on the relevant factual context rather than on an argument about the merits of the challenge. In *Burlington v. Ecuador*, the arbitrator was disqualified on the basis of his

comments in the explanations filed in reply to the challenge. These explanations made adverse comments about the ethics of counsel for the respondent. The Chairman found that

> such comments do not serve any purpose in addressing the proposal for disqualification or explaining circumstances relevant to the allegations that the arbitrator manifestly lacks independence or impartiality.[29]

The burden of proof in a challenge lies with the party bringing the proposal to disqualify. That party must establish facts demonstrating the arbitrator's failure to meet the requirements of Convention Article 14.[30] The proponent may not rely on speculation or unfounded assertions to prove the facts in support of its challenge.[31] The legal standard of proof on such an application is an objective one, based on how a reasonable third party would evaluate the evidence.[32] Proof of actual dependence or bias is not required to succeed on a challenge, and it is sufficient to establish the appearance of dependence or bias.[33] While the International Bar Association Guidelines on Conflict of Interest are not strictly applicable to challenges under the ICSID Convention, they may serve as a useful reference for the decision-maker.[34]

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29 *Burlington v. Ecuador, supra* note 19, at ¶¶ 78–81.

30 *Suez v. Argentina, supra* note 21, at ¶¶ 28–29; *Burlington v. Ecuador, supra* note 19, at ¶ 67.

31 *ConocoPhilipps Company v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify a Majority of the Tribunal, ¶¶ 52–53 (May 5, 2014).

32 *Id*. at ¶ 53; *Burlington v. Ecuador, supra* note 19, at ¶ 67; *Abaclat v. Argentine Republic*, ICSID Case No. ARB/07/05, Decision on the Proposal to Disqualify a Majority of the Tribunal, ¶ 77 (Feb. 4, 2014); *Blue Bank International & Trust (Barbados) Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, ¶ 60 (Nov. 12, 2013).

33 *İçkale İnşaat Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Decision on Claimant's Proposal to Disqualify Professor Philippe Sands, ¶ 117 (July 11, 2014); *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch, ¶ 53 (Mar. 20, 2014); *Blue Bank v. Venezuela, supra* note 33, at ¶ 59; *Burlington v. Ecuador, supra* note 19, at ¶ 66.

34 International Bar Association, *Guidelines on Conflict of Interest in International Arbitration*, http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#2004; *Burlington v. Ecuador, supra* note 19, at ¶ 69; *Blue Bank v. Venezuela, supra* note 33, at ¶ 62.

3.7 *Decision on the Challenge*

Once the challenge has been fully briefed, the non-challenged arbitrators (or the Chairman if charged with making the decision) will decide the disqualification proposal. If the two non-challenged arbitrators are equally divided and cannot reach an agreement, they will so advise the Secretary-General, and the matter will be decided by the Chairman. In this circumstance, the non-challenged arbitrators typically inform the Secretary-General that they are equally divided, and therefore the matter must be referred to the Chairman. The non-challenged arbitrators generally do not provide an explanation as to why they are unable to agree on the challenge. Once referred, the Chairman must make best efforts to render the decision within thirty days of receiving the referral.[35]

The decision on a challenge is usually taken on the basis of the written record compiled by the parties. While the non-challenged arbitrators and the Chairman have the discretion to hold a hearing, the decision is usually taken solely on the basis of the written record.[36]

On rare occasions, the Chairman of the Administrative Council has asked a third party for a recommendation on a challenge proposal.[37] While it is within the discretion of the Chairman to do so, it is unusual. Even where a recommendation is requested, the Chairman is not bound by it. The decision is always that of the Chairman, and is never delegated to another decision-maker.[38]

If the challenge is rejected, the suspension is automatically lifted and the proceeding immediately resumes with the same tribunal.[39] If the challenge is upheld, the proceeding remains suspended until the vacancy is filled. Vacancies are generally filled by the same method as used in the original nomination.[40]

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35 ICSID Arbitration Rule 9(5).

36 *ConocoPhillips v. Venezuela, supra* note 32, at ¶¶ 41–45.

37 For example, in *Generation Ukraine v. Ukraine*, ICSID Case No. ARB/00/9, Award, ¶ 4.16 (Sept. 16, 2003) and in *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, ¶ 36 (Feb. 6, 2007), the Chairman requested a recommendation from a third party prior to making a decision on proposals to disqualify an arbitrator who formerly held senior staff positions at the World Bank. Such a recommendation was also requested in *Pey Casado v. Chile, supra* note 5, at ¶ 39, and Abaclat and others v. Argentine Republic, ICSID Case No. ARB/07/5, Decision (Dec. 21, 2011).

38 *Abaclat v. Argentina, supra* note 33, at ¶ 66.

39 ICSID Arbitration Rule 9(6).

40 ICSID Arbitration Rule 10. The only exception to this is if the vacancy is caused by a resignation of a party-appointed arbitrator that was not agreed to by the other arbitrators or if a party asks the Chairman to act because a new appointment has not been made and accepted within forty-five days. *See* ICSID Arbitration Rules 11–12.

A challenged arbitrator may resign any time after being informed of the challenge by submitting his or her resignation to the other members of the tribunal.[41] If the resigning arbitrator was originally appointed by one of the parties, the non-challenged co-arbitrators may accept or reject the resignation. If accepted, the vacancy will be filled by the same method as the original appointment was made. If rejected, the Chairman of the ICSID Administrative Council fills the vacancy.[42] The purpose of this requirement is to ensure that there is no collusion between the resigning arbitrator and the party that originally appointed them.[43]

4 Grounds for Disqualification

The main grounds for challenge in an ICSID arbitration are that the arbitrator manifestly lacks the qualities required by Convention Article 14 or that the arbitrator is ineligible for appointment. These grounds are established by Convention Article 57, which states:

> A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14. A party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV.

The first of these, a manifest lack of the qualities required by Article 14, is the ground for a challenge raised most frequently. While the English version of Article 14 refers to "independent judgment," the equally authentic Spanish and French versions of Article 14 of the ICSID Convention translate this phrase as "imparcialidad de juicio" and "doivent . . . offrir toute garantie d'independence," respectively. As a result, Article 14 encompasses challenges made on the basis of the absence of independence or impartiality. In this context, independence has been defined by cases as the absence of external control over the arbitrator, whereas impartiality is the absence of bias or predisposition toward a

41 ICSID Arbitration Rule 8; *see also*, ICSID Convention Article 56.

42 ICSID Arbitration Rules 10–11.

43 ICSID, *History of the ICSID Convention: Documents Concerning the Origin and Formulation of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, Vol. II–2, 982–983 (1968).

party.[44] Together, these requirements ensure that an arbitrator has "the ability to consider and evaluate the merits of each case without relying on factors that have no relation to such merits."[45]

The second ground for a challenge in Convention Article 57 is that an arbitrator is ineligible for appointment under Articles 38 to 40 of the ICSID Convention. Articles 38 to 40 require arbitrators appointed by the Chairman of the ICSID Administrative Council to be nationals of States other than the State of the claimant investor(s) or the respondent State. In addition, the majority of the arbitrators must be nationals of States other than the State party to the dispute and the State whose national is a party to the dispute, unless the parties agree otherwise. This ground has never been successfully invoked in a case but has been raised in cases where the arbitrator resigned prior to a formal challenge decision being issued.[46]

A further basis for challenge is that an arbitrator has become incapacitated or unable to perform the duties of office. Rule 8 of the ICSID Arbitration Rules governs incapacity or resignation of an arbitrator, and makes the same procedure in respect of challenges (Arbitration Rule 9) applicable to such an allegation.[47] Usually arbitrators resign on their own initiative if they became incapacitated or otherwise unable to perform the duties of office. To date, there has never been a disqualification on this basis.

5 Standard—Manifest Lack of the Qualities Required of An Arbitrator

A number of commentators and cases have debated the meaning of "manifest" in Convention Article 57. Some have suggested that it requires a very substantial absence of the required qualities. In the words of the non-challenged arbitrators in *Amco v. Indonesia*, 'manifest lack' means "not a possible lack of the

44 *Içkale İnşaat Limited Şirketi v. Turkmenistan, supra* note 34, at ¶¶ 115–116; *ConocoPhillips v. Venezuela, supra* note 32, at ¶¶ 50–51, 54–55; *Suez. v. Argentina, supra* note 21, at ¶¶ 28–30; *Suez v. Argentina, supra* note 10, at ¶¶ 27–28; *Burlington v. Ecuador, supra* note 19, at ¶¶ 65–66; *Urbaser v. Argentina, supra* note 20, at ¶¶ 36–38; Saint Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/13, Decision, ¶¶ 54–56 (Feb. 27, 2013); *Abaclat v. Argentina, supra* note 33, at ¶¶ 74–75.

45 *Urbaser v. Argentina, supra* note 20, at ¶ 40; *ConocoPhillips v. Venezuela, supra* note 32, at ¶ 51.

46 *Eudoro A. Olguín v. Republic of Paraguay*, ICSID Case No. ARB/98/5, Award, ¶¶ 15–16 (July 26, 2001).

47 *See also* ICSID Convention, Art. 56.

quality, but a quasi-certain, or to go as far as possible, a highly probable one."[48] Others have suggested that it encompasses a standard more akin to reasonable doubt: as expressed in *Vivendi v. Argentina*, Article 57 of the Convention cannot mean that an "arbitrator might be heard to say that, while he might be biased, he was not *manifestly* biased and he would therefore continue to sit."[49] In *EDF v. Argentina*, the Tribunal found that 'manifest' "relates not to the seriousness of the allegation but to the ease with which it may be perceived."[50]

Recent cases have consistently affirmed that the ICSID Convention standard does not require proof of actual dependence or bias; it is sufficient to establish the appearance of dependence or bias.[51] The existence of dependence or bias is assessed objectively, based on a reasonable evaluation of the evidence by a third party.[52] It cannot be based on a party's subjective belief that an arbitrator lacks independence or impartiality.[53] This assessment is fact specific, and made on a case-by-case basis. The standard applicable to challenges applies equally to party-appointed arbitrators, arbitrators appointed by an agreement between the parties, and arbitrators appointed by the Chairman or other appointing authority.[54]

Allegations that an arbitrator should be disqualified for lack of independence or impartiality arise in various situations.[55] Several of these situations are examined below.

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48 *Amco v. Indonesia, supra* note 4.

49 *Compania de Aguas del Aconquija S.A. & Vivendi v. Argentina, supra* note 17, at ¶ 20.

50 *EDF International v. Argentine Republic, supra* note 12, at ¶¶ 65–68.

51 *Içkale İnşaat Limited Şirketi v. Turkmenistan, supra* note 34, at ¶ 117; *Blue Bank v. Venezuela, supra* note 33, at ¶ 59; *ConocoPhillips v. Venezuela, supra*, note 32, at ¶ 52; *Burlington v. Ecuador, supra* note 19, at ¶ 66; Repsol, S.A. & Repsol Butano S.A. v. Republica Argentina, ICSID Case No. ARB/12/38, Decision Sobre la Propuesta de Recusacion a la Mayoria del Tribunal, ¶¶ 71–72 (Dec.13, 2013); *Caratube v. Kazakhstan, supra*, note 34, at ¶ 57. For a review of relevant cases and comments on this issue, *see* Daele, Karel, *Saint-Gobain v. Venezuela and Blue Bank v. Venezuela: The Standard for Disqualifying Arbitrators Finally Settled and Lowered*, 29(2) ICSID Review, 296–305 (2014).

52 *ConocoPhillips v. Venezuela, supra* note 32, at ¶ 53; *Blue Bank v. Venezuela, supra* note 33, at ¶ 60; *Burlington v. Ecuador, supra* note 19, at ¶ 67; *Caratube v. Kazakhstan, supra*, note 34, at ¶ 54.

53 *Universal v. Venezuela, supra* note 13, at ¶ 71; *Blue Bank v. Venezuela, supra* note 33, at ¶ 60; *Burlington v. Ecuador, supra* note 19, at ¶ 67.

54 *Urbaser v. Argentina, supra* note 20, at ¶ 34.

55 For an extensive discussion of challenge cases, *see* Karel Daele, *Challenge and Disqualification in International Arbitration*, Wolters Kluwer (2012); Daele, *supra* note 52; Michael Hwang, *Issue Conflict in ICSID Arbitrations*, 8 Transnt'l Dispute Mgmt (Dec., 2011).

5.1 *Professional or Personal Relationship of Arbitrator with a Party or Its Counsel*

Most challenges allege that the arbitrator has a prior or continuing personal or professional relationship with a disputing party or its counsel that improperly affects their ability to decide the case.

5.1.1 Professional Relationships

The mere existence of a professional relationship between an arbitrator and a party or counsel is not an automatic basis for disqualification, and tribunals have considered case-specific factors that indicate whether the arbitrator can make an impartial decision in the circumstances.[56] These factors include the nature, extent, and duration of the relationship and whether the arbitrator is financially dependent on the other party or counsel.

The tribunal in *Suez v. Argentina* addressed allegations of conflict concerning the professional duties of an arbitrator who was also a non-executive corporate director in a multinational financial services corporation. That corporation was a minority shareholder (under 3%) in each of the claimant corporations. The respondent filed a proposal to disqualify the arbitrator on the basis of an absence of impartiality and independence. The Tribunal set out four criteria to address the proposal to disqualify. It considered: (1) the closeness or proximity of the connection between the challenged arbitrator and the claimants; (2) the intensity and frequency of the alleged connection; (3) the extent to which the challenged arbitrator is dependent on the claimants for benefits as a result of the connection; and (4) the extent to which benefits accrue to the challenged arbitrator as a result of the connection. The greater the proximity, intensity, dependence, and materiality of the connection, the greater is the likelihood that the relationship may influence the arbitrator's independence of judgment.[57] Applying this test, the non-challenged arbitrators in *Suez* concluded that the challenged arbitrator's non-executive directorship did not result in a lack of independence or impartiality. They anchored their decision on the facts that she had no direct relationship with the claimants, no interaction with the claimants by reason of the directorship, derived no benefit from the claimants, and that her compensation as a director was not affected by the shareholdings in the claimant companies.[58]

In *Blue Bank v. Venezuela*, the challenged arbitrator was a partner in the Madrid office of a multinational law firm and a member of its international

56 *Compania de Aguas del Aconquija S.A. v. Argentina, supra* note 17, at ¶ 28.

57 *Suez. v. Argentina, supra* note 10, at ¶¶ 31–40.

58 *Id.* at ¶¶ 36–40; *see also, EDF v. Argentina, supra* note 12, at ¶¶ 61–134.

arbitration steering committee. At the same time, the New York and Caracas offices of that firm instituted a case against Venezuela. Although the challenged arbitrator had no direct involvement in his firm's case against Venezuela, the challenge was upheld given the common respondent State, the fact that the cases were proceeding simultaneously, the likelihood that similar issues would be raised in the two cases, the connection of the law firm's branch offices, and the fact that the challenged arbitrator derived remuneration from the different branches comprising the international law firm.[59]

The challenged arbitrator in *Vivendi v. Argentina* filed a declaration advising that a member of his law firm had provided legal services unrelated to the arbitration of the claimant corporation. The challenge was rejected because the relationship had been immediately and fully disclosed, the arbitrator had no personal involvement in the lawyer-client relationship with the claimant, the work done had no relation to the pending arbitration, the work consisted of a specific legal transaction and was not strategic or general legal advice, and the legal relationship was concluding.[60]

In *Amco v. Indonesia*, the tribunal rejected a challenge where the arbitrator had given tax advice to the principal shareholder in the claimant corporation and had a profit-sharing arrangement with the lawyers acting for the claimant before his appointment, but no longer held these positions.[61] The absence of financial dependence on the disputing party appears to have been a significant factor in this case.

5.1.2 Personal Relationships

Personal relationships have also been the basis for challenges. It is not unusual for counsel and arbitrators to be personally acquainted, and this fact alone has been held not to prove bias. Again, it is the nature and the extent of the acquaintance that are relevant to Convention Articles 14 and 57.[62] Thus, an arbitrator who formerly was co-counsel with the appointing counsel did not violate Article 14, especially where there was no evidence that similar legal issues would be considered and the relationship had not placed the appointing

59 *Blue Bank v. Venezuela, supra* note 33, at ¶¶ 66–69.

60 *Compania de Aguas del Aconquija S.A. v. Argentina, supra* note 17, at ¶¶ 26–27.

61 *Amco Asia Corp v. Republic of Indonesia*, Decision on the Proposal to Disqualify an Arbitrator (June 24, 1982) (unpublished) but cited in *Compania de Aguas del Aconquija S.A. v. Argentina, supra* note 17, at ¶¶ 21–22 (doubting the conclusion in *Amco*).

62 *Alpha v. Ukraine, supra* note 11, at ¶¶ 67–69.

counsel in a privileged position to anticipate the arbitrator's views.[63] In *Alpha v. Ukraine*, the Tribunal held that a transitory and long-ago schooling acquaintance between an arbitrator and counsel to a party is not a relationship of sufficient proximity to establish a conflict of interest.[64] In *Getma v. Guinea*, the claimant appointed an arbitrator whose brother had been appointed by it in a parallel case under the OHADA arbitration rules.[65] While the two cases were based on the same facts, consent to arbitrate arose out of different legal instruments. The Chairman rejected the challenge, noting that no evidence suggested that the two professional arbitrators would violate their confidentiality obligations or otherwise act improperly simply because they were brothers.[66] In *Zhinvali v. Georgia*, a challenge based on occasional social contacts between the claimant and its party-nominated arbitrator was rejected.[67]

5.2 *Statement by Arbitrator in a Case or Publication*

5.2.1 Statements in Awards and Decisions

Some challenges have been based on claims that an arbitrator's awards and decisions prove that the arbitrator has preconceived ideas and is not open to persuasion in the pending case. The fact that an arbitrator rendered a decision against the respondent in a prior case, where there were no common facts, is insufficient to establish lack of impartiality.[68] In *Repsol v. Argentina*, an arbitrator's views on a legal issue that was not raised by the pleadings did not justify disqualification.[69] A difference of opinion among tribunal members on an interpretation of a factual or legal matter,[70] or the fact that an arbitrator's decision in a prior case is subject to an annulment application, also do not

63 *Universal v. Venezuela, supra* note 13, at ¶¶ 97–105; *see also Nations Energy v. Panama, supra* note 14, at ¶¶ 63–69.

64 *Alpha v. Ukraine, supra* note 11, at ¶ 47.

65 Organisation pour l'Harmonisation en Afrique du Droit des Affaires" or "Organisation for the Harmonization of Business Law in Africa".

66 *Getma International and others v. Republic of Guinea*, ICSID Case No. ARB/11/29, Decision sur la Demande en Recusation de Monsieur Bernardo M. Cremades, Arbitre (June 28, 2012).

67 *Zhinvali v. Georgia*, ICSID Case No. ARB/00/1, Decision (Jan. 19, 2001) (unpublished) but cited in *Compania de Aguas del Aconquija S.A. v. Argentina, supra* note 17, at ¶ 23.

68 *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentina, supra* note 10, at ¶¶ 31–42; *Participaciones Inversiones Portuarias* (*PIP*) *SARL v. Gabon, supra* note 16; *Abaclat v. Argentina, supra* note 33, at ¶¶ 80–81.

69 *Repsol v. Argentina, supra* note 52, at ¶¶ 76–79.

70 *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentina, supra* note 21, at ¶ 35.

establish an absence of impartiality.[71] Nor does the fact that an arbitrator made a procedural ruling adverse to a disputing party,[72] or refused an application for reconsideration by a disputing party.[73]

Generally, tribunals have held that deciding similar legal issues in concurrent or consecutive arbitrations does not establish bias.[74] For example, in *İçkale v. Turkmenistan*, an arbitrator was challenged because he had interpreted the treaty clause at issue in favor of the respondent State in a prior case. The non-challenged arbitrators rejected the challenge because there was no overlap between the merits of the prior case and the instant case. They viewed interpretation primarily as a legal task, at most based on facts unrelated to the merits of the case and not specific to the parties in the case. Consequently, exposure to prior argument about the correct legal interpretation of the clause did not result in an absence of independence or impartiality.[75]

In *Saint-Gobain v. Venezuela*, the challenged arbitrator was formerly the in-house counsel for the Government of Argentina in investment cases and the appointing counsel for Venezuela was formerly his supervisor. The claimant investor challenged this appointment on the basis of the arbitrator's relationship to the counsel for the respondent and its concern that the arbitrator would feel compelled to uphold positions that he had defended when he was counsel for Argentina. The challenge was dismissed. The arbitrator and his former supervisor had had few contacts with each other and so no perception of partiality could rest on this ground. In terms of the legal issues, there was no basis to conclude that the arbitrator felt compelled to endorse the views he had argued as an advocate for a party, and there was no evidence suggesting that the arbitrator was unable to decide the pending case in an impartial manner.[76]

5.2.2 Other Statements

The situation is more difficult when considering statements made outside the context of a case decision or award. In *Perenco v. Ecuador*, an arbitrator was challenged based on comments he had made in a media interview to the effect that the respondent State appearing before him had been recalcitrant in

71 *Participaciones Inversiones Portuarias (PIP) SARL v. Gabon, supra* note 16, at ¶ 28.

72 *Abaclat v. Argentina, supra* note 33, at ¶¶ 79–83.

73 *ConocoPhillips v. Venezuela, supra* note 32.

74 *Tidewater v. Venezuela, supra* note 13, at ¶¶ 65–72; *Universal v. Venezuela, supra* note 13, at ¶ 83.

75 *İçkale v. Turkmenistan, supra*, note 34, at ¶¶ 118–122; *see also, Caratube v. Kazakhstan, supra* note 34, at ¶ 65.

76 *Saint-Gobain v. Venezuela, supra* note 45, at ¶¶ 61–87.

complying with the orders of investment tribunals.[77] Ultimately, the arbitrator resigned from the case. In *Urbaser v. Argentina*, the claimant alleged that the respondent's nominee had declared his views on two key legal issues in the case, and therefore was not impartial. The claimant supported this allegation by citing two academic publications written by the arbitrator. In one text the arbitrator had addressed the most favored nation treatment standard and concluded that one line of cases was the preferred view. In another journal, the arbitrator had stated that great weight should be given to an interpretation of the defense of necessity by a particular annulment committee. Both of these legal questions were at issue in the case before the challenged arbitrator.[78] The non-challenged arbitrators rejected the challenge, finding that these statements were academic opinions, and not evidence of prejudgment. In their view, the opinions were not "of such force as to prevent the arbitrator from taking full account of the facts, circumstances, and argument presented by the parties in the particular case."[79]

5.3 *Repeat Appointments*

The mere fact that an arbitrator faces similar legal or factual issues in other cases does not prove bias.[80] However, several challenges have argued that repeat appointment of an arbitrator by the same party or counsel can sustain a challenge.[81] In *Tidewater v. Venezuela*, the claimant challenged the respondent-nominated arbitrator on the basis that she had been nominated by the same respondent in three other cases in the previous six years. The non-challenged arbitrators rejected the challenge and addressed the question of repeat appointments at length. They began their analysis by noting that the question of whether repeat appointments create an absence of independence "is a matter of substance, not of mere mathematical calculation."[82] Indeed, the simple fact of repeat appointment by the same party, without more, did not prove a manifest lack of independence. The type of additional circumstance which might indicate potential conflict of interest was

77 *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Challenge to Arbitrator (Dec. 8, 2009).

78 *Urbaser v. Argentina, supra* note 20, at ¶¶ 20–32.

79 *Urbaser v. Argentina, supra* note 20, at ¶¶ 38–59.

80 *Universal v. Venezuela, supra* note 13, at ¶¶ 80–85.

81 The IBA *Guidelines on Conflict of Interest in International Arbitration, supra* note 35, Code of Conflict list several situations on the orange list involving repeat appointment. However, as noted above, the IBA Guidelines are not applicable to a challenge under the ICSID Convention.

82 *Tidewater v. Venezuela, supra* note 13, at ¶ 59.

> if either (a) the prospect of continued and regular appointment, with the attendant financial benefits, might create a relationship of dependence or otherwise influence the arbitrator's judgment; or (b) there is a material risk that the arbitrator may be influenced by factors outside the record in the case as a result of his or her knowledge derived from other cases.[83]

In *Universal v. Venezuela*, the non-challenged arbitrators found that four appointments of the challenged arbitrator by the same respondent State did not prove bias, especially when there was no evidence of financial dependence between the arbitrator and the nominating State.[84] In the same case, the appointment of the same arbitrator by the same law firm in two other cases against Venezuela was not grounds for disqualification, especially where there was no evidence of the financial dependence of the arbitrator on the law firm, nor any other facts indicating lack of impartiality.[85] In *Opic v. Venezuela*, the unchallenged arbitrators stated that repeat appointment by the same party or counsel was a consideration to be carefully considered in a challenge. However, they declined to disqualify the challenged arbitrator as he had only been appointed by the respondent twice before, in what was effectively a single case.[86] The non-challenged arbitrators also held that having been appointed by the same law firm in three cases did not reach the level of a manifest lack of independence.[87] In *Burlington v. Venezuela*, the respondent State challenged the claimant's appointee because the appointee had been appointed by the same law firm in eight ICSID cases between 2007 and 2013. However, the issue was not decided on the basis of repeat appointments because this ground was not raised in a timely fashion.[88] In *Repsol v. Argentina*, the arbitrator was unsuccessfully challenged on the basis that he had been appointed in three on-going cases.[89] In *İçkale v. Turkmenistan*,[90] counsel and the Tribunal agreed

83 *Tidewater v. Venezuela, supra* note 13, at ¶ 62*; see also, Suez. v. Argentina, supra* note 21; *Suez. v. Argentina, supra* note 10; *Participaciones Inversiones Portuarias* (*PIP*) *SARL v. Gabon, supra* note 16; *Universal v. Venezuela, supra* note 13.

84 *Universal v. Venezuela, supra* note 13, at ¶¶ 75–79.

85 *Universal v. Venezuela, supra* note 13, at ¶¶ 86–88.

86 *Opic Karimum Corporation v. Bolivarian Republic of Venezuela*, Decision on the Proposal to Disqualify Professor Philippe Sands, ICSID Case No. ARB/10/14, ¶¶ 46–52 (May 5, 2011).

87 *Id*. at ¶ 53.

88 *Burlington v. Venezuela, supra* note 19, at ¶¶ 74–75.

89 *Repsol v. Argentina, supra* note 52, at ¶¶ 84–86.

90 *İçkale v. Turkmenistan, supra*, note 34, at ¶ 123.

that three prior appointments by the same counsel's firm were insufficient to indicate manifest lack of impartiality.

On the other hand, in *Caratube v. Kazakhstan*, the same law firm appointed the challenged arbitrator to two cases which addressed the same fact situation, very similar issues of law, and involved the same respondent and closely related claimant corporations. In these circumstances, the Tribunal disqualified the arbitrator, concluding that

> [b]ased on a careful consideration of the Parties' respective arguments and in light of the significant overlap in the underlying facts between the *Ruby Roz* case and the present arbitration, as well as the relevance of these facts for the determination of legal issues in the present arbitration, the Unchallenged Arbitrators find that—independently of Mr. Boesch's intentions and best efforts to act impartially and independently—a reasonable and informed third person would find it highly likely that, due to his serving as arbitrator in the *Ruby Roz case* and his exposure to the facts and legal arguments in that case, Mr. Boesch's objectivity and open-mindedness with regard to the facts and issues to be decided in the present arbitration are tainted.[91]

As a result, where repeat appointments are raised, the overall factual circumstances and in particular whether there is evidence of financial dependence between the arbitrator and the parties or counsel will be important criteria.

5.4 *Arbitrator Roles: The "Double Hat" Issue*

An unresolved question in investment arbitration is whether arbitrators who act in different capacities in multiple investment cases should be disqualified.[92] This is often characterized as the "double hat" conundrum, where an arbitrator acts simultaneously as counsel, arbitrator, and perhaps even as an expert witness in other investment cases. Is there a conflict when an arbitrator simultaneously sits on a tribunal with one arbitrator and pleads as counsel before that same arbitrator in a second case? What if an arbitrator acts as an expert

91 *Caratube v. Kazakhstan, supra* note 34, at ¶ 90.

92 For example, in *Societe Generale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Claimant's Proposal to Disqualify Arbitrator (Dec. 19, 2002), a challenge to the respondent's party-nominated arbitrator on the basis that he had provided legal advice in the past to a different respondent, in a different case presided over by Pakistan's counsel, was rejected.

witness in one case and addresses the issue canvassed in the expert opinion in his capacity as arbitrator in a second case? Some commentators believe that there should be a strict division between these roles and that an individual should not play these roles at the same time. Others argue that the mere fact of playing different roles in different cases is inconclusive as to whether there is a conflict of interest, and that realistically, in a field with relatively few experts and few cases, the ability to play different roles is important to developing arbitrators with experience, knowledge and a realistic perspective. The issue has yet to be addressed by ICSID cases and remains a debated one in the legal community.[93]

6 Conclusion

Judicious use of the proposal to disqualify is one of the built-in checks and balances in investment arbitration and helps to ensure its overall legitimacy. With the increased number of challenges and decisions on challenges in investment arbitration, the applicable standards and outcomes are becoming increasingly predictable. However, even with increasing clarity in the law applicable to challenges, parties should not underestimate the importance of a strong factual foundation to support a proposal to disqualify.

93 *See* Hwang, *supra* note 56.

Annex 1 Proposals to Disqualify, by Arbitrators (to September 1, 2014)

	Case No.	Claimant	v.	Respondent	Challenged Arbitrator	Outcome	Publication
1	ARB/81/1	Amco Asia Corporation and others	v.	Republic of Indonesia	Edward W. Rubin	Declined	Decision on the Proposal to Disqualify an Arbitrator, June 24, 1982—unpublished, referred to in Decision on Jurisdiction, September 25, 1983, 1 ICSID Reports 399, ¶ 2
2	ARB/97/3—Annulment	Compañía de Aguas del Aconquija S.A. and Vivendi Universal	v.	Argentine Republic	L. Yves Fortier	Declined	Decision on the Challenge to the President of the Committee, October 3, 2001, worldbank@icsid.org
3	ARB/98/2	Víctor Pey Casado and President Allende Foundation	v.	Republic of Chile	Jorge Witker Velásquez	Arbitrator resigned	Resignation referred to in Award of May 8, 2008, ¶ 9, www.italaw.com
4	ARB/98/2	Víctor Pey Casado and President Allende Foundation	v.	Republic of Chile	Francisco Rezek	Arbitrator resigned	Resignation referred to in Award of May 8, 2008, ¶ 20, www.italaw.com

(cont.)

	Case No.	Claimant	v.	Respondent	Challenged Arbitrator	Outcome	Publication
5	ARB/98/2	Víctor Pey Casado and President Allende Foundation	v.	Republic of Chile	Galo Leoro Franco	Arbitrator resigned	Resignation referred to in Award of May 8, 2008, ¶¶ 35–39, www.italaw.com
6	ARB/98/2	Víctor Pey Casado and President Allende Foundation	v.	Republic of Chile	Mohammed Bedjaoui	Upheld	Decision of February 21, 2006, referred to in Award of May 8, 2008, ¶¶ 35–39, www.italaw.com
7	ARB/98/2	Víctor Pey Casado and President Allende Foundation	v.	Republic of Chile	Pierre Lalive	Declined	Decision of February 21, 2006, referred to in Award of May 8, 2008, ¶¶ 35–39, www.italaw.com
8	ARB/98/2	Víctor Pey Casado and President Allende Foundation—Resubmission	v.	Republic of Chile	Philippe Sands	Arbitrator resigned	Letter of Resignation from the Tribunal, January 10, 2014, www.italaw.com
9	ARB(AF)/98/3	The Loewen Group, Inc. and Raymond L. Loewen	v.	United States of America	L. Yves Fortier	Arbitrator resigned	Resignation referred to in Award of June 26, 2003, ¶¶ 21–22, www.italaw.com

	Case No.	Claimant	v.	Respondent	Challenged Arbitrator	Outcome	Publication
10	ARB/98/5	Eudoro A. Olguín	v.	Republic of Paraguay	Dale Furnish	Arbitrator resigned	Resignation referred to in Award of July 26, 2001, ¶¶ 15–16, worldbank @icsid.org
11	ARB/98/8— Interpretation Proceeding	Tanzania Electric Supply Company Limited	v.	Independent Power Tanzania Limited	Charles N. Brower	Arbitrator resigned	Resignation, March 12, 2010, Case Procedural Details, worldbank@icsid. org
12	ARB/98/8— Interpretation Proceeding	Tanzania Electric Supply Company Limited	v.	Independent Power Tanzania Limited	Kenneth S. Rokison	N/A	Proceeding discontinued
13	ARB/99/3	Philippe Gruslin	v.	Malaysia	Gavan Griffith	Declined	Unpublished Decision, April 27, 2000
14	ARB/00/1	Zhinvali Development Ltd.	v.	Republic of Georgia	Andreas Jacovides	Declined	Unpublished Decision, January 19, 2001
15	ARB/00/9	Generation Ukraine Inc.	v.	Ukraine	Jürgen Voss	Declined	Decision of July 5, 2001, referred to in Award of September 16, 2003, ¶¶ 4.8–4.18, www.italaw.com

(cont.)

	Case No.	Claimant	v.	Respondent	Challenged Arbitrator	Outcome	Publication
16	ARB/01/12	Azurix Corp.	v.	Argentine Republic	Andrés Rigo Sureda	Declined	Decision of February 25, 2005, referred to in Award of July 14, 2006, ¶¶ 33–36 worldbank@icsid.org
17	ARB/01/13	SGS Société Générale de Surveillance S.A.	v.	Islamic Republic of Pakistan	J. Christopher Thomas	Declined	Decision on Claimant's Proposal to Disqualify Arbitrator, December 19, 2002, 8 ICSID Reports, 398
18	ARB/02/8	Siemens A.G.	v.	Argentine Republic	Andrés Rigo Sureda	Declined	Decision of April 15, 2005, referred to in Award of February 6, 2007, ¶¶ 31–38, www.italaw.com
19	ARB/02/13	Salini Construttori S.p.A. and Italstrade S.p.A.	v.	Hashemite Kingdom of Jordan	Eric Schwartz	Arbitrator resigned	Resignation referred to in Award of January 31, 2006, ¶ 9, worldbank@icsid.org
20	ARB/02/16	Sempra Energy International	v.	Argentine Republic	Francisco Orrego Vicuña	Declined	Decision of June 5, 2007, referred to in Award of September 28, 2007, ¶¶ 57–60, 66, world bank@icsid.org

	Case No.	Claimant	v.	Respondent	Challenged Arbitrator	Outcome	Publication
21	ARB/02/16	Sempra Energy International	v.	Argentine Republic	Marc Lalonde	Declined	Decision of June 5, 2007, referred to in Award of September 28, 2007, ¶¶ 57–60, 66, world bank@icsid.org
22	ARB/02/16	Sempra Energy International	v.	Argentine Republic	Sandra Morelli Rico	Declined	Decision of June 5, 2007, referred to in Award of September 28, 2007, ¶¶ 57–60, 66, world bank@icsid.org
23	ARB/03/17	Suez, Sociedad General de Aguas de Barcelona, S.A. and Interagua Servicios Integrales de Agua, S.A.	v.	Argentine Republic	Gabrielle Kaufmann-Kohler	Declined	Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, October 22, 2007, worldbank@icsid.org
24	ARB/03/17	Suez, Sociedad General de Aguas de Barcelona, S.A. and Interagua Servicios Integrales de Agua, S.A.	v.	Argentine Republic	Gabrielle Kaufmann-Kohler	Declined	Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal, May 12, 2008, www.italaw.com

(cont.)

	Case No.	Claimant	v.	Respondent	Challenged Arbitrator	Outcome	Publication
25	ARB/03/19	Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A.	v.	Argentine Republic	Gabrielle Kaufmann-Kohler	Declined	Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, October 22, 2007, worldbank@icsid.org
26	ARB/03/19	Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A.	v.	Argentine Republic	Gabrielle Kaufmann-Kohler	Declined	Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal, May 12, 2008, www.italaw.com
27	ARB/03/22	Electricidad Argentina S.A. and EDF International S.A.	v.	Argentine Republic	Fernando de Trazegnies Granda	Arbitrator resigned	Resignation, July 7, 2006, Case Procedural Details, worldbank@icsid.org
28	ARB/03/22	Electricidad Argentina S.A. and EDF International S.A.	v.	Argentine Republic	Gabrielle Kaufmann-Kohler	N/A	Proceedings Suspended
29	ARB/03/23	EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A.	v.	Argentine Republic	Fernando de Trazegnies Granda	Arbitrator resigned	Resignation referred to in Award of June 11, 2012, ¶ 27, www.italaw.com

	Case No.	Claimant	v.	Respondent	Challenged Arbitrator	Outcome	Publication
30	ARB/03/23	EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A.	v.	Argentine Republic	Gabrielle Kaufmann-Kohler	Declined	Challenge Decision Regarding Professor Gabrielle Kaufmann-Kohler, June 25, 2008, www.italaw.com
31	ARB(AF)/04/1	Corn Products International, Inc.	v.	United Mexican States	Manuel Tron	Arbitrator resigned	Resignation referred to in Decision on Responsibility, January 15, 2008, ¶ 16, worldbank@icsid.org
32	ARB/05/7	Saipem S.p.A.	v.	People's Republic of Bangladesh	Christoph H. Schreuer	Declined	Decision of October 11, 2005, referred to in Award of June 30, 2009, ¶ 57, www.italaw.com
33	ARB/05/11	Asset Recovery Trust S.A.	v.	Argentine Republic	Jaime C. Irarrázabal	Declined	Proposal Declined, November 27, 2006, Case Procedural Details, worldbank@icsid.org

(cont.)

	Case No.	Claimant	v.	Respondent	Challenged Arbitrator	Outcome	Publication
34	ARB/05/21	African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L.	v.	Democratic Republic of the Congo	Teresa Giovannini	Arbitrator resigned	Resignation referred to in Sentence sur les déclinatoires de compétence et la recevabilité, July 29, 2008, ¶ 8, worldbank@icsid.org
35	ARB/06/2	Quiborax S.A., Non-Metallic Minerals S.A. & Allan Fosk Kaplún	v.	Plurinational State of Bolivia	Gabrielle Kaufmann-Kohler	Declined	Decision of July 6, 2010, referred to in Decision on Jurisdiction, September 27, 2012,¶ 26, worldbank@icsid.org
36	ARB/06/2	Quiborax S.A., Non-Metallic Minerals S.A. & Allan Fosk Kaplún	v.	Plurinational State of Bolivia	Brigitte Stern	Declined	Decision of July 6, 2010, referred to in Decision on Jurisdiction, September 27, 2012,¶ 26, worldbank@icsid.org
37	ARB/06/2	Quiborax S.A., Non-Metallic Minerals S.A. & Allan Fosk Kaplún	v.	Plurinational State of Bolivia	Marc Lalonde	Declined	Decision of July 6, 2010, referred to in Decision on Jurisdiction, September 27, 2012,¶ 26, worldbank@icsid.org

	Case No.	Claimant	v.	Respondent	Challenged Arbitrator	Outcome	Publication
38	ARB/06/6	Rail World LLC and others	v.	Republic of Estonia	Mark Raeside	Arbitrator resigned	Resignation referred to in Order of the Tribunal Taking Note of the Discontinuance of the Proceeding, February 5, 2007, ¶ 4, worldbank@icsid.org
39	ARB/06/18	Joseph C. Lemire	v.	Ukraine	Jan Paulsson	Declined	Decision of September 23, 2008, referred to in Award of March 28, 2011, ¶¶ 12–13, www.italaw.com
40	ARB/06/19—Annulment	Nations Energy, Inc. and others	v.	Republic of Panama	Fernando Mantilla-Serrano	Arbitrator resigned	Resignation, May 18, 2011, Case Procedural Details, worldbank@icsid.org
41	ARB/06/19—Annulment	Nations Energy, Inc. and others	v.	Republic of Panama	Stanimir Alexandrov	Declined	Decision Sobre la Propuesta de Recusation del Dr. Stanimir A. Alexandrov, September 7, 2011, www.italaw.com

(cont.)

	Case No.	Claimant	v.	Respondent	Challenged Arbitrator	Outcome	Publication
42	ARB/07/2—Annulment	RSM Production Corporation	v.	Central African Republic	Nayla Comair-Obeid	Arbitrator resigned	Resignation, February 27, 2011, Case Procedural Details, worldbank@icsid.org
43	ARB/07/5	Abaclat and others	v.	Argentine Republic	Albert Jan van den Berg	Declined	Decision, December 21, 2011, worldbank@icsid.org
44	ARB/07/5	Abaclat and others	v.	Argentine Republic	Pierre Tercier	Declined	Decision, December 21, 2011, worldbank@icsid.org
45	ARB/07/5	Abaclat and others	v.	Argentine Republic	Albert Jan van den Berg	Declined	Decision on the Proposal to Disqualify a Majority of the Tribunal, February 4, 2014, worldbank@icsid.org
46	ARB/07/5	Abaclat and others	v.	Argentine Republic	Pierre Tercier	Declined	Decision on the Proposal to Disqualify a Majority of the Tribunal, February 4, 2014, worldbank@icsid.org
47	ARB/07/11	ALAS International Baustoffproduktions AG	v.	Bosnia and Herzegovina	Stephen M. Schwebel	N/A	Proposal Withdrawn, December 4, 2007, Case Procedural Details, worldbank@icsid.org

	Case No.	Claimant	v.	Respondent	Challenged Arbitrator	Outcome	Publication
48	ARB/07/13	S&T Oil Equipment	v.	Romania	John Savage	Arbitrator resigned	Resignation referred to in Order of Discontinuance of the Proceeding, July 16, 2010, ¶ 14, www.italaw.com
49	ARB/07/16	Alpha Projektholding GmbH	v.	Ukraine	Yoram A. Turbowicz	Declined	Decision on Respondent's Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz, March 19, 2010, worldbank@icsid.org
50	ARB/07/19	Electrabel S.A.	v.	Republic of Hungary	Brigitte Stern	Declined	Decision of February 25, 2008, referred to in Decision on Jurisdiction, Applicable Law and Liability, November 30, 2012, ¶¶ 1.9–1.11, worldbank@icsid.org, www.iarreporter.com

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	Case No.	Claimant	v.	Respondent	Challenged Arbitrator	Outcome	Publication
51	ARB/07/20	Saba Fakes	v.	Republic of Turkey	Laurent Lévy	Declined	Decision of May 5, 2008, referred to in Award of July 14, 2010, ¶¶ 8–9, worldbank@icsid.org, www.iarreporter.com
52	ARB/07/26	Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa	v.	Argentine Republic	Campbell McLachlan	Declined	Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan, Arbitrator, August 12, 2010, worldbank@icsid.org
53	ARB/07/30	ConocoPhillips Company and others	v.	Bolivarian Republic of Venezuela	L. Yves Fortier	Declined	Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator, February 27, 2012, worldbank@icsid.org
54	ARB/07/30	ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V.	v.	Bolivarian Republic of Venezuela	L. Yves Fortier	Declined	Decision on the Proposal to Disqualify a Majority of the Tribunal, May 5, 2014, worldbank@icsid.org

	Case No.	Claimant	v.	Respondent	Challenged Arbitrator	Outcome	Publication
55	ARB/07/30	ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V.	v.	Bolivarian Republic of Venezuela	Kenneth Keith	Declined	Decision on the Proposal to Disqualify a Majority of the Tribunal, May 5, 2014, worldbank@icsid.org
56	ARB/08/5	Burlington Resources, Inc.	v.	Republic of Ecuador	Francisco Orrego Vicuña	Upheld	Decision on the Proposal for Disqualification of Professor Francesco Orrego Vicuna, December 13, 2013, worldbank@icsid.org
57	ARB/08/6	Perenco Ecuador Limited	v.	Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)	Charles N. Brower	Arbitrator resigned	Decision on Challenge to Arbitrator, December 8, 2009, www.italaw.com
58	ARB/08/15	CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V.	v.	Bolivarian Republic of Venezuela	Robert von Mehren	Declined	Decision on the Respondent's Proposal to Disqualify a Member of the Tribunal, November 6, 2009, worldbank@icsid.org

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	Case No.	Claimant	v.	Respondent	Challenged Arbitrator	Outcome	Publication
59	ARB/08/17	Participaciones Inversiones Portuarias (PIP) SARL	v.	Republic of Gabon	Ibrahim Fadlallah	Declined	Decision on Proposal for Disqualification of an Arbitrator, November 12, 2009, worldbank@icsid.org
60	ARB/09/19	Carnegie Minerals Gambia Limited	v.	Republic of The Gambia	Jean Kalicki	Declined	Proposal Declined, May 17, 2011, Case Procedural Details, worldbank@icsid.org
61	ARB/10/5	Tidewater Inc. and others	v.	Bolivarian Republic of Venezuela	Brigitte Stern	Declined	Decision on Claimant's Proposal to Disqualify Professor Brigitte Stern, Arbitrator, December 23, 2010, worldbank@icsid.org
62	ARB/10/9	Universal Compression International Holdings, S.L.U.	v.	Bolivarian Republic of Venezuela	Brigitte Stern	Declined	Decision on the Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Tawil, Arbitrators, May 20, 2011, worldbank@icsid.org

	Case No.	Claimant	v.	Respondent	Challenged Arbitrator	Outcome	Publication
63	ARB/10/9	Universal Compression International Holdings, S.L.U.	v.	Bolivarian Republic of Venezuela	Guido Tawil	Declined	Decision on the Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Tawil, Arbitrators, May 20, 2011, worldbank@icsid.org
64	ARB/10/9	Universal Compression International Holdings, S.L.U.	v.	Bolivarian Republic of Venezuela	J. William Rowley	N/A	Proposal Withdrawn, July 2, 2013, Case Procedural Details, worldbank@icsid.org
65	ARB/10/14	Opic Karimum Corporation	v.	Bolivarian Republic of Venezuela	Philippe Sands	Declined	Decision on the Proposal to Disqualify Prof. Philippe Sands, Arbitrator, May 5, 2011, www.italaw.com
66	ARB/10/23	TECO Guatemala Holdings, LLC	v.	Republic of Guatemala	Rodrigo Oreamuno	Arbitrator resigned	Resignation referred to in Award of December 19, 2013, ¶ 22, worldbank@icsid.org
67	ARB/10/24	İçkale İnşaat Limited Şirketi	v.	Turkmenistan	Philippe Sands	Declined	Decision on Claimant's Proposal to Disqualify Professor Philippe Sands, July 11, 2014, www.italaw.com

(cont.)

	Case No.	Claimant	v.	Respondent	Challenged Arbitrator	Outcome	Publication
68	ARB(AF)/11/2	Crystallex International Corporation	v.	Bolivarian Republic of Venezuela	Florentino Feliciano	Arbitrator resigned	Resignation, December 11, 2013, Case Procedural Details, worldbank@icsid.org
69	ARB/11/5	Longreef Investment A.V.V.	v.	Bolivarian Republic of Venezuela	Eduardo Gómez-Pinzón	Declined	Proposal Declined, January 24, 2012, Case Procedural Details, worldbank@icsid.org
70	ARB/11/19	Koch Minerals Sàrl and Koch Nitrogen International Sàrl	v.	Bolivarian Republic of Venezuela	Florentino Feliciano	Declined	Proposal Declined, February 24, 2014, Case Procedural Details, worldbank@icsid.org
71	ARB/11/19	Koch Minerals Sàrl and Koch Nitrogen International Sàrl	v.	Bolivarian Republic of Venezuela	V.V. Veeder	Declined	Proposal Declined, April 30, 2014, Case Procedural Details, worldbank@icsid.org
72	ARB/11/19	Koch Minerals Sàrl and Koch Nitrogen International Sàrl	v.	Bolivarian Republic of Venezuela	Marc Lalonde	Declined	Proposal Declined, April 30, 2014, Case Procedural Details, worldbank@icsid.org

	Case No.	Claimant	v.	Respondent	Challenged Arbitrator	Outcome	Publication
73	ARB/11/19	Koch Minerals Sàrl and Koch Nitrogen International Sàrl	v.	Bolivarian Republic of Venezuela	Florentino Feliciano	Declined	Proposal Declined, April 30, 2014, Case Procedural Details, worldbank@icsid.org
74	ARB/11/29	Getma International and others	v.	Republic of Guinea	Bernardo Cremades	Declined	worldbank@icsid.org
75	ARB/12/1	Tethyan Copper Company Pty Limited	v.	Islamic Republic of Pakistan	John Beechey	Arbitrator resigned	Resignation referred to in Decision on Claimant's Request for Provisional Measures of December 13, 2012, ¶¶ 9–12, world bank@icsid.org
76	ARB(AF)/12/5	Rusoro Mining Ltd	v.	Bolivarian Republic of Venezuela	Francisco Orrego Vicuña	Declined	Proposal Declined, June 14, 2013, Case Procedural Details, worldbank@icsid.org
77	ARB/12/13	Saint-Gobain Performance Plastics Europe	v.	Bolivarian Republic of Venezuela	Gabriel Bottini	Declined	Decision on Claimant's Proposal to Disqualify an Arbitrator, February 27, 2013, worldbank@icsid.org

(cont.)

	Case No.	Claimant	v.	Respondent	Challenged Arbitrator	Outcome	Publication
78	ARB/12/20	Blue Bank International & Trust (Barbados) Ltd.	v.	Bolivarian Republic of Venezuela	Santiago Torres Bernardez	Arbitrator resigned	Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, November 12, 2013, ¶ 17, www.italaw.com
79	ARB/12/20	Blue Bank International & Trust (Barbados) Ltd.	v.	Bolivarian Republic of Venezuela	José María Alonso	Upheld	Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, November 12, 2013, www.italaw.com
80	ARB/12/24	Transban Investments Corp.	v.	Bolivarian Republic of Venezuela	David Caron	Declined	Proposal Declined, May 13, 2014, Case Procedural Details, worldbank@icsid.org
81	ARB/12/24	Transban Investments Corp.	v.	Bolivarian Republic of Venezuela	Santiago Torres Bernárdez	Declined	Proposal Declined, May 13, 2014, Case Procedural Details, worldbank@icsid.org

	Case No.	Claimant	v.	Respondent	Challenged Arbitrator	Outcome	Publication
82	ARB/12/38	Repsol, S.A. and Repsol Butano, S.A.	v.	Argentine Republic	Claus von Wobeser	Declined	Decision sobre la Propuesta de Recusacion a la Mayoria del Tribunal, December 13, 2013, worldbank@icsid.org
83	ARB/12/38	Repsol, S.A. and Repsol Butano, S.A.	v.	Argentine Republic	Francisco Orrego Vicuña	Declined	Decision sobre la Propuesta de Recusacion a la Mayoria del Tribunal, December 13, 2013, worldbank@icsid.org
84	ARB/13/13	Caratube International Oil Company LLP and Devincci Salah Hourani	v.	Republic of Kazakhstan	Bruno Boesch	Upheld	Decision on the Proposal for Disqualification of Mr. Bruno Boesch, March 20, 2014, worldbank@icsid.org

CHAPTER 3

The Determination of Arbitrator Challenges by the Secretary-General of the Permanent Court of Arbitration

Sarah Grimmer

1 Introduction

The Permanent Court of Arbitration ("PCA") is an intergovernmental organization established by the 1899 Convention for the Pacific Settlement of International Disputes.[1] The PCA provides services for the resolution of disputes involving various combinations of states, state-controlled entities, intergovernmental organizations, and private parties. The PCA's services are provided through its secretariat, the International Bureau, which is located in the Peace Palace in The Hague and is headed by its Secretary-General.

The source of the PCA Secretary-General's authority to determine challenges derives from party agreement. This agreement may be memorialized in a variety of instruments including treaties,[2] contracts,[3]

* Senior Legal Counsel, Permanent Court of Arbitration. The opinions expressed in this chapter reflect the personal views of the author and should not be interpreted as binding upon the Permanent Court of Arbitration ("PCA"). The author thanks Dr. Lukasz Gorywoda, Assistant Legal Counsel at the PCA, for his research assistance. Due to confidentiality concerns and obligations, certain sources discussed within this chapter cannot be provided but are on file with the PCA.

1 Convention for the Pacific Settlement of Disputes, 32 Stat 1779, TS 392 (July 29, 1899) [hereinafter 1899 Convention]. The 1899 Convention was revised in 1907 by the 1907 Convention for the Pacific Settlement of International Disputes, 36 Stat 2199, 1 Bevans 557 (Oct. 18, 1907).

2 For a list of treaties (including bilateral and multilateral investment treaties) that entrust the Secretary-General of the PCA with appointing authority powers, see Permanent Court of Arbitration, *Treaties and Other Instruments Referring to the PCA*, http://www.pca-cpa.org/showpage.asp?pag_id=1068 (last visited Jun. 9, 2015).

3 For example, in PCA Case No. 2012–22, the parties agreed in a services contract that

> "any controversy concerning this Agreement . . . shall be finally resolved by arbitration in accordance with the UNCITRAL Arbitration Rules in effect as of the date of this Agreement. The appointing authority shall be the International Bureau of the Permanent Court of Arbitration." Notwithstanding that parties refer to the "PCA" or the "International Bureau" as the appointing authority, appointing authority functions are formally carried out by the Secretary-General of the PCA.

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compromis,[4] domestic legislation,[5] or procedural rules.[6] The most common context within which the Secretary-General determines challenges to arbitrators is under the UNCITRAL Arbitration Rules 1976 or 2010 ("UNCITRAL Rules" or "Rules") where the parties have designated the Secretary-General as the appointing authority.[7]

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4 For example, in Article 1(4) of the Arbitration Agreement Between the Government of Sudan and the Sudan People's Liberation Movement/Army of July 7, 2008, the Parties agreed to "designate the Secretary General of the PCA as the appointing authority to act in accordance with this Agreement and the PCA Rules." Arbitration Agreement Between the Government of Sudan and the Sudan People's Liberation Movement/Army Art. 1(4) (July 7, 2008), *available at* http://www.pca-cpa.org/showpage.asp?pag_id=1306.

5 Part III of the Mauritian International Arbitration Act 2008 entrusts the Secretary-General of the PCA with various appointing authority powers, including determining challenges. For example, Article 14(3) provides,

> "Where a challenge under any procedure agreed by the parties . . . is not successful, the challenging party may, within 30 days after having received notice of the decision rejecting the challenge, request the PCA to decide on the challenge."

Mauritian International Arbitration Act 2008, Art. 14(3) [hereinafter 2008 Mauritian Arbitration Act], *available at* http://www.miac.mu/download/The_InternationalArbitration_Act_2008.pdf.

6 The PCA Arbitration Rules 2012 (which are based on the 2010 UNCITRAL Arbitration Rules and are a consolidation and modernization of earlier sets of PCA Optional Rules) designate the Secretary-General as the appointing authority. Permanent Court of Arbitration, Arbitration Rules 2012, Art. 6(1) (Dec. 17, 2012) [hereinafter PCA Arbitration Rules]. The Paris Arbitration Rules also designate the Secretary-General of the PCA as appointing authority: "The Secretary-General of the Permanent Court of Arbitration in The Hague shall be the Appointing Authority under these Rules." Paris Arbitration Rules, Art. 1(3), http://www.parisarbitration.com/wp-content/uploads/2014/02/PARIS-ARBITRATION-RULES.pdf. The Secretary-General of the PCA also holds an appointing authority function under the P.R.I.M.E. Finance Arbitration Rules: "If the parties have not otherwise agreed on the choice of an appointing authority at the time of the commencement of the arbitration, any party may request the Secretary-General of the PCA to act as the appointing authority." P.R.I.M.E. Finance Arbitration Rules, Art. 6(1).

7 Under the UNCITRAL Rules 1976 and 2010, the Secretary-General is entrusted with the task of designating appointing authorities. He may also act directly as the appointing authority where the parties so agree. Since 1976, and as of the date of writing (March 11, 2015), the Secretary-General has been requested to provide appointing authority services under the UNCITRAL Rules on 570 occasions. Over the last ten years, he has been requested to act directly as appointing authority in approximately 15% of such cases. In numerous arbitrations administered by the PCA under the UNCITRAL Rules, parties and tribunals have, subsequent to the commencement of the proceedings and/or constitution of the tribunal, designated the Secretary-General of the PCA as appointing authority. *See, e.g.*, *South American Silver Ltd. (Bermuda) v. Plurinational State of Bolivia*, PCA Case No. 2013–15, Terms of Appointment, Art. 3.2 (Mar. 4, 2014), http://www.pca-cpa.org/showpage.asp?pag_id=1586 (providing that

2 Overview of Challenges Submitted to the PCA Secretary-General

Since 1976, twenty-eight challenges have been submitted to the Secretary-General for determination.[8] Those challenges were made in a total of seventeen arbitrations. Except for two cases, all of the challenges were submitted pursuant to the 1976 or 2010 UNCITRAL Rules. In the first of the two non-UNCITRAL-Rules cases, the parties agreed that challenges would be resolved by applying the 2004 International Bar Association Guidelines on Conflicts of Interest in International Arbitration ("2004 IBA Guidelines").[9] In the second case, the challenge was brought under the Mauritian International Arbitration Act 2008 ("Mauritian Arbitration Act").[10]

Twenty-four of the challenges were filed in investor-state arbitrations commenced under bilateral or multilateral investment treaties. Five of those

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"[b]y agreement of the Parties, the Secretary-General of the Permanent Court of Arbitration acts as the appointing authority in this arbitration for all purposes under the UNCITRAL Rules").

8 This figure does not include two challenges that were filed but never contested. In the first case, the party that had appointed the challenged arbitrator agreed to the challenge within one week of it being submitted. In the second case, the challenged arbitrator resigned the same day that the challenge was filed.

9 In this case, the legal standard applied to the challenge was found in the General Standards of the Guidelines. The first General Standard provides that

"[e]very arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so during the entire arbitration proceeding until the final award has been rendered or the proceeding has otherwise finally terminated."

The second General Standard provides that an arbitrator shall not accept appointment,

"if facts or circumstances exist, or have arisen since the appointment, that, from a reasonable third person's point of view having knowledge of the relevant facts, give rise to justifiable doubts as to the arbitrator's impartiality or independence."

Int'l Bar Ass'n., Guidelines on Conflict of Interest in International Arbitration (2004) [hereinafter 2004 IBA Guide-lines], http://www.ibanet.org/Search/Default.aspx?q=IBA+2004+Guidelines&page_num=1 (last visited Jun. 9, 2015).

10 Articles 13(1) and (2) of the Mauritian Arbitration Act provide that an arbitrator shall "disclose any circumstance likely to give rise to justifiable doubts as to his [or her] impartiality or independence" when approached in connection with a possible appointment and from the time of appointment throughout the arbitral proceedings. Article 13(3) provides that an arbitrator may be challenged "only if circumstances exist that give rise to justifiable doubts as to his [or her] impartiality or independence." Unlike the UNCITRAL Rules, Article 13(3) also expressly provides that an arbitrator may be challenged if he or she does not possess qualifications agreed to by the parties. 2008 Mauritian Arbitration Act, *supra* note 5, Arts. 13(1)–(3).

challenges were submitted by a claimant against the arbitrator appointed by the respondent and seventeen challenges were submitted by the respondent against the arbitrator appointed by the claimant. On two occasions, the respondent challenged the presiding arbitrator who had been appointed by the co-arbitrators or the Secretary-General of the PCA in consultation with the parties, respectively. In one case, in the context of a challenge to the whole tribunal, a respondent challenged the arbitrator that it had appointed. In seven cases, more than one member of the tribunal was challenged; in four of these cases, challenges were lodged by one side against the arbitrator appointed by the other side within one month of each other. In two cases, the same arbitrator was challenged twice. Approximately two-thirds of the challenges were filed within six months of the commencement of the arbitration and/or shortly after the appointment of the challenged arbitrator. The rest were submitted later in the proceedings.[11]

Of the four non-investor-state arbitrations, one involved a contract-claim brought by a private entity against an intergovernmental organization. The second involved a dispute between a private party and a state that had designated the PCA Secretary-General as the appointing authority in their production sharing contract. The third case arose out of a settlement agreement between two private parties who agreed, subsequent to the challenge, that the PCA Secretary-General should decide it. The fourth case involved private parties that had decided in a submission agreement that the Mauritian Arbitration Act would govern the arbitration, according to which a challenge could be submitted to the PCA for determination if it had been rejected according to a prior procedure.[12] Two challenges were filed within less than three months of the commencement of the arbitration and/or shortly after the appointment of the arbitrator in question; the remaining two challenges were filed later in the proceedings.

Of the twenty-eight contested challenges filed with the Secretary-General, twenty-four resulted in determinations: seventeen challenges were rejected, seven were upheld. In three challenges, the challenged arbitrator resigned before a decision was made, and in one case the challenging party withdrew the challenge in the context of broader settlement negotiations.

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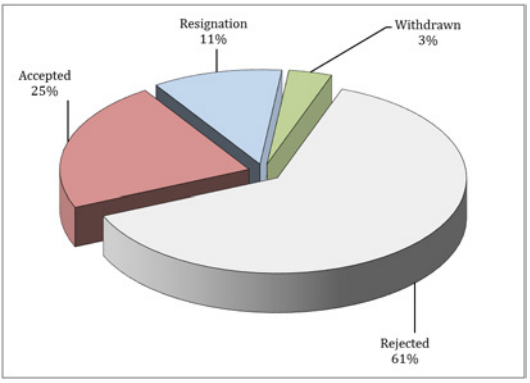
11 For a discussion on challenges filed at later stages of proceedings, see Chapter 9 by Judith Levine in this volume.

12 2008 Mauritian Arbitration Act, *supra* note 5, Art. 14(3). The prior procedure was that the tribunal would decide the challenge. However, since the parties had agreed to submit the case to a sole arbitrator, this meant that, in the first instance, the challenge to the sole arbitrator was to be determined by the sole arbitrator.

TABLE 3.1 *Outcomes of challenges submitted to the Secretary-General of the PCA for determination*



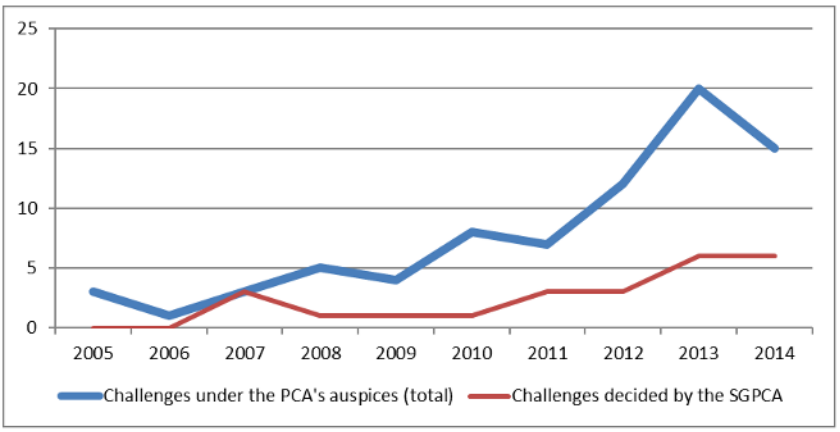
In addition to the above challenge proceedings, in three arbitrations, the Secretary-General has been requested to make non-binding recommendations on challenges to a designated appointing authority.[13]

The International Bureau of the PCA also regularly provides administrative assistance to the appointing authority of the Iran-United States Claims Tribunal ("IUSCT" or "Tribunal") when the appointing authority is requested to appoint members to the Tribunal or determine a challenge.[14] Over the course

13 One such request arose in *Abaclat & Others v. Argentine Republic*, ICSID Case No. ARB/07/5, with respect to Argentina's proposal under Articles 14 and 57 of the ICSID Convention and Rule 9 of the ICSID Arbitration Rules to disqualify the president of the tribunal, Professor Pierre Tercier, and the arbitrator appointed by the claimants, Professor Albert Jan van den Berg. On December 19, 2011, the Secretary-General of the PCA issued his recommendation. *See Abaclat & Others v. Argentine Republic*, ICSID Case No. ARB/07/5, PCA Case No. IR 2011/1, Recommendation Pursuant to the Request by ICSID Dated November 18, 2011 on the Respondent's Proposal for the Disqualification of Professor Pierre Tercier and Professor Albert Jan Van Den Berg Dated September 15, 2011 (Dec. 19, 2011), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC4894_En&caseId=C95). On December 21, 2011, the Chairman of the ICSID Administrative Council issued his decision on the proposal to disqualify the two arbitrators. E-mail from Robert B. Zoellick, Chairman of the ICSID Administrative Council, Regarding *Abaclat & Others v. Argentine Republic*, ICSID Case No. ARB/07/5 (Dec. 21, 2011), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC4893_En&caseId=C95.

14 Pursuant to Articles 6(2) and 7(2)(b) of the IUSCT Rules of Procedure dated May 3, 1983 (which are based on the 1976 UNCITRAL Rules), the Secretary-General of the PCA may be called upon to designate an appointing authority to the IUSCT. Iran-United States Claim

TABLE 3.2 *Total number of challenges submitted in cases under the PCA's auspices, and total number of those challenges that were submitted to the PCA Secretary-General for determination*



of its thirty-three-year-long existence, twenty-two attempts to disqualify a member of the IUSCT have been made.[15]

The PCA also frequently provides administrative assistance to appointing authorities designated in matters in which the PCA acts as registry.

The graph above shows the total number of challenges that were submitted in cases under the PCA's auspices over the last decade. It also shows how many of those challenges were submitted to the Secretary-General for determination.

The scope of this chapter is limited to contested challenges that have been submitted to the PCA Secretary-General for determination since 1976. As already mentioned, almost all of such challenges were brought under the UNCITRAL Arbitration Rules.

Tribunal, Tribunal Rules of Procedure (May 3, 1989), *available at* http://www.iusct.net/General%20Documents/5-TRIBUNAL%20RULES%20OF%20PROCEDURE.pdf. Since the establishment of the IUSCT in 1982, PCA Secretaries-General have designated the following four appointing authorities who have served over the periods indicated in parentheses: (1) Justice Charles M.J.A. Moons (January 1982–June 1993); (2) Sir Robert Jennings (July 1999–September 2003); (3) Justice Willem E. Haak (February 2004–February 2013); and (4) Justice Gerard Josephus Maria Corstens (October 2013–present).

15 For more information on challenges at the IUSCT, see Chapter 4 by Lee Caplan in this volume.

3 The Challenge Procedure Under the UNCITRAL Arbitration Rules and the Practice of the PCA

Article 12 of the 2010 UNCITRAL Arbitration Rules provides that:

> 1. An arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.
> 2. A party may challenge the arbitrator appointed by it only for reasons of which it becomes aware after the appointment has been made.
> 3. In the event that an arbitrator fails to act or in the event of the de jure or de facto impossibility of his or her performing his or her functions, the procedure in respect of the challenge of an arbitrator . . .shall apply.

The Rules stipulate that a party that intends to challenge an arbitrator shall send notice of its challenge within fifteen days after it has been notified of the appointment of the arbitrator, or within fifteen days after the circumstances giving rise to the challenge become known to that party. Under the 1976 version of the Rules, following notification of a challenge, if the other side has not agreed to the challenge and the challenged arbitrator has not resigned, the challenge is ripe for determination by the appointing authority.[16]

Under the 2010 Rules, a further step has been introduced: if within fifteen days of the notification of the challenge, the other side has not agreed to the challenge and the challenged arbitrator has not resigned, the challenging party shall within thirty days from the notice of challenge seek a decision on the challenge from the appointing authority.[17]

Notwithstanding that the period of time within which a challenge must be filed is clearly defined under the UNCITRAL Rules, disputes over the timeliness of challenges are common.[18]

The Rules do not provide for a procedure according to which the appointing authority shall decide a challenge. This is a matter of discretion. The general practice of the Secretary-General is to decide challenges on the basis of written submissions. If the challenge is comprehensive when initially filed, the

16 UNCITRAL Arbitration Rules, GA/RES/31/98, Art. 12(1) (Dec. 15, 1976) [hereinafter 1976 UNCITRAL Rules].

17 UNCITRAL Arbitration Rules, A/65/465, Art. 13(4) (Dec. 6, 2010), http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf [hereinafter 2010 UNCITRAL Rules].

18 *See infra* Part 4.

Secretary-General will first seek the non-challenging party's comments, and this will often be followed by a second round of pleadings by both parties. If the challenge is not comprehensive when filed, the Secretary-General will first invite the challenging party to elaborate its position. The Secretary-General typically grants periods of ten days to the parties to submit their first round of comments plus a similar or shorter period of time for reply rounds. These time periods are flexible depending on the circumstances.

The challenged arbitrator will also be given an opportunity to comment on the challenge. In the PCA's experience, many challenged arbitrators abstain from submitting comments other than confirming that they consider themselves to be impartial and independent. Sometimes, a challenged arbitrator will submit his or her opinion on the merits of the arguments submitted by a party in support of a challenge. While this is the arbitrator's right, such an approach draws into sharp relief the adversarial nature of the relationship between the arbitrator and the challenging party.[19]

In some cases the Secretary-General has also found it appropriate to invite the comments of the other members of the tribunal.[20] For example, one case

19 In at least one case, the comments of the challenged arbitrator made in response to a challenge resulted in the challenge being upheld. In *Burlington Resources, Inc. v. Ecuador* (ICSID Case No. ARB/08/5), the challenged arbitrator had concluded his comments on the challenge with allegations about the ethics of counsel for the challenging party, the Republic of Ecuador. The Chairman of the ICSID Administrative Council found that

> "such comments do not serve any purpose in addressing the proposal for disqualification or explaining circumstances relevant to the allegations that the arbitrator manifestly lacks independence or impartiality. In the Chairman's view, a third party undertaking a reasonable evaluation of the [arbitrator's comments] would conclude that the [relevant] paragraph . . . manifestly evidences an appearance of lack of impartiality with respect to the Republic of Ecuador and its counsel."

Burlington Resources, Inc. v. Ecuador, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, ¶¶ 79–80 (Dec. 13, 2013).

20 The UNCITRAL Rules are silent in this regard. Some other procedural rules expressly provide that the comments of the other members of the tribunal may be invited. *See, e.g.*, London Court of International Arbitration, Arbitration Rules, Art. 10.4 (Oct. 1, 2014), http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx ("The LCIA Court may require at any time further information and materials from the . . . other members of the Arbitral Tribunal (if any)."); International Chamber of Commerce, 2012 Arbitration Rules, Art. 14(3) (2012), http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Rules-of-arbitration/Download-ICC-Rules-of-Arbitration/ICC-Rules-of-Arbitration-in-several-languages/ ("The Court shall decide on . . . a challenge after the Secretariat has afforded an opportunity for the arbitrator

involved a challenge based on the arbitrator's behavior during proceedings which allegedly demonstrated his ability to dominate the thinking of the other members of the tribunal. The Secretary-General invited the other members of the tribunal to comment. One arbitrator submitted comments while the other abstained.

The Secretary-General's practice is to decide challenges on the basis of written submissions. It is exceptionally rare that the Secretary-General is requested to hold a hearing on a challenge, or that hearings are held on challenges at all.[21]

In one case before the Secretary-General, the challenging party (a state) requested a hearing. The non-challenging party did not consider that a hearing was necessary; however, it was concerned that any decision rejecting the challenge would be attacked on due process grounds before the national courts at the place of arbitration (which was the jurisdiction of the challenging state-party) and therefore agreed to the request. A one-day hearing was held before the Secretary-General at the Peace Palace in The Hague. It was attended by the representatives of the parties but not by the tribunal members. The transcript and the audio recording of the hearing were supplied to each tribunal member after the hearing. The challenged arbitrator was invited to answer several questions after the hearing, which he did. The parties were then given an opportunity to comment on his responses, which they did. In this case, conscious that the timing of his decision would result in the maintenance or vacation of long-held hearing dates, the Secretary-General issued a forty-three-page decision within six days of receipt of the parties' final comments.

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concerned, the other party or parties and any other members of the arbitral tribunal to comment in writing").

21 The *Chagos Marine Protected Area Arbitration* (Mauritius v. United Kingdom) is one exception. In this arbitration, under the United Nations Convention on the Law of the Sea ("UNCLOS") in which the PCA acts as registry, a hearing was held on a challenge. In May 2011, Mauritius challenged Sir Christopher Greenwood following his appointment as arbitrator by the United Kingdom. As Annex VII of UNCLOS does not specify a procedure by which arbitrator challenges shall be determined, the tribunal proposed and the parties agreed that the decision on the challenge would be made by a majority vote of the four other members of the tribunal, with the president of the tribunal having a casting vote in the absence of a majority. The tribunal decided to hold a hearing on the challenge. It was held on October 4, 2011, at the Peace Palace in The Hague. Present at the hearing were the agents and other representatives of the parties, and the four other members of the tribunal. Sir Christopher Greenwood did not attend. For more information on the case, see *Republic of Mauritius v. United Kingdom of Great Britain & Northern Ireland*, Reasoned Decision on the Challenge (Nov. 30, 2011), http://www.pca-cpa.org/showpage.asp?pag_id=1429.

In another case, the challenging party requested that the Secretary-General hold a hearing on its challenge to all three members of the tribunal. The other side did not agree. Taking into account the nature, size, timeframe, and complexity of the matter, the Secretary-General agreed to hold a teleconference during which the parties would be given equal time to present their positions and answer questions. The challenged arbitrators did not attend the call but were provided with a transcript, on which none of them chose to comment. They had each provided comments on the challenge at an earlier stage.

The time it takes from the date a challenge is filed to the date the challenge is decided varies greatly depending on numerous factors such as the number of pleading rounds, the length and complexity of the written submissions, the holding of a hearing (in exceptional cases) plus any post-hearing comments, and any requests for time extensions. From the date of the final submission on a challenge to the issuance of the Secretary-General's decision, the average time taken over the surveyed challenges is fifteen days.

Under the UNCITRAL Rules, the arbitral proceedings may continue notwithstanding that a challenge is pending. In the PCA's experience, it is prudent to suspend proceedings pending a challenge when it is filed during the constitution of the tribunal.

Since 2008, the practice of the Secretary-General has been to issue reasons for challenge decisions if any of the parties so request. Since that date, at least one party in every challenge proceeding has requested that the Secretary-General provide reasons for his challenge decision. The PCA is bound by the agreement of the parties concerning the confidentiality of arbitrations it administers. Accordingly, challenge decisions are not published except with the consent of the parties.

4 Timeliness

As mentioned above, a party must send notice of its challenge within fifteen days after the appointment of the challenged arbitrator or within fifteen days after the circumstances giving rise to the challenge became known to that party. On timeliness, the Secretary-General has held that:

> There are important reasons for time limits to apply to the filing of challenge proceedings. They protect the integrity of the proceedings by compelling parties with knowledge of facts that might disqualify an arbitrator to make such facts known and to seek their determination immediately or be estopped from invoking them later on.

Notwithstanding the clear time limit provided in the Rules, the timeliness of challenges is often an issue. In the challenges surveyed in this chapter, timeliness was disputed in over 50% of proceedings.

Of those cases, the Secretary-General found that eight challenges were submitted out-of-time and, in one case, that one of the grounds for challenge was submitted out-of-time. However, in all instances, and although he was under no obligation to do so, the Secretary-General assessed the substance of the challenge. In four challenges, the non-challenging parties expressly requested that the Secretary-General do so even though they had also requested a finding of untimeliness. In each instance in which the Secretary-General considered the merits of a challenge after having found it to be untimely, he also found that the challenge failed on the merits.

A common objection to timeliness is that the challenging party must have known about the circumstances giving rise to the challenge more than fifteen days before its filing because either the facts were already in the public domain or they had come to light earlier in the course of the arbitration. For example, in one case involving a respondent state, a challenge was based on the fact that a partner in the same law firm as the arbitrator appointed by the claimant had been retained in another case as counsel adverse to a public authority of the same state. The claimant argued that the state must have known of the retainer when it happened, not five months later when it was disclosed by the arbitrator. The state denied actual knowledge. The Secretary-General was not satisfied that the claimant had established knowledge on the part of the respondent and accepted the challenge as timely.

The Secretary-General has imputed actual knowledge to the challenging party on three occasions where he was satisfied that the party must have known of the relevant circumstances more than fifteen days before filing the challenge.

In the first case, the party's own submissions demonstrated that the circumstances were known well before the fifteen-day time period. In the second case, the challenging party provided no information on when it became aware of the circumstances; it remained silent on the question of timeliness. In the third case, the challenge was based on views expressed by an arbitrator in a recently issued dissenting opinion. The Secretary-General accepted the other side's argument that the challenging party must have been aware of the arbitrator's views on the particular issue before the dissent because they had been in the public domain for at least six years by virtue of the arbitrator's publications (a list of which had been provided to the parties upon the arbitrator's appointment). On that basis, the Secretary-General considered the challenge to be untimely.

The timeliness of a challenge may be conditioned upon which version of the Rules apply to the arbitration. In one case, the parties disputed which version of the UNCITRAL Arbitration Rules applied to the case. This was significant to the question of timeliness as, unlike Article 14(3) of the 2010 Rules, the 1976 Rules do not impose an outer time limit by which the challenging party must seek a decision on the challenge from the appointing authority—something that the challenging party had not done in the case at hand. It was ultimately not necessary for the Secretary-General to determine this point as he considered that the challenge failed on the merits.

In some cases, it may be clear that certain elements of a challenge are timely whereas others are not. In such circumstances, the Secretary-General will disregard those grounds that are not timely and only consider those grounds that are. However, such a distinction may not be appropriate or possible where the challenging party bases its challenge on the "aggregate" or "accumulation" of all grounds, or on an alleged "pattern of conduct," the most recent example of which falls within the fifteen-day period.

In one case, a party challenged the whole tribunal on the grounds that there existed a "pattern of conduct" that evinced bias. It relied on a procedural decision issued within the fifteen-day period in which the tribunal had rejected a request by the challenging party to reconsider an earlier ruling. According to the challenging party, the refusal to reconsider was the "trigger" event that spearheaded numerous other decisions and awards made against it over the course of several years that together showed the tribunal's bias. The challenging party argued that the Secretary-General should consider all the facts and circumstances that occurred prior to the trigger event that could demonstrate "an impressible pattern of bias" on the part of the tribunal. However, the Secretary-General found that the circumstances complained of were varied and disparate such that they did not constitute a "pattern of conduct." He considered all the circumstances that occurred more than fifteen days before the challenge as untimely. However, given that the non-challenging party had expressly requested that he decide the case on the merits notwithstanding its lack of timeliness, he did so, and found that he would have rejected it had it been filed in a timely fashion.

In the same case, the challenging party also argued that the tribunal should be disqualified for failure to act under Article 13(2) of the 1976 Rules. The issue arose as to whether the fifteen-day time limit in the Rules should apply to such a ground. The Secretary-General commented that in cases of alleged failure to act, it would be normal to look beyond a fifteen-day period. Both parties considered it necessary for the Secretary-General to take into account "all circumstances," including the tribunal's prior conduct of proceedings. In these

circumstances, the Secretary-General held that he did not consider the challenge for failure to act, which invoked circumstances predating the fifteen-day period, to be time-barred. In response to the non-challenging party's concern that this would mean that any party could bring a challenge at any time by simply asking a tribunal to reconsider a prior decision, the Secretary-General clarified that his finding in the circumstances of the case did not establish a "rule" that would apply to all cases.

5 Disclosure

Article 11 of the 2010 Rules provides that

> [w]hen a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties and the other arbitrators unless they have already been informed by him or her of these circumstances.[22]

The disclosure obligation engages when a person is approached in connection with his or her possible appointment and continues from the time of appointment throughout the arbitration proceedings. The standard for disclosure differs from the standard for the determination of challenges in that the former refers to circumstances "likely" to give rise to justifiable doubts as to an arbitrator's independence and impartiality whereas the latter concerns circumstances that "give" rise to such doubts.[23]

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22 Article 9 is the equivalent provision in the 1976 Rules. However, the 2010 Rules improve on the 1976 Rules by referring *expressly* to the continuous nature of the arbitrator's disclosure obligation.

23 The standard for disclosure has been expressed in various ways. According to Caron and Caplan:

> "The circumstances which should be disclosed are those which are 'likely' to give rise to 'justifiable doubts as to . . . impartiality or independence,' and thus constitute a basis for challenge under Article 12(1) of the Rules. Article 11 thus implicitly recognizes that although there can be many relationships between the arbitrator and the parties, the duty to disclose does not require disclosure of *all* circumstances which might support a challenge under Article 12. Rather the duty extends only to those circumstances which more likely than not would support a challenge."

In over half of the challenges submitted to the Secretary-General, a complaint was raised about an arbitrator's disclosure. In approximately one-third of the challenges submitted to the Secretary-General, improper disclosure was raised as a ground for challenge in and of itself.

The Secretary-General has not upheld a challenge solely on the ground of improper disclosure. However, in three challenges, the Secretary-General found that the underlying facts that were not properly disclosed warranted the removal of the arbitrator. In two of those cases, the failure to make proper disclosure was considered an aggravating factor in the Secretary-General's assessment. In several other instances where the Secretary-General ultimately rejected the challenge, he recorded that the arbitrator could have been more prudent in communicating his or her disclosure, or had not fulfilled his or her disclosure obligations under the Rules either because disclosure was late or incomplete.

When deciding challenges in which an arbitrator's disclosure is impugned, the Secretary-General has stated:

> Full disclosure by an arbitrator upon appointment is indispensable, not only to ensure the general legitimacy of arbitral proceedings, but also to allow the parties to assess whether they wish to exercise their right to challenge an arbitrator under the UNCITRAL Rules if they are of the view that the arbitrator does not meet the requisite standard of independence and impartiality.
>
> In certain cases, a failure to disclose circumstances that the arbitrator had a duty to disclose can, in itself, give rise to justifiable doubts as to that arbitrator's independence and impartiality.
>
> [However, n]on-disclosure does not automatically give rise to justifiable doubts pursuant to Article 10(1) of the UNCITRAL Rules. . . . This depends on the circumstances of the case, including "whether the failure to disclose was inadvertent or intentional, whether it was the result of an honest exercise of discretion, whether the facts that were not disclosed

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David D. Caron & Lee M. Caplan, The UNCITRAL Arbitration Rules: A Commentary 196 (2d ed. 2013). Karel Daele describes the standard as follows:

"By referring to 'justifiable doubts' the UNCITRAL Rules adopt an objective standard according to which disclosure is required of facts and circumstances that, from the point of view of a reasonable third party, not knowing the arbitrator's state of mind, are likely to give rise to doubts as to the arbitrator's independence or impartiality."

Karel Daele, Challenge and Disqualification of Arbitrators in International Arbitration, ¶ 1-050 (2012).

> raised obvious questions about impartiality and independence, and whether the nondisclosure is an aberration on the part of a conscientious arbitrator or part of a pattern of circumstances raising doubts as to impartiality."[24]

Problems with disclosure generally fall into the following categories: the disclosure is not properly transmitted; it is late, or it is the result of prompting by a party rather than of the arbitrator's own initiative; and/or disclosure is incomplete or not made at all.

It is important that arbitrators ensure that any disclosure statement they make is properly transmitted to the relevant parties by a means of communication that allows for a record of transmission. The importance of this step cannot be overstated. In one case, an arbitrator sent a disclosure statement to the parties from his spouse's e-mail account. At the first procedural meeting three months later the arbitrator's disclosure was referred to, at which point the respondent state indicated that it had never seen the e-mail. Upon learning of the contents of the disclosure, the respondent filed a challenge, which was upheld by the Secretary-General.

In another case, the arbitrator's disclosure statement was e-mailed by the clerk at his chambers to the parties but was allegedly never received by the respondent state. It became aware of the disclosed circumstances in the context of a challenge it filed against the arbitrator two years later on other grounds. The respondent state added the underlying facts, as well as the allegedly improper disclosure, as grounds to its challenge. While the challenge was ultimately rejected, the circumstances revealed in the disclosure statement augmented its seriousness.

The Rules are clear as to when disclosure should be made: when a person is approached in connection with his or her possible appointment as an arbitrator, and, once appointed, immediately upon the advent of circumstances likely to give rise to justifiable doubts.

In three challenges, the arbitrators decided to issue disclosure statements only once the tribunal had been fully constituted. This is too late. The Rules state that disclosure must first be made "when a person is approached in connection with his or her possible appointment."

Arbitrators are not relieved of their duty to disclose facts because the facts are in the public domain. The Rules oblige arbitrators to disclose circum-

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24 Stewart Abercrombie Baker & Mark David Davis, The UNCITRAL Arbitration Rules in Practice: The Experience of the Iran-United States Claims Tribunal 50 (1992).

stances; they do not oblige parties to investigate circumstances potentially relevant to an arbitrator's independence or impartiality, notwithstanding that this has become customary practice for many counsel and parties.

In one case, the challenged arbitrator had failed to disclose prior appointments in two public, high profile arbitrations. The non-challenging party argued that the other side should have known about the appointments, notwithstanding that the arbitrator had not disclosed them. The Secretary-General held that the public nature of the prior appointments did not exonerate the arbitrator from his duty to make prompt and full disclosure. The prior appointments clearly fell within the scope of his disclosure obligations, which he had failed to meet.

It is not always clear to potential arbitrators whether circumstances fall under the scope of their disclosure obligation. The Secretary-General considers that the most prudent approach individuals can adopt is to resolve any doubts in favor of disclosure. Disclosing circumstances is not an admission that the circumstances raise justifiable doubts as to the individual's independence or impartiality. When individuals resolve doubts in favor of disclosure, they ensure the integrity of the proceedings by placing any potentially relevant information in the hands of the parties, where it belongs. The question of whether a given circumstance gives rise to justifiable doubts is ultimately for an appointing authority to determine if a party, in possession of all relevant facts, exercises its procedural right to challenge an arbitrator. An arbitrator cannot deprive a party of that right by refusing to divulge information that is potentially relevant to the question of his or her independence or impartiality.

Nevertheless, arbitrators are not obliged to divulge information that is clearly not relevant to their independence or impartiality. In one case where the party impugned the arbitrator for not having disclosed that he and appointing counsel were members of the same editorial board, had spoken at the same conferences, and contributed chapters to the same book, the Secretary-General stated:

> An arbitrator may of course choose the prudent course of disclosing all of his prior contacts with the party appointing him and that party's counsel. Or even all of his professional activities; however, Article 9 of the UNCITRAL Rules does not impose such a burdensome disclosure requirement.

That information is requested by a party does not change the disclosure standard. The Secretary-General has held that:

> While I consider that any doubt about disclosure should be resolved in favor of disclosure, I do not accept that simply because a party requests certain information an arbitrator is obliged to disclose such information or violates Article 9 by declining to do so.

The pertinent factor is whether or not the information requested by the party concerns circumstances likely to give rise to justifiable doubts as to an arbitrator's independence or impartiality. Deciding whether certain information falls under that standard is a question of judgment that, in the case of doubt on the part of the arbitrator, should be exercised in favor of disclosure.

6 Legal Standard to be Applied to Challenges under the UNCITRAL Arbitration Rules

Article 12(1) of the UNCITRAL Rules provides that "any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence." The requirement that the doubts be "justifiable" grants an objective nature to the standard.[25]

In interpreting this standard, the Secretary-General has repeatedly held that although the perspective of the challenging party is part of the context of the challenge, it is not decisive; rather, the doubt must be justifiable pursuant to an analysis of all of the relevant circumstances from the perspective of an objective, reasonable, and informed third party.

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25 *See Vito G. Gallo v. Canada*, NAFTA/UNCITRAL Case, PCA Case No. 55798, Decision on the Challenge to Mr. J. Christopher Thomas, QC, ¶ 19 (Oct. 14, 2009); *AWG Group Ltd. v. Republic of Argentina*, UNCITRAL Case, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal, ¶ 22 (May 12, 2008) ("The words 'justifiable doubt' clearly indicate that Article 10(1) establishes an objective, rather than a subjective standard for determining the existence of a circumstance that creates justifiable doubts as to an arbitrator's impartiality and independence"); *National Grid PLC v. Republic of Argentina*, LCIA Case No. UN 7949, Decision on the Challenge to Mr. Judd L. Kessler, ¶ 87 (Dec. 3, 2007); *Country X v. Company Q*, Challenge Decision, ¶¶ 23–24 (Jan. 11, 1995), 22 Yearbook Comm. Arb., Kluwer L. Int'l (1997); Caron & Caplan, *supra* note 23, at 208 ("The inclusion of the word 'justifiable' in Article 12(1), to define the kind of doubt required to sustain a challenge reflects UNCITRAL's clear intention of establishing an objective standard for impartiality and independence. While a party's subjective concerns about an arbitrator's bias may prompt a challenge, it is the objective reasonableness of these concerns that is ultimately determinative"); *see also* Daele, *supra* note 23, ¶ 5-038.

Further, the Secretary-General adopts the approach that for a challenge to be sustained, a party need not demonstrate *actual* bias or prejudgment. It is sufficient to establish an *appearance* of dependence or bias.[26] "Justifiable" doubts may therefore arise in the absence of persuasive evidence that the challenged arbitrator *in fact* lacks independence or has acted in a partial manner.

7 Grounds for Challenges to Arbitrators Determined by the Secretary-General of the PCA

The grounds for challenges that have been alleged against arbitrators in the twenty-eight challenges chronicled in this chapter fall into the following broad categories: (1) an arbitrator's relationship to a party or counsel for a party[27] (including, multiple appointments of an arbitrator by the same party or counsel; an arbitrator's financial interest in a party; an arbitrator's and counsel's previous collaboration as co-counsel; familial links between arbitrator and counsel; and personal animosity from an arbitrator towards a counsel); (2) improper conduct during the proceedings; (3) public statements made by an arbitrator; (4) issue conflicts; and (5) failure to act. In 70% of the challenges surveyed, more than one ground of challenge was raised by the challenging party.

7.1 *Arbitrator's Relationship to a Party or Counsel for a Party*

7.1.1 Professional Relationships between an Arbitrator and a Party or Counsel for a Party

7.1.1.1 *Multiple Appointments of an Arbitrator by the Same Party or Counsel*

In seven of the challenges surveyed in this chapter, the fact that an arbitrator had been appointed by the same party or counsel on multiple occasions constituted a ground of challenge. The Secretary-General upheld one of the challenges and rejected four. In the other two challenges, the arbitrators resigned before a decision was made.

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26 Caron & Caplan, *supra* note 23, at 214 ("[S]ustaining a challenge of an arbitrator under Article 12 does not necessarily require proof of an arbitrator's *actual* lack of impartiality or independence. The *appearance* of these deficiencies may alone suffice in certain circumstances to disqualify an arbitrator. Article 12 notably requires only that 'doubts' as to an arbitrator's impartiality or independence be proven to be justifiable, not that an arbitrator is, in fact, biased or dependent on a party.").

27 On this topic, see Chapter 10 by Luke Sobota in this volume.

On multiple appointments by the same party or counsel, the Secretary-General has not only considered whether there exists a relationship of financial dependence arising from repeated appointments of an arbitrator by a party or counsel, but also whether an affinity has developed between the arbitrator and party or counsel such that the arbitrator's impartiality may be justifiably doubted. He has held,

> The issue of multiple appointments involves, but is not limited to, a consideration of financial dependence arising from the significance of the multiple appointments—and expectation of future appointments—to the arbitrator's income. The issue of multiple appointments also engages the question of an affinity developed by the arbitrator for the party or the counsel that has repeatedly appointed him or her. It should therefore not be limited to an examination of financial dependence arising from the arbitrator's income from the appointments. The question remains: do the number and significance of the appointments considered in context, and in light of the period of time over which the appointments were made, raise justifiable doubts in the eyes of a reasonable and fair-minded third person as to the arbitrator's independence or impartiality?

In challenges involving repeat appointments, parties have often referred to the Orange List 3.3.7 of the 2004 IBA Guidelines which stipulates that the situation where "[t]he arbitrator has within the past three years received more than three appointments by the same counsel or the same law firm" is a matter for disclosure but from which no presumption regarding disqualification should arise.[28] The Secretary-General has held that "circumstances could exist where three or fewer appointments of an arbitrator by the same law firm within a three-year period could justify disqualification." Each case must be assessed on its own merits.

On the relevance of the IBA Guidelines generally, the Secretary-General has stated:

> The IBA Guidelines do not pretend to be exhaustive, particularly in the field of investment arbitration. Therefore, the absence of recognition by the IBA Guidelines of a ground neither precludes nor invalidates a challenge made on that ground. The IBA Guidelines are promulgated by a private body that cannot (and does not) purport to legislate for international arbitration generally. Indeed, the guidelines themselves expressly

28 2014 IBA Guidelines, *supra* note 9, Orange List, 3.3.7.

> recognize that they "are not legal provisions and do not override any applicable national law or arbitration rules chosen by the parties." In the absence of an agreement between the parties on the application of the IBA Guidelines to a challenge, they represent only the non-binding views of one group of practitioners on arbitrator conflicts of interest.

When assessing the impact of multiple appointments, a number of issues beyond the number of prior appointments may be relevant, such as what percentage of the individual's income is derived from the appointments; what percentage of total appointments over the relevant period do the multiple appointments represent; whether the multiple appointments are made by the same party irrespective of counsel or by the same counsel irrespective of the party; whether the arbitrator has been entrusted with roles other than arbitrator by the party or counsel and the nature of those roles (for example, as expert, counsel, agent, or as a governmental official); and how long the appointments lasted.

In the case in which the Secretary-General upheld a challenge relying on this ground, the arbitrator had been appointed by the respondent state in five arbitrations, one mediation, and by a state-owned entity in another arbitration in the preceding ten-year period. The arbitrator was also of the same nationality as the respondent state. The multiple appointments were only disclosed five months after the arbitrator's appointment in the case at hand. The challenging party argued that the regular pattern of appointments by the respondent state essentially equated to a "retainer" of the arbitrator's services. The respondent, a developing country, argued that the pool of highly experienced arbitrators of its nationality was limited and that successive governments had appointed the individual because of his exceptional experience and proven integrity. The Secretary-General considered that the circumstances gave rise to justifiable doubts as to the arbitrator's impartiality and independence.

In one of the unsuccessful challenges invoking this ground, the arbitrator had been appointed by the law firm representing the claimant in two previous arbitrations, fifteen and four years earlier, and as an expert in two interrelated court proceedings that commenced seven and four years earlier. In assessing the case, the Secretary-General concluded that, considering the context of the arbitrator's total number of publicly known appointments as arbitrator or expert—which was significant—the prior appointments by the law firm did not give rise to justifiable doubts as to his *independence*. The Secretary-General believed, however, that the question of the impact that the appointments might hold for an *appearance of bias* required closer examination.

The Secretary-General determined that the first appointment was remote in time whereas the second arbitral appointment was relatively recent and

important. The first retainer of the arbitrator as an expert was also significant, but given the relatedness of the second expert appointment, it did not significantly augment the arbitrator's potential conflict; it was more akin to a continuation of the first expert appointment than a second appointment. The Secretary-General found that the earlier appointments were limited in number and spread over a significant time period. They did not support the inference that the arbitrator had developed a particular affinity or close professional relationship with counsel for the claimant. The challenge was rejected.

With respect to expert appointments generally, the Secretary-General has commented that while they are different in nature to arbitrator appointments, the direct financial relationship and interaction between the party or its counsel and the expert renders such relationships relevant for disclosure and for consideration in the event of a challenge.

In another case, the individual had been appointed three times by the same law firm (once as expert, twice as arbitrator) over an eleven-year period. The Secretary-General found that the prior appointments of the arbitrator did not justify his removal from the tribunal. They were limited in number, spread over a significant period of time, and exhibited certain mitigating factors; for example, the appointment as expert by the law firm eleven years earlier had been *for* the challenging party, and the arbitrator had resigned from the most recent arbitral appointment after just ten days.

In another challenge dismissed by the Secretary-General, the arbitrator had been appointed by the claimants' counsel on one occasion seven years earlier (in which the tribunal unanimously ruled against the claimants). The Secretary-General found that such a circumstance was insufficient to give rise to justifiable doubts as to the arbitrator's impartiality or independence.

In two cases in which the challenging party invoked multiple appointments as a challenge ground, the arbitrators resigned before the challenge was decided. In the first case, the individual was serving as arbitrator upon the appointment of the same respondent state in three other pending arbitrations, two of which involved the same contract, bilateral investment treaty ("BIT"), governmental measure, and type of investor. In the second case, the challenged arbitrator had been appointed by counsel for the non-challenging party on just one prior occasion. This, however, was not the principal ground for the challenge; it was also based on the fact that the arbitrator had acted as co-counsel with the appointing counsel in three investor-state arbitrations within an eight-year period.

A variation on the theme of multiple appointments that arises in investor-state arbitrations is where a party challenges an arbitrator on the ground that

he or she has been repeatedly appointed as arbitrator (and/or as expert or counsel) by only investors or by only states. Parties may contend that this evidences an alignment by the arbitrator with the interests of investors or states and thus affects his or her impartiality. This argument has been submitted as an additional ground to challenges but never as the sole ground for a challenge in the cases presently discussed.

In one such case, the challenging party impugned the impartiality of the arbitrator on the ground of repeated appointments as arbitrator and counsel by investors. The respondent argued that the individual had built his career by representing investors against states. The arbitrator denied this, pointing out that on several occasions he had been appointed by states. He also contended that the multiple appointments by investors were made by different parties and by different law firms.

The Secretary-General rejected this challenge. He held that states on the one hand and investors on the other have varied interests and cannot be treated as single collective entities. Further, just because a lawyer has argued positions favorable to an investor or to a state does not mean that he or she identifies with investors or states generally, to the point of losing his or her impartiality when acting as an arbitrator. Finally, the Secretary-General clarified that an individual's appointment as an arbitrator by an investor or a state is not a circumstance that gives rise to justifiable doubts as to his or her impartiality or independence in and of itself.

Another variation on the theme of multiple appointments is where the arbitrator has received multiple appointments by parties adverse to the challenging party. In one case, the arbitrator had been appointed twice in unrelated cases by parties that were adverse to the challenging party (a respondent state). The Secretary-General rejected the challenge, holding, as above, that serving as an arbitrator in another case upon appointment by the opposing party does not, in and of itself, place the arbitrator in an adverse position to the other party.

7.1.1.2 *Financial Interest or Link to One of the Parties*

When a party can demonstrate that an arbitrator has a financial interest or link to one of the parties, that arbitrator is vulnerable to a successful challenge.

The Secretary-General upheld a challenge where the arbitrator's firm represented the wholly-owned subsidiary of one of the claimants in unrelated legal proceedings at the time of appointment. Notwithstanding various undertakings by the arbitrator to conduct the case as a personal matter separate from the firm logistically and financially, the Secretary-General considered

that justifiable doubts as to the arbitrator's independence and impartiality had been established. He considered that an existing financial interest in one of the parties was a disqualifying factor under the justifiable doubts test. He was not satisfied that the various undertakings proposed by the arbitrator would eliminate the conflict.

7.1.1.3 *Presence of a Long-Standing Relationship*

In another case, the challenging party alleged that the arbitrator appointed by the state (but not of its nationality) had developed a "long-standing and multi-faceted relationship" with the state. The challenging party claimed that the arbitrator had provided legal advice to the state on at least two important issues; namely, with respect to the opening of a government office and concerning proceedings before the International Court of Justice ("ICJ"). The arbitrator denied the latter allegation.

The Secretary-General examined the facts underlying the arbitrator's alleged relationship with the state. He found that the claimant had only demonstrated that (1) the arbitrator had certain contacts with a government office of the state in the course of activities connected to his former position as a public official of his home country; and (2) he attended a meeting at which legal and other considerations relating to the state's claim before the ICJ were discussed in a general way.

The Secretary-General reasoned that while these circumstances were relevant to the evaluation of the arbitrator's independence and impartiality, they were not sufficient to create justifiable doubts on the part of a reasonable and fair-minded third person. The claimant had failed to show that the arbitrator's contacts with one of the government offices "went beyond the customary contacts expected by virtue of his prior professional responsibilities." Given the arbitrator's denial of having provided legal advice to the state in an ICJ case, the Secretary-General found the challenge to be unfounded on this ground to the extent that it was maintained. He also found that the claimant had not established that the arbitrator's role in the meeting involved providing legal advice. The Secretary-General also concluded that no relationship analogous to that of counsel had ever existed between the arbitrator and the respondent state. The challenge was rejected.

7.1.1.4 *Arbitrator and Counsel Have Previously Acted as Co-Counsel*

In two challenges, the fact that the arbitrator and appointing counsel had previously acted as co-counsel was raised as a ground.

As already mentioned, in one case, the arbitrator and appointing counsel had acted as co-counsel in three investor-state arbitrations within a period

of eight years. The arbitrator resigned before a decision was made on the challenge.

In the other case, the arbitrator and appointing counsel had served as co-counsel over a period of approximately five years in an earlier unrelated investor-state arbitration. This collaboration had concluded five years before the challenge. After considering all of the circumstances of this challenge, and considering the absence of additional factors that suggested the existence of a close relationship beyond the professional, the Secretary-General considered that the facts of this case did not give rise to justifiable doubts as to the arbitrator's impartiality or independence.

In both of these cases, the parties had referred to the 2004 IBA Guidelines. The non-challenging party had drawn support from the fact that the 2004 IBA Guidelines deemed collaboration as co-counsel to be a neutral factor.[29] In his decision, the Secretary-General clarified that notwithstanding what was suggested by the 2004 IBA Guidelines, there may be circumstances in which collaboration as co-counsel can give rise to justifiable doubts.

7.1.1.5 *Other Professional Contacts Between Arbitrator and Counsel*

In another investor-state arbitration already mentioned, one of the challenge grounds was based on the fact that the arbitrator and appointing counsel had contributed chapters to the same book published six years earlier; had spoken at the same three conferences held between one to three years prior the challenge; and were members of the same editorial board. The Secretary-General noted that contributors to a book and speakers at a conference may have no relationship at all. He found that these circumstances fell short of establishing the kind of close connection that would give rise to justifiable doubts.

Finally, in a contract case, the respondent party, an intergovernmental organization ("IGO"), was represented by a lawyer from the office of the attorney general, a public agency of the state host to the IGO. When the respondent appointed an arbitrator who was also a public attorney, the claimant submitted a challenge on the grounds that by virtue of their mutual status as public attorneys, a clear "proximity" would exist between the two and lead to issues of independence and impartiality. The challenge was eventually withdrawn when the parties began settlement talks.

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29 The 2004 IBA Guidelines relegate the situation where the "arbitrator and counsel for one of the parties . . . have previously served together . . . as co-counsel" to the Green List, which is described as containing "a non-exhaustive enumeration of specific situations where no appearance of, and no actual, conflict of interest exists from the relevant objective point of view." 2004 IBA Guidelines, *supra* note 9, Art. 4.4.2.

7.1.2 Personal Relationship Between an Arbitrator and One of the Parties or Counsel for a Party

7.1.2.1 *Familial Links between Arbitrator and Counsel for a Party*

When a party can establish that an arbitrator has a familial link to one of the parties or counsel, that arbitrator may be vulnerable to a successful challenge.

In one case, the respondent challenged the arbitrator appointed by the claimant on the grounds that the arbitrator's daughter was employed as an associate at one of the offices of the global law firm representing the claimant. While the office of the firm at which she worked was not involved in the particular case in which her father had been appointed, its practice included international arbitration. The Secretary-General found that the familial link between the arbitrator and counsel for the claimant satisfied the justifiable doubts test.

7.1.2.2 *Personal Animosity from an Arbitrator Toward Counsel*

In five cases, the challenging party has relied on the *opposite* of a close, amicable, and personal relationship between the arbitrator and one of the parties or its counsel; that is, it has alleged that the arbitrator harbors animosity towards the party or its counsel so as to affect his or her impartiality.

In one such case, the challenging party alleged that there was reason to believe that the arbitrator considered that a member of its legal team was associated with fraudulent behavior in other unrelated proceedings. The challenging party argued that an informed third party could reasonably conclude that the arbitrator might doubt the veracity and integrity of the respondent's counsel and would be incapable of separating his view of the respondent's counsel from the merits of the case. Having assessed the facts underlying the challenging party's assertions, as well as comments from the other side and the challenged arbitrator, the Secretary-General rejected the challenge.

In another case, the challenging parties complained of the arbitrator's "unbecoming attitude" towards them. For example, they argued, the arbitrator had bullied a junior counsel into silence by banging his fist on a table during a meeting. After examining the meeting records and submissions, the Secretary-General found that while the arbitrator could have avoided such aggressive behavior, he was acting within the confines of his mandate to maintain order during what was a tense meeting. More importantly, the Secretary-General found that there was no indication from the arbitrator's behavior that he held any particular bias against the challenging parties or that there was any appearance of bias.

7.2 *Improper Conduct During the Proceedings*

In three cases, the challenging party alleged that the arbitrator's conduct during the proceedings evidenced a lack of impartiality or independence. All three arbitrations were contract-based. All three challenges were dismissed.

In the first case, the challenging party complained about multiple instances of alleged misconduct on the part of the arbitrator during four hearings held over a two-year period. The complaints were numerous and wide-ranging but followed three themes: First, the arbitrator assisted claimants with their case; second, the arbitrator regularly interfered with the presentation of the respondent's case; and third, the arbitrator exerted an over-bearing presence such that he controlled the deliberations of the tribunal.

After examining the parties' positions and the audio files and transcripts from the hearings, the Secretary-General found that even though the hearings in the matter had occasionally been tense (and one of the contributing factors was the arbitrator's forceful character), his conduct fell entirely within his mandate as a member of the tribunal and did not raise justifiable doubts as to his impartiality or independence.

In the second case, the complained of behavior was twofold: the arbitrator had allegedly determined his fees with the claimant in a unilateral communication, and had allegedly attempted to foreclose the respondent's right to file a challenge in the case. At the crux of the first complaint was the fact that the arbitrator had advised the appointing party of his usual fee rates when approached about his appointment. The second complaint concerned an invitation from the arbitrator to the respondent to indicate within the time limits of the UNCITRAL Rules whether it held any objections to his acting as arbitrator. When the respondent raised no objection within that time limit, the arbitrator took note of that fact. The Secretary-General did not find that these circumstances gave rise to justifiable doubts as to the arbitrator's impartiality or independence.

In the third case, the challenging parties argued that the arbitrator had conducted himself in a misleading manner; namely, that he had posed questions to a witness about a lease agreement in a way that suggested that he was unfamiliar with its contents. Later, he disclosed to the parties that he was familiar with the lease agreement because he had provided legal advice to the notaries who had registered it. After examining the hearing transcripts, the Secretary-General found that he was unable to conclude that the questions posed by the arbitrator were intended to conceal his knowledge about the agreement and not to test the witness's own knowledge of the document's terms. The

Secretary-General also found that the arbitrator's prior advice to the notaries was not related to the dispute and caused no concern regarding his independence or impartiality.

7.3 *Public Statements Made by an Arbitrator*

In one case, the respondent challenged the arbitrator appointed by the claimant on the basis of comments he had made about the respondent in a published interview. The parties had agreed that the challenge would be decided by the Secretary-General of the PCA, applying the 2004 IBA Guidelines. The Secretary-General interpreted the standard thereunder as one of justifiable doubts as to the arbitrator's impartiality or independence, which could be satisfied by establishing an *appearance* of bias.[30]

In the arbitration, the tribunal had issued a temporary order and a provisional measures order restraining the respondent from, *inter alia*, any attempt to seize the claimant's assets. The respondent did not comply with the orders (or a similar order issued in another case). Several months later, the arbitrator was interviewed about a variety of topics in international arbitration. Early in the interview, the arbitrator mentioned that the respondent state was denouncing the ICSID Convention and had spoken of the possibility of denouncing one of its BITs. The arbitrator was then asked what he considered to be the most pressing issues in international arbitration. In response, he referred, *inter alia*, to the respondent's refusal to comply with the orders and, in the next line, stated:

> But when recalcitrant host countries find out that claimants are going to act like those who were expropriated in Libya . . . the politics might change.

The respondent contended that the interview gave rise to a strong appearance of bias on the part of the arbitrator. By contrast, the claimant considered that the interview contained an innocuous summary of publicly known facts. The Secretary-General found, *inter alia*, that it was reasonable to consider the reference to "recalcitrant host state" as a reference to the respondent, and that the arbitrator's comments likened the respondent's conduct to that of Libya in the 1970s and, as such, evinced an unfavorable view of the respondent. The Secretary-General found that the

> combination of words chosen by [the arbitrator] and the context in which he used them [had] the overall effect of painting an unfavourable

30 See *supra* note 9.

> view of [the respondent] in such a way as to give a reasonable and informed third party justifiable doubts as to [the arbitrator's] impartiality.

The Secretary-General upheld the challenge.[31]

7.4 *"Issue Conflicts"*

For the purposes of this chapter, an "issue conflict" is broadly defined as a conflict arising out of the arbitrator's relationship not with the parties, but with the subject matter of the dispute.[32]

Eight challenges involving "issue conflicts" have been submitted to the Secretary-General for determination. All the challenges arose in investor-state arbitrations. The Secretary-General rejected six of the challenges. In the remaining two cases, the arbitrators resigned before any decision was made by the Secretary-General.

One of the challenges involved an arbitrator acting concurrently as arbitrator and counsel (commonly referred to as "double-hatting"). Another challenge concerned the appointment of an arbitrator in two related matters, raising concerns that he would be privy to, and improperly influenced by, information from one case in the other. The remaining challenges centered on concerns that, in light of his or her previously expressed views, the arbitrator would be inappropriately predisposed with respect to issues in the case.

7.4.1 Concurrent Service as Arbitrator and Counsel

The first "issue conflict" challenge submitted to the PCA was brought against Professor Emmanuel Gaillard in the *Telekom Malaysia Berhad v. Republic of Ghana* case.[33] Professor Gaillard had been appointed by the claimant. On

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31 For further discussion of this challenge, see Chapter 2 by Meg Kinnear and Frauke Nitschke, Chapter 9 by Judith Levine, and Chapter 11 by Charles Brower, Sarah Melikian and Michael P. Daly in this volume.

32 For further discussion on issue conflicts, see Chapter 8 by Romain Zamour in this volume. Note also the comments by the ICCA-ASIL Joint Task Force on Issue Conflicts in Investor State Arbitration:

> "The term 'issue conflict' has come to be widely used in international arbitration literature and, increasingly, in arbitrator challenges, but the term has no settled definition. . . . While the notion of issue conflict is not equivalent to impartiality, it rests on concerns about impartiality. Does an arbitrator approach a significant disputed issue with the ability to decide it based on the parties' arguments in the case, and not on the basis of some inappropriate predisposition?"
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> Discussion Draft Report of ICCA-ASIL Joint Task Force, ¶¶ 16–17 (Mar. 12, 2015).

33 *Telekom Malaysia Berhad* (*Malaysia*) *v. Republic of Ghana*, PCA Case No. 2003-03.

day four of the jurisdictional and liability hearing, the respondent submitted the merits award in the *Consortium RFCC v. Kingdom of Morocco*[34] arbitration that had been made public the day before. The next day, Professor Gaillard disclosed, under Article 9 of the 1976 Rules, that he had been retained to initiate annulment proceedings against the *RFCC* award and that those proceedings had begun. Two days later, the respondent submitted a challenge to Professor Gaillard on the grounds that his role as counsel seeking to annul the *RFCC* award was inconsistent with his role as arbitrator, which included the duty to impartially consider the respondent's submissions on the *RFCC* award. The claimant argued that the parties did not disagree on the principle upheld in the *RFCC* case but rather on the application of it to the facts of the case at hand. It also argued that ICSID annulment proceedings are concerned with the legitimacy of the process rather than with substantive correctness. Professor Gaillard did not withdraw. The Secretary-General of the PCA rejected the respondent's challenge.[35]

The respondent then submitted the challenge to the District Court of The Hague as permitted by the Dutch Arbitration Act then in force. The District Court of The Hague ruled that unless Professor Gaillard stepped down as counsel in the *RFCC* annulment proceedings within ten days, the challenge would be upheld. Professor Gaillard withdrew as counsel in the annulment proceedings.[36] However, the respondent filed a second challenge to Professor Gaillard as arbitrator before the District Court arguing that it was prejudiced because Professor Gaillard had already played a double role as arbitrator and counsel for some time. The District Court rejected the respondent's challenge. It found that all of the decisions taken in the arbitration over the relevant period were procedural and, in any event, not adverse to the respondent.[37]

7.4.2 Concurrent Appointments as Arbitrator in Related Cases

In another case, an arbitrator was first appointed by counsel for the claimants in an investor-state arbitration, and shortly thereafter appointed by the same counsel in a related commercial arbitration. The respondent in the investor-state arbitration challenged the arbitrator on the grounds that, among other

34 *Consortium RFCC v. Kingdom of Morocco*, ICSID Case No. ARB/00/6.

35 At this time, the Secretary-General did not issue reasoned challenge decisions.

36 *Republic of Ghana v. Telekom Malaysia Berhad*, Case No. HA/RK 2004, 667, Decision of the District Court of The Hague (Oct. 18, 2004).

37 *Republic of Ghana v. Telekom Malaysia Berhad*, Case No. HA/RK 2004, 788, Decision of the District Court of The Hague (Nov. 5, 2004).

things, his appointment in the related case would give him access to knowledge of certain facts related to the dispute which could condition his future ruling. The arbitrator promptly resigned from the second arbitration. The respondent maintained its challenge arguing that the arbitrator had acted in both cases for some time during which he must have acquired information about the parties and the dispute that he would otherwise not have been aware of, and such a scenario breached the principle of equal treatment of the parties.

The Secretary-General acknowledged that the dual appointments in the related cases could raise concerns of procedural fairness as the arbitrator could be influenced by evidence and arguments that might not be present—or even admissible—in the case at hand. However, the Secretary-General noted that at the time of the arbitrator's resignation, the tribunal in the related case had not been constituted and the only information that the arbitrator had received was the notice of arbitration. The Secretary-General concluded that the conflict had failed to materialize and the issue had effectively become moot. The challenge was rejected.

7.4.3 Previously Expressed Views

The six remaining challenges were based on concerns about the inappropriate disposition of an arbitrator with respect to relevant issues in the case, as result of the arbitrator's previously expressed views.[38] In a challenge of this kind, the Secretary-General stated the following:

> [K]nowledge of the law or prior views expressed about the law are not *per se* a source of conflict that requires removal of an arbitrator. The fact that an arbitrator has knowledge of the law or has written about the law

38 This ground was also invoked by a respondent in a dual challenge to the presiding arbitrator and the arbitrator appointed by the claimants in a PCA-administered investor-state arbitration. The challenged arbitrators had served together on two earlier tribunals that had taken positions on a specific legal issue that was expected to arise in the case. The arbitrator appointed by the claimants had also served on a third tribunal ruling on the same issue and had written on the topic. All three awards had subsequently been annulled (in full or in part), following which the arbitrator appointed by the claimants had defended his view in a publication. The appointing authority found that to sustain a challenge on the basis of a previously expressed view of the law, it must be found that "there is a pre-judgment of an issue likely to be relevant to the dispute on which the parties have a reasonable expectation of an open mind." The appointing authority upheld the challenge against the arbitrator appointed by the claimants and dismissed the challenge against the presiding arbitrator.

> is consistent with the general principle of *jura novit curia* ("the judge knows the law").
>
> A successful challenge on the basis of issue conflict would demonstrate an arbitrator's unwillingness or apparent inability to consider alternative viewpoints and arguments that may be presented in the course of an arbitration. The threshold is therefore high, particularly in the investment treaty setting where . . . the treaty being interpreted is not the same treaty as the one that has been opined on previously.

In one case, the arbitrator was challenged on the basis of having issued a dissenting opinion in an unrelated investor-state arbitration, which allegedly expressed his predetermined view on a relevant issue. The challenging party contended that it would be "quite impossible" for the arbitrator to adjudicate with an open mind on the very issue on which he had a firmly held negative view, based only on the presentations of the parties and uninfluenced by his own thorough treatment of the issue in the dissenting opinion.

The non-challenging party resisted the challenge on timeliness, arguing that the arbitrator had publicly expressed his views on the issue in legal writings published years earlier. On the merits, it argued that from the dissenting opinion, it was not possible to conclude that factors other than the merits of the case would influence the arbitrator's conclusions.

The Secretary-General examined the parties' submissions, the arbitrator's comments (in which he had emphasized the importance of considering the specificities of each case and treaty), and the arbitrator's previous writings. The Secretary-General noted that the treaty upon which the arbitrator had previously opined was not the same treaty as in the case at hand. He found that the circumstances did not demonstrate the arbitrator's unwillingness or apparent inability to consider alternative viewpoints. The challenge was rejected.

In another case, a challenge was lodged by the respondent against the presiding arbitrator for prior views expressed about a particular cause of action. The claimant had invoked the cause of action and relied upon the presiding arbitrator's writings on the topic, as expressed by the arbitrator in an expert opinion, a prior award, and other publications. The respondent argued that the presiding arbitrator's writings suggested that he had taken a consistent view on the matter, "interpreting it in such a way that conforms to the interest of the investor, but not a state." The respondent considered that a reasonable observer would not believe that the respondent had a chance of convincing the presiding arbitrator to change his mind with respect to the meaning of the concept. The claimant argued that the challenge was late, and that the presiding

arbitrator's writings were "general opinions and/or historical surveys," "uncontroversial," not focused on the present case, and not reflective of a bias in favor of investors.

The Secretary-General held that the respondent's challenge was late but considered it prudent to assess the merits. The Secretary-General noted that the cause of action was a general one under international law that could be invoked under a multitude of circumstances. He held that the presiding arbitrator's writings did not reveal fixed views on any of the specific legal issues likely to be relevant in the present case. He rejected the respondent's assertion that the presiding arbitrator consistently interpreted the concept in a manner favoring investors; indeed, the Secretary-General noted that in the prior award, the arbitrator had denied the investor's claim under the cause of action. The Secretary-General concluded that the fact that the presiding arbitrator had previously written on the topic only suggested that he was an expert on it but did not raise justifiable doubts as to his ability to approach the parties' arguments with an open mind.

In the same case, the respondent also challenged the arbitrator appointed by the claimant on the grounds of his previously stated views in "another arbitration" on the same cause of action. The Secretary-General found that there were insufficient facts to give rise to justifiable doubts as to the arbitrator's ability to keep an open mind on the legal concept in the case at hand.

In another case, one of the grounds raised against the challenged arbitrator was the fact that he had been retained by the party that appointed him as an expert in two other proceedings. His expert reports in those proceedings allegedly dealt with issues relevant to the present case, in a manner favorable to the appointing party.

The Secretary-General did not agree that the expert reports suggested that the arbitrator had prejudged the issues in the present case. In particular, the second expert report neither expressed an opinion on any matter distinctly put in the arbitration at hand, nor demonstrated an unwillingness or inability to consider alternative viewpoints and arguments that could be presented in the course of the arbitration.

In an additional case, a challenge was brought by a claimant against an arbitrator on the grounds, *inter alia*, that he had already prejudged key issues material to the arbitration in another pending case involving the same respondent. According to the claimant, the two arbitrations not only involved the same respondent but also the same contract, investment treaty, governmental measure, and type of investor. The respondent argued that neither the legal nor factual issues were sufficiently related to the other case to warrant the dismissal of the arbitrator. The arbitrator resigned before any decision was made on the challenge.

In another matter, the respondent challenged the arbitrator appointed by the claimant on the ground, *inter alia*, that the arbitrator had been a member of three tribunals that had ruled against the respondent on a particular legal issue in three other arbitrations. Further, the arbitrator had publicized his opinion on the same legal issue in writings on multiple occasions. According to the respondent, the same legal issue was likely to arise in the case at hand, and it did not believe that the arbitrator could hear the parties on it with an open mind. The arbitrator resigned before any decision was made on the challenge.

7.5 *Failure to Act*

Four challenges have been submitted to the Secretary-General under Article 13(2) of the 1976 UNCITRAL Rules which provides:

> In the event that an arbitrator fails to act or in the event of the *de jure* or *de facto* impossibility of his performing his functions, the procedure in respect of the challenge and replacement of an arbitrator . . . shall apply.[39]

This ground does not implicate an arbitrator's impartiality or independence.

In one case, the tribunal was challenged on the basis that it had persistently failed to devote the necessary time to rule on important issues in the arbitration, such that a reasonable observer would conclude that its conduct constituted an impermissible failure to act for the purposes of Article 13 of the Rules. The challenging party also invoked the law of the seat of arbitration, which provided that the mandate of the tribunal could be terminated if, after repeated reminders, it carried out its mandate in an "unacceptably slow manner." After a review of the legal standards under the UNCITRAL Rules and the law at the place of arbitration, the Secretary-General held,

> [I]t is clear that in order for me to uphold a challenge on the basis of failure to act [in this case], I must (i) be satisfied that the arbitrators have consciously neglected their duties; (ii) take account of their overall conduct; and (iii) find that the conduct falls clearly below the standard of what may be reasonably expected from an arbitrator. The last element is an objective one, meaning the test is based on what a reasonable and informed third party would conclude, and not the subjective perceptions or feelings of the parties. That the conduct must fall "clearly" below the reasonable expectations means that the ground can only be made out in exceptional and serious circumstances.

39 1976 UNCITRAL Rules, *supra* note 16, Art. 13(2).

The Secretary-General also observed,

> It is common ground that an appointing authority does not serve the role of an appellate magistrate and it is not its function to decide whether an arbitrator's actions were correct. The objective element of the failure-to-act test nevertheless does leave limited room for the appointing authority to assess the reasonableness of a tribunal's actions in the sense that if there is some evidence that the tribunal acted reasonably, it is less likely that its conduct fell "clearly below the standard of what may be reasonably expected from an arbitrator" and if the tribunal manifestly acted unreasonably, it is more likely that its conduct "fell clearly below the standard of what may be reasonably expected from an arbitrator."

After having examined the conduct of the arbitrator, the parties' pleadings, and the comments of the tribunal, the Secretary-General did not accept that the tribunal had consciously neglected its duties in such a way that its overall conduct fell clearly below the standard of what may be reasonably expected from a tribunal. The challenge was rejected.

In another case, the claimant sought the removal of an arbitrator on the grounds that the arbitrator's "huge case load in investment arbitrations" and other adjudicatory and academic commitments constituted a case of *de facto* impossibility to perform the necessary functions of an arbitrator. The opposing party argued that Article 13(2) of the Rules only contemplated extreme circumstances that make it legally or physically impossible for an arbitrator to perform his or her duties.

The Secretary-General rejected the challenge on the grounds that he had been presented with no evidence of any complaints about the arbitrator's performance or any *actual* failure of the arbitrator to perform. In light of this, as well as the arbitrator's positive statements reiterating the arbitrator's commitment to the case, as well as evidence of the arbitrator's reputation for diligence, the Secretary-General rejected the challenge.

8 Conclusion

Over the last decade, there has been a general trend of increasing numbers of challenges to arbitrators. In the cases surveyed in this chapter, challenges have been brought on a wide variety of grounds. Notably, the number of manifestly frivolous challenges is low. Some lament the increasing number of challenges as reflecting a more litigious or adversarial approach by parties and counsel

in arbitral proceedings. However, it may be that the growth in the number of challenges broadly matches the growth in the numbers of cases, particularly investor-state arbitrations. The upside of all of this activity is a growing body of decisions which serves to clarify the applicable standards for disclosure and challenges and, thus, enhances the predictability of proceedings. The work of the Secretary-General of the PCA alongside other appointing authorities is critical in this regard.

CHAPTER 4

Arbitrator Challenges at the Iran-United States Claims Tribunal

Lee M. Caplan

1 Introduction

The Iran-United States Claims Tribunal ("the Tribunal") has been the scene of numerous challenges to the arbitrators who have served as its members. The majority of these challenges have been brought by the governments of Iran and the United States, and not by private claimants appearing before the Tribunal. In many respects, these challenges may be viewed as a manifestation of the poor relations between the United States and Iran existing both before the Tribunal's establishment in 1981 and continuing throughout its thirty-four-year history.

Hailed as one of the great examples of pacific settlement in recent times, the Tribunal served as a critical element of the overall arrangement between the United States and Iran that resolved the 1979 Hostage Crisis and addressed the economic turmoil caused by the Iranian Revolution. That compromise, memorialized in the Algiers Accords, called for the United States to unblock several billions of dollars in Iranian government funds frozen in response to the crisis and to assist Iran with the return of the Shah's assets. For its part, Iran had to release the fifty-two Americans taken hostage at the U.S. Embassy in Tehran. Both governments also agreed that certain litigation against Iran in U.S. courts would be terminated and certain categories of claims against Iran and between the two governments would be settled at the Iran-United States Claims Tribunal.[1] To date, the Tribunal has resolved 3937 claims, leaving a handful of large government-to-government claims on the docket.[2]

1 The origins of the Tribunal are addressed in Charles N. Brower & Jason Brueschke, The Iran-United States Claims Tribunal 3 (1998) and in George Aldrich, The Jurisprudence of the Iran-United States Claims Tribunal 2 (1996).

2 The Tribunal's jurisprudence has been carefully examined in numerous treatises. *See, e.g.*, Aldrich, *supra* note 1; Aida Avanessian, Iran-United States Claims Tribunal in Action (1993); Brower & Brueschke, *supra* note 1; Rahmatulla Khan, The Iran-United States Claims Tribunal: Controversies, Cases, and Contribution (1990); Wayne Mapp, The Iran-United States Claims Tribunal: The First Ten Years (1981–1991): An Assessment of the Tribunal's Jurisprudence

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The Tribunal, though productive, has suffered from a climate of distrust between the governments, some of which is evidenced by the many challenges to the Tribunal's arbitrators. Most of the challenges at the Tribunal have arisen under rather unusual circumstances, to say the least. One of the earliest challenges, for example, was prompted by a physical assault by two Iranian arbitrators on a Swedish arbitrator on the Tribunal's premises. In two sustained efforts, the Iranian government waged a series of challenges targeting the President of the Tribunal, whom it believed was unduly favoring the United States. On another occasion, the U.S. government challenged all three Iranian arbitrators when it believed they were engaged in a scheme to kick back portions of their salaries to the Iranian government.[3]

This chapter addresses these and other challenges at the Iran-United States Claims Tribunal. Section 2 describes the institutional and procedural framework under which challenges at the Tribunal may be brought. Section 3 addresses the critical role of the Tribunal's appointing authority in resolving challenges in the Tribunal's highly charged setting. Section 4 provides an overview of the various challenges brought to date in connection with the Tribunal's work.

2 The Challenge Process at the Iran-United States Claims Tribunal

The procedures for challenge of arbitrators at the Iran-United States Claims Tribunal derive from the primary agreements comprising the Algiers Accords: the Declaration of the Government of the Democratic and Popular Republic of Algeria ("General Declaration"), the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran ("Claims Settlement Declaration"), and the Tribunal's Rules of Procedure ("Tribunal Rules").[4] These instruments

and its Contribution to International Arbitration (1993). For a discussion of the Tribunal's remaining docket, see Ronald J. Bettauer, *The Task Remaining: The Government Cases, in* The Iran-United States Claims Tribunal and the Process of International Claims Resolution 355 (David D. Caron & John R. Crook eds., 2000).

3 These instances relate to the challenges of Judges Mahmoud Kashani and Shafie Shafeiei in 1984 and of Judges Assadollah Noori, Koorosh Ameli, and Mohsen Aghahosseini in 2005. *See supra* Part 4.2.

4 The Algiers Accords are the international instruments memorializing the settlement between the United States and Iran. Declaration of the Government of the Democratic and Popular Republic of Algeria, Jan. 19, 1981, 1 Iran-U.S. C.T.R. 1, 1 (1983) [hereinafter General

address the composition of the Tribunal, as well as the conditions under which its members may be challenged.

The General Declaration bound the United States and Iran to "bring about the settlement of [claims] through binding arbitration."[5] The Claims Settlement Declaration set forth the terms of such arbitration, including that

> the Tribunal shall consist of nine members or such larger multiple of three as Iran and the United States may agree are necessary to conduct its business expeditiously.[6]

Because no agreement on a larger multiple of three was ever reached, three of the nine members have always been appointed by Iran with Iranian nationality, three by the U.S. government with U.S. nationality, and three others with third-country nationalities have been appointed by agreement of the six party-appointed arbitrators or, failing their agreement, by a designated third-party called the Appointing Authority.[7] Among the three third-country arbitrators, one is chosen to serve as President of the Tribunal by agreement of the six party-appointed arbitrators or, failing their agreement, by the Appointing Authority.[8]

The composition of the Tribunal has varied depending on the type of claim being heard. The Tribunal has jurisdiction to decide three types of claims: (1) claims by nationals of one country against the government of the other country (the vast majority of which have involved claims by U.S. nationals against the Iranian government); (2) official claims between the governments arising out of contractual arrangements between them; and (3) any disputes as to the interpretation or performance of the General Declaration and the Claims Settlement Declaration.[9] The first category of claims, representing the bulk of the Tribunal's work to date, has been conducted through three

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Declaration]; Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Jan. 19, 1981, 1 Iran-U.S. C.T.R. 1, 9 (1983) [hereinafter Claims Settlement Declaration]. These are reprinted in volume I of the 1983 Iran-United States Claims Tribunal Reports ("Iran-U.S. C.T.R.") and in Caron & Crook, *supra* note 2, app. 1–5.

5 General Declaration, General Principle A.

6 Claims Settlement Declaration, *supra* note 4, art. III(1); Tribunal Rules of Procedure, Iran-U.S., art. 7, May 3, 1983 [hereinafter Tribunal Rules].

7 Claims Settlement Declaration, *supra* note 4, art. III(1).

8 *Id.*

9 *Id.*, arts. II(1)–(3), VI(4); General Declaration, *supra* note 4, ¶ 17.

chambers consisting of one Iranian, one American, and one third-country arbitrator serving as presiding arbitrator. As a general rule, claims under the second and third categories are resolved by all nine arbitrators sitting as the Full Tribunal.[10]

The Claims Settlement Declaration also provides,

> the Tribunal shall conduct its business in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) except to the extent modified by the Parties or by the Tribunal. . . .[11]

The Tribunal Rules were therefore based on the UNCITRAL Arbitration Rules, as adopted by UNCITRAL in 1976 ("1976 UNCITRAL Rules") and as modified by the Tribunal in order to carry out its functions most effectively. The Tribunal Rules were adopted on May 3, 1983, and amended in minor respects on May 27, 1997.[12]

Accordingly, the challenge standards and procedures for the Iran-United States Claims Tribunal are found in Articles 10, 11, and 12 of the 1976 UNCITRAL Rules, to the extent modified by the Tribunal. Article 10 sets forth the substantive standard governing the conduct of members of the Tribunal, providing that an "arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence." Articles 11 and 12 provide the basic framework for the challenge process, including establishing time limits, notice requirements, and mechanisms for removal and replacement of an arbitrator. Article 13(2) permits a challenge to be brought under the procedures in Articles 11 and 12 on the basis of an arbitrator's failure to act or the impossibility of performing his or her functions.

The Tribunal Rules incorporate the text of Articles 10 through 13 of the 1976 UNCITRAL Rules unchanged, but provide minor clarifications that are reflected in the "Notes" accompanying the Rules. These Notes take into account the unique institutional characteristics of the Tribunal, namely that only the governments, and not private litigants, have the right to appoint arbitrators or have them appointed to the Tribunal by the Appointing Authority. The Notes clarify that any government may challenge an arbitrator within fifteen days of his or her initial appointment or at any point thereafter if circumstances

10 Note, however, that several official claims have been decided by chambers of the Tribunal.

11 *Id.*, art. III(2).

12 The Tribunal Rules are reprinted in Caron & Crook, Iran-United States Claims Tribunal, *supra* note 2, Appendix 6.

exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.[13]

In contrast, the Notes indicate that a party litigating before one of the Tribunal's three chambers, including private claimants, may only raise a challenge within the context of a particular case. Litigating parties may challenge an arbitrator within fifteen days of any case being assigned to a chamber, or after circumstances in the case give rise to justifiable doubts as to the arbitrator's impartiality or independence become known to a disputing party.[14] As further clarification, the Notes provide that disputing parties in a chamber case may challenge an arbitrator only "with respect to the particular case involved, and not upon any general grounds which also relate to other cases."[15] By contrast, governments may make challenges on general grounds outside the context of a chamber case, such as regarding conduct related to a government-to-government case or the administrative work of the Tribunal.[16]

Once the 1976 UNCITRAL Rules were incorporated into the Tribunal Rules, the Iran-United States Claims Tribunal immediately became the test center for UNCITRAL's newly minted standards and procedures with respect to the challenge of arbitrators. The rules have adequately served the needs of the Tribunal. While providing useful substantive standards for measuring the conduct of Members of the Tribunal, they do not overregulate the area. Such flexibility has allowed the Tribunal and, more importantly, the Tribunal's Appointing Authority, who ultimately decides challenges against Tribunal Members, the flexibility to develop a distinct practice that is tailored to the Tribunal's unique context.

3 The Role of the Appointing Authority

Challenges to any Member of the Tribunal are decided by the Tribunal's Appointing Authority.[17] The Appointing Authority has played an important role in developing the Tribunal's challenge practice and jurisprudence. In addition, the Appointing Authority has, to some extent, mitigated the friction between the United States and Iran at the Tribunal, and thus has helped to facilitate the main task of the Tribunal of deciding claims efficiently and effectively.

13 Tribunal Rules, *supra* note 6, arts. 9–12, n. 1.

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.*, art. 12.

Under the Tribunal Rules, if the governments have not agreed on the designation of an appointing authority, the designation is made, upon the request of a government, by the Secretary-General of the Permanent Court of Arbitration ("PCA").[18] Over the life of the Tribunal, the Appointing Authority has never been designated by agreement and, as a result, the Secretary-General has been called upon to make the designation on four occasions: once at the Tribunal's outset, once upon the death of the Appointing Authority, and twice upon the resignation of the Appointing Authority. The Appointing Authority's tenure has not been subject to any time limits and, thus, the role is filled on a permanent basis until the Appointing Authority is unable or unwilling to serve.[19]

To date, the practice of the Secretary-General has been to designate an Appointing Authority who is an individual, as opposed to an institution—particularly an individual with the highest legal qualifications. Judge Charles Moons, former Chief Justice of the Supreme Court of the Netherlands, served as the Tribunal's first Appointing Authority, followed by Sir Robert Jennings, former President of the International Court of Justice and Professor at Cambridge University, and W.E. Haak, former Chief Justice of the Supreme Court of the Netherlands. Currently, Judge Geert J.M. Corstens, also a former Chief Justice of the Supreme Court of the Netherlands, acts as the Tribunal's Appointing Authority.

The practice of the Tribunal has been to have one individual fulfill all of the functions of the Appointing Authority, both by appointing arbitrators when called upon to act and by deciding challenges in the context of all types of cases—private claims and government-to-government claims—as well as the general work of the Tribunal.

The designation of an individual as Appointing Authority, with the strongest legal credentials to serve on a permanent basis over the full range of responsibilities, has brought the Tribunal stability and consistency over its long history. The written decisions of the Appointing Authority with respect to challenges of arbitrators, on the whole, have reflected the careful analysis of an eminent legal mind. The long tenures of the Appointing Authority, particularly of Judge Moons and Judge Haak, have fostered the development of a rich and largely consistent jurisprudence.[20]

These conditions have also assisted in the development of an effective and efficient practice of investigation and evidence gathering in the context of resolving challenges. Beginning with Judge Moons, the Appointing Authority

18 *Id.*, art. 7(2)(b).

19 For a discussion of the permanent designation of the Appointing Authority, *see* Robert Briner, *The Appointing Authority* in Caron & Crook, *supra* note 2, at 160–61.

20 *Id.* at 172.

has generally approached his task as much from the perspective of an investigator as an adjudicator. The practice has been to conduct a written phase of proceedings in which the parties, the government agents, and the challenged arbitrator or arbitrators have the opportunity to state their views before the Appointing Authority, often through multiple rounds of submissions. In an approach that is atypical of international arbitration practice, the Appointing Authority has also conducted extensive interviews with the challenging party, the challenged arbitrator or arbitrators, the government agents, and any other person with relevant information.[21] This unique approach was often necessary as many challenges at the Tribunal arose out of allegations of conspiratorial conduct that were difficult to vet solely on the basis of documentary evidence and the written statements of those involved.

The characteristics of the institution of the Appointing Authority have generally served the interests of the Tribunal well. The careful, hands-on, and responsible approach of the Appointing Authority assured all involved in a challenge that the matter was being considered seriously and thoroughly. While the decision of the Appointing Authority inevitably left one side unhappy, some consolation could be found in the fact that the claims of the parties were comprehensively investigated and subjected to rigorous legal scrutiny—earning at least the respect, if not the approval, of the parties involved. In this regard, the institution of the Appointing Authority has functioned as a stabilizing force that has maintained the integrity of the Tribunal under difficult conditions. This goal has been accomplished through a process of reducing often heated and politically motivated disputes over the conduct of Members of the Tribunal to legal problems capable of resolution by objective legal and factual analysis.

4 Challenges at the Iran-United States Claims Tribunal

Over its long history, a total of twenty-two challenges have been brought against various Members of the Tribunal.[22] Significantly, twenty of these were

21 *Id.* On a rare occasion, the Appointing Authority even allowed the parties to present oral testimony. *See Decision of the Appointing Authority on the Objections by Iran to Judge Mangård*, Mar. 5, 1982, *reprinted in* 1 Iran-U.S. C.T.R. 509, 510 (1981–1982) (noting the occurrence of "oral commentary" by the parties).

22 This figure is based on the total number of attempts to disqualify a particular member of the Tribunal as opposed to the number of challenge actions submitted to the Appointing Authority, some of which sought to challenge multiple arbitrators at the same time in a single action. For example, the U.S. government's notice of challenge of Judges Kashani

brought by a government party: twelve by the Iranian government and eight by the U.S. government. Only two challenges have been raised by private claimants. None of the challenges were upheld. In three instances, the arbitrator either resigned or was withdrawn by the party that appointed him. In nine instances, the challenge was dismissed on technical grounds, including that the challenge was untimely filed or for failure to state the reasons of the challenge. In the ten remaining instances, the challenge was dismissed for failure to establish justifiable doubts as to the challenged arbitrator's impartiality or independence or a failure to act on the part of the challenged arbitrator.[23]

Following is a brief description of the challenges brought by the Iranian government, the U.S. government, and private U.S. claimants.[24] A chart summarizing all challenges appears at the end of this chapter.

4.1 *Challenges by the Iranian Government*

The Iranian government has brought a total of twelve challenges against members of the Tribunal. Of these, eleven have been against third-party arbitrators, seven of which were brought against the member then serving as the President of the Tribunal. The Iranian government has brought only one challenge against a U.S. arbitrator. These figures appear to reflect the Iranian perception that the U.S. arbitrators were unlikely to vote in favor of Iranian interests, and thus it was critical to monitor and check the conduct of the third-country arbitrators who were often believed to be unduly favoring U.S. interests.

A brief description of each of the Iranian government's challenges appears below.

4.1.1 Challenge Based On Informal Remark

The first challenge brought at the Tribunal was Iran's challenge of Judge Nils Mangård in 1982, only a few months after the Tribunal was in operation. During a meeting of the arbitrators in Chamber Three near the end of 1981, Judge Mangård made an informal remark whose content is disputed but which

and Shafeiei counts as two challenges, even though the Appointing Authority addressed the challenges as part of one action.

23 Note that in two additional cases not included in this statistic, namely the challenges of Judges Noori, Ameli, and Aghahosseini in 2005 and the challenge of Judge Seifi in 2010, the Appointing Authority dismissed the challenges as untimely filed but also continued to address the merits of the claims. These challenges were included as four of the nine instances in which challenges were dismissed on technical grounds.

24 This description draws heavily from the treatment of the same subject in Chapter 5 of David D. Caron & Lee M. Caplan, The UNCITRAL Arbitration Rules: A Commentary 177–274 (2d ed., 2012).

resulted in a request by Iran for his resignation. The Iranian arbitrator, Seyyed Hossein Enayat believed the remark to be critical of the Iranian judicial system and the executions that were then taking place in Iran. Judge Mangård later stated that the remark was misunderstood.

Within a month's time, the Iranian Government sent a letter to Judge Mangård informing him that "the Islamic Republic of Iran hereby disqualifies Your Honour as a 'neutral' arbitrator. . . ."[25] Iran therefore took the position that it possessed the power to unilaterally disqualify a third-country arbitrator. The Tribunal disagreed. The incident prompted the designation of Judge Moons as the Tribunal's first Appointing Authority. In considering the Tribunal's first challenge, Judge Moons also agreed that the challenge procedure under the Tribunal Rules was the exclusive mechanism for seeking to disqualify an arbitrator.[26] He also rejected the Iranian government's challenge as inadmissible for failing to state the reason for the challenge within the meaning of the Tribunal Rules.[27]

4.1.2 Challenges Against Third-Country Arbitrators, Including in Their Role as President of the Tribunal

At times during the life of the Tribunal, Iran has doggedly pursued the disqualification of third-country arbitrators who it believed were unduly favoring the United States, including by conspiring with U.S. arbitrators to Iran's detriment.[28] In two separate series of challenges—one against Judge Robert Briner and the other against Judge Krzystof Skubiszewski—Iran sought to disqualify and continue to disqualify Members of the Tribunal who would come to serve or were currently serving as President of the Tribunal, and Iran's efforts appeared targeted at unseating the President.

First, Iran raised a series of three challenges against Judge Briner, who served as President of the Tribunal from February 1989 to February 1991. On September 13, 1988, the first challenge was brought against Judge Briner in his role as Chairman in Case No. 55, *Amoco Iran v. Islamic Republic of Iran*, before he served as President. The Iranian government alleged that Judge Briner had a past relationship with the Swiss subsidiary of Morgan Stanley, an important

25 *Decision of the Appointing Authority on Judge Mangård*, 1 Iran-U.S. C.T.R. 515 (providing excerpts of the letter).

26 *Id.* at 514–15.

27 *Id.* at 518.

28 One long-serving U.S. arbitrator noted "the pervasive Iranian tactics of verbal and psychological abuse to which most, if not all, of the presiding arbitrators have been subjected." Aldrich, *supra* note 1, at 72 n. 13.

expert witness for the claimant in the case, and that he had failed to disclose that relationship. The Iranians were concerned because the claimant heavily relied upon Morgan Stanley's testimony in quantifying the relief it sought and because an "arbitrator related to an expert witness [could not] be assumed to be impartial in the treatment of such a witness vis-a-vis other witnesses."[29] On December 6, 1988, Judge Briner withdrew from Case No. 55 under protest.[30]

The second challenge by the Iranian government against Judge Briner came on July 28, 1989, after his election as President of the Tribunal. This time the challenge, although arising in part out of a specific case, was directed generally at Judge Briner's continued service at the Tribunal. The basis for the challenge was Judge Briner's handling of Case No. 39, *Phillips Petroleum Co. Iran v. Islamic Republic of Iran & the National Iranian Oil Co.*, primarily the manner in which the amount of the award was determined.[31]

The Iranian government claimed that Judge Briner had used a secret memorandum given to him by the U.S. arbitrator, Judge George Aldrich, to determine the amount of the award and then withheld that same memorandum from the Iranian arbitrator in the case. Other charges leveled against Judge Briner were that: (1) he used the disputed testimony of Morgan Stanley from Case No. 55; (2) the award was tainted with efforts to conceal and slant evidence in the claimant's favor; (3) there were significant inaccuracies in the award that served to increase the amount awarded to the claimant; and (4) Judge Briner had ignored Tribunal practice and made inconsistent decisions during the course of the proceedings without any explanation and which served mainly to benefit the claimant.[32]

The challenge was brought by the Iranian government after the majority had signed the English-language version of the award.[33] The timing of the challenge suggested that the Iranian government was trying to circumvent the

29 Letter from Mohammed K. Eshragh, Agent of of Iran, to Charles Moons, Appointing Authority, Sept. 13, 1988, *reprinted in* 20 Iran-U.S. C.T.R. 181, 182 (1988-III) (regarding the initiation of the first challenge by Iran to Judge Briner).

30 Letter from Judge Robert Briner to Charles Moons, Appointing Authority, Dec. 6, 1988, *reprinted in* 20 Iran-U.S. C.T.R. 329–30 (1988-III).

31 Letter from Ali H. Nobari, Agent of Iran, to Charles Moons, Appointing Authority, July 28, 1989, *reprinted in* 21 Iran-U.S. C.T.R. 318 (1989-I) (regarding the initiation of the second challenge by Iran to Judge Briner); *see also* Letter from Ali H. Nobari, Agent of Iran, to Charles Moons, Appointing Authority, Aug. 29, 1989, *reprinted in* 21 Iran-U.S. C.T.R. 355 (1989-I) (regarding the initiation of the second challenge by Iran to Judge Briner).

32 *Id.*

33 In the practice of the Tribunal, an award against Iran is not notified to the escrow agent to facilitate payment out of the security account until the award is filed in both English and Persian.

finality of the award established in the Tribunal Rules and was attempting to use the challenge mechanism not only to undermine Judge Briner's leadership, but also in essence to appeal the award.

On September 19, 1989, Judge Moons, the Appointing Authority, dismissed the challenge largely on technical grounds. First, the Appointing Authority found that the Iranian government did not meet the fifteen-day deadline for bringing a challenge under the Tribunal Rules. Second, he dismissed the challenge because much of the material Iran wanted to use to support its challenge came from *in camera* deliberations, which are considered confidential under the Tribunal Rules and thus generally should not be examined by the Appointing Authority in making a decision on the merits of a challenge.[34]

The third challenge to Judge Briner was in many ways an extension of the second. On September 11, 1989, just days prior to the Appointing Authority's decision on the second challenge, the Iranian government initiated a further challenge on the ground that Iran had just learned of possible violations of India's foreign exchange laws by Judge Briner.[35] Iran also argued that these alleged violations should bear on the Appointing Authority's decision in the then still-pending second challenge. The Appointing Authority decided this challenge in his decision of September 25, 1989, finding that Judge Briner, regardless of whether there "theoretically" was a violation, had acted in good faith and that the act did not thus raise "justifiable doubts as to Mr. Briner's impartiality or independence."[36]

Another series of challenges—four in total—by the Iranian government were leveled against Judge Krzysztof Skubiszewski, who served as President of the Tribunal from February 1994 to February 2010. In 1999, Iran based two related challenges against Judge Skubiszewski on events surrounding an inquiry by the Tribunal's Deputy Secretary-General into the balance of the security account. The security account is a fund which Iran is required by the

34 *Decision of the Appointing Authority on the Second Challenge by Iran of Judge Briner*, Sept. 19, 1989, *reprinted in* 21 Iran-U.S. C.T.R. 384 (1989-I).

35 Letter from Ali H. Nobari, Agent of Iran, to Charles Moons, Appointing Authority, Sept. 11, 1989, *reprinted in* 21 Iran-U.S. C.T.R. 380 (1989-I) (regarding the initiation of the third challenge by Iran of Judge Briner). According to Iran, Judge Briner was "the key element in a money laundering scandal in India" having "been the source of illegal foreign exchange payments in the amount of $200,000." *Id.*

36 *Decision of the Appointing Authority on the Third Challenge by Iran to Judge Briner*, Sept. 25, 1989, *reprinted* in 21 Iran-U.S. C.T.R. 396, 398 (1989-I); *see also* Letter from Timothy E. Rarnish, Agent of the United States, to Charles Moons, Apointing Authority, Sept. 15, 1989, *reprinted in* 21 Iran-U.S. C.T.R. 383 (1989-I); Letter from Timothy E. Ramish, Agent of the United States, to Charles Moons, Apointing Authority, Sept. 19, 1989, *reprinted in* 21 Iran-U.S. C.T.R. 395 (1989-I).

Algiers Accords to maintain at a minimum level in order to satisfy adverse awards.

On May 20, 1999, Iran raised its first challenge. It alleged partiality and prejudgment of the issues by Judge Skubiszewski for collecting evidence on a "central issue" in Case No A/28, which dealt with Iran's obligation to maintain the security account at U.S. $500 million.[37] Iran's second challenge raised on June 3, 1999, alleged that Judge Skubiszewski lied when denying that he instructed the Tribunal's Deputy Secretary-General to inquire into the account's balance.

On August 30, 1999, the Appointing Authority, Sir Robert Jennings, dismissed both challenges. He found not only that the inquiry into the account balance was proper to update information relating to a pending case, regardless of who directed it, but also that Iran presented no credible evidence that Judge Skubiszewski had directed or was complicit in making the inquiry, or that he lied about any involvement.[38]

In 2007, Iran challenged Judge Skubiszewski again. This time Iran alleged that the President had excluded an Iranian arbitrator from Tribunal deliberations. In November 2006, Judge Assadollah Noori, an Iranian arbitrator, submitted his resignation, effective on the day after the conclusion of the hearings in Case No. B61, and refused to participate in the deliberations of that case.[39] Judge Hamid Reza Oloumi Yazdi ultimately replaced Judge Noori and by a decision dated May 1, 2007, the Full Tribunal decided that "Mr. Oloumi Yazdi will be afforded the time he requires fully and adequately to prepare for deliberations in Case No B61." Citing the May 1, 2007 decision, Judge Oloumi submitted a memorandum to the President of the Tribunal on November 23, 2007, formally requesting a rehearing of certain issues in the case and a postponement of all deliberations until April 2008 to allow him adequate time to prepare. The Tribunal denied Judge Oloumi's request.

On November 30, 2007, Iran challenged Judge Skubiszewski, alleging that the President "virtually eliminated Judge Oloumi from deliberations of Case B61" by turning down his request for a postponement of deliberations through "most irregular action committed clandestinely with obvious prejudice" to

37 Caron & Caplan, *supra* note 24, at 186.

38 *Decision of the Appointing Authority on the Challenge of Judge Skubiszewski*, Aug. 30, 1999, *reprinted in* 38 Iran-U.S. C.T.R. 378–85 (2004–2009).

39 Judge Noori's conduct was inconsistent with Article 13(5) of the Tribunal Rules, also known as the "Mosk Rule," which required an arbitrator to continue to serve as a Member of the Tribunal after his or her resignation "with respect to all cases in which he had participated in a hearing on the merits."

Iran.[40] Iran further argued that the Full Tribunal's decision of May 1, 2007, as formulated, denied the president any discretion to reverse that decision. In a related action, described below in section 4.2.2, the United States challenged Judge Oloumi for disclosing the Tribunal's confidential deliberations.

On April 2, 2008, Judge Haak, the Appointing Authority, dismissed both challenges in a joint decision. As to the challenge against Judge Skubiszewski, the Appointing Authority found that the Judge appeared to have appropriately submitted Judge Oloumi's request to the Full Tribunal for decision.

Just before the Appointing Authority rendered his joint decision, Iran challenged President Skubiszewski yet again on February 29, 2008. Iran argued that a particular written submission sent by the President to the Appointing Authority in response to Iran's November 30, 2007 challenge reflected the President's "surfaced negative view of Iran's *character and moral fibre*."[41] The submission contained a vigorous defense of the president's conduct, describing Iran's challenge as "an effort to misconstrue the facts," "pure fantasy," and an "attempt to mislead" and "twist the facts."[42] Judge Haak summarily dismissed the challenge on April 8, 2008, noting that such expressions did not give rise to justifiable doubts as to the President's impartiality and independence. He found that "a challenged arbitrator has the right fully to defend him or herself and that harsh accusations may be met with an equally strong response."[43]

In 2009, Iran brought a final challenge against Judge Skubiszewski, along with a challenge against Judge Gaetano Arangio-Ruiz, a third-country arbitrator. On August 5, 2009, shortly after the Tribunal had rendered its partial award in Case No. B61, Iran submitted the two challenges in connection with a request to revise the partial award. The challenge alleged that the two arbitrators had been involved in "a calculated scheme to covertly and illegally revise the Tribunal's partial award" in Case No. A15(II:A) on which Iran argued it had based many of its representations in Case No. B61. Thus, according to the Iranian government, it therefore had not been given the opportunity to present its case on the issues on which the B61 partial award was decided.[44]

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40 *Joint Decision of the Appointing Authority on the Challenges of Judges Skubiszewski and Oloumi*, Apr. 2, 2008 (citing Iran's Notice of Challenge, Nov. 30, 2007), *reprinted in* 38 Iran-U.S. C.T.R. 414 (2004–2009).

41 *Decision of the Appointing Authority on the Challenge of Judge Skubiszewski,* Apr. 8, 2008, *reprinted in* 38 Iran-U.S. C.T.R. 445 (2004–2009).

42 *Id.* at 447.

43 *Id.* at 450.

44 *Joint Decision of the Appointing Authority on the Challenges of Judges Skubiszewski and Arangio-Ruiz*, Mar. 5, 2010, at 1, ¶ 2.1.

Iran further argued that the refusal of Judges Skubiszewski and Arangio-Ruiz to recuse themselves from deciding the request for revision created additional doubts as to their impartiality and independence.[45]

Judge Haak, the Appointing Authority, disagreed and dismissed the challenges based on a combination of grounds.[46] These grounds included: (1) while Iran had timely lodged its challenge within fifteen days of the issuance of the B61 partial award, any "other circumstances" leading up to that decision which gave rise to Iran's doubts in Case No. B61 would have occurred beyond that time period;[47] (2) Iran's "calculated scheme" allegation had not been sufficiently substantiated, leaving as Iran's principal claim that the challenged arbitrators illegally revised the prior partial award in Case No. A15(II:A & II:B) in violation of the principle of *res judicata*;[48] (3) neither the challenged arbitrators' defense of themselves in the challenges, nor their refusal to recuse themselves from deciding Iran's request for revision or to step down entirely, in any way provided additional grounds for challenge;[49] (4) by choosing to challenge only two arbitrators, as opposed to all the arbitrators who formed the majority behind the B61 partial award, Iran "fatally weakened" its challenge because it would require the Appointing Authority to agree to hold the party-appointed arbitrator to a lower standard of impartiality and independence;[50] and (5) since the Appointing Authority does not serve as an appellate body, he must approach an alleged *res judicata* violation with special caution, having authority only to sustain a challenge where (as was not the case here) "the two awards are so clearly divergent on their face" as to demonstrate a lack of impartiality and independence.[51]

4.1.3 Other Challenges

Iran brought other challenges against Judge Arangio-Ruiz, a third-country arbitrator, and Judge Charles Brower, a U.S. arbitrator. In 1991, the Iranian government challenged Judge Arangio-Ruiz, alleging a failure to act on his part. Iran claimed that while Judge Arangio-Ruiz was not totally inactive, his

45 *Id.*

46 In the course of the challenge, Judge Skubiszewski sadly passed away, though the Appointing Authority continued to decide the challenge against the former President in the absence of agreement between the United States and Iran that the matter was moot. *Id.* at 7, ¶¶ 28–31.

47 *Id.* at 11, ¶ 47.

48 *Id.* at 12, ¶ 54.

49 *Id.* at 14–15, ¶¶ 58–62.

50 *Id.* at 16, ¶ 68.

51 *Id.* at 21–22, ¶¶ 86–87.

overall neglect of his duties constituted a failure to act. The Appointing Authority, Judge Moons, upon review of the evidence concluded on September 24, 1991, that

> Mr. Arangio-Ruiz has not consciously neglected his arbitral duties in such a way that his overall conduct as an arbitrator and chairman of one of the Tribunal's chambers falls clearly below the standard of what may be reasonably expected of an arbitrator in a Tribunal such as the Iran-United States Claims Tribunal.[52]

Most recently, on May 10, 2010, the Iranian government challenged Judge Brower for his allegedly unauthorized interference with the functions of the Appointing Authority in appointing a new third-country arbitrator. At issue was Judge Brower's phone call to prospective candidate Pierre-Marie Dupuy to explain the various aspects of the position. Notably, the call was placed after Judge Haak, the Appointing Authority, had selected Professor Dupuy with the support of both the United States and Iran. Iran alleged that Judge Brower's phone call was inconsistent with the Tribunal Rules, contravened the orders of the Appointing Authority, and was pursued on behalf of the United States. On September 3, 2010, the Appointing Authority dismissed the challenge rather summarily, finding no breach of the appointment procedures and no violation of the standard of impartiality and independence.[53]

4.2 *Challenges by the U.S. Government*

To date, the U.S. government has brought eight challenges, all of which have been against Iranian arbitrators, with the exception of one challenge against Judge Bengt Broms, a third-party arbitrator. In general, the U.S. government appears motivated to bring challenges as a response to what it believes are significant threats to the Tribunal's proper functioning.

4.2.1 Physical Assault on an Arbitrator

The U.S. government brought its first challenge in response to an unprecedented physical assault by two Iranian arbitrators on a third-country arbitrator. On September 3, 1984, Judge Mahmoud Kashani and Judge Shafie Shafeiei, Iranian arbitrators, physically attacked Judge Nils Mangård. In official Tribunal

52 *Decision of the Appointing Authority on the Challenge by Iran of Judge Arangio-Ruiz*, Sept. 24, 1991, *reprinted in* 27 Iran-U.S. C.T.R. 328, 336 (1991-II).

53 *Decision of the Appointing Authority on the Challenge of Judge Charles Brower*, Sept. 3, 2010.

correspondence, Judge Gunnar Lagergren, then President of the Tribunal, described the attack as follows:

> [T]wo members of the Tribunal used physical force on a third member with the intention of ejecting him bodily from the Tribunal premises, and forbade his return under threat of physical harm.[54]

The United States challenged Judges Kashani and Shafeiei on September 17, 1984.[55] The United States argued that the attack by the Iranian judges demonstrated that the Iranian arbitrators were unable to separate their identity with that of Iran and that their repudiation of basic principles of conduct governing international arbitration constituted a failure to act.[56] Iran sought to justify the conduct of Judges Kashani and Shafeiei by alleging that Judge Mangård's voting record "demonstrated his lack of neutrality and his total submissiveness to the wishes of the United States Government and American corporations."[57]

The incident was ultimately resolved without the need for intervention by the Appointing Authority, Judge Moons. Toward the end of 1984, Iran withdrew and, not long after, replaced Judges Kashani and Shafeiei.

4.2.2 Breach of Confidentiality

In the later life of the Tribunal, breaches of the Tribunal's confidentiality rules triggered two challenges by the United States.

On January 4, 2001, the U.S. government challenged Judge Broms because his concurring and dissenting opinion in Case No. A/28 contained revelations

54 Letter from Gunnar Lagergren, Iran-U.S. Claims Tribunal President, to All Arbitrators, Mohammad K. Eshgrah, Agent of Iran, and John R. Crook, Agent of the United States, Sept. 5, 1984, *reprinted in* Caron & Crook, Iran-United States Claims Tribunal, *supra* note 4, at 177.

55 Letter and Memorandum from John R. Crook, Agent of the United States, to Charles Moons, Appointing Authority, Sept. 17, 1984, *reprinted in* 7 Iran-U.S. C.T.R. 289 (1984-III) and Caron & Crook, *supra* note 2, at 184 (initiating the challenge of Judges Kashani and Shafeiei).

56 Letter from John R. Crook to Charles Moons, Sept. 17, 1984, 7 Iran-U.S. C.T.R. 294–301; Caron & Crook, *supra* note 2, at 191–192.

57 Letter from Judges Kashani and Shafeiei, Iranian Arbitrators, to Gunnar Lagergren, Iran-U.S. Claims Tribunal President, Sept. 6, 1984, *reprinted in* 7 Iran-U.S C.T.R. 284 and Caron & Crook, Iran-United States Claims Tribunal, *supra* note 2, at 179.

about the secret deliberations of the Tribunal.[58] The U.S. government argued that Judge Broms's opinion

> intentionally and repeatedly undercut the legitimacy of those portions of the Tribunal's ruling favorable to the United States, demonstrate[d] his favorable disposition towards Iran, and strip[ped] those arbitrators who had voted in favor of the United States from the protections and respect accorded by the requirement of confidentiality of deliberations.[59]

On March 10, 2001, the U.S. government renewed its request for challenge when, according to the United States, Judge Broms's responses to the allegations only "exacerbate[d] his wrongful conduct both by compounding his original disclosures of confidential deliberations and by gratuitously exhibiting anti-American bias in a surprisingly raw manner."[60]

On May 7, 2001, the Appointing Authority, Sir Robert Jennings, dismissed the U.S. government's challenge.[61] While recognizing the serious nature of Judge Broms's breaches of confidentiality, the evidence indicated that they were likely motivated by the arbitrator's inability in the face of successful opposition "to resist the temptation to continue arguing with his colleagues."[62] However, according to Sir Robert Jennings, Judge Broms's comments did not indicate that he was "so beholden in some way to the Iranian Government such that he has lost his independence of thought and action."[63]

In another incident involving a revelation of the Tribunal's confidential deliberations, the United States challenged Judge Oloumi. After replacing Judge Noori as an Iranian arbitrator after the hearing in Case No. B61, a large intergovernmental claim, Judge Oloumi sent a memorandum to the President of the Tribunal, with copies to the government parties, requesting that certain

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58 *See* Memorandum in Support of the Challenge by the United States of Mr. Bengt Broms, Jan. 4, 2001, at 5–6.

59 Letter from Allen S. Weiner, Agent of the United States, to Sir Robert Jennings, Appointing Authority, Jan. 4, 2001, at 1. The U.S. government also argued that the opinion demonstrated that Judge Broms had violated Article 33 of the Tribunal Rules and Article V of the Claims Settlement Declaration because he failed to decide Case No. A/28 on the applicable law.

60 Reply of the United States to the Submission of Iran and Mr. Bengt Broms Concerning the Challenge by the United States of Judge Broms, Mar. 10, 2001, at 1.

61 *See Decision of the Appointing Authority on the Challenge of Judge Broms*, May 7, 2001, *reprinted in* 38 Iran-U.S. C.T.R. 386 (2004–2009).

62 *Id.* at 391.

63 *Id.* at 394.

parts of the hearings in the case be repeated. In the same memorandum, Judge Oloumi asserted that his prior request to postpone the deliberations, once he realized the magnitude of the legal and factual issues to be addressed, was "unexpectedly rejected."[64]

Judge Oloumi's memorandum sparked two related challenges against Judges Skubiszewski and Oloumi. As discussed above, the challenge of Judge Skubiszewski concerned the alleged exclusion of Judge Oloumi from meaningful participation in the deliberations. A follow-on challenge brought by the U.S. government, filed on December 10, 2007, sought to disqualify Judge Oloumi for revealing confidential communications in deliberations regarding the Tribunal's treatment of his request for postponement. The U.S. government argued that the breach

> appear[ed] to be calculated to enable the party that appointed him, Iran, to seek to influence the Tribunal's ongoing deliberations in Case B61 and alter the composition of the Tribunal in the midst of deliberations.[65]

On April 2, 2008, Judge Haak, the Appointing Authority, dismissed both challenges in a joint decision. With respect to the challenge of Judge Oloumi, the Appointing Authority found that, while Judge Oloumi did breach the Tribunal's confidentiality rules, he did not do so in bad faith. Judge Haak ruled that

> [t]he breach is thus not as serious as the United States claims, due to the lack of intention to disclose confidential information and to the vagueness of Judge Oloumi's statements.[66]

4.2.3 Financial Dependence on the Iranian Government

In a significant challenge to the legitimacy of the Iranian arbitrators, on December 21, 2005, the U.S. government challenged all three Iranian arbitrators, Judges Assadollah Noori, Koorosh Ameli, and Mohsen Aghahosseini.[67] The challenge was prompted by a statement made by Judge Noori on December 6, 2005, in a Full Tribunal meeting on the subject of a new Tribunal budget. In that

64 38 Iran-U.S. C.T.R. 421 (2004–2009).

65 *Joint Decision of the Appointing Authority on the Challenges of Judges Skubiszewski and Oloumi*, Apr. 2, 2008, *reprinted in* 38 Iran-U.S. C.T.R. 414, 442 (2004–2009).

66 *Id.* at 443.

67 Letter from Clifton Johnson, Agent of the United States, to Judge W.E. Haak, Appointing Authority, Dec. 21, 2005 (regarding notice of challenge of arbitrators Assadollah Noori, Koorosh H. Ameli, and Mohsen Aghahosseini).

meeting, Judge Noori stated that any increase in arbitrator salaries would not substantially affect the personal situation of the Iranian arbitrators because they remit a portion of their remuneration to the Iranian government. The U.S. government argued that this statement proved that the Iranian arbitrators were financially dependent on the Iranian government, as the government had the power to reward or sanction the conduct of Iranian arbitrators by adjusting the level of income that they were allowed to keep.[68]

Both the Iranian arbitrators and Iran argued that the challenge was untimely because the practice of remitting arbitrator payments was made known to the U.S. government since the early days of the Tribunal. They also argued that the payments in question were not illicit, but rather were made pursuant to Iranian tax law.

On April 19, 2006, the Appointing Authority, Judge Haak, dismissed the U.S. challenge as untimely. His decision was based on two pieces of evidence that he believed demonstrated that the U.S. government had prior knowledge of the Iranian practice: (1) handwritten notes of the Secretary-General from a 1984 budget meeting, according to which a former Iranian arbitrator explained the Iranian practice in the presence of the U.S. Agent; and (2) a 2006 letter from a former Iranian arbitrator stating that a U.S. arbitrator suggested in a 1981 Tribunal meeting, in which the U.S. Agent was present, that the Iranian arbitrators may wish to return the portion of their salaries that Iran found to be objectionable.[69] The Appointing Authority also found that even were the challenge timely, he would have rejected it on the merits because the U.S. government failed to prove that the payments to Iran were anything other than legal contributions, pursuant to Iranian tax law.[70]

4.2.4 Failure to Disclose a Conflict

On April 22, 2010, the U.S. government challenged Judge Seyed Jamal Seifi on the basis of his prior involvement as an arbitrator in an ICC arbitration between Iran and Cubic Corporation, a U.S. corporation. The ICC tribunal rendered its award in 1997. The U.S. government alleged that both Iran's claims in the ICC arbitration and one of its claims in Case No. B61 related to the same sale and installation of military equipment under contracts between Iran and Cubic

68 *Id.* at 1; *see also* Letter from Clifton Johnson, Agent of the United States, to Judge W.E. Haak, Appointing Authority, Feb. 2, 2006, at 7 (regarding the challenge of arbitrators Assadollah Noori, Koorosh H. Ameli, and Mohsen Aghahosseini).

69 *Decision by the Appointing Authority on the Challenge of Judges Noori, Ameli, and Aghahosseini*, Apr. 19, 2006, *reprinted in* 38 Iran-U.S. C.T.R. 406, 410 (2004–2009).

70 *Id.*

Corporation. The U.S. government therefore claimed that Judge Seifi impermissibly failed to disclose his prior participation in the ICC arbitration, which was likely to influence his participation in any future proceedings in Case No. B61.

The Appointing Authority, Judge Haak, dismissed the challenge, finding that Judge Seifi did not have a duty to disclose his prior involvement in the ICC arbitration given the differences in the legal bases of the two proceedings, and that the U.S. government was time barred from bringing the challenge since it had relied upon Judge Seifi's dissent in the ICC arbitration in its 2009 pleadings in Case No. B61.[71]

4.3 *Challenges by U.S. Claimants*

Of the 3845 private claims litigated before the Tribunal, only two challenges were made against Members of the Tribunal by private claimants, both of which were U.S. nationals. The infrequency of challenges by private claimants is perhaps not surprising in light of the largely predetermined conditions under which claimants were allowed to bring their claims. Private claims were assigned to one of the three chambers of the Tribunal, comprised of a third-country arbitrator who served as chair, a U.S. arbitrator, and an Iranian arbitrator who was assumed to never (and in fact never did) vote against his own government.

These conditions were not conducive to raising challenges. Generally speaking, U.S. claimants were content to allow the third-country and U.S. arbitrator to decide the case by majority rule. Moreover, the futility in challenging the Iranian arbitrator was likely immediately evident to U.S. claimants where such a challenge, even if successful, would only bring about the appointment of another unsympathetic Iranian arbitrator, resulting only in unnecessary delays in the proceedings. Nevertheless, challenges by private U.S. claimants were pursued on two occasions, though neither was successful.

In 1990, the U.S. claimant in Case No. 248, *Carlson v. Islamic Republic of Iran*, challenged the participation of Judge Noori, the Iranian arbitrator, who had earlier served as general counsel of the parent corporation of the respondent.[72] The Appointing Authority denied the challenge, concluding that even if

71 *Decision by the Appointing Authority on the Challenge of Judge Seifi*, Sept. 3, 2010.

72 Letter from Claimant in Case No. 248 to Charles Moons, Appointing Authority, Feb. 20, 1990, *reprinted in* 24 Iran-U.S. C.T.R. 309 (1990-I) (initiating the challenge of Judge Noori in Case No. 248).

> his service as Head of the NIOI legal office [the parent corporation of the respondent] and his failure to disclose this to the President of the Tribunal were true, I do not feel this doubt can be termed justifiable doubt.[73]

Judge Moons likely dismissed this circumstance much too readily and, in this sense, his decision may be seen as reflecting the low expectations of impartiality that came to be placed on the Iranian arbitrators.

The next and last challenge by a private U.S. claimant was brought in 2004 against Judge Bengt Broms in connection with Case No. 485, *Frederica Lincoln Riahi v. Islamic Republic of Iran*, the last private claim to be resolved at the Tribunal. Previously, on March 28, 2003, the U.S. claimant had requested that the Tribunal reopen Case No. 485, presided over by Judge Broms, alleging that the award rendered in that case was fundamentally biased and unfair. On July 2, 2003, the claimant reaffirmed her request and asked Judge Broms to recuse himself from any further involvement in the matter because his conduct of the proceedings and exercise of judgment in rendering the award were central issues raised by her application. On January 26, 2004, the U.S. claimant challenged Judge Broms for his continued participation in the claimant's post-award application.

The Appointing Authority, Sir Robert Jennings, rejected the challenge as untimely since the circumstances giving rise to the challenge were set forth in the claimant's July 2003 application, but the challenge was not formally raised until January 2004, well after the fifteen-day time limit had expired.[74] The challenge therefore may be seen as a last grasp at rectifying a perceived wrong in one of the Tribunal's longest and most contentious cases.

5 Conclusion

The Algiers Accords were unique in that they brought sworn enemies together under one roof—that of the Iran-United States Claims Tribunal—for the resolution of billions of dollars in claims, most by U.S. claimants against Iran. The Algiers Accords were successful in transforming an extremely volatile political crisis into a series of smaller, less intense legal disputes to be resolved through

73 *Decision of the Appointing Authority on the Challenge of Judge Noori*, Aug. 31, 1990, *reprinted in* 24 Iran-U.S. C.T.R. 314, 324 (1990-1).

74 *Decision of the Appointing Authority on the Challenge of Judge Broms*, Sept. 30, 2004, *reprinted in* 38 Iran-U.S. C.T.R. 398, 402–405 (2004–2009).

legal reasoning instead of political rhetoric. While the Algiers Accords moved a foreign relations emergency from the world stage to the hearing room, tensions between the United States and Iran naturally persisted. These tensions were reflected in the politics of the Tribunal, including to some extent, in the approach of the parties to challenging Members of the Tribunal.

For most of the Tribunal's life, the Iranian government had little motivation to move efficiently through the work of the Tribunal. The vast majority of claims totaling billions of dollars were against Iran. As part of a strategy to delay proceedings, both the Iranian government and Iranian arbitrators engaged in dilatory tactics. The Iranian arbitrators, for example, were known to refuse to sign awards or absent themselves from deliberations in an attempt to prevent the Tribunal's chambers from completing their work.[75] The Iranian government's multiple challenges against arbitrators serving as President of the Tribunal, and any other third-party or U.S. arbitrator who was viewed as favoring the United States, seemed generally consistent with this goal.

For their part, the U.S. government and U.S. nationals had a vested interest in the Tribunal's continued progress, both from an economic and political perspective. Further, there was little faith that the Iranian arbitrators would conduct themselves in an impartial and independent manner and, thus, little was to be gained by their challenge and possible replacement by another Iranian arbitrator.[76] It is therefore not surprising that there were very few challenges brought by U.S. nationals and that the challenges brought by the U.S. government generally sought to preserve the integrity of the Tribunal's operations. The latter challenges generally addressed arbitrator conduct that was believed to be fundamentally intolerable, such as physical attacks by arbitrators, breaches of confidentiality of deliberations, and financial dependence of arbitrators on the party that appointed them.

The long life and quasi-permanent status of the Tribunal has likely also affected the approach to challenges. Some challenges were one-off events, such as attempts to remove an arbitrator from a particular chamber case. However, many challenges, in particular those brought by the Iranian government, appeared to be part of a broader strategy to influence and even intimidate Tribunal decision-makers. The multiple challenges against Judge Skubiszewski, for example, stand out as targeted harassment designed to sway

75 *See* Caron & Caplan, *supra* note 24, at 278–322 (discussing chapter 6 entitled "Failure to Act, Other Disruptions, and the Replacement of an Arbitrator").

76 *See* John R. Crook, *The Tribunal at Mid-Life: The American Agent's View, in* Caron & Crook, Iran-United States Claims Tribunal, *supra* note 2, at 150 (noting "numerous indications of direct *ex parte* contacts between Iranian respondents and persons inside the Tribunal aimed at influencing the disposition of cases").

the Tribunal President at a time when his position required him to make decisions that were potentially adverse to Iran's interests—for example, making inquiries into whether Iran was required to replenish the security account or moving forward with deliberations in Case No. B61 after Judge Noori refused to participate in them following his resignation from the Tribunal.

Through it all, the challenge process under the Tribunal Rules and the practice of the Appointing Authority have played a role in holding the Tribunal together at the seams. The challenge process itself could not eliminate the climate of distrust that persisted for years at the Tribunal. However, it did create an important channel for airing grievances about the conduct of Members of the Tribunal and a procedure for resolving those grievances by a permanent and neutral arbiter in accordance with legal standards. Thus, like the Algiers Accords themselves, the Tribunal's challenge process helpfully judicialized intractable political differences, subjecting them to legal standards that produced outcomes by which the parties had to abide by, however unhappy they were with the results.

Even if the challenges at the Iran-United States Claims Tribunal were pursued more readily and more aggressively than in other arbitral forums, the practices and decisions that have resulted are still highly instructive as to the scope and nature of the challenge process. By presenting many extreme claims for the Appointing Authority's determination, the parties have tested the challenge process in ways that other arbitral tribunals are likely never to experience. Under these conditions, the Appointing Authority has produced a body of jurisprudence that has examined, interpreted, and shaped the substantive and procedural standards for bringing challenges under the 1976 UNCITRAL Rules with unparalleled attention and care.[77] Further, the Appointing Authority's decisions are publicly available, providing these important insights to the world and undoubtedly influencing the approaches of many international arbitral institutions.

77 *See* Caron & Caplan, *supra* note 24, at 177–274 (addressing the import of these decisions in detail).

Summary of challenges at the Iran-United States claims Tribunal

Challenged Arbitrator(s)	Challenging Party	Date of Challenge	Alleged Circumstances	Outcome
Judge Mangård	Iran	December 28, 1981	Critical statement regarding Iran	Dismissed (Moons): Failure to state reasons for challenge
Judge Kashani Judge Shafeiei	U.S.	September 17, 1984	Physical assault on arbitrator	Iran withdrew judges
Judge Briner	Iran	September 13, 1988	Relationship with claimant's expert witness	Challenged judge withdrew
Judge Briner	Iran	July 28, 1989	Conspiracy with U.S. arbitrator to determine amount of award	Dismissed (Moons): Untimely filed; reliance on confidential evidence
Judge Briner	Iran	September 11, 1989	Violations of foreign exchange laws	Dismissed (Moons): No justifiable doubts
Judge Noori	U.S. Claimant	February 20, 1990	Relationship to respondent	Dismissed (Moons): No justifiable doubts
Judge Arangio-Ruiz	Iran	August 8, 1991	Failure to act	Dismissed (Moons): No neglect of duties
Judge Skubiszewski	Iran	May 20, 1999	Prejudging issue in case	Dismissed (Jennings): No justifiable doubts
Judge Skubiszewski	Iran	June 3, 1999	Denial that Judge directed inquiry into Security Account	Dismissed (Jennings): No justifiable doubts

Challenged Arbitrator(s)	Challenging Party	Date of Challenge	Alleged Circumstances	Outcome
Judge Broms	U.S.	January 4, 2001	Disclosure of secret deliberations	Dismissed (Jennings): No justifiable doubts
Judge Broms	U.S. Claimant	January 26, 2004	Participation in post-award proceedings	Dismissed (Jennings): Untimely filed
Judge Noori Judge Ameli Judge Aghahosseini	U.S.	December 21, 2005	Financial dependence on Iran	Dismissed (Haak): Untimely filed; no justifiable doubts
Judge Skubiszewski	Iran	November 30, 2007	Exclusion of arbitrator from deliberations	Dismissed (Haak): No justifiable doubts
Judge Oloumi	U.S.	December 10, 2007	Disclosure of secret deliberations	Dismissed (Haak): No justifiable doubts
Judge Skubiszewski Judge Arangio-Ruiz	Iran	August 5, 2009	Scheme between arbitrators to revise award	Dismissed (Haak): Untimely filed; no justifiable doubts
Judge Skubiszewski	Iran	February 29, 2008	Negative view of Iran	Dismissed (Haak): No justifiable doubts
Judge Seifi	U.S.	April 22, 2010	Prior involvement in related arbitration	Dismissed (Haak): Untimely filed; no justifiable doubts
Judge Brower	Iran	May 20, 2010	Contact with candidate for third-country arbitrator	Dismissed (Haak): No justifiable doubts

CHAPTER 5

Challenges of Arbitrators, Lessons from the ICC

Loretta Malintoppi and Andrea Carlevaris

1 Introduction: The Procedure for Challenges of Arbitrators in ICC Arbitration

Since its establishment in 1923, the International Court of Arbitration of the International Chamber of Commerce (the "ICC Court" or the "Court") has registered more than 21,000 arbitrations. The Court's caseload has grown steadily, at a faster pace in the last decade. The new cases registered in 1980 were 250; they rose to 365 in 1990 and 541 in 2000; 767 new cases were introduced in 2013, and 791 in 2014. The total number of ICC cases pending at any given time is approximately 1500. This caseload is unparalleled in the universe of arbitral institutions administering international arbitral proceedings.

A significant portion (on average, between 10% and 12%) of parties involved in ICC arbitrations are states and state entities. Most of the cases involving state parties are based on arbitration agreements contained in commercial or state contracts. Thus far, only a minor, but growing, number of these cases oppose a state to an investor on the basis of an international investment instrument listing ICC arbitration as one of the options for dispute resolution available to the parties. As of the end of 2014, the overall number of investor-state arbitrations received by the Court was twenty-three, the majority of which were filed in the last five years.[1] In a few instances, the Court also received a request pursuant to a bilateral investment treaty ("BIT") providing for the President of the ICC Court to act as appointing authority.[2] The ICC Court, with the Secretariat's support, meets once a month in plenary sessions and several times a month in *ad hoc* committee sessions to make a number of decisions on the administration of cases, including decisions which affect the constitution and composition of arbitral tribunals, notably regarding the appointment and confirmation of arbitrators, challenges introduced by the parties, and the replacement of arbitrators on the Court's initiative.

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1 Sixteen of the twenty-three cases were filed between 2009 and 2014, with a record year in 2014, when six such cases were registered.

2 *See, e.g.*, 25(1) ICC Ct. of Arbitration Bull. 1, 10 (2014).

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While the number of challenges or of cases in which the Court considers replacing arbitrators is on the rise, this seems to reflect the overall increase of the number of pending cases and of arbitrators acting in such cases.[3] The number of challenges in proportion to the number of arbitrators confirmed or appointed in ICC cases has not risen significantly over the last fifteen years.[4] A review of the cases shows that multiple challenges are frequently introduced against different members of the tribunal within a given arbitration. Moreover, it is apparent that ICC challenges are rarely successful. For instance, in the course of 2014, sixty challenges were introduced against arbitrators; of these, only five were accepted. In one instance the Court replaced an arbitrator who was prevented *de jure* or *de facto* from fulfilling his functions under the ICC Rules or did not fulfil such functions in accordance with the Rules.

ICC arbitrators must be, and remain throughout the duration of the arbitration, impartial and independent of the parties to the arbitration.[5] Upon nomination, arbitrators are required to sign a statement of acceptance, availability, impartiality, and independence and to disclose in writing

> *any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality*.[6]

The subjective test that applies to independence (i.e., "*independence in the eyes of the parties*") is designed to ensure that the arbitrator makes the fullest disclosure of circumstances which may affect his/her independence, while the test appears to be of an objective nature when it comes to impartiality (i.e., "*circumstances that could give rise to reasonable doubt*").

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3 Forty challenges were filed in ICC cases in 2005. This number rose to sixty-six in 2013 and sixty in 2014. In 2005, the Court had to replace six arbitrators; this rose to forty-six in 2013 and 34 in 2014.

4 Jason Fry, Simon Greenberg & Francesca Mazza, *The Secretariat's Guide to ICC Arbitration* 175 (2012).

5 ICC, Arbitration Rules, art. 11(1) (2012) [hereinafter ICC Rules], *available at* http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Rules-of-arbitration/Download-ICC-Rules-of-Arbitration/ICC-Rules-of-Arbitration-in-several-languages/. Unless expressly stated otherwise, a reference to the ICC Rules in this chapter is intended to be to the 2012 Rules.

6 *Id.* (emphasis added).

It is important to distinguish the above-mentioned test applicable to arbitrators' disclosures from the test applied by the Court when deciding on challenges, which is invariably objective.

If an arbitrator discloses information in the statement of acceptance, availability, impartiality, and independence, the Secretariat invites the parties to comment on the disclosure. The Court attaches considerable weight to any objections raised at this early stage, as this practice may discourage challenges introduced at a later stage of the proceedings.

Pursuant to Article 14(1) of the ICC Rules, a challenge of an arbitrator, whether for an alleged lack of impartiality, independence, or otherwise, is made by the submission to the Secretariat of a written statement specifying the facts and circumstances on which the challenge is based.

The challenge must be introduced within thirty days from the receipt of the notification of the appointment or confirmation by the party making the challenge or within thirty days from the date when it was informed of the facts or circumstances on which the challenge is based.[7] The Court decides on the admissibility and, at the same time, if necessary, on the merits, of a challenge after the Secretariat has received within a suitable period of time written comments from the arbitrator concerned, the other party or parties and any other members of the arbitral tribunal. Such comments, if any, are communicated to the parties and to the arbitrators.[8]

Under Article 15(1), an arbitrator can be replaced upon death, acceptance by the Court of his/her resignation, acceptance by the Court of a challenge, or upon a request by all the parties.[9] Arbitrators can also be replaced by the Court of its own initiative[10] if they are prevented *de jure* or *de facto* from fulfilling their functions under the Rules or are not fulfilling their functions in accordance with the Rules or within the prescribed time limits.

The replacement of an arbitrator under Article 15(2) is a two-step procedure: first, the Court decides whether to initiate replacement proceedings, and second, at a subsequent session, after the Secretariat has received comments from the arbitrator concerned, the parties, and the other members of the arbitral tribunal, the Court makes a final decision on the replacement.

Challenges and replacements under Article 15(2) of the ICC Rules are two separate procedures. Challenges require a party's request, whereas the Court can replace an arbitrator under Article 15(2) on its own motion. However, given

7 *See id.*, art. 14(2).

8 *Id.*, art. 14(3).

9 *Id.*, art. 15(1).

10 *Id.*, art. 15(2).

the open-ended nature of the grounds which can be invoked as a basis of a challenge ("*for an alleged lack of impartiality or independence, or otherwise*")[11] or of a replacement respectively

> (*the arbitrator is prevented* de jure *or* de facto *from fulfilling* [*his or her*] *functions, or that* [*he or she*] *is not fulfilling those functions in accordance with the Rules or within the prescribed time limits*),[12]

the two procedures are often linked. The Court may, in fact, upon rejection of a challenge, decide to initiate replacement proceedings on grounds different from those invoked by the challenging party.

The ICC Court normally decides requests for challenges or replacements of arbitrators in its monthly plenary sessions on the basis of reports prepared by the teams within the Secretariat who are designated to manage the relevant cases under the supervision of the senior management.[13] The report for each case contains essential information about the case and a summary of the factual and legal questions involved in the request for challenge or replacement. While it is customary for the Secretariat's reports to contain a mention of any provisions from the IBA Guidelines on Conflicts of Interests in International Arbitration ("IBA Guidelines") that may provide guidance for a particular case, the experience of the Court shows that these Guidelines do not cover all actual challenges filed under the ICC Rules. Moreover, the IBA Guidelines provide guidance on standards of disclosure, but they contain no hard and fast rules on conflicts of interest. As the IBA Guidelines themselves specify, "*a disclosure does not imply that the disclosed facts are such as to disqualify the arbitrator*" or "*the existence of a conflict of interest*", and disclosure does not even create a presumption in favor of disqualification.[14] In any event, the ICC Court usually attaches greater importance to its own practice and does not rely solely on the IBA Guidelines for its decisions.

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11 *Id.*, art. 14(1) (emphasis added).

12 *Id.*, art. 15(2) (emphasis added).

13 All members of the Court (which, as of January 31, 2015 comprises of 142 members) are invited to attend plenary sessions. However, between thirty and fifty members are generally in attendance.

14 Int'l Bar Assoc., Guidelines on Conflicts of Interest in International Arbitration, Explanation to General Standard 3(a), (c) (2014), http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx (last visited Apr. 00, 2015) (emphasis added).

In addition to the Secretariat's report, when it is invited to decide on challenges and replacements, the Court is also provided with another report prepared by one of its members, who presents his/her analysis concerning the replacement or disqualification request together with recommendations for the decision to be adopted by the Court. The 'rapporteur' presents orally his/her report (a written version of which is also provided to all Court members) and a general discussion follows where Court members who wish to intervene express their views.

Despite this analogy between challenges and replacements, the present chapter only deals with challenges. Given the scope of this book, the chapter focuses on challenges submitted in cases involving state parties (whether states or state-owned entities), in both commercial and investment treaty arbitrations. After a brief discussion in section 2 below on the debate over the confidentiality of the ICC decisions on challenges of arbitrators, section 3 will provide an analysis of selected decisions in arbitrations involving states and state entities during the 2012–2014 period. The cases have been divided under sub-sections according to the subject matter of the challenges; that is, on the basis of the grounds invoked by the party that moved to disqualify the arbitrator for lack of impartiality and/or independence. Some conclusions are drawn in section 4, the final section of this chapter, as to the lessons that can be learned from this recent practice of the ICC Court.

2 The Debate Over the Confidentiality of the Court's Decisions on Challenges

Article 11(4) of the Rules provides that the reasons for the Court's decisions on challenges and replacements are not communicated to the parties.[15] The main rationale of this rule is to reaffirm the administrative nature of the Court's decisions, and to avoid providing the parties with ammunition to oppose those decisions before national courts.

The rule also reflects the intention to avoid any additional delays and possible costs which may be involved in the preparation of a reasoned decision. Moreover, given the nature of the collective process leading to the decision described above, and the different opinions that may be expressed at Court sessions by a large number of members coming from a variety of countries and

15 The same rule applies also to the appointment and confirmation and replacement of arbitrators.

legal cultures, identifying the specific reasons underlying a Court's decision to accept or reject a challenge may be a difficult task.

The principle that the Court does not provide reasons for its decisions has been acknowledged by the French courts in the *Fairplus* case.[16] The Paris court held that the arbitral institution is under no obligation to motivate its decisions on challenges, which are administrative in nature, and added that the failure to communicate the reasons does not amount to a violation of due process and is not otherwise contrary to public policy.[17] Advocates of the opposite view, according to which the decisions should be motivated, emphasize that these decisions are analogous to those made by state courts, which are generally reasoned. Moreover, the argument goes, given the wealth of experience of the ICC Court, the publication of such decisions, which presupposes communication of their reasons to parties and arbitrators, could provide useful guidance in this area and would facilitate the emergence of a body of practice, which in turn may enhance predictability.

One of the consequences of the non-disclosure of the reasons on which the Court's decisions are based is that the Court's practice on challenges of arbitrators goes largely undetected. Proposals were made to modify this provision during the last process of revision of the Rules, but, for the reasons mentioned above, they remained unsuccessful. Periodic reviews of selected decisions are nevertheless published from time to time in the ICC Court Bulletin. Such articles, prepared by members of the Secretariat, provide summaries of the cases and indicate trends in the Court's approach to the issues underlying the challenges or replacements, without giving details as to the reasons justifying individual decisions.[18]

The growing call for greater transparency in investor-state cases, largely caused by the public interests underlying this type of arbitrations, has however prompted an interesting evolution in this respect. In the recent past, the ICC Commission on Arbitration and ADR set up a task force which examined arbitrations involving states or state entities and produced a report in 2012 suggesting that states resorting to investment arbitration under the ICC Rules

16 *See* Tribunal de grande instance [TGI] Paris, Dec. 19, 2012, Fairplus Holding et La Valaisanne c. CCI, Cahiers de l'arbitrage 455, 2013 (Fr.).

17 *Id.*

18 Jason Fry & Simon Greenberg, *The Arbitral Tribunal: Applications of Articles 7–12 of the ICC Rules in Recent Cases*, 20(2) ICC Int'l Ct. of Arbitration Bull. 1, 12 (2009) hereinafter Fry & Greenberg, *Applications*]; Anne Marie Whitesell, *Independence in ICC Arbitration: ICC Court Practice Concerning the Appointment, Confirmation, Challenge and Replacement of Arbitrators*, 18 ICC Int'l Ct of Arbitration Bull., Special Supp. 1, 7 (2007).

and seeking greater transparency, consider derogating from Article 11(4) and include in their BITs, free trade agreements, or domestic legislation the following formula:

> *The Parties agree that the International Court of Arbitration shall communicate the reasons for its decisions on the disputed confirmation, non-confirmation, challenge and replacement of arbitrators, in derogation of Article 11(4) of the ICC Rules of Arbitration.*[19]

While, at the time of writing, the authors are not aware of any instance where this provision has been included in an investment treaty or legislative measure by states, there have been two instances where the parties agreed that the ICC Court provide reasons for challenge decisions. While they involved state parties, these were however not investor-state disputes.

In both cases, the agreement provided communication only to the parties and the arbitrators, and not to the public at large. The parties' agreement that the Court should communicate the reasons for the decision was reached after the submission of the challenge, and was not contained in the arbitration agreement or in another contractual provision entered into prior thereto. Interestingly, in the first of these cases, the respondents, in submitting the challenge and requesting communication of the reasons therefor, alleged that the failure to provide reasons might constitute grounds for challenging the award before the state courts. In both cases, the Court examined the challenges in a plenary session pursuant to the usual practice. The Court then appointed a small committee of its members, which prepared a succinct motivation for communication to the parties and the arbitrators.

As mentioned, the two above-mentioned cases involved state entities, but they were not investor-state cases based on an international investment protection instrument. Therefore, they do not constitute a direct application of the principle reflected in the Commission's Report referred to above. However, by admitting that the parties can jointly request that the Court motivate its decision, the Report confirms that Article 11(4) of the Rules is not among the provisions from which the parties may not derogate. Once the principle of derogation is admitted for investment cases, there seems to be no compelling reason to have a different approach in commercial arbitration.

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19 ICC Commission Report, States, State Entities and ICC Arbitration ¶ 21 (2012). The Report specifies that "[*t*]*he derogation does not extend to appointment decisions: the reasons for appointments should normally be apparent from an appointee's CV*." *Id.*

Therefore, this appears to be an area for potential further development as the fact that the Court may provide reasons for its decisions on challenges upon the parties' joint request may prove attractive to parties who would have otherwise opted for a different system of rules. It is interesting in this regard to recall the challenge filed in July 2007 by the respondent state in the UNCITRAL arbitration *National Grid* v. *Argentina*, where after a first challenge introduced by Argentina against the Chairman of the tribunal was rejected by the ICC Court without providing reasons for the decision, the parties agreed that a second challenge would be submitted to the London Court of International Arbitration ("LCIA"), ostensibly because the reasons of its decision would be reasoned.[20]

3 Analysis on Selected Decisions

Parties to arbitration proceedings challenge arbitrators for a variety of reasons. Some of these reasons are unique to proceedings involving state parties, such as the case in which an arbitrator nominated by a state party has a relationship of dependence, employment or similar connections with the same state.

Other challenges are not peculiar to cases involving states and may equally take place in arbitrations between private parties, such as for instance alleged bias shown by an arbitrator in favor of one of the parties during the proceedings or a conflict of interests involving the arbitrator or the arbitrator's law firm and one of the parties or its counsel.

In all cases, it is important to bear in mind that the decisions of the ICC Court are fact-driven and are generally taken on the basis of the specific circumstances of each case. This makes the identification of consistent trends and principles difficult.

Examples of these and other situations will be examined in turn below. Decisions on challenges in non-ICC arbitrations (primarily ICSID) will sometimes be referred to as an indication of general trends, and to compare the practice to that under the ICC Rules.

3.1 *The Arbitrator's Connection with a State Party*

The arbitrator's connection with a state party can take different forms but it usually concerns the arbitrator's past or current employment or other

20 *National Grid v. Argentina*, UNCITRAL, Decision on Jurisdiction, ¶¶ 11–18 (June 20, 2006) & Award, ¶¶ 37–42 (Nov. 3, 2008).

professional connection with a state or a state entity. In general, the Court's decisions on challenges of arbitrators who were employed in some capacity by a state have depended on the precise nature of the arbitrator's connection with the state seen in the light of the particular factual context. Ordinarily, the Court tends to remove an arbitrator when there is a particularly close and qualified connection with the state party, but it is reluctant to do so when a challenge is based on the mere fact that the proposed arbitrator is, or was in the past, a civil servant and the nominating party was a state or a state-owned entity. Another factor that may be taken into account is the fact that—given the nature of the political and/or economic system of certain countries—it may be hard to identify a suitable candidate who does not have any governmental connections. This consideration has sometimes weighed in favor of rejecting a challenge, in light of the factual circumstances of a particular case.

Typical examples are provided by situations where the Court is invited to consider the independence of an arbitrator who has taught, or held other academic positions at a public university, or was employed by a ministry, by a different branch of the public administration, or by a state entity. In deciding these challenges, the Court looked at objective criteria, such as whether the arbitrator's employer was indeed related to the state, how close the relationship was, and the duration of the relationship.

In one decision, the Court analyzed in detail whether the arbitrator's past teaching activities at a public police academy constituted a valid ground for a challenge, given that the respondent was a ministry of the same state.[21] While it was undisputed that the police academy was a public educational facility affiliated with the state's Ministry of Interior, the final decision on the challenge hinged on whether the Court would find that, given the arbitrator's teaching position, he would qualify as a government officer or an agent of the state.

The Court also considered whether the arbitrator's position could have affected his judgment, and whether the fact that he was teaching at the academy would lie beyond the control of the administration, thus operating on the basis of academic freedom, much like a university. In a number of previous cases the Court had taken the position that the holding of an academic position at a public university of a state party did not provide sufficient ground to uphold a challenge. In this particular case, the Court also took into account that, while publicly funded, the police academy in question was a formally independent entity that was subordinated to a different ministry than the respondent in the case.

21 Case No. 18489.

In those specific circumstances, the Court rejected the challenge, even though the proceedings were still at an early stage and a potential replacement procedure would have been relatively simple and inexpensive for the parties. In making this decision, the Court also took into account the fact that the arbitrator disclosed this information in his *curriculum vitae*.

The Court is traditionally less likely to accept a challenge if the employment relationship between the nominee and the State ceased by the time of the appointment.

For instance, in one case the Court rejected the challenge of a nominee who disclosed that he had been an employee at the Ministry of Foreign Affairs of the state that was a party to the proceedings because the employment relationship had ceased ten years prior to the challenge. In the meantime, the arbitrator was working for a privately owned company with no link to the state.[22] By contrast, the Court decided not to confirm a co-arbitrator who was at the time of the proceedings a judge in the employment of the respondent's state.[23]

In another challenge scenario, the Court had to examine whether an arbitrator's former position as Secretary of a state's ministry created a "direct link" between the arbitrator and the respondent state giving rise to doubts as to the arbitrator's impartiality and independence, as alleged by the claimant.[24]

In reaching its decision, the Court considered that the arbitrator disclosed in his *curriculum vitae* that he had served as a public servant for almost three decades. In addition, the Court also took into account the fact that the arbitrator had held various senior positions at other ministries and had been appointed by the head of the respondent state himself to one of these posts. At the same time, it was also taken into consideration that the arbitrator had no on-going connection with the government, had not been employed as a civil servant for seven years, and was acting as an independent professional at the time of his nomination.

The question was thus whether the nature and length of the arbitrator's past relationship might show dependence on the state on the part of the arbitrator. Eventually, the lack of an on-going link with the government proved to be a decisive element in this challenge, and, in spite of the past high-profile positions that the arbitrator enjoyed within the government, the Court decided to reject the challenge.

By contrast, the Court decided to accept the challenge against a co-arbitrator nominated by a respondent state who had been a Minister of that state and

22 Case No. 13056.

23 Case No. 14874.

24 Case No. 19767.

also held the position of Deputy Prime Minister.[25] The Court considered that, in the particular context of that case, the prominence of these functions, and the fact that the prospective arbitrator repeatedly occupied such functions, were more significant than the fact that he had left politics and other public duties long before the start of the proceedings.

Similarly, the Court accepted a challenge against a co-arbitrator nominated by a respondent state who failed to disclose that he had been personally involved in several aspects of the matter in dispute and who had been the vice-president of an entity that was closely linked to the state party.[26] The Court reached this decision despite the fact that the applicable law allowed members of that entity to act as arbitrators.

While failure to disclose a particular situation does not lead to the automatic disqualification of an arbitrator, the Court may take into account the lack of disclosure in cases where there is an accumulation of circumstances militating in favor of the challenge.

3.2 *Relationships with Other Members of the Tribunal or Counsel*

Certain grounds for challenging arbitrators are not exclusive to arbitrations involving states. A number of requests for challenges of arbitrators are centered on alleged objectionable relationships between the arbitrator and other members of the tribunal or counsel representing one of the parties. In particular, relationships between arbitrators and counsel may be objectionable, and can give rise to successful challenges, when links of financial dependence exist. Arbitrations involving states are no strangers to these types of situations.

However, in general terms and not necessarily within the context of the ICC Rules, this is an area that has also witnessed attempts to challenge arbitrators on the basis of remote connections between them and counsel. To give just one example of an investor-state dispute where this matter arose, in the ICSID arbitration *Alpha* v. *Ukraine*, an arbitrator was challenged because he and counsel for one of the parties were students at Harvard Law School together twenty years previously.[27] Eventually, the two arbitrators deciding the challenge concluded that disclosure of a common educational experience was not necessary. The challenge was thus dismissed by the co-arbitrators for failure to prove facts

25 Case No. 13589.

26 Case No. 14345.

27 *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Decision on Respondent's Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz (Mar. 19, 2010).

that would indicate a manifest lack of impartiality or independence on the part of the arbitrator.

Treaty tribunals have also been requested by parties to decide whether it was proper for counsel to participate in a case. The classical examples are the *Hrvatska Elektropriveda* v. *Slovenia* and *Rompetrol* v. *Romania* arbitrations, both based on the relations between counsel for one of the parties and a member of the arbitral tribunal. Given the circumstances of the first case, the tribunal ruled that a barrister sitting in the same chambers as the president of the tribunal should be excluded from participating in the case.[28] In the second case, *Rompetrol* v. *Romania*, the tribunal specified that the *Hvartska* decision was not a binding precedent and took pains to distinguish it.[29] The tribunal reasoned that the presumed rationale for the challenge was that the choice of counsel may imply an unfair advantage in the case—given his past relationship with a member of the tribunal. In rejecting the challenge, the non-challenged members of the tribunal emphasized the importance of a party's right to be represented by counsel of its choice. In the circumstances, the tribunal found that the association in question took place in the past and therefore there was no reasonable possibility of bias that could justify the exclusion of counsel.

The same problem arose in a number of cases under the ICC Rules, where new counsel joined already pending proceedings. However, in these cases, parties did not contest the appointment of counsel, but challenged a member of the arbitral tribunal on grounds of the conflict of interest allegedly caused by

28 *Hrvatska Elektroprivreda v. Slovenia*, ICSID Case No. ARB/05/24, Tribunal's Ruling Regarding the Participation of David Mildon QC in Further Stages of the Proceedings (May 6, 2008). This case had some rather unique features: i) it was found that the system of the London Chambers was wholly foreign to the claimant, ii) the respondent had decided not to inform the claimant or the tribunal of the barrister's involvement in the case until very late in the proceedings, and iii) the respondent had refused to disclose the scope of the barrister's involvement, even a few days before the hearing on the merits. The tribunal held that "*as a judicial formation governed by public international law*," it had "*an inherent power to take measures to preserve the integrity of its proceedings*," which was grounded on Article 44 of the ICSID Convention. *Id.*, ¶ 33. On that basis, faced with the choice between the Chairman's resignation and the exclusion of counsel, the tribunal found that it was "*both necessary and appropriate to take action under its inherent power*" and directed counsel to cease to participate in the proceedings. *Id.*

29 *Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility (Apr. 18, 2008). *Rompetrol* was not a case involving barristers from the same chambers but one based on a prior association between counsel for a party and a member of the tribunal.

such appointment. To protect the integrity of the proceedings and avoid surprises, ICC arbitrators frequently include in the terms of reference limits to the parties' powers to appoint counsel, for instance by imposing specific time limits for doing so.

In other cases, the Court had to deal with challenges based on the allegedly close relationship between two co-arbitrators. In one instance, the claimant found it objectionable that the two members of the tribunal co-authored a university textbook on international law and that one of them answered a letter written by the challenged arbitrator in an "*unusually personal tone*".[30] In rejecting the challenge, the Court noted that the arbitrators in question had worked on separate chapters of the book, at different points in time and in different locations. The Court also noted that the letter which formed one of the grounds for the challenge did not indicate a particular closeness between the arbitrators but, rather, it used a relatively standard professional tone.

3.3 *Repeat Appointments*

A typical and increasingly frequent situation is that of so-called "repeat appointments" of arbitrators, i.e., situations where the same individual is appointed by the same party—or by the same counsel representing different parties—in several cases.[31] It is usually argued by the challenging parties in those cases that the potential threat to the arbitrator's independence and impartiality is two-pronged: first, the fact that the same arbitrator is repeatedly appointed by the same party or counsel may lead to procedural inequalities because the arbitrator may be privy to information that the other members of the tribunal do not have. Second, and more importantly, this kind of situation may also indicate a close connection between the same individuals—or between the arbitrator and a particular party—and suggest the existence of potential bias as the arbitrator may be more inclined to rule in favour of the party to whom he/she "owes" the repeat appointments. In extreme cases, it may be argued that the arbitrator in question owes a significant part of its revenues to the party or counsel appointing him/her, or even that he/she is in a relationship of economic dependence with that party or counsel.

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30 Case No. 18257.

31 *See, e.g., Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Decision on Disqualification of an Arbitrator (Apr. 26, 2008); *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Disqualification of an Arbitrator (Feb. 25, 2008); *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, UNCITRAL, Partial Award on Jurisdiction (Feb. 27, 2004).

The IBA Guidelines adopt a rigorous view with regard to this matter: appointment, within the past three years, on two or more occasions by one of the parties, or by an affiliate of one of the parties, or on more than three occasions by the same counsel, or the same law firm, constitute an "Orange List" circumstance requiring disclosure and constituting a possible ground for challenge.[32] This approach has been criticized as being too "*mechanical*" and offering a basis for "*arbitrary, often random disqualification*".[33]

An example of challenges arising from repeat appointments in the investor-state context is offered by the decision on the claimant's proposal to disqualify an arbitrator rendered by the non-challenged arbitrators on 23 December 2010 in the ICSID case *Tidewater* v. *Venezuela*.[34]

In that case, the claimant sought to disqualify an arbitrator who had not disclosed prior appointments by the party that nominated her, Venezuela, and by the law firm representing Venezuela. This case also touched on the question of whether publicly known information should be disclosed. In the challenged arbitrator's view, information in the public domain, such as the composition of ICSID tribunals, does not need to be disclosed. The two members disagreed with that position. They held that arbitrators should disclose appointments made by the same party (or an affiliate) since not all these appointments are necessarily in the public domain. In particular, they noted that: "*in considering the scope of her duty of disclosure, the arbitrator may not count on the due diligence of the parties' counsel*" and stated that the arbitrators are in the best position to assess whether any information that might be relevant for conflicts purposes should be disclosed.[35] Nevertheless, in recognition of the fact that the composition of tribunals is made public and is readily accessible in the ICSID system, the two members of the tribunal stressed that any disclosure in this regard should be made "*out of an abundance of caution*", presumably in order to avoid any appearance of impropriety.[36] Interestingly, they also restricted the time frame of the disclosure to three years prior to the appointment, i.e. the same time limit advocated in the IBA Guidelines.

It is also noteworthy that the unchallenged arbitrators in *Tidewater* emphasized two points: i) that repeat appointments should not automatically be read as "*an indication of justifiable doubts about*" an arbitrator's independence and

32 IBA Guidelines, *supra* note 14, ¶¶ 3.1.3, 3.3.8.

33 Gary Born, *International Commercial Arbitration* 1882–1993 (2014).

34 *Tidewater, Inc. et al., v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/05, Decision on Claimant's Proposal to Disqualify Professor Brigitte Stern, Arbitrator (Dec. 23, 2010).

35 *Id.*, ¶ 51.

36 *Id.*, ¶ 54.

impartiality, but they may in fact be a consequence of the arbitrator's independence and impartiality,[37] and ii) that an arbitrator should not necessarily be disqualified because he/she "*was exposed to similar legal or factual issues in concurrent or consecutive arbitrations*." The two members agreed with previous rulings that, if such disqualification requests were automatically to be accepted, "*investment and commercial arbitration would become unworkable*."[38]

Coming back to the ICC system, repeat appointments are not uncommon and they are not limited to arbitrations involving state parties. Not infrequently, the problem arises at the confirmation stage.

In one case, the Court did not confirm a prospective arbitrator who had acted in five cases in which the claimant was a party (in three cases, as co-arbitrator upon nomination of that party and in the remaining two as chair of the arbitral tribunal upon the joint nomination of the co-arbitrators). The Court considered the relatively small pool of potential arbitrators in the claimant's country, but it also took into account that one of the cases involving the same claimant was still pending.[39]

In another case, the respondent first objected to the confirmation of an arbitrator, and then challenged him on grounds that he had already been appointed by the same party in two related cases between the same parties.[40] In rejecting both the objection to the confirmation and the challenge, the Court noted that the respondent had itself nominated the same arbitrator in the related cases, and that the objection was based mainly on the arbitrator's alleged biased conduct in the related cases, rather than on the multiple appointments.

The Court also faced a situation in another case where the claimant challenged an arbitrator who had been nominated as a co-arbitrator in another unrelated case by the same counsel.[41] Even though the arbitrator spontaneously disclosed his appointment in the other case, the claimant objected to the timing of the disclosure and alleged that the arbitrator breached Article 7(3) of the 1998 Rules by disclosing this circumstance five months after his appointment. The claimant's main argument was that the arbitrator received from the respondent's counsel an indirect economic profit as a consequence of his nomination and would therefore be biased in favor of such counsel and the party he represented.

37 *Id.*, ¶ 61.

38 *Id.*, ¶ 68.

39 Fry & Greenberg, *Applications, supra* note 18, at 20.

40 Case No. 18257.

41 Case No. 16232.

The Court rejected the challenge on the assumption that the arbitrator had not been nominated by the respondent's counsel, but by the party he represented, and the arbitrator's fees would be fixed by the Court and paid out of the advance on costs which were incurred by the parties in equal shares. In addition, although multiple appointments of an arbitrator by the same law firm could potentially create an economic relationship and give rise to conflicts of interests, in this specific instance there had been only one nomination by the same counsel.

In rejecting the challenge, the Court took account of the claimant's argument that a stricter standard is allegedly applicable when all members of the arbitral tribunal are to be appointed by the Court, as provided in this case by the arbitration agreement. Such distinction is not decisive in light of the general duty to be impartial and independent (Article 7(1) of the 1998 ICC Rules), which is applicable to every arbitrator regardless of the appointment process. Therefore, the standards of independence or impartiality remain the same and ought to be subject to the same analysis when an arbitrator is nominated by the parties and when he or she is appointed by the Court.

3.4 *The Arbitrator's Relationship with Parties Adverse to the State*

In some cases, arbitrators have been challenged, not on the basis of an alleged relationship with the state itself, but on the basis of professional relationships with parties adverse to the state in unrelated matters. In this respect, the challenging party may rely on the arbitrator's lack of impartiality, or on the privileged access to information not available to the other members of the arbitral tribunal.

In one instance, the Court accepted a challenge based, among other grounds, on the fact that the arbitrator's firm had advertised its repeated representation of private companies against the respondent state and its acquired extensive knowledge of "*market practice and government dynamics*" in the economic sector to which the dispute pertained.[42] The Court upheld the challenge in the light of the overall factual background of this case, in which the challenging party also invoked an issue conflict and the alleged relationship between the arbitrator's firm and counsel for the claimant. The Court also considered that the proceedings were still at an early stage.

The possibility that an "*arbitrator's law firm is currently acting adversely to one of the parties, or an affiliate of one of the parties*" is listed in the "Orange List" ("*situations that, depending on the facts of a given case, may . . . give rise to doubts*

42 Case No. 18294.

as to the arbitrator's impartiality or independence") of the IBA Guidelines.[43] However, this does not mean that the fact of providing legal services to parties acting against a state, or of failing to disclose such circumstance, can in itself be considered as a valid ground for challenge, in the absence of additional elements.

3.5 *Issues Relating to the Nationality of the Arbitrator*

Arbitration rules generally contain specific nationality requirements aimed to preserve the arbitrators' neutrality and the ICC Rules are no exception. Pursuant to Article 13(5), "[t]*he sole arbitrator or president of the arbitral tribunal shall be of a nationality other than those of the parties*."[44] Given the mandatory character of this provision, failure to respect these requirements may constitute the basis of a challenge. However, the practice of the Court shows that, even in cases where the requirements of Article 13(5) are respected, the nationality of an arbitrator may be invoked as a ground for challenge. This applies equally in arbitrations involving states and in arbitral proceedings between private parties. However, specific problems may arise in proceedings involving a state party.

An interesting example is provided by a case where the Court was asked to decide the challenge of an arbitrator based on the fact that the state of his nationality enacted sanctions against the state party's entities. The challenge was rejected.[45] The Court considered that this circumstance was in itself insufficient to uphold a challenge, and noted that the arbitrator had shown no sign of bias against the state party during the conduct of the proceedings. This decision is consistent with other cases (not involving states), where the Court rejected challenges brought against an arbitrator invoking bias on the basis of his/her nationality.[46]

3.6 *Bias Allegedly Shown During the Conduct of the Proceedings*

It is not uncommon for parties to raise objections to the impartiality of members of tribunals in the light of their conduct during the arbitral proceedings. Although these cases are not unique to arbitrations involving state parties, some examples are discussed below to the extent that they present element of interest.

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43 IBA Guidelines, *supra* note 14, ¶ 3.4.1.

44 ICC Rules, *supra* note 5, art. 13(5).

45 Case No. 17720.

46 Cases Nos. 12923; 15851; 10681; 15355.

In general terms, proving clear bias or lack of independence of an arbitrator following his or her behavior during the arbitral proceedings is a tall order.

Challenges concerning an arbitrator's questioning style during a hearing are rarely successful. In one case, a party argued that an arbitrator showed bias because he asked questions aimed at assisting the case of the party that appointed him, rather than merely seeking to clarify some issues.[47]

On the basis of the hearing transcript, on which the entire challenge was based, the Court considered that there was no appearance of bias and rejected the challenge. For the Court, the arbitrator's questions—as reflected in the transcript—were not made in a badgering manner, they did not appear to be unreasonable and were not isolated, as the other members of the tribunal also asked questions. Finally, given that the challenge in this case had been made at a rather late stage of the proceedings, just before the scheduled final hearing, a replacement of the challenged arbitrator would have caused unwarranted disruption to the proceedings.

As a general rule, the Court rarely accepts challenges based on a lack of impartiality due to an arbitrator's alleged improper or unfair conduct of the proceedings when such a challenge was based on procedural decisions or directions issued by the arbitrator.[48]

3.7 *Failure to Conduct the Proceedings in Accordance with the Rules*

Challenges where arbitrators are blamed for the alleged failure to conduct the proceedings in accordance with the ICC Rules, for inefficient management of the proceedings, or for delays incurred in the procedure, are usually dismissed by the Court. This is notably the case of challenges based on the failure to timely establish the terms of reference and the provisional timetable, to render a final award in a timely fashion, to establish the facts of the case as soon as possible, or to timely decide on the arbitral tribunal's jurisdiction.

In one instance, even though the Secretariat had to send reminders to the chairman inquiring about the status of the case, the Court found that, in the circumstances of that case, the delays did not *per se* provide sufficient reason to uphold the challenge.[49] The Court noted, *inter alia*, that according to Article 24(2) of the 1998 Rules, the Court might extend the time limit "*on its own initiative*" and this had happened in this case.[50] The extension of the time limit

47 Case No. 18968.

48 "*Challenges based purely on an arbitrator's procedural decision have very rarely succeeded.*" Fry, Greenberg & Mazza, *supra* note 4, at 172.

49 Case No. 18257.

50 *Id.*

is within the Court's discretion and thus it is generally not a proper ground for a challenge against members of arbitral tribunals.

In one case, the arbitral tribunal communicated the draft final award to the parties before submitting it to the Court.[51] The claimant party challenged all the members of the arbitral tribunal arguing that their conduct breached Article 27 of the 1998 Rules, requiring arbitrators to submit draft awards to the ICC Court for scrutiny, and providing that no award can be notified to the parties until it has been approved by the Court.[52] Despite the serious breach of the Rules, the Court rejected the challenge. It considered that the replacement of the arbitrators would not have remedied the breach, and would have been perceived as unfair to the winning party. Moreover, the need to reconstitute the arbitral tribunal would have resulted in a significant delay in the notification of the award to the parties.

In another case, the Court rejected the respondent party's challenge, which was based on the tribunal's alleged violation of Article 29 of the Rules and the tribunal's decision not to correct or interpret the award.[53]

Whilst the Court may be reluctant to accept a challenge based on the arbitrator's procedural conduct, the challenge has sometimes been an opportunity for the Court to examine such conduct in light of its powers to replace arbitrators *ex officio*. In this respect, the Court does not shy away from replacing arbitrators if substantial procedural delays are incurred.

In one instance, delays in preparing the terms of reference combined with delays in responding to the parties and to the Secretariat were found to be excessive and recurrent.[54] There was not a single communication from the tribunal to the parties for almost three months after the transmission of the file to the tribunal and more than eight months after the start of the proceedings. Nearly three weeks passed between the claimant's request for an update about the status of the matter and the chairman's response. Further, four months after the file had been transmitted to the arbitral tribunal, the terms of reference had not yet been finalized.

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51 Case No. 11380.

52 Article 33 of the 2012 Rules states:

> "*Before signing any award, the arbitral tribunal shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the award, and, without affecting the arbitral tribunal's liberty of decision, may also draw its attention to points of substance. No award shall be rendered by the arbitral tribunal until it has been approved by the Court as to its form.*"
>
> ICC RULES, *supra* note 5, art. 33.

53 Case No. 12994.

54 Case No. 18275.

In the Court's view, the chairman's slow response to the parties and to the Secretariat and his failure to copy the Secretariat in his correspondence to the parties suggested that his management of the case was unlikely to improve in the future. In light of these circumstances, and given that the case was still at an early stage, while rejecting the challenge based on an alleged lack of impartiality, the Court decided to proceed with the arbitrator's replacement since this would be less disruptive to the proceedings.

3.8 *Alleged Violations of Due Process or of the Rules*

As discussed in section 3.6 above, the ICC Court is generally reluctant to accept challenge requests based on the arbitrators' procedural decisions, except in cases where the conduct of the arbitrator was manifestly improper or constituted a serious violation of the principles of due process or the ICC Rules. Challenges based purely on procedural decisions very rarely succeed as it is not the Court's role to pass judgment on the conduct of arbitral proceedings or to second guess the procedural decisions made by arbitrators, who enjoy a greater appreciation than the Court of the relevant circumstances of a particular case.

In this connection, it is interesting to note that the Court usually rejects challenges concerning tribunals' decisions on bifurcation or procedural orders. Indeed, a tribunal enjoys a broad discretionary power to administer the proceedings as it deems fit.

In taking decisions regarding the propriety of a tribunal's conduct of arbitral proceedings, the Court would normally verify that the parties were treated equally and had the opportunity to present their case and that the tribunal's decisions were balanced and reasoned.

For instance, in one case the Court examined a challenge based on the allegation that it was improper for a sole arbitrator to: (i) apply the IBA Rules on the Taking of Evidence in International Arbitration to the proceedings, and, on the basis of these Rules, (ii) to order the production of documents after the phase of written submissions; and (iii) to freely decide on procedural questions regarding the translation of documents. In rejecting the challenge, the Court took into account that the sole arbitrator had given the respondent state an opportunity to submit its arguments opposing the abovementioned procedural decisions.[55]

The Court has, on other occasions, rejected challenges based on a number of different procedural measures: procedural orders drawing adverse inferences on the merits from one of the parties' refusal to enforce a partial award; decisions

55 Case No. 17841.

regarding document production (allegedly showing bias or prejudgment in favor of one of the parties); and decisions allegedly failing to provide the parties with a reasonable opportunity to present their cases due to short deadlines. The Court's decisions in these cases normally hinged on whether there were disadvantages for one party in particular, thus violating the principle of equal treatment of the parties, or on whether the decisions went outside the scope of the tribunal's mandate.

3.9 *Conflicting Issues or Prejudgment of Issues*

In some cases, the Court may be called upon to decide whether an arbitrator's impartiality or independence may be affected by the fact that the arbitrator sits on another tribunal and is likely to decide similar legal issues arising from similar sets of facts in the two cases. This situation is particularly interesting in cases involving states and is not uncommon in investor-state disputes.

An example concerned a challenge based on the allegation that an arbitrator sitting at the same time on two tribunals in cases where the disputes arose from similar facts and legal issues and concerned the hydrocarbon industry in the same country might have prejudged the case. Even though both arbitrations concerned the same industry and the same country, the Court noted that they dealt with the supply of natural gas to two different countries and that the contracts underlying the two disputes were not the same and were not part of the same economic transaction. The Court observed that the same legal issue (i.e., the existence of restrictions and taxes on the exportation of natural gas from the country in question) was at stake in the two cases. The challenge was rejected on the assumption that an arbitrator is not automatically disqualified as a consequence of his relationship with the legal issues of a case ("issue conflict").[56] Moreover, in the case at hand there was no risk of prejudgment as the arbitral tribunal had already rendered a partial award on liability dealing *inter alia* with the legal issue common to the two cases.

In the case in question, the challenged arbitrator had failed to disclose the above-mentioned facts in a timely manner. Although failure to disclose a particular situation by an arbitrator does not in itself lead to the arbitrator's automatic disqualification, lack of disclosure can nevertheless be taken into account as an element in favor of accepting a challenge in situations where the arbitrator failed to disclose important circumstances. Moreover, repeated non-disclosures by an arbitrator could indeed call into question his or her

56 Case No. 16232; *see* Fry, Greenberg & Mazza, *supra* note 4, at 172; Fernando Mantilla-Serrano, *L'indépendance d'esprit de l'arbitre* (*ou le issue conflict*), *in* Liber Amicorum en L'Honneur de Serge Lazareff 441 (2011).

independence in the eyes of the parties. In this instance, in spite of the non-timely disclosure, the Court decided that the facts of the case did not warrant the acceptance of the challenge.

It is interesting that the ICC Court's practice on arbitrators' challenges rarely shows instances of "issue conflicts" *stricto sensu*, which are frequent in investment arbitration, i.e. challenges made when the prospective arbitrator is also involved as counsel and advocate in another pending case involving related legal issues. The rationale of a challenge in these circumstances is that, to the extent that a nominated arbitrator acts as counsel in a dispute that involves similar or the same legal questions and adopts in that context certain positions regarding those issues, he/she may not be able to maintain an unbiased approach in the case where he or she is called to act as an arbitrator.[57]

Another situation often giving rise to challenges based on the prejudgment of issues by an arbitrator concerns the publication of academic writings. In one instance, the Court dealt with a challenge based on an article regarding a pending case at the Supreme Court of the respondent state.[58] While the arbitrator did not himself write the article, it was published by the arbitrator's law firm and no specific authors were mentioned by name. The Court noted that the Supreme Court case was wholly separate from the arbitration proceedings but that the article commented on certain positions that the respondent state had either taken or was expected to take in that particular case. Given that the respondent state had not made any jurisdictional objections, it remained unclear whether and how the issues discussed in the article would affect the proceedings.

In light of this and other circumstances (for example, the fact that the arbitrator's law firm regularly represented private parties in the country and economic sector in question, and had acquired an in-depth knowledge of the government's practice), the Court accepted the challenge.

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57 *See, e.g.*, *Eureko B.V. v. Republic of Poland*, Judgment of the Court of First Instance of Brussels, Challenge to Arbitrator, R.G. 2006/1542/A (Dec. 22, 2006), *available at* http://www.italaw.com/cases/documents/416; *Telekom Malaysia Berhard v. Republic of Ghana* ("TMB/Ghana"), Dist. Ct. of The Hague, Challenge 13/2004, Petition No. HA/RK 2004.667 (Oct. 18, 2004), Challenge 17/2004, Petition No. HA/RK/2004/778 (Nov. 5, 2004), *available at* www.transnational-dispute-management.com (unofficial English translation); *see* Audley Sheppard, *Arbitrator Independence in ICSID Arbitration, in* International Investment Law for the 21st Century, Essays in Honor of Christoph Schreuer 131–156 (Christina Binder et al., eds., Oxford Univ. Press 2009); Loretta Malintoppi, *Independence, Impartiality and Duty of Disclosure in Investment Arbitration, in* Oxford Handbook of International Investment Law 789–829 (Peter Muchlinski et al., eds., Oxford Univ. Press 2008).

58 Case No. 18294.

The case of academic opinions provided by arbitrators which arguably show preconceived positions with regard to some of the central issues of an arbitration is not uncommon in investor-state disputes. An example of this kind of challenge is provided by the *Urbaser* v. *Argentina* ICSID arbitration, where the claimant argued that the views expressed by the arbitrator in certain publications on the legal question of the state of necessity and on the most-favored nation clause showed a preference or partiality for the position that Argentina would most likely have taken in the case.[59] For the claimant in this case, the arbitrator's views were more than the expression of mere doctrinal opinions because they allegedly showed that he had already "*prejudged an essential element*" of the dispute.[60] However, the two unchallenged members of the tribunal who decided on the disqualification request disagreed with the claimant's position and rejected the challenge. In their view, the arbitrator's publications did

> *not meet the threshold of presenting an appearance that he is not prepared to hear and consider each party's position with full independence and impartiality*.[61]

4 Conclusion

This *tour d'horizon* of the ICC Court's practice in addressing and deciding challenges of arbitrators in cases involving states shows that the types of challenges introduced before the Court do not greatly differ from those underlying disputes between private commercial parties. Indeed, the majority of challenge scenarios that the ICC Court is confronted with are not unique to arbitrations involving state parties but equally occur in the case of ordinary disputes between private litigants.

A notable exception is represented by cases where the challenged arbitrators are civil servants or have a close connection with the state party or governmental entity that designated them. In those cases, the Court does not usually hesitate to accept challenges, even when circumstances in a given country restrict the pool of suitable candidates without any governmental connections.

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59 *Urbaser S.A. & Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan, Arbitrator, (Aug. 12, 2010).

60 *Id.*, ¶ 23.

61 *Id.*, ¶ 58.

In cases where the relationship between the arbitrator and the state is continuous and significant, a degree of dependence may be found and a challenge upheld, depending on the factual background of each given case.

As far as the procedural regime of challenges is concerned, an analysis of the ICC Court's practice confirms the widespread claim for increased transparency in arbitrations involving states and state entities, including in treaty-based disputes. The abovementioned Report of the ICC Commission, which gives effect to the possible consent of the parties on the communication of reasons for decisions on challenges in investor-state arbitrations, and the first two cases involving public entities where such consent was expressed, are clear indications to this effect. Future practice will show whether these developments also represent a first step towards moving away from a traditional feature of ICC arbitration.

CHAPTER 6

Selection and Recusal in the WTO Dispute Settlement System

Gregory J. Spak and Ron Kendler

1 Introduction

This chapter explores the process and frequency of recusal in World Trade Organization ("WTO") dispute settlement, which has been rare in the WTO's twenty-year history.

The chapter begins by briefly describing the history of the WTO dispute settlement mechanism and then turns to the details of adjudicator selection in the WTO. It then discusses the procedural rules governing ethical conflicts and recusals in the WTO, as well as the few instances of such recusal. The chapter concludes by proposing reasons as to why challenges and recusals are so rare in the WTO system.

2 Background: The WTO Dispute Settlement Mechanism

The selection and recusal procedures of the WTO system reflect the characteristics of the system itself. The WTO was established in 1995 as the successor organization to the General Agreement on Tariffs and Trade ("GATT"), a treaty-based institution that liberalized its signatories' tariffs through several negotiating 'rounds.' As both the mandate and the membership of the GATT grew, the eighth such round, the Uruguay Round (1986–1994) replaced it with the WTO.[1]

One of the key achievements of the Uruguay Round was the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU")—the

1 A more complete, but still brief, description of the WTO's evolution from the GATT and the emergence of the WTO Dispute Settlement system can be found in Gregory Spak & Gisele Kapterian, *Courts and Tribunals of Specialized Jurisdiction: The World Trade Organization, in* The Rules, Practice, and Jurisprudence of International Courts and Tribunals, (Giorgetti ed., 2012).

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WTO Agreement that governs the process for resolving trade disputes between WTO Members. The DSU was a direct response to perceived weakness of the GATT dispute settlement system, which due to its reliance on diplomatic resolution and adoption of results by consensus, was widely criticized as being ineffective.[2] The DSU, in turn, instituted a more rigorous and rules-oriented procedure.

Following a mandatory consultation period, the DSU enables WTO Members to litigate trade disputes in two stages. First, they do so before a WTO panel, an *ad hoc* body of three panelists who adjudicate the dispute.[3] Their report is binding unless a party appeals the decision prior to formal adoption.[4] Second, if a party appeals, then the dispute goes to the WTO Appellate Body, a standing institution with seven members, any three of which hear the appeal in a given dispute. The appeal is limited to issues of law covered in the panel report and legal interpretations developed by the panel.[5] The Appellate Body report, once adopted by the DSB, is final and binding on the parties.[6]

3 Selection

The process of choosing panelist and Appellate Body members has an impact on the frequency of recusals. As reviewed below, the selection process allows the parties to resolve or avoid potential concerns, making recusals or objections less necessary.

2 *See, e.g.*, William J. Davey, *Dispute Settlement in GATT*, 11 Fordham Int'l L.J. 51, 61–62 (1987).

3 "Panels shall be composed of three panelists unless the parties to the dispute agree, within 10 days from the establishment of the panel, to a panel composed of five panelists." Understanding on Rules and Procedures Governing the Settlement of Disputes Art. 8.5, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU]. However, there has never been a panel composed of five panelists.

4 The Dispute Settlement Body ("DSB") must adopt a panel report within sixty days of its circulation, unless it is appealed or "the DSB decides by consensus not to adopt its report." *Id.*, Art. 16.4. The DSB adopts the panel report virtually automatically under the so-called "negative consensus" rule.

5 *Id.*, Art. 17.6.

6 As with panel reports, the DSB will adopt Appellate Body reports unless it decides by consensus not to; however, it must do so within thirty days of publication. *Id.*, Art. 17.14. The DSB adopts the Appellate Body report virtually automatically.

3.1 *Panels*

The DSU first requires parties to attempt a negotiated resolution to their dispute through the process of "consultations."[7] In the event that parties fail to reach a negotiated resolution, they can request a panel which the Dispute Settlement Body ("DSB") establishes.[8] Once the panel is established, panelists are selected.

Article 8 of DSU provides the rules for selecting panelists. Panels must be "composed of well-qualified governmental or non-governmental individuals" with demonstrated international trade law or policy experience.[9] To this end, the DSU requires the WTO Secretariat to maintain an "indicative list" of such individuals "from which panelists may be drawn as appropriate."[10] However, an individual need not be on the indicative list in order to be considered. A panelist may not be a citizen of either a disputing or third party[11] member "unless parties to the dispute agree otherwise."[12] Parties have often allowed, on a case-by-case basis, non-governmental panelists from third parties to the particular dispute. Third parties have no role in the panelist selection process.

Panelists are required to serve in their individual capacities, and WTO members are prohibited from instructing or otherwise seeking to influence them in the context of a dispute.[13] If a developing country is party to a dispute, the panel must, upon the request of that developing country, "include at least one panelist from a developing country Member."[14]

Although parties are required to oppose individual panelists only for "compelling reasons,"[15] they frequently raise objections or simply indicate that a particular candidate is not acceptable. Detailed justifications of the rejection

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7 *Id.*, Art. 4.

8 *Id.*, Art. 6.

9 *Id.*, Art. 8.1. Specifically, "including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member." *Id.*

10 *Id.*, Art. 8.4.

11 The DSU enables "[a]ny Member having a substantial interest in a matter before a panel" to participate in the proceedings through oral and written submissions, which the panel and/or Appellate Body may take into consideration in the course of the dispute; the DSU refers to such countries as "third parties" in a dispute. *Id.*, Art. 10.2.

12 *Id.*, Art. 8.3.

13 *Id.*, Art. 8.9.

14 *Id.*, Art. 8.10.

15 *Id.*, Art. 8.6.

are not required, and rejection simply leads the Secretariat to propose alternative panelists. As a result, the process at times is lengthy and difficult. In the event that parties cannot agree on panelists within twenty days of a panel's establishment, either party may request the WTO Director-General to appoint panelists, which he must do within ten days of the request.[16] In the last decade, more than half of the panels composed in any given year were done so by the Director-General.[17] In some instances, the parties will agree on one or two panelists, and then ask the Director-General to appoint the panel.

3.2 *The Appellate Body*

The appeal is governed by the DSU and the Appellate Body's *Working Procedures for Appellate Review* ("Appellate Body Working Procedures" or "Working Procedures").[18] Composition of the seven-person Appellate Body is governed by Article 17.3 of the DSU:

> The Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government. The Appellate Body membership shall be broadly representative of membership in the WTO. . . . They shall not participate in

16 *Id.*, Art. 8.7 ("If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate. . . ."). In one notable example, however, then-WTO Director-General Pascal Lamy refused to name the panelists in the dispute between the United States and the European Union ("EU") over subsidization of their commercial aircraft, in light of his prior service as EU Trade Commissioner; he assigned a Deputy Director-General to compose the panel in his stead. Alan Beattie, *Lamy Waives Right to Name WTO Panel*, Fin. Times (Oct. 8, 2005), http://www.ft.com/cms/s/0/d79abca8-3797-11da-af40-00000e2511c8.html#axzz3O96uHcR6.

17 The number of panels composed by the Director-General out of the total number of panels for every given year in the past decade were as follows: 2004 (8 out of 13); 2005 (7 out of 7); 2006 (6 out of 9); 2008 (2 out of 3); 2009 (6 out of 8); 2010 (7 out of 9); 2011 (3 out of 5); 2012 (5 out of 6) and 2013 (9 out of 11). Jonathan T. Fried, *2013 in WTO Dispute Settlement*, World Trade Org., http://www.wto.org/english/tratop_e/dispu_e/jfried_13_e.htm (last visited Apr. 00, 2015).

18 Appellate Body Report, *Working Procedures for Appellate Review*, WT/AB/WP/6 (Aug. 16, 2010) [hereinafter Appellate Body Working Procedures]. The Appellate Body Working Procedures were first issued in February 1996, and have been revised five times since their publication, most recently in 2010. *Id.*, Annex III.

> the consideration of any disputes that would create a direct or indirect conflict of interest.[19]

Under the Appellate Body Working Procedures, the three-member group that hears an appeal is known as a "division."[20] The key requirement is in Rule 6(2) of the Working Procedures, under which the division must

> be selected on the basis of rotation, while taking into account the principles of random selection, unpredictability and opportunity for all Members to serve regardless of their national origin.[21]

Rule 6(2) highlights two key points: first, unlike panels, there is no requirement that an adjudicator who is also a national of either disputing party be prohibited from hearing the case. Indeed, the limited number of Appellate Body members and their nationalities would make that impossible.[22] Second,

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19 DSU, *supra* note 3, Art. 17.3. Further guidance on conflicts of interest is provided in the DSU Rules of Conduct and the Appellate Body Rules of Procedure, as discussed in section 4 below.

20 *Id*., Rule 6(1).

21 *Id*., Rule 6(2). The current roster of the Appellate Body is: Ujal Singh Bhatia (India); Peter Van Den Bossche (Belgium); Seung Wha Chung (Korea); Thomas R. Graham (United States); Ricardo Ramírez-Hernández (Mexico); Shree Baboo Chekitan Servansing (Mauritius); and Yuejiao Zhang (China). *Appellate Body Member*s, World Trade Org., http://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm (last visited Apr. 00, 2015).

22 For example, recent disputes involving China, Mexico and the United States have all seen Appellate Body members from those countries serving on the respective divisions that heard the appeals. *See, e.g*., Appellate Body Report, *China—Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, 16, WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R (Aug. 7, 2014) (identifying Appellate Body member Yuejiao Zhang, a Chinese national, as a member of the division hearing a dispute in which China was a party); Appellate Body Report, *United States—Certain Country of Origin Labelling* (COOL) *Requirements*, 1, WT/DS384/AB/R, WT/DS386/AB/R (Jun. 29, 2012) (identifying Appellate Body member Ricardo Ramírez-Hernández, a Mexican national, as a member of the division hearing a dispute in which Mexico was a party); Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, 1, WT/DS381/AB/R (May 16, 2012) (identifying Appellate Body member Thomas R. Graham, a U.S. national, as a member of the division hearing a dispute in which the United States was a party).

it demonstrates the trust that the broader membership of the WTO has placed in the Appellate Body as an institution.[23]

Finally, Rule 6(3) governs the exceptions to an Appellate Body member's service on a division. It includes three situations:

(a) Recusal from service due to either the disclosure of a conflict (under Rule 9 of the Appellate Body Working Procedures) or a material violation of the *Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU Rules of Conduct") (under Rule 10 of the Appellate Body Working Procedures);
(b) Inability to serve due to "illness or other serious reasons" (under Rule 12 of the Appellate Body Working Procedures); or
(c) Intention to resign from the Appellate Body (under Rule 14 of the Appellate Body Working Procedures).[24]

The issues of conflict disclosure and material violation under (a) are discussed further in Section 4 below.

4 Recusal

The recusal of a WTO panelist or Appellate Body member is governed by the DSU Rules of Conduct. Some of these rules apply only to panelists (along with arbitrators and experts relevant to particular forms of proceedings under the WTO Agreements),[25] some apply only to Appellate Body members, and some apply to both.

4.1 *DSU Rules of Conduct*

The proposal for the DSU Rules of Conduct dates back to June 1994, when Canada proposed adopting a "code of conduct" to address certain issues,

23 Valerie Hughes, *The Institutional Dimension, in* The Oxford Handbook of International Trade Law 269, 287 (Daniel Bethlehem et al. eds., 2009).

24 Appellate Body Working Procedures, *supra* note 18, Rule 6(3).

25 In light of this scope of coverage, any reference to "panelists" below—strictly in the context of the DSU Rules of Procedure—is understood to encompass panelists, arbitrators and experts.

including confidentiality and impartiality.[26] By the end of the year, the United States had circulated a draft *Code of Ethics for the Settlement of Disputes*,[27] kicking off a two-year negotiation process that resulted in the adoption of the DSU Rules of Conduct on December 3, 1996.[28]

The DSU Rules of Conduct contains nine provisions. They apply to panelists and Appellate Body members, among others.[29] Section II sets out the "Governing Principle" of the Rules, which requires that the covered individuals

> shall be independent and impartial, shall avoid direct or indirect conflicts of interest and shall respect the confidentiality of proceedings of bodies pursuant to the dispute settlement mechanism, so that through the observance of such standards of conduct the integrity and impartiality of that mechanism are preserved.[30]

Section III of the DSU Rules of Conduct concerns "Observance of the Governing Principle." It requires panelists and Appellate Body members "to disclose the existence or development of any interest, relationship or matter" that they know or

> could reasonably be expected to know and that is likely to affect, or give rise to justifiable doubts as to, that person's independence or impartiality;

as well as avoid "any direct or indirect conflicts of interest in respect of the subject matter of the proceeding."[31] A separate sub-provision requires these

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26 General Council, *Minutes of Meeting Held in the Centre William Rappard on 21 June 1994*, 15, C/M/273 (Jul. 12, 1994).

27 *See* Preparatory Committee for the World Trade Organization, Sub-Committee on Institutional, Procedural and Legal Matters, *Rules of Ethical Conduct for the Settlement of Disputes: Communication from the United States*, PC/IPL/W/12 (Nov. 9, 1994). For a thorough and extensive account of this negotiation process, see Gabrielle Marceau, *Rules and Ethics for the New World Trade Organization Dispute Settlement Mechanism*, 32 J. World Trade 57 (1998).

28 World Trade Org., Dispute Settlement Body, *Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes*, WT/DSB/RC/1 (Dec. 11, 1996) [hereinafter DSU Rules of Conduct].

29 *Id.*, § IV. The DSU Rules of Conduct also apply to WTO staff and Secretariat members as well as, as noted above, arbitrators and experts in respective proceedings under the WTO Agreements involving such individuals. *See supra* note 25 and accompanying text.

30 DSU Rules of Conduct, *supra* note 28, § II.1.

31 *Id.*, § III.1.

officials to "not incur any obligation or accept any benefit" that would further "interfere with" or "give justifiable doubts as to the proper performance of that person's dispute settlement duties."[32]

In order to satisfy the requirements of section III above, section VI outlines the self-disclosure process which panelists and Appellate Body members must go through. Under this provision, such individuals must disclose "any information that could reasonably be expected to be known to them at the time" of the request of their service on a panel or Appellate Body division that "is likely to affect or give rise to justifiable doubts as to their independence or impartiality."[33]

To assist in this process, Annex 2 of the DSU Rules of Conduct contains an "illustrative list" of issues that, if relevant, should be disclosed. They are:

(a) Financial interests (e.g. investments, loans, shares, interests, other debts); business interests (e.g. directorship or other contractual interests); and property interests relevant to the dispute in question;
(b) Professional interests (e.g. a past or present relationship with private clients, or any interests the person may have in domestic or international proceedings, and their implications, where these involve issues similar to those addressed in the dispute in question);
(c) Other active interests (e.g. active participation in public interest groups or other organisations which may have a declared agenda relevant to the dispute in question);
(d) Considered statements of personal opinion on issues relevant to the dispute in question (e.g. publications, public statements);
(e) Employment or family interests (e.g. the possibility of any indirect advantage or any likelihood of pressure which could arise from their employer, business associates or immediate family members).[34]

As part of the process, WTO adjudicators must sign a "disclosure form" attached to Annex 3 of the DSU Rules of Conduct.[35] The information contained therein

32 *Id.*, § III.2.

33 *Id.*, § VI.2.

34 *Id.*, Annex 2.

35 *Id.*, § VI.4. The form contains the following statement:

"I have read the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and the Rules of Conduct for the DSU. I understand my continuing duty, while participating in the dispute settlement mechanism, and until such time as the Dispute Settlement Body (DSB) makes a decision on adoption of a report relating to the

is then disclosed to the Chair of the DSB "for consideration by the parties to the dispute."[36] For appeals, the Appellate Body members in the division must first "review the factual portion of the Panel report"; their disclosure is then "disclosed to the Standing Appellate Body for its consideration whether the member concerned should hear a particular appeal."[37]

Section VIII is the most extensive provision in the DSU Rules of Conduct, and for the purposes of this chapter, the most important: as its title indicates, it sets out "Procedures Concerning Subsequent Disclosure and Possible Material Violations." Under this provision, any disputing party "who possesses or comes into possession of evidence of a material violation of the obligations of independence, impartiality, or confidentiality or the avoidance of direct or indirect conflicts of interest" must submit it to the Chair of the DSB (for panelists, arbitrators and experts) or the Appellate Body (for Appellate Body members) in a written statement.[38] Such evidence must be submitted at "the earliest possible time and on a confidential basis"; in the event that it is not, the submitting party "shall explain why it did not do so earlier."[39]

Following submission, the respective authority must complete a review (outlined for each type of jurist below) "within fifteen working days."[40] However, an allegation of a panelist or Appellate Body member's failure to disclose "a relevant interest, relationship or matter" is insufficient grounds for disqualification; rather, there must also be

> evidence of a material violation of the obligations of independence, impartiality, confidentiality or the avoidance of direct or indirect conflicts of interests and that the integrity, impartiality or confidentiality of the dispute settlement mechanism would be impaired thereby.[41]

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proceeding or notes its settlement, to disclose herewith and in future any information likely to affect my independence or impartiality, or which could give rise to justifiable doubts as to the integrity and impartiality of the dispute settlement mechanism; and to respect my obligations regarding the confidentiality of dispute settlement proceedings." *Id.*, Annex 3.

36 *Id.*, § VI.4(a).

37 *Id.*, § VI.4(b)(i).

38 *Id.*, § VIII.1.

39 *Id.*, §§ VIII.1, VIII.4.

40 *Id.*, § VIII.4.

41 *Id.*, § VIII.2.

The provision then sets out differing obligations to determine whether a material violation has occurred, depending on whether the subject of the alleged breach is a panelist or Appellate Body member.[42] In the event that a panelist resigns, or his/her appointment is revoked or excused, then "the procedures specified in the DSU for initial appointment shall be followed for appointment of a replacement" but in half the required time.[43] If the same occurs for an Appellate Body member, then the Appellate Body member "who . . . would be next selected through rotation to consider the dispute, would automatically be assigned to the appeal."[44]

Matters concerning possible material violations must be resolved "as expeditiously as possible" and "all information concerning possible or actual material violations . . . shall be kept confidential."[45] Indeed, as a general matter, the rules emphasize and require confidentiality in multiple provisions.[46]

4.2 *Panels*

Any evidence concerning a possible material violation by a panelist must be provided to the Chair of the DSB, who must then share it with the panelist for his/her "consideration."[47] If, after this, "the matter is not resolved," then the DSB Chair must forward the evidence to the parties involved in the dispute.[48] The provision requiring this action also notes that

> [i]f the person concerned resigns, the Chair of the DSB shall inform the parties to the dispute, and as the case may be, the panelists, the arbitrator(s) or experts.[49]

Following the opportunity for both the panelist and the parties in the dispute to be heard, the Chair of the DSB is required "[i]n all cases" to consult with the WTO Director-General and "a sufficient number of chairs of the relevant

42 *See infra* Part 4.2.

43 DSU Rules of Conduct, *supra* note 28, § VIII.18.

44 *Id.*

45 *Id.*, §§ VIII.19, VIII.20. The provision on confidentiality notes that this requirement applies "[e]xcept to the extent strictly necessary to carry out this decision[.]"

46 These include provisions governing disclosure, overall DSB proceedings, and the submission of evidence regarding possible material violations of the governing principle. *Id.*, §§ II.1, III.2, VI.6, VII, VIII.1, VIII.2, VIII.20.

47 *Id.*, §§ VIII.5, VIII.6.

48 *Id.*, § VIII.7.

49 *Id.*

Council or Councils to provide an odd number" in order to decide whether there has been a material violation of the DSU Rules of Conduct.[50] The provision adds that

> [w]here the parties agree that a material violation of these Rules has occurred, it would be expected that, consistent with maintaining the integrity of the dispute settlement mechanism, the disqualification of the person concerned would be confirmed.[51]

The somewhat odd structure of this provision—under which the Chair of the DSB and high-ranking WTO officials decide the issue of violation, but in part contingent on the disputing parties' agreement—is due to the differing views of WTO members in the course of negotiating the DSU Rules of Procedure, and remained a point of contention "until the last minute"; it was the last issue in the negotiations to be resolved.[52]

Some WTO members believed that it should be the sole right of the parties to disqualify a panelist; others viewed that doing so could compromise and undermine the legitimacy of the dispute settlement system.[53] As such, the final wording was meant to provide the parties a substantive role in the determination, as reflected in the language that a disqualification "would be expected . . . consistent with maintaining the integrity of the dispute settlement mechanism," but in any event, the Chair of the DSB, in consultation with other high-ranking WTO officials would "always [have] the last say on the disqualification of panelists."[54]

To date, "no panelist has ever been found to commit a material violation of the Rules of Conduct."[55] This is not to say that no panelist has ever withdrawn from a case or been replaced. Indeed, this has happened in several instances.

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50 *Id.*, § VIII.8. Under the WTO's governance structure, specialized councils and committees govern the implementation of individual WTO Agreements (*e.g.*, the Council on Trade in Goods governs issues arising under the GATT).

51 *Id.*

52 Marceau, *supra* note 27, at 86.

53 *Id.* at 86–87.

54 *Id.*

55 *See, e.g.*, José Ignacio Garcia Cueto, *Impartiality and Independence of Arbitrators: Challenging Arbitrators on World Trade Organization and Investor-State Panels Based on Continuous Appointments by the Parties* 8, May 6, 2014, *available at* http://lexarbitri.pe/wp-content/uploads/2014/06/JIGC-Lex-Arbitri-.pdf (last visited Apr. 00, 2015); *see also* Peter Van Den Bossche & Werner Zdouc, The Law and Policy of the World Trade Organization 217 (3rd ed. 2013).

However, as discussed below, only one of these instances has been proven to be due to potential or actual conflicts of interest. Others were the result of unrelated concerns, such as the panelist's health or promotion to other positions in the WTO.[56] In some instances, the circumstances surrounding a panelist's departure are unclear.[57]

Moreover, the mere invocation of an actual or potential conflict of interest does not necessarily entail a finding of material violation of the DSU Rules of Conduct. Only two disputes out of hundreds have, according to publicly available information, involved either the withdrawal of a panelist due to ethical concerns or a party raising ethical concerns in the course of dispute proceedings:

(1) In *Turkey—Restrictions on Imports of Textile and Clothing Products* (DS34) ("*Turkey—Textiles*"), one of the panelists withdrew from the panel approximately a month after its composition.[58] Although the reasons for the panelist's withdrawal were not publicly disclosed, it is understood to have occurred "very exceptionally," evidently at his "own initiative" after a party to the dispute raised concerns over

56 *See, e.g.*, Replacement of a Member of the Panel: Note by the Secretariat, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS/381/7 (Aug. 24, 2010) (noting the replacement of panelist due to his death); *see also* Panel Report, *United States—Continued Existence and Application of Zeroing Methodology*, ¶ 1.8, WT/DS350/R (Oct. 1, 2008); Matthew Kennedy, *Why Are WTO Panels Taking Longer? And What Can Be Done About It?*, 45 J. World Trade 221, 238–39 (2011) (noting that a panelist in a dispute resigned following her appointment to the Appellate Body); Panel Report, *United States—Final Dumping Determination on Softwood Lumber from Canada—Recourse to Article 21.5 of the DSU by Canada*, ¶ 1.5, WT/DS264/RW (Apr. 3, 2006), as reversed by *Appellate Body Report* WT/DS264/AB/RW (Aug. 15, 2006) (noting that the Chair of the panel withdrew "following his appointment as a Deputy Director-General of the WTO Secretariat").

57 *See, e.g.* Panel Report, *European Communities—Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, ¶¶ 1.7–1.8, WT/DS299/R (Jun. 17, 2005) (noting the resignation of one of the panelists approximately three months after the panel's composition); Panel Report, *Guatemala—Anti-Dumping Investigation Regarding Portland Cement from Mexico*, ¶¶ 1.7–1.8, WT/DS60/R (June 19, 1998), as reversed by Appellate Body Report WT/DS60/AB/R (Nov. 2, 1998) (noting the withdrawal of one of the panelists approximately two months after the panel's composition).

58 Panel Report, *Turkey—Restrictions on Imports of Textile and Clothing Products*, ¶¶ 1.5–1.6, WT/DS34/R (May 31, 1999), as modified by Appellate Body Report WT/DS34/AB/R (Oct. 22, 1999).

a relevant unpublished conference paper that he authored but had not disclosed to the parties.[59]

(2) In *Guatemala—Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico* (DS156) ("*Guatemala—Cement II*"), one of the parties raised its concerns over the appointment of a panelist who had served on a panel in a previous dispute over the same issue ("*Guatemala—Cement I*"), contending that "it would be virtually impossible for him" not to consider "the decisions taken in the previous dispute in which he participated," thereby depriving the "Panel of its independence and . . . render[ing] it unsuitable."[60] The panel did not rule on its own competence, noting that under the DSU, panel composition was determined by the parties or, in the alternative, the Director-General.[61] It noted that the "only proper way" for the party raising this concern would have been "to avail itself of its right under Article VIII:1 of the [DSU Rules of Conduct]," adding that it was "not aware whether" the party had decided to do so.[62]

As noted above, neither case involved the actual finding of a violation of the DSU Rules of Conduct. Thus, there are only a few instances in the WTO system in which a panelist has withdrawn due to ethical concerns. There are no findings of any actual violation(s) of the DSU Rules of Conduct.

4.3 *The Appellate Body*

The requirements differ in cases of assessing a possible material violation of the DSU Rules of Conduct when the subject concerned is an Appellate Body member. Under the relevant provisions, the party possessing this information must submit it first to the other party in the dispute and then to the Appellate Body itself.[63]

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59 Van Den Bossche & Zdouc, *supra* note 55, at 217, fn. 323 and accompanying text.

60 Panel Report, *Guatemala—Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, ¶ 4.3, WT/DS156/R (Oct. 24, 2000); *see also* Joseph R. Brubaker, *The Judge Who Knew Too Much: Issue Conflicts in International Adjudication*, 26 Berkeley J. Int'l L. 111, 125–126 (2008) (discussing the *Guatemala—Cement II* dispute).

61 Panel Report, *Guatemala—Cement II, supra* note 60, ¶ 8.11.

62 *Id.* ¶ 8.12. "This is not surprising given the confidential nature of the Chair's proceedings under the Rules of Conduct." Brubaker, *supra* note 60, at 126.

63 DSU Rules of Conduct, *supra* note 28, § VIII.14.

Like the Chair of the DSB in the correlative provision governing the panelists, the Appellate Body must then provide the evidence to the Appellate Body member for "consideration"[64] and provide the Appellate Body member and the parties to the dispute with the opportunity to be heard.[65] However, unlike the procedure for determining whether a panelist has materially violated the DSU Rules of Conduct, the final decision and action is made solely by the Appellate Body, without input from the parties or any other WTO officials. The only additional requirement is that the Appellate Body "inform the parties to the dispute and the Chair of the DSB of its decision, together with relevant supporting information."[66]

There is little to no publicly available information regarding the recusal of Appellate Body members in WTO disputes. Commentary has largely focused on panelist recusal—perhaps a reflection of the party-driven and relatively more transparent panelist selection process. One account, however, notes that "there have been a number of instances where . . . Appellate Body members have recused themselves in compliance with the Rules of Conduct."[67] However, it provides no further detail, only noting that these instances have occurred without the invocation of the provisions in the DSU Rules of Conduct related to material violations.[68]

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64 *Compare id.*, § VIII.15 ("Upon receipt of the evidence referred to in paragraphs VIII:1 and VIII:2 above, the Standing Appellate Body shall forthwith provide it to the person who is the subject of such evidence, for consideration by the latter."), *with id.*, § VIII.6 ("Upon receipt of the evidence referred to in paragraphs VIII:1 and VIII:2, the Chair of the DSB shall forthwith provide the evidence to the person who is the subject of such evidence, for consideration by the latter.").

65 *Compare id.* § VIII.16 ("It shall be for the Standing Appellate Body to take any appropriate action after having provided a reasonable opportunity for the views of the person concerned and the parties to the dispute to be heard.") *with id.* § VIII.8 ("In all cases, the Chair of the DSB, in consultation with the Director-General and a sufficient number of Chairs of the relevant Council or Councils to provide an odd number, and after having provided a reasonable opportunity for the views of the person concerned and the parties to the dispute to be heard, would decide whether a material violation of these Rules as referred to in paragraphs VIII:1 and VIII:2 above has occurred. . . . ").

66 *Id.*, §§ VIII.16, VIII.17.

67 Yves Renouf, *Challenges in Applying Codes of Ethics in A Small Professional Community: The Example of the WTO Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, in* Accountability, Investigation And Due Process in International Organizations 111, 127 (Chris De Cooker ed., 2005).

68 *Id.* at 127 ("In other words, the Rules of Conduct seem to date to have been operating successfully without any need to trigger the formal exclusion mechanism contained therein.").

Given the importance attached to confidentiality in both the DSU Rules of Conduct and the Appellate Body's operations—evident, for example, in its selection of divisions—the lack of available information on conflicts and related recusals is not surprising, and moreover makes it unlikely that any such information will emerge. It does suggest, however, that the DSU Rules of Conduct effectively govern the issue of impartiality and recusal in the context of the Appellate Body.[69]

5 Commentary

It is safe to say that recusal is very rare in the WTO dispute settlement system. The question then remains as to why—what is it about the system that can account for the infrequency of challenges to WTO adjudicators in the two decades and over 400 disputes of the organization's history?

The answer lies in various factors, which can be grouped loosely under the headings institutional, reputational, and procedural. Each is examined in turn.

5.1 *Institutional Factors*

Perhaps the most compelling explanation of the relative lack of challenges to WTO adjudicators is the party-driven nature of panelist selection. As noted above, parties must agree on panelists or accept the Director-General's appointments, and the parties have wide latitude in rejecting candidates. As a result, concerns that parties may have regarding any possible ethical violation by a prospective panelist can be addressed at the outset, to the extent that the parties have sufficient information to do so.

Granted, consensus by disputing parties will not be present in the event that the Director-General appoints some or all of the panelists. However, the DSU Rules of Conduct are still available in the event that a party has concerns regarding a panelist's impartiality following appointment.

The requirement of consensus in the selection of WTO panels can be contrasted with other notable forms of international adjudication such as arbitration. For example, the rules governing three prominent[70] forms of inter-

69 *See, e.g., id.* (noting that support for this proposition can be found that "never, after a decision has been rendered, has a panel or the Appellate Body been challenged on grounds of lack of independence or impartiality, or due to conflicts of interest").

70 According to one survey, ICC, LCIA and ICSID together account for approximately 70% of international arbitration proceedings. White & Case LLP, 2010 International Arbitration Survey: Choices in International Arbitration 23, *available at* http://www.whitecase

national arbitration under the International Chamber of Commerce ("ICC"), the London Court of International Arbitration ("LCIA") and the International Centre for the Settlement of Investment Disputes ("ICSID") include arbitrator selection procedures that allow some form of unilateral appointment:

(a) Under ICC rules, disputes are to be decided by either a sole arbitrator (at the parties' agreement or appointment by the ICC Court of Arbitration) or three arbitrators, two of which are appointed by each respective party (the third is appointed by the ICC Court of Arbitration).[71]

(b) The LCIA rules contain similar provisions and provide that the parties or a third party may agree to appoint arbitrators and the LCIA Court may appoint the sole arbitrator unless the parties agree otherwise and any arbitrators as agreed by the parties "with due regard for any particular method or criteria of selection agreed in writing by the parties."[72] The LCIA Court, may also "refuse to appoint any such nominee if it determines that he is not suitable or independent or impartial."[73] If the parties fail to make a timely nomination, or agree that one of them (claimant or respondent) shall nominate, and in turn fails to do so, then "the LCIA Court may appoint an arbitrator notwithstanding the absence of the nomination and without regard to any late nomination."[74]

(c) Under ICSID rules, the parties must either agree on a sole or "any even number of arbitrators";[75] if they fail to do so, then each party may appoint an arbitrator, with the third appointed "by agreement of the parties."[76]

.com/files/upload/fileRepository/2010International_Arbitration_Survey_Choices_in_International_Arbitration.pdf (last visited Apr. 00, 2015).

71 International Chamber of Commerce, *ICC Rules of Arbitration*, Art. 12, *available at* http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/#article_12 (last visited Apr. 00, 2015).

72 London Court of International Arbitration, *LCIA Arbitration Rules*, Art. 5.5, *available at* http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx#article5 (last visited Apr. 00, 2015).

73 *Id.*, Art. 7.1.

74 *Id.*, Art. 7.2.

75 World Bank, *ICSID Convention, Regulations and Rules*, Art. 37(2)(a) [hereinafter "ICSID Convention"], *available at* https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc_en-archive/ICSID_English.pdf (last visited Apr. 00, 2015).

76 *Id.*, Art. 37(2)(b).

The fact that these arbitral institutions leave open the possibility that a party may select an adjudicator without any input from the other party could explain why parties appear to challenge the impartiality of panelists in the WTO context less frequently than in others. Simply put, they have a comparatively greater role.[77]

Parties have no involvement in the process of selecting which Appellate Body members will hear an appeal. However, the Appellate Body members enjoy broad support and respect throughout the WTO membership. They are regarded as the system's top jurists, and there is a significant presumption that they act with integrity and without conflicts of interest or bias. Institutionally, it would be odd for a WTO member to question the fitness of an Appellate Body member.

5.2 *Reputational Factors*

Reputation is another factor that helps explain the lack of challenges by parties to WTO adjudicators' competence. First, WTO members are concerned about their own reputations. One commentator notes that members, when pursuing WTO disputes, seek to cultivate "their status as legitimate members of the international community"; maintain "the stability and utility of the system as a whole"—particularly through abiding by the system's rules; and are "concerned about how they are perceived by other participants."[78]

Such concerns are likely present in the minds of diplomats and counsel to WTO members when considering whether and how to challenge adjudicators' competence. The WTO dispute settlement system is widely perceived as functioning efficiently and effectively. A WTO member that is concerned about its own reputation in the context of that system is less likely to raise concerns about the possible ethical conflicts of a panelist or Appellate Body member.

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77 The emphasis on consensus underscores a related, but distinct element of the WTO's institutional uniqueness that could account for the lack of challenges to panelists' competence. The WTO's predecessor, the GATT emphasized negotiation over legalistic action; indeed, commentators have noted that the half-century during which the GATT evolved into the WTO involved significant "legalization" and culminated with the creation of the dispute settlement mechanism. *See, e.g.*, Ernst-Ulrich Petersmann, The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement 84–87 (1997). This foundation of negotiation and diplomatic cooperation—evident, for example, in the requirement that parties seek a resolution through consultations prior to the establishment of a panel—further supports the requirement that parties mutually agree on panelists, and therefore arguably contributes to the relative lack of challenges to panelists.

78 *See, e.g.*, Joseph A. Conti, *Learning to Dispute: Repeat Participation, Expertise, and Reputation at the World Trade Organization*, 35 Law & Soc. Inquiry 625, 633 (2010).

Few WTO members want to appear frivolous or out-of-step with a system that is perceived to be functioning well. This is especially so given that the member has (at least at the panel formation stage) already had the opportunity to voice its concerns and to reject candidates without detailed explanations.

A second reputational concern may provide additional insight. As noted above, panelists must be sufficiently qualified in the field of international trade law or policy in order to serve on a panel. Thus, panelists have included not only officials from governments and international organizations, but also academics and even private attorneys. The specialized nature of this discipline has generated a community that is tightly knit, and has been described as "collegial," "collaborative," and "small"—knowledge of political contexts and diplomatic sensitivities, and the cultivation of professional relationships" are just as important as substantive expertise.[79]

The nature of WTO disputes means that today's panelist could become tomorrow's opposing counsel. It is not difficult to see why in such a small community, challenges to the very essence of an adjudicator's professional reputation—his or her ability to be impartial and ethical—are rare. Members are concerned not only about their own reputation, but how their actions may affect the reputations of those around them and the community at large.

5.3 *Procedural Factors*

Finally, two procedural factors could explain the relative lack of challenges to adjudicators' competence, and these factors have been noted by others.[80] First is the fact that members can appeal the outcome of a dispute. This procedural guarantee serves to provide parties with the confidence that they need not utilize any and all procedural tools—such as challenging the impartiality of an adjudicator—in order to avert an unfavorable outcome.

Second, the extensive nature of the DSU Rules of Conduct requires that any challenges are well-founded and sufficiently supported by evidence. Members are therefore deterred from raising potentially frivolous claims against a panelist or Appellate Body member's competence to rule on a specific dispute. As a result, the rarity of challenges could reflect a tacit acknowledgment by parties that, simply put, the rules are working: adjudicators are forthcoming in their disclosures, and there is no evidence, per the standard set by the DSU Rules of Conduct, to suggest that they are otherwise not fit to hear the dispute in question.

79 *Id.* at 649.

80 *See, e.g.*, Cueto, *supra* note 55, at 10–12.

6 Conclusion

The infrequent challenges to WTO adjudicators might be surprising to those unfamiliar with the WTO system. The system is active, the stakes are high in many disputes, and, for better or worse, diplomacy is slowly giving way to litigation, with most of its tactics.

For now, these tactics have stopped short of frequent challenges to the adjudicators. The combination of an agreement-based and party-driven system, with extensive rules governing adjudicator selection and recusal, has generated an environment in which such challenges are infrequent. Institutional, reputational, and procedural factors appear to guard against any sudden change in this behavior.

CHAPTER 7

Challenges of Judges in International Criminal Courts and Tribunals

Makane Moïse Mbengue

1 Introduction

The independence and impartiality of judges are overwhelmingly accepted as fundamental prerequisites to the rule of law. The requirements of independence and impartiality are general principles of law recognized in all legal systems that ensure the protection of one of the most fundamental human rights: the right to a fair trial.[1]

In the international context, this right is perhaps most important in criminal courts and tribunals, as these courts pronounce on the responsibility of individuals for international crimes. In fact, unlike other international courts and tribunals whose primary litigants are states, international criminal courts pronounce on individuals, and their decisions directly impact the liberty of the accused. The independence and impartiality of the judges who determine the fate of these individuals is thus particularly important to ensure the due process rights of the accused.

Indeed, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") has confirmed that

> [t]he fundamental human right of an accused to be tried before an independent and impartial tribunal is generally recognized as being an integral component of the requirement that an accused should have a fair trial.[2]

To this end, a number of guidelines and principles have been developed to ensure judicial independence, applicable to all international judges. There have also been numerous guidelines and principles developed at the

1 Antonio Cassesse, International Criminal Law 393–94 (2003).

2 *Prosecutor v. Anto Furundzija*, Case No. IT-95-71/1-A99, Appeals Chamber, Judgment, ¶ 177 (Int'l Crim. Trib. for the Former Yugoslavia July 21, 2000), http://www.icty.org/x/cases/furundzija/acjug/en/fur-ajo00721e.pdf.

 | DOI 10.1163/9789004302129_009

international level to apply to domestic courts and judges, as well as guidelines on conflict of interest in international arbitration.[3] This chapter will focus on those developed specifically for the international judiciary setting the general framework, most notably the Burgh House Principles on the Independence of the International Judiciary ("Burgh House Principles"). This chapter focuses on rules governing independence and impartiality in international criminal courts and tribunals: the International Criminal Tribunal for the former Yugoslavia; the International Criminal Tribunal for Rwanda ("ICTR"); the International Mechanism for Criminal Tribunals (the "Mechanism") that will take over the mandates of the ICTY and ICTR at the completion of their work; the Special Court for Sierra Leone ("SCSL"); the Special Tribunal for Lebanon; and the International Criminal Court ("ICC").

The statutes and rules of the various international criminal courts and tribunals address the independence and impartiality of judges in general terms. These rules normally set out the criteria for the qualification of judges and requirements of independence and impartiality through restricting outside activities, and in many instances they provide detailed guidance on when judges should recuse themselves.[4]

Challenges to the judicial process based on an alleged lack of independence and impartiality have been raised in the ICTY, the ICTR, the SCLC, and the ICC. Moreover, certain developments at the ICTY, most notably the leaked email of Judge Frederik Harhoff where allegations of impartiality were levied against the ICTY's president, raise certain issues regarding the independence and impartiality of the ICTY and its judges. These developments will be discussed in the context of the present chapter. Before concluding, the chapter will also briefly compare the approaches to other international regimes, the International

3 For a full discussion of these principles and guidelines, most notably the Basic Principles on the Independence of the Judiciary and the Bangalore Principles of Judicial Conduct, see International Commission of Jurists, International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors—A Practitioners Guide (2d ed. 2007), Geneva Switzerland. *See also* IBA Guidelines on Conflicts of Interest in International Arbitration 2014 (having been revised to reflect the accumulated experience of the IBA Guidelines on Conflict of Interest in International Arbitration 2004); Chapter 2 by Meg Kinnear and Frauke Nitschke in this volume (discussing the International Centre for Settlement of Investment Disputes ("ICSID") regime); Chapter 3 by Sarah Grimmer in this volume (discussing the Permanent Court of Arbitration ("PCA")); Chapter 9 by Judith Levine in this volume (discussing the PCA).

4 For a more general discussion of the statutes and rules of various international courts and tribunals, see Ruth Mackenzie & Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 Harv. Int'l L.J. 271, 275 (2003).

Centre for the Settlement of Investment Disputes ("ICSID"), the World Trade Organization ("WTO"), and the International Court of Justice ("ICJ").

2 Independence and Impartiality in the Context of International Criminal Courts

The requirements of independence and impartiality are particularly important in the context of international criminal courts and tribunals since these tribunals have jurisdiction over individuals, thus triggering the extensive due process rights provided by human rights law. Virtually all international and regional human rights instruments provide for the guarantee to a competent, independent, and impartial tribunal established by law.[5]

Of note, also are the Burgh House Principles, which develop

> guidelines of general application to contribute to the independence and impartiality of the international judiciary, with a view to ensuring the legitimacy and effectiveness of the international judicial process.[6]

In so doing, the Burgh House Principles clearly set the general application of the parameters of judicial independence and impartiality. They provide that in order to ensure judicial independence

5 *See, e.g.*, American Convention on Human Rights Art. 8(1), *opened for signature* Nov. 22, 1969, O.A.S.T.S. No. 36 (entered into force July 18, 1978); International Covenant on Civil and Political Rights Art. 14(1), Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6. I.L.M. 368 (1967), 999 U.N.T.S. 171; Convention for the Protection of Human Rights and Fundamental Freedoms Art. 6(1), *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 262 (1952); Universal Declaration of Human Rights, Art. 10, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); African Charter on Human and Peoples' Rights Arts. 7(a)–(c), June 27, 1981, O.A.U. Doc. CAB/LEG/67/3/Rev. 5 (1981) (entered into force Oct. 21, 1986); *see* Francois-Xavier Bangamwabo, *The Right to an Independent and Impartial Tribunal: A Comparative Study of the Namibian Judiciary and International Judges, in* The Independence of the Judiciary in Namibia 244–45 (Nico Horn & Anton Bösl eds., 2008); International Commission of Jurists, *supra* note 3, at 5–7.

6 The Centre for International Courts & Tribunals, *The Burgh House Principles on the Independence of the International Judiciary*, pmbl., *available at* http://www.ucl.ac.uk/laws/cict/docs/burgh_final_21204.pdf (reproducing the Burgh House Principles on the Independence of the International Judiciary) (last visited Apr. 00, 2015).

> judges must enjoy independence from the parties to the cases before them, their own states of nationality or residence, the host countries in which they serve, and the international organizations under the auspices of which the court or tribunal is established.[7]

They further provide that "judges must be free from undue influence from any source," that "judges shall decide cases impartially, on the basis of the facts of the case and the applicable law," and that

> judges shall avoid any conflict of interest, as well as being placed in a situation which might reasonably be perceived as giving rise to any conflict of interest.[8]

These are the basic principles contained in most statutory documents of the various international courts and tribunals, with varying degrees of detail and elaboration.

Some argue that independence and impartiality are inherently linked and cannot be distinguished, while others consider that they are different concepts and should be treated as such.[9] The ICTR has highlighted the distinction between the two noting that "[j]udicial independence connotes freedom from external pressure and interference. Impartiality is characterized by objectivity in balancing the legitimate interests at play."[10] Independence may be most easily understood as "freedom from influence," while impartiality may be understood as "freedom from bias."[11]

The conditions for judicial independence and impartiality have been the subject of debate and include, but are not limited to, the election and appointment of judges, including their qualifications; security of tenure of their office and their privileges and immunities; their salaries and financial security; their discipline, removal, or disqualification; and their institutional independence.[12] Nonetheless, this chapter concentrates on those issues that could potentially form the basis of a challenge to a judge in international criminal courts or

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7 *Id.*

8 *Id.*

9 Bangamwabo, *supra* note 5, at 246.

10 *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-A, Appeal Chamber, Decision on the Defence Motion for Interlocutory Appeal on the Jurisdiction of Trial Chamber I, Joint and Separate Opinions by Judge MacDonald and Judge Vohrah, ¶ 35 (June 3, 1999).

11 Bangamwabo, *supra* note 5, at 246.

12 *Id.* at 244.

tribunals. It therefore focuses on the procedural rules established to determine whether judges are prevented from sitting in a particular case due to the requirements of independence and impartiality as encompassed in their governing instruments (i.e., statutes and rules).

Ensuring the independence of judges in the context of international criminal law may pose particular challenges not faced in other areas.

Two considerations make the endeavor of ensuring judges' independence and impartiality more challenging in this context. First, is the greater role of politics: trials occur in the face of political realities and ongoing wars, such that criminal proceedings against individuals may not always be a political priority.[13] This could result in uneven or selective prosecution of crimes where political will is present. Experience has shown that "many states only want to end impunity when it does not conflict with other political aims."[14] Judges may feel obliged to bow to the might and pressures of politically and/or economically important powers as a result. Second, is the tendency to expect convictions given the gravity of international crimes and the need to combat impunity.[15] There seems to be a perception that an acquittal of an alleged perpetrator is a failure of the process by which he/she was tried.[16] There is thus a risk to judicial independence to fold to political or other pressures to convict those accused of the most heinous crimes falling within the jurisdiction of international criminal courts and tribunals. Some have therefore opined,

> In the world political arena many of the supporters of an international criminal justice system advocate it as a way of achieving reconciliation and peace, impunity and deterrence. Justice may indeed assist towards these desirable goals in many cases; but it must be accepted that when a just trial results in an unpalatable result, it cannot be compromised for the sake of other aims.[17]

These are not just theoretical risks to judicial independence and impartiality. One small example of this influence and pressure was the call of Judge Antonio Cassese, then president of the ICTY, to the International Olympic Committee in 1996 to prevent Serbia from participating in the Olympic games of that

13 Sylvia de Bertodano, *Judicial Independence in the International Criminal Court*, 15 Leiden J. Int'l L. 409, 409 (2002).

14 *Id.* at 423.

15 *Id.* at 410.

16 *Id.*

17 *Id.* at 414.

year unless it helped arrest Radovan Karadzic and Ratko Mladic, whom he specifically referred to as "war criminals."[18] This presumption of guilt before the accused were even tried suggests a lack of impartiality required of that judge at trial.[19] One can only assume that such a presumption of guilt (in direct contradiction to the presumption of innocence required to ensure the due process rights of the accused) is a result of political pressure and the gravity of the international crimes.

Moreover, the heightened role of politics in international criminal law suggests that judges may feel obliged to bow to the might and pressures of politically and/or economically important powers.[20] In fact, Judge Frederik Harhoff of the ICTY suggested that Judge Theodore Meron, the ICTY's current president, did just that in an email that was leaked to the press.[21] The real difficulty in this area is that states setting up tribunals that may potentially have jurisdiction over their own nationals are more inclined to exert pressure and control over the court and judges appointed by them.[22] These considerations make the independence and impartiality of judges in international criminal courts even more difficult to ensure. The fact that these judges have jurisdiction over individuals rather than over states makes their independence and impartiality even more important to ensure the fundamental human rights of the accused.

The statutes and rules of each court or tribunal elaborate how the independence and impartiality of judges may be attained within the auspices of each court or tribunal. These, along with the established procedural mechanism to determine whether a judge should be prevented from sitting on a particular case in the ICTY, the ICTR, the Mechanism, the Special Court for Sierra Leone, the Special Court for Lebanon, and ICC are examined below. The cases in which judges have been challenged in the ICTY, the ICTR, the Special Court for Sierra Leone, and the ICC are highlighted to demonstrate the application of these rules and the elaboration of the principles behind them. These principles, and the procedural rules to uphold them, are particularly important in the context of international criminal courts and tribunals given the inherent

18 *Id.* at 417.

19 *Id.*

20 *Id.* at 428.

21 Marlise Simons, *Judge at War Crimes Tribunal Faults Acquittals of Serb and Croat Commanders*, N.Y. Times (June 14, 2013), http://www.nytimes.com/2013/06/15/world/europe/judge-at-war-crimes-tribunal-faults-acquittals-of-serb-and-croat-commanders.html?_r=0.

22 De Bertodano, *supra* note 13, at 429.

challenges described above related to the due process rights of the accused, the vulnerability of international criminal law to political pressures, and the gravity of international crimes. In addition, certain questions concerning the independence and impartiality of judges at the ICTY raised by Judge Harhoff's letter are highlighted to demonstrate the difficulties in ensuring independence and impartiality in the context of international criminal law.

3 The International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda

3.1 *The Statutory Requirements*

The statutes and rules governing the ICTY and ICTR are virtually identical since both were created by the Security Council in the exercise of its powers under Chapter VII of the United Nations Charter.[23] There have been later amendments to the rules of procedure for each tribunal that have led to some minor differences in the two.[24] Article 13 of the Statute of the ICTY and Article 12 of the Statute of the ICTR provide that all judges shall be "persons of high moral character, impartiality and integrity."[25] These provisions and the procedures for determining such impartiality are elaborated upon in the Rules of Procedure and Evidence of the ICTY ("ICTY Rules") and in the Rules of Procedure and Evidence of the ICTR ("ICTR Rules"). In particular, Rule 14 (of both the ICTY Rules and the ICTR Rules) requires each judge to make a declaration before taking up duties solemnly declaring to discharge his/her duties "honourably, faithfully, impartially and conscientiously."[26] In essence, this is a declaration of

23 The ICTY was created by Security Council Resolution 808 (1993) and the ICTR was created by Security Council Resolution 955 (1994).

24 For differences in the two, see the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, adopted on February 11, 1994 and revised dozens of times, most recently on May 22, 2013 and the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, adopted on June 29, 1995 and amended dozens of times, most recently on April 10, 2013. see *infra*, at 8.

25 Statute of the International Tribunal for Rwanda Art. 12, S.C. Res. 955, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute]; Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 Art. 13, 48th Sess., U.N. Doc. S/25704 (May 25, 1993) [hereinafter ICTY Statute].

26 International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, Rule 14, U.N. Doc. ITR/3/Rev. 1 (entered into force June 29, 1995) [hereinafter ICTR Rules]; Rules of

independence and impartiality to ensure the fundamental due process rights of the accused.

Rule 15 for both the ICTY Rules and ICTR Rules provides details on the substance and procedure for the disqualification of judges. Rule 15(A) provides that a judge may not sit on a case in which he/she has a personal interest or has had any associations that might affect his/her impartiality, and in such cases requires the judge to withdraw.[27] Rule 15(B) provides the right of any party to apply to the presiding judge for the disqualification and withdrawal of a judge on the grounds listed in Rule 15(A).[28] However, Rule 15(B) of the ICTY Rules contains a more detailed procedure in four sub-paragraphs that were amended in July 2005, examined below.[29] These additional sub-paragraphs are not included in the ICTR Rules, perhaps because the ICTY has had to determine cases pertaining to the judicial independence and impartiality of its judges more frequently than the ICTR.[30]

Rule 15(B)(i) of the ICTY Rules provides that any party may apply to the presiding judge for the disqualification of a judge, and that the presiding judge shall confer with the judge in question and report to the president.[31] Rule 15(B)(ii) provides that following the report of the presiding judge, the president shall appoint a panel of three judges from other chambers if necessary to report its decision on the merits of the application.[32] It further provides that if the decision is to uphold the application for disqualification, then the president shall assign another judge to sit in his/her place.[33] Rule 15(B)(iii) provides that the decision of the panel of three judges shall not be subject to interlocutory appeal.[34] It is not clear whether the report of the presiding judge would be subject to appeal if the panel of three judges were not deemed necessary. Finally, Rule 15(B)(iv) provides that if the challenged judge is the president, then the

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Procedure and Evidence, Rule 14, IT/32 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 11, 1994) [hereinafter ICTY Rules].

27 ICTR Rules, *supra* note 26, Rule 15(A); ICTY Rules, *supra* note 26, Rule 15(A).

28 ICTR Rules, *supra* note 26, Rule 15(B); ICTY Rules, *supra* note 26, Rule 15(B).

29 *See* ICTY Rules, *supra* note 26, Rule 15(B) (amended on July 5, 2005 by IT/32/Rev. 36).

30 *See* Bangamwabo, *supra* note 5, at 259. The ICTY has had at least four such cases, while the ICTR has only had one. These will be discussed below. In addition, the amendments related to the disqualification of judges in the ICTY Rules were made in 2002 and 2005, whereas the last amendments to the ICTR Rules were made in 2000. The continued amendments to the ICTY Rules may also be explained by its busier docket.

31 ICTY Rules, *supra* note 26, Rule 15(B)(i) (amended on July 5, 2005 by IT/32/Rev. 36).

32 *Id.*, Rule 15(B)(ii).

33 *Id.*

34 *Id.*, Rule (B)(iii).

vice president shall assume the responsibility of the president in accordance with Rule 15.[35]

The procedure is less detailed in the ICTR Rules but is the same in substance. Rule 15(B) of the ICTR Rules provides that any party may apply to the presiding judge for disqualification of a judge on the grounds listed in Rule 15(A), and that the Bureau[36] shall determine the matter, after the presiding judge has conferred with the challenged judge.[37] It further provides that if the Bureau upholds the application, the president shall assign another judge to replace the disqualified judge.[38] Rule 15(C) of both the ICTY Rules and the ICTR Rules further clarifies that a judge who reviews an indictment against an accused shall not be disqualified from sitting as a member of a trial chamber for the trial of that accused.[39] However, the ICTY Rules, as amended in July 2005, go further in Rule 15(C) by providing that such a judge shall also not be disqualified from sitting as a member of the Appeals Chamber to hear any appeal in that case.[40] The remaining sub-paragraphs of the ICTY Rules and ICTR Rules are different and specific to each tribunal.

Rule 15(D)(i) of the ICTY Rules further provides that no judge shall sit on an appeal in a case in which he/she sat as a member of the trial chamber.[41] Rule 15*bis* (C) of the ICTY Rules and the ICTR Rules[42] clarify that if a judge is unable to continue sitting in a part-heard case, then the president may assign another judge to the case and order either a rehearing or continuation of the proceedings from that point.[43] However, the Rule provides that the continuation of

35 *Id.*, Rule (B)(iv).

36 The ICTR Rules define "bureau" as "[a] body composed of the President, the Vice-President and the more senior Presiding Judge of the Trial Chambers." ICTR Rules, *supra* note 26, Rule 2.

37 *Id.*, Rule 15(B).

38 *Id.*

39 *Id.*, Rule 15(C); ICTY Rules, *supra* note 26, Rule 15(C).

40 ICTY Rules, *supra* note 26, Rule 15(C).

41 *Id.*, Rule 15(D)(i). It was last amended in July 2005. Rule 15(D)(ii) further provides that

"[n]o Judge shall sit on any State Request for Review pursuant to Rule 108 *bis* in a matter in which [he/she] sat as a member of the Trial Chamber whose decision is to be reviewed."

Rule 15(D) of the ICTR Rules was deleted when amended; it provided that

"no member of the Appeals Chamber shall sit on any appeal in a case in which another Judge of the same nationality sat as a member of the Trial Chamber."

No equivalent rule relating to the nationality of the judges on appeal exists in the ICTY Rules.

42 Rule 15*bis* is identical in both the Rules of Procedure and Evidence of the ICTY and ICTR.

43 ICTR Rules, *supra* note 26, Rule 15*bis* (C); ICTY Rules, *supra* note 26, Rule 15*bis* (C).

the proceedings can only be ordered with the consent of the accused after the opening statements have taken place, except as provided in paragraph (D). Rule 15*bis* (D) provides that "the remaining Judges may nonetheless decide" that proceedings may be continued with a substitute judge even if the accused withholds his/her consent "if, taking all the circumstances into account, they determine unanimously that doing so would serve the interests of justice."[44] This rule further clarifies that this decision on continuation is subject to appeal directly to a full bench of the Appeals Chamber by either party.[45] The ICTR has dealt with the circumstances described in paragraph (D) above.[46]

These rules thus establish the procedure to be followed in the event a party challenges the independence and/or impartiality of a judge, in pursuit of the due process rights of the accused. The ICTY and, to a lesser extent the ICTR, have elaborated upon the substance of the independence and impartiality requirements within their frameworks. A brief review of the authoritative case law follows.

3.2 *Jurisprudence*

3.2.1 The Jurisprudence of the ICTY

As noted, the ICTY has had to decide cases related to the independence and impartiality of its judges on more than one occasion.[47] In *Prosecutor v. Delalic, Mucic, Delic, & Landzo*, a judge was challenged on the basis of her appointment as vice president of her country of origin impacting her independence, considering that her new appointment involved political activities in the executive branch of the government.[48] At the time of the case in 1998, the ICTY Rules

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44 ICTY Rules, *supra* note 26, Rule 15*bis* (D). Include a citation to ICTR?

45 Rule 15*bis* (D) further specifies that

> "[i]f no appeal is taken or the Appeals Chamber affirms the decision of the Trial Chamber, the President shall assign to the existing bench a Judge, who, however, can join the bench only after he or she has certified that he or she has familiarised himself or herself with the record of the proceedings. Only one substitution under this paragraph may be made."

46 For clarifications of these circumstances, see *infra* Part 3.2.2.

47 *See, e.g.*, *Prosecutor v. Seselj*, Decision on Motion for Disqualification, Case No. IT-03-67-PT (Int'l Crim. Trib. for the Former Yugoslavia June 10, 2003); *Prosecutor v. Blagovic*, Case No IT-02-60-PT, Decision on Motion for Disqualification (Int'l Crim. Trib. for the Former Yugoslavia Mar. 19, 2003); *Prosecutor v. Furundzija*, Case No. IT-95-17/1-A 99, Appeals Chamber, Judgment (Int'l Crim. Trib. for the Former Yugoslavia July 21, 2000); Prosecutor v. Delalic et al., Case No. IT-96-21-T, Decision of the Bureau on Motion on Judicial Independence (Int'l Crim. Trib. for the Former Yugoslavia Sept. 4, 1998).

48 *Delalic*, Case No. IT-96-21-T.

were the same as those of the ICTR Rules (i.e., the amendments and subparagraphs of Rule 15 (B) as noted above did not yet exist), and the presiding judge referred the matter to the Bureau for determination. Interestingly, the Bureau first reviewed the jurisprudence of the European Court of Human Rights ("ECHR") in relation to the due process guarantees provided in Article 6(1) of the European Convention on Human Rights.[49] This example provides a clear instance of cross-fertilization between international courts and tribunals.

The ICTY recalled the two-fold test developed by the EHCR for assessing the impartiality of a tribunal:

> The existence of impartiality . . . must be determined according to a subjective test, that is on the basis of the personal conviction that a particular judge has in a given case, and also according to an objective test, *that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect*.[50]

The ICTY thus considered that under the objective component of the test, it must "assess relevant circumstances that may give rise to an 'appearance' of partiality" and recalled that if there is " 'legitimate reason to fear' a lack of impartiality in a judge, he or she must withdraw from the case."[51]

The ICTY then recalled the test for measuring independence as developed by the ECHR:

> In determining whether a body can be considered to be independent—notably of the executive and the parties in the case—the Court has had regard to the manner of appointment of its members and the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.[52]

After a more in depth survey of the ECHR's case law, the Bureau concluded that the concerned judge was not disqualified under Rule 15(A) because she had committed not to take up her post or assume any duties as vice president of Costa Rica until the completion of her judicial duties.[53] Interestingly, the

49 *Id.*

50 *Id.* (quoting Hauschidt v. Denmark, A 154, ¶ 46 (1989) (emphasis in original).

51 *Id.* (quoting *Hauschidt*, A 154, ¶ 48).

52 *Id.* (quoting App. No. 8209/78).

53 *Id.*

applicants contended that although there is no express provision in the ICTY's statute stating that judicial and political offices are incompatible, the effects of Article 13 of the Statute and ICTY Rule 15, taken together, have the same effect as Article 16(1) of the Statute of the International Court of Justice that provides that "[n]o member of the Court may exercise any political or administrative function."[54] The ICTY conceded this point, but made clear that the issue is not whether there is a prohibition against the exercise of any political or administrative function, but rather whether the concerned judge is exercising such a function. Having determined that the judge was not in fact exercising such functions, the judge was not disqualified under Rule 15(A).

In the later case of *Prosecutor v. Furundzija*, the tribunal developed its jurisprudence again, elaborating upon the jurisprudence of the ECHR.[55] In this case, the defendant sought the disqualification of a judge and the vacation of the judgment and sentence based on the judge's involvement with the U.N. Commission on the Status of Women that dealt with allegations of systematic rape in the former Yugoslavia. After a review of ECHR jurisprudence and the two-pronged test noted above, as well as some national jurisprudence, the tribunal set out the principles for interpreting and applying the impartiality requirements of the ICTY.[56] It held that:

> there is a general rule that a Judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias. On this basis, . . . the following principles should direct [the Tribunal] in interpreting and applying the impartiality requirement of the Statute:
>
> A. Judge is not impartial if it is shown that actual bias exists.
> B. There is an unacceptable appearance of bias if:
> (i) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved,

54 *Id.* (quoting Statute of the International Court of Justice Art. 16(1), 15 U.N.I.C.I.O. 35559 Stat. 1055 (1945) [hereinafter ICJ Statute]).

55 *Prosecutor v. Furundzija*, Case No. IT-95-17/1-A 99, Appeals Chamber, Judgment (Int'l Crim. Trib. for the Former Yugoslavia July 21, 2000).

56 *Id.; see also* Mackenzie & Sands, *supra* note 4, at 280 (discussing the *Furundzija* case and the test developed therein).

together with one of the parties. Under these circumstances, a Judge's disqualification from the case is automatic; or

(ii) the circumstance would lead a reasonable observer, properly informed, to reasonably apprehend bias.[57]

With regard to the "reasonable observer" referred to in standard B(ii) above, the ICTY observed that

> the "reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold."[58]

The ICTY noted that there were no allegations of actual bias under standard B(i) above, and considered whether the circumstances would lead a reasonable and informed observer to apprehend bias. It noted in this regard that "there is a presumption of impartiality which attaches to a Judge"[59] and that in the absence of evidence to the contrary, it must be assumed that judges can free their mind of any personal beliefs or predispositions.[60] It observed that it is for the appellant to adduce sufficient evidence to satisfy the tribunal that a judge was not impartial, and that "there is a high threshold to reach in order to rebut the presumption of impartiality."[61] Subsequent cases in the ICTY,[62] the ICTR,[63] the Special Court for Sierra Leone,[64] and the ICC[65] have followed this approach.

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57 *Furundzija*, Case No. IT-95-17/1-A 99, ¶ 189.

58 *Id.*, ¶ 190.

59 *Id.*, ¶ 196.

60 *Id.*, ¶ 197.

61 *Id.*

62 *See Prosecutor v. Vojislav Seselj*, IT-03-67-PT, Decision on Motion for Disqualification (Int'l Crim. Trib. for the Former Yugoslavia June 10, 2003); *Prosecutor v. Momcilo Krajisnik*, Case No. IT-00-39-PT, Decision by a Single Judge on the Defence Application for Withdrawal of a Judge from the Trial (Int'l Crim. Trib. for the Former Yugoslavia Jan. 22 2003); *Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic, Esad Landzo*, IT-96-21-A, Appeals Chamber, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001).

63 *See infra* Part 3.2.2.

64 See *infra* Part 4.2.

65 *See infra* Part 6.1.3.

The tribunal then considered the objectives of the U.N. Commission on the Status of Women as coinciding with the objectives of the resolutions leading to the establishment of the tribunal.[66] It thus observed and concluded that

> "concern for the achievement of equality for women, which is one of the principles reflected in the United Nations Charter, cannot be taken to suggest any form of prejudgment in any future trial for rape." To endorse the view that rape as a crime is abhorrent and that those responsible for it should be prosecuted within the constraints of the law cannot in itself constitute grounds for disqualification.[67]

The tribunal further observed that her experience as part of the U.N. Commission on the Status of Women gave her the relevant qualifications under Article 13(1) of the Statute, and that it would be an "odd result if the operation of an eligibility requirement were to lead to an inference of bias."[68] Thus, the tribunal rightly found no appearance of bias in the circumstances of the case.[69] The "reasonable observer" test and the presumption of impartiality have been adopted in subsequent cases in most criminal courts and tribunals: the ICTR, the SCSL, and the ICC. The *Furundzija* case thus seems to set the standard and threshold for the independence and impartiality of judges in international criminal courts and tribunals.

3.2.2 The ICTR's Jurisprudence

The ICTR has followed the two-pronged test set out in the *Furundzija* case above in adopting and enunciating the "reasonable observer" test in the *Karemera* case.[70] In the *Karemera* case,[71] the accused eventually alleged that the decisions in the case itself showed a bias against him but these allegations were initially denied as the defense failed to illustrate either actual or perceived bias in the judge's actions.[72] A decision, finding actual bias or a reasonable appre-

66 *Furundzija*, Case No. IT-95-17/1-A 99, ¶ 201.

67 *Id.*, ¶ 202.

68 *Id.*, ¶ 205.

69 *Id.*, ¶ 215.

70 *Prosecutor v. Karemera et al.*, ICTR, Bureau, ¶¶ 8–11 (May 17, 2004); *see* Guido Acquaviva et al., *Trial Process, in* International Criminal Procedure: Principles and Rules 782 (Göran Sluiter et al., eds., 2013).

71 *Karemera*, ICTR, Bureau. Although, please note that there are several decisions in this case with contradictory observations that are extremely difficult to find on the internet and decipher, which will be set out in this chapter.

72 *Id.; see* Acquaviva, *supra* note 70, at 782.

hension of bias, triggers the procedures in Rule 15*bis* discussed above.[73] In the *Karemera* case, a judge was challenged on the basis of her domestic situation (living with a member of the prosecution team), and the judge withdrew from the proceedings due to an apprehension of bias.[74] However, before she withdrew from the proceedings, the two other judges declined a defense motion on disqualification on the grounds of impartiality even though they were aware of her cohabitation with a member of the prosecution team.[75] Following her withdrawal from the case, the remaining members of the chamber considered that it was in the interests of justice to continue with a substitute judge, even though most of the witness testimony had not been video recorded.[76] The Appeals Chamber later held that a reasonable apprehension of bias against the tribunal as a whole could be found due to their declining the defense motion against the judge despite being aware that she was cohabiting with a member of the prosecution team.[77] In light of this finding, the Trial Chamber III held that it was endowed with "inherent powers to make judicial findings that were necessary to achieve the primary obligation to guarantee a fair trial to the accused."[78] It declared that a decision on leave to amend the indictment

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73 Whereby another judge may be assigned to the case and order a rehearing or continue with the proceedings with the consent of the accused (if past the opening statements) unless the remaining judges deem it in the interests of justice to continue even without the consent of the accused. *See* ICTR Rules, *supra* note 26, Rule 15*bis* (C); ICTY Rules, *supra* note 26, Rule 15*bis* (C); *see also* Acquaviva, *supra* note 71, at 783.

74 *Prosecutor v. Karemera et al.*, ICTR, Appeals Chamber, ¶ 67 (Oct. 22, 2004); *see* Acquaviva, *supra* note 71, at 784.

75 *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR15bis. 2, Reasons for Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material, ¶ 69 (Oct. 22, 2004). For more detail on these provisions, particularly discussions during the preparatory phase of the State, Rules, and Code, providing another overview of these complicated decisions, see Yvonne McDermott, *Article 41—Excusing and Disqualification of Judges, The Rome Statute, in* The Commentary on the Law of the International Criminal Court (Mark Klamberg, ed., forthcoming 2015), *available at* http://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-4/#c3760 (last visited Apr. 00, 2015) and Acquaviva, *supra* note 71, at 784.

76 *Karemera*, Case No. ICTR-98-44-AR15bis. 2.

77 *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-PT, Decision on Severance of André Rwamakuba and Amendments of the Indictment, ¶ 22 (Dec. 7, 2004); *see* McDermott, *supra* note 76; Acquaviva, *supra* note 71, at 784.

78 *Prosecutor v. Karemera et al.*, ICTR, Trial Chamber, ¶ 22 (Dec. 7, 2004); *Acquaviva, supra* note 71, at 784.

was affected by the later finding of apprehension of bias against the bench and should thus no longer have effect.[79]

This review of the case law and statutory requirements shows that applicants face a particularly high burden to demonstrate a lack of impartiality in the ICTY and the ICTR. The presumption of impartiality described above could be at odds with the presumption of guilt that accompanies most accused of international crimes, along with the requirement of impartiality as a fundamental human right, and the fact that these criminal courts are the sole international tribunals with jurisdiction over individuals and the power to deprive freedom. Nonetheless, the above reasoning regarding the objectives of the U.N. Commission on the Status of Women and the resolutions establishing the ICTY are quite valid. To hold otherwise would lead to a slippery slope where defendants could potentially challenge female judges in rape cases based on an appearance of bias as a female, given that females are the predominant victims of rape. The judgment thus strikes the appropriate balance between the rights of the accused and the requirements of international justice. Nonetheless, the importance of the requirements of independence and impartiality cannot be downplayed in the context of international criminal courts and tribunals, and the challenges specific to this context must be understood.

3.3 *Particular Challenges of Ensuring Independence and Impartiality in Both the ICTY and the ICTR*

As noted above, there is a perceived risk that judges of international criminal courts and tribunals may bow to the pressures from major economic and political powers given the inherent politicization of international criminal law.[80] In fact, Judge Frederik Harhoff raised allegations against the American/Israeli President of the Court, Judge Meron, of pressuring other judges into approving the acquittals of top Croatian and Serbian commanders, Ante Gotovina, Momčilo Perišić, Jovica Stanišić, and Franko Simatović.[81] He alleged that Judge Meron exerted pressure over the other judges in order to protect the military establishments of powerful states, such as the United States and Israel, from expansive forms of criminal liability, as developed through the joint criminal enterprise jurisprudence of the ICTY.[82] The legal controversy of the decisions

79 *Id.*

80 For a full discussion, see de Bertodano, *supra* note 13.

81 *See* Simons, *supra* note 21.

82 The English version of the e-mail can be found at E-mail from Judge Frederick Harhoff, Int'l Crim. Trib. for the Former Yugoslavia (June 6, 2013) [hereinafter E-mail from Judge Harhoff], *available at* http://www.bt.dk/sites/default/files-dk/node-files/511/6/6511917-

relates to the degree of responsibility that top military commanders should have for war crimes committed by their subordinates. The allegations were contained in an e-mail sent by Judge Harhoff to fifty-six lawyers, friends, and associates, which were subsequently published by a Danish newspaper. In the e-mail, Judge Harhoff severely criticizes the controversial acquittals and the "tenacious pressure" exerted by Judge Meron on other judges in such a way "that makes you think he was determined to achieve an acquittal."[83]

Many have observed a softening of the law towards the protection of military interests, but Judge Harhoff is the first to attribute the apparent change to the tribunal's current president, Judge Meron.[84] Judge Harhoff observes:

> Have any American or Israeli officials ever exerted pressure on the American presiding judge (the presiding judge for the court that is) to ensure a change of direction? We will probably never know. But reports of the same American presiding judge's tenacious pressure on his colleagues in the Gotovina-Perisic case makes you think he was determined to achieve an acquittal—and especially that he was lucky enough to convince the elderly Turkish judge to change his mind at the last minute. Both judgments then became majority judgments 3–2.[85]

This raises serious concerns as to the independence of Judge Meron, and the ICTY as a whole. The *New York Times* reports that some comments by unnamed ICTY senior officials seem to corroborate Judge Harhoff's accusations which led to a

> mini-rebellion . . . brewing against Judge Meron, prompting some of the 18 judges of the [ICTY] to group around an alternative candidate for the election for tribunal president.[86]

However, it seems that these allegations were not taken seriously enough to warrant his replacement since Judge Meron was reelected as president on October 1, 2013, after the e-mail had been leaked. It is unclear whether any

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letter-english.pdf; *see also* Marko Milanovic, *Danish Judge Blasts ICTY President*, EJIL: Talk! (June 13, 2013), http://www.ejiltalk.org/danish-judge-blasts-icty-president/ (last visited Apr. 00, 2015).

83 *See* Simons, *supra* note 21; E-mail from Judge Harhoff, *supra* note 83.

84 *See id.*

85 *See* E-mail from Judge Harhoff, *supra* note 83.

86 Simons, *supra* note 21.

action was taken to ensure his independence and freedom of influence from the United States and Israel. Nonetheless, Judge Harhoff describes the risks inherent in international criminal law:

> The latest judgments here have brought me before a deep professional and moral dilemma, not previously faced. The worst of it is the suspicion thatsome of my colleagues have been behind a shortsighted political pressure that completely changes the premises of my work in my service to wisdom and the law.[87]

He seems to suggest that the alleged pressure by Judge Meron to satisfy political power alters the role of judges from that of serving the rule of law to serving the will of political powers. On the other hand, the leaked e-mail in and of itself has been criticized as uncorroborated slanderous accusations and reflecting a "conspiracist attitude, tinged with anti-Semitism."[88] Defenders of Judge Meron argue that he exerted no such pressure and is being unfairly attacked for decisions that were reached by a majority of the tribunal in each case.[89] Some argue that there is no evidence that Judge Meron acted out of influence from the United States or Israel, but that the judge was implementing his conservative view of international humanitarian law.[90] Others contend that

> it was deeply unethical, and far more scandalous than any of the allegations in the letter, for Judge Harhoff to reveal confidential discussions between the judges.[91]

In this regard they contend that

> the fact that Judge Harhoff still has a job indicates the need . . . for a binding code of judicial ethics at all international criminal tribunals, not just at the ICC.[92]

87 E-mail from Judge Harhoff, *supra* note 83.

88 *See* Luka Misetic, *Comment, in* Milanovic, *supra* note 83.

89 David Rohde, *Gutting International Justice*, Reuters (July 13, 2013), http://blogs.reuters.com/david-rohde/2013/07/12/gutting-international-justice/.

90 *Id.*

91 Kevin Jon Heller, *The Real Judge Meron Scandal at the ICTY*, Opinio Juris (June 17, 2013, 9:57 PM), http://opiniojuris.org/2013/06/17/the-real-judge-meron-scandal-at-the-icty/.

92 *Id.*

The controversy had important ramifications. In July 2013, Rwanda called for the resignation of Judge Meron, requesting that Judge Meron step down and a retrial of all the cases that he worked on "or influenced the decisions of the judges."[93] Considering that the ICTY and the ICTR share an Appeals Chamber, the independence of the president of this chamber equally impacts both the ICTY and the ICTR. It is unclear how, and if these concerns were addressed, but Judge Meron's subsequent reelection suggests that the accusations were found to be baseless and that Judge Meron's independence is intact. Media reports simply report Rwanda's calls for his resignation; there is no further reporting or information on how the situation was handled. In any case, Judge Meron's subsequent reelection indicates that the matter was resolved.

These developments demonstrate the very real risk of political influence on judges' independence. Even if states do not pressure judges to rule in a certain way, judges may feel obliged to cooperate with their governments and find a legal solution to a case that supports their own national interest, particularly concerning the individual criminal responsibility of top military commanders of powerful states. Moreover, one judge has observed, "At my court, judges are no doubt aware that taking a controversial position in an unpopular decision could have an effect on their re-election" but that he was "confident that the judges' sense of professionalism would prevail.[94] The political influence, combined with the election of judges, makes the principles and procedures to ensure the independence and impartiality of judges in international criminal courts all the more important.

3.4 *The International Residual Mechanism for Criminal Tribunals*

The International Residual Mechanism for Criminal Tribunals (the "Mechanism") was established by the Security Council acting under Chapter VII of the United Nations Charter to carry out the residual functions of the ICTY and the ICTR following the completion of all of their trials and appeals.[95] It was established to commence as of July 1, 2012 for the ICTR branch and July 1, 2013 for the ICTY branch.[96] The Security Council requested the ICTY and the

93 Edwin, Musoni, *Rwanda Wants ICTR Judge Meron to Resign*, New Times (June 19, 2013), *available at* http://allafrica.com/stories/201306200232.html.

94 Brandeis Inst. for Int'l Judges, Challenges to Judicial Independence 2 (2010).

95 Security Council Resolution on the Establishment of the International Residual Mechanism for Criminal Tribunals with Two Branches, S.C. Res. 1966, pmbl., U.N. Doc. S/RES/1966 (Dec. 22, 2010) [hereinafter Mechanism].

96 *Id.*, ¶ 1.

ICTR to complete all their remaining work no later than December 31, 2014 and to prepare their closure to ensure a smooth transition to the Mechanism.[97] Although the Mechanism commenced operations according to the timeline provided by the Statute above,[98] it does not seem that the ICTY and the ICTR have successfully completed all judicial activities by December 31, 2014, since the Appeals Chamber is still rendering judgments as of January 2015.[99]

The Mechanism's statute sets out the same qualifications in Article 9 as those set out in the statutes of the ICTY and the ICTR, and adds that "[p]articular account shall be taken of experience as judges of the ICTY or the ICTR."[100] The Rules of Procedure and Evidence of the Mechanism are virtually identical to those of the ICTY Rules and the ICTR Rules: Rules 18, 19, and 20 on the qualification, disqualification, and absence of judges respectively are identical to those of the ICTY,[101] with variations where necessary for the Mechanism. For example, they refer to an "ICTY or ICTR Judge who has reviewed an indictment against an accused" in Rule 18(C) in order to suit the specific circumstances of the Mechanism. Given this, it may be presumed that they will be interpreted and applied in the same manner and that the line of jurisprudence laid out above will apply in the event that a challenge is raised.

4 The Special Court for Sierra Leone

The Special Court for Sierra Leone ("SCSL") was established by agreement between the United Nations and the government of Sierra Leone pursuant to Security Council Resolution 1315 (2000) of August 14, 2000 to prosecute persons responsible for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since November 30, 1996.[102] The Statute of the SCSL ("SCSL Statute") and its Rules of Procedure and Evidence ("SCSL Rules") govern the independence and impartiality of its

97 *Id.*, ¶ 3.

98 *See* Letter from the President of the International Residual Mechanism for Criminal Tribunals addressed to the President of the Security Council, S/2014/826, ¶ 5 (Nov. 19, 2014).

99 *See* Press Release, Int'l Crim. Trib. for the Former Yugoslavia, Appeals Chamber Upholds Convictions of Five Senior Bosnian Serb Officials for Srebrenica and Zepa Crimes, The Hague (Jan. 30, 2015), *available at* http://www.icty.org/sid/11618.

100 Mechanism, *supra* note 96, Art. 9.

101 *See* ICTY Rules, *supra* note 26, Rules 14–16.

102 *See* Statute of the Special Court for Sierra Leone, S.C. Res. 1315, pmbl., Art. 1, U.N. Doc. S/RES/1315 (Aug. 14, 2000) [hereinafter SCSL Statute].

judges and set out the procedure for the disqualification of judges in a similar manner as the other courts and tribunals have, as discussed in this chapter. The jurisprudence of the SCSL has interpreted these provisions in a similar manner as the ICTY and has expressly adopted the approach of the ICTY in the *Furundzija* case.

4.1 *The Statutory Requirements*

Article 13 of the SCSL Statute sets out the qualifications and appointment of judges in an identical manner as the ICTY,[103] the ICTR,[104] and the ICC.[105] However, the SCSL Statute goes further in its formulation relating to the qualification and appointment of judges by adding a second sentence after the usual "high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices."[106] The second sentence of Article 13 provides that judges "shall be independent in the performance of their functions, and shall not accept or seek instructions from any Government or any other source."[107]

As in other courts and tribunals, the SCSL Rules further elaborate the requirements of independence and impartiality and deal with the disqualification of judges. In particular, Rule 14 requires each judge to make a solemn declaration before taking up duties to discharge his/her duties "honestly, faithfully, impartially and conscientiously" in a similar manner as the declaration in the ICTY and the ICTR; but the SCSL Rules add that these duties will be discharged "without fear or favor, affection or ill-will."[108] The declaration as provided for in the SCSL seems to encompass more elements of independence and impartiality.

Rule 15 deals with the disqualification of judges and provides that

> a judge may not sit at a trial or appeal in any case in which his impartiality might reasonably be doubted on any substantial grounds.[109]

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103 ICTY Statute, *supra* note 25, Art. 13.

104 ICTR Statute, *supra* note 25, Art. 12.

105 Rome Statute of the International Criminal Court Art. 36(3)(a), U.N. Doc. A/CONF. 189/9, 37 I.L.M. 999 (July 17, 1998) [hereinafter Rome Statute].

106 SCSL Statute, *supra* note 103, Art. 13(1).

107 *Id.*

108 Another difference in the formulation in the Rules of the ICTR and ICTY is that they begin with "honorably, faithfully, impartially and conscientiously," whereas the rules of the SCSL begin with "*honestly*" rather than "honourably."

109 Rules of Procedure and Evidence of the Special Court for Sierra Leone, Rule 15(A) (entered into force Mar. 7, 2003) [hereinafter SCSL Rules], *available at* https://www1.umn.edu/

Rule 15(D) provides that any judge who reviews an indictment shall not be prohibited from sitting as a member of the Trial Chamber in the trial of the accused or that reason, in a similar manner as the ICTY Rules and ICTR Rules. However, the SCSL Rules are broader in scope than the ICTY Rules and ICTR Rules, as they refer to any judge who approved the indictment or who had any involvement at the pre-trial or interlocutory stages of the proceedings.[110] Rule 15(D) of the ICTY Rules expressly prevents any judge who sat in the trial stages of the proceedings from being a member of the Appeals Chamber in the same case. It has been noted that while this is not expressly included in the rules for the ICTR or SCSL, "this is presumably implicit to the SCSL and ICTR regimes, or at least no practice to the contrary has ever been shown."[111] The jurisprudence of the SCSL has adopted the same approach as the ICTY in applying the "reasonable observer" test in the interpretation of this provision.[112]

Rule 15 clarifies that any party may apply for the disqualification of a judge on the above ground,[113] and that the president may assign an alternate judge where a judge voluntarily withdraws from a case.[114] Rule 15*bis* sets out the procedure where a disqualification of a judge is sought. It provides that

> where it is alleged that a Judge is not fit to sit as a member of the Special Court, the President may refer the matter to the Council of Judges.[115]

It further provides that:

> Should the Council of Judges determine that:
>
> (i) the allegation is of a serious nature, and
> (ii) there appears to be a substantial basis for such allegation,

humanrts/instree/SCSL/Rules-of-proced-SCSL.pdf. It should be noted, however, that this provision was amended in May 2004 and November 2006, after the cases discussed below. The differences in wording and organization do not in any case affect the substance or standard set in this jurisprudence. It seems that the provision was identical to that of the ICTY and the ICTR, as well as the Special Court for Lebanon, prior to these amendments.

110 *See* Acquaviva, *supra* note 70, at 781.

111 *Id.*

112 *See infra* Part 4.2.

113 SCSL Rules, *supra* note 110, Rule 15(B).

114 *Id.*, Rule 15(C).

115 *Id.*, Rule 15*bis*(A).

> it shall refer the matter to the Plenary Meeting which will consider it and, if necessary, make a recommendation to the body which appointed the Judge.[116]

The Rule also provides that the challenged judge shall be entitled to present his/her comments on the matter at each stage,[117] as in other courts and tribunals. Although that wording does not exactly mirror the procedure set out in the ICTY, the ICTR, and the ICC, the jurisprudence of the SCSL has adopted the same approach as these tribunals, as discussed in the following section.

Rule 16(B) deals with the procedure in case of absence and resignation if a judge is disqualified and provides that the president may designate an alternate judge in such an instance. It is a similar provision as in the ICTY and the ICTR (and the Special Court for Lebanon discussed below), but it does not include the requirement of consent if the case has proceeded past the oral argument phase.[118] The SCSL seems to do less to protect the due process rights of the accused.

4.2 *Jurisprudence*

The SCSL has noted that

> the applicable test for determining applications made under Rule 15(B) is whether an independent bystander or reasonable person will have a legitimate reason to fear that the judge in question lacks impartiality, "in other words, whether one can apprehend bias."[119]

It thus seems to adopt the "reasonable observer" test developed by the ICTY. The SCSL has confirmed that the test set out above is "consistent with the ICTY jurisprudence, in particular the test derived from the Judgment in the case of

116 *Id.*, Rule 15*bis*(B).

117 *Id.*, Rule 15*bis*(C).

118 As further discussed below, the procedure in the SCSL thus seems to be more in line with the ICC in not requiring consent to replace a judge after the oral proceedings have passed. However, in the ICC's case, this is countered by its extensive Judicial Code of Ethics, while in the SCSL's case, there is no such counter balance to ensure the due process rights of the accused. *See infra* Part 6.

119 *Prosecutor v. Norman*, Case No. SCSL-2004-14-PT, Decision on the Motion to Recuse Judge Winter from the Deliberation in the Preliminary Motion on the Recruitment of Child Soldiers, ¶ 22 (May 28, 2004) (quoting *Prosecutor v. Sesay*, Case No. SCSL-2004-15-AR15, Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber, ¶ 15 (Mar. 13, 2004).

Furundzija as set out as follows."[120] It then recalled the entire test set out in the *Furundzija* case and affirmed that "the focus is therefore on 'an unacceptable appearance of bias'."[121] However, it noted that "the starting point for any determination of such claim . . . is that 'there is a presumption of impartiality which attaches to a Judge.' "[122] It thus directly quoted the ICTY in the *Furundzija* case and brought the approach of the SCSL directly in line with that of the ICTY and the ICTR.

The first case of the SCSL dealing with disqualification, the *Sesay* case, did not discuss the test or presumption of impartiality in such express terms, and did not refer to the ICTY's jurisprudence. In that case, the SCSL stated that the relevant question is "whether one can apprehend bias."[123] A judge was challenged on the basis of the authorship of a book on crimes against humanity that expressly referred to atrocities committed by the Sierra Leone's Revolutionary United Front, of which some of the accused standing trials were highly ranked members.[124] The SCSL did not recall the presumption of impartiality but instead found that publication to give rise to a reasonable apprehension of bias.[125] However, the fact that the judge made direct comments on the atrocities committed by the armed group to which the accused belonged is perhaps strong enough grounds to rebut the presumption of impartiality in any case.

In the subsequent case of *Norman*, which recalled the test and presumption set out in the *Furundzija* case, the judge's involvement in children's rights advocacy was not seen to give rise to actual or perceived bias in a case involving child soldiers.[126] This is not only in line with the legal test set out in the *Furundzija* case, but in keeping with its findings since involvement in children's rights groups does not create bias with regard to child soldiers just as involvement in women's rights groups does not create bias with regard to rape. This is also in line with a similar case at the ICC where the judge was involved in UNICEF in a case involving the use of child soldiers.[127] Considering the *Sesay* and *Norman* decisions together

120 *Id.*, ¶ 23.

121 *Id.*

122 *Id.*, ¶ 25 (quoting *Prosecutor v. Furundzija*, Case No. IT-95-17/1-A 99, Appeals Chamber, Judgment, ¶ 196 (Int'l Crim. Trib. for the Former Yugoslavia July 21, 2000)).

123 *Sesay*, Case No. SCSL-2004-15-AR15, ¶ 15.

124 See *id.*; McDermott, *supra* note 76; Acquaviva, *supra* note 71, at 782.

125 *See id.*

126 *Norman*, Case No. SCSL-2004-14-PT; *see also* McDermott, *supra* note 76.

127 *See supra* notes 167–73.

> might lead one to conclude that while some prior involvement in causes correlating in some way to the subject-matter of the case will not in itself be a ground to apprehend judicial bias, involvement in activities concerning in some way the individual accused certainly will.[128]

It should be noted that the Bangalore Principles on Judicial Conduct permit judges to serve on advisory or official bodies, so long as such membership is not inconsistent with the perceived impartiality of the judge, in keeping with these decisions.[129] The Bangalore Principles on Judicial Conduct were developed to apply to judges in national courts, but the underlying principles governing judicial conduct (and their independence and impartiality) are generally shared in all of the guidelines and rules established and should govern all judiciary, whether national or international.[130] Nonetheless, the Bangalore Principles seem to be the only guidelines that expressly allow the membership of advisory or official bodies and are therefore relevant to recall here to confirm the line of jurisprudence discussed above.

5 The Special Court for Lebanon

Like the SCSL, the Special Court for Lebanon ("SCL") was established by agreement between the United Nations and the Lebanese Republic pursuant to Security Council Resolution 1664 (2006) of March 29, 2006. It has jurisdiction over persons responsible

> for the death of former Lebanese Prime Minister Rafiq Hariri and in the death or injury of other persons. If the SCL finds that other attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005, or any later date decided by the Parties and with the consent of the Security Council, are connected in accordance with the principles of criminal

128 Acquaviva, *supra* note 710, 782–783.

129 The Bangalore Principles on Judicial Conduct, Principle 4.11.3 (2002) [hereinafter Bangalore Principles]; *see* Acquaviva, *supra* note 71, at 783. The Burgh House Principles are silent with regards to membership of these bodies but they deal with extra judicial activity and provide that judges shall not engage in any extra judicial activity that is incompatible with their judicial function or might reasonably appear to affect their independence and impartiality. *See* Bangalore Principles, *supra*, Principle 8 (discussing extrajudicial activity). This formulation is more in keeping with the wording of the statutory documents of international criminal courts and tribunals.

130 *See* International Commission of Jurists, *supra* note 3, at 141.

> justice and are of a nature and gravity similar to the attack of 14 February 2005, it shall also have jurisdiction over persons responsible for such attacks. This connection includes but is not limited to a combination of the following elements: criminal intent (motive), the purpose behind the attacks, the nature of the victims targeted, the pattern of the attacks (modus operandi) and the perpetrators.[131]

It should be noted, however, that the SCSL has jurisdiction over serious violations of international humanitarian law and Sierra Leonean law, while the SCL only has jurisdiction over violations of Lebanese law.[132]

5.1 *The Statutory Requirements*

Article 9 of the Statute of the SCL deals with the qualification and appointment of judges in an identical manner as all other courts and tribunals examined in this chapter, but refers instead to "extensive judicial experience" rather than "qualifications required in their respective countries for appointment to the highest judicial offices" as referred to in all other texts.[133] This is most likely due to the fact that the statute expressly requires that one of the three judges in the Trial Chamber shall be Lebanese, and that two of the five judges in the Appeals Chamber shall be Lebanese.[134]

Rule 24 of the Rules of Procedure and Evidence for the SCL ("SCL Rules") provides an identical text for the solemn declaration as that provided in the ICTY Rules and the ICTR Rules.[135] In fact, the SCL Rules seem virtually identical to those of the ICTY Rules and the ICTR Rules. Rule 25 deals with the disqualification of judges in an identical manner as that of Rule 15 in the ICTY Rules and the ICTR Rules.[136]

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131 Statute of the Special Tribunal for Lebanon, S.C. Res. 1757, Art. 1, U.N. Doc. S/RES/1757 (May 30, 2007) [hereinafter STL Statute], *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N07/363/57/PDF/N0736357.pdf?OpenElement.

132 *See id.*, Art. 2; SCSL Statute, *supra* note 103, Art. 1.

133 *See* SCSL Statute, *supra* note 103, Art. 13; *see also* Rome Statute, *supra* note 106, Art. 36(3)(a); ICTR Statute, *supra* note 25, Art. 12; ICTY Statute, *supra* note 25, Art. 13.

134 *See* STL Statute, *supra* note 132, Art. 8.

135 *See* ICTR Rules, *supra* note 26, Rule 14; ICTY Rules, *supra* note 26, Rule 14.

136 Special Tribunal for Lebanon, Rules of Procedure and Evidence, STL-BD-2009-01-Rev. 7, Rule 25 (Mar. 20, 2009), http://www.stl-tsl.org/images/RPE/RPE_EN_February_2015.pdf [hereinafter STL Rules].

In addition, Rule 26 governs the procedure in case a judge is disqualified and is virtually identical to Rule 15*bis* (C) of the ICTY Rules and the ICTR Rules.[137] Given that these statutory requirements are virtually identical to those in the ICTY and ICTR, it may be assumed that they will be interpreted in the same manner by the Court in the application of the "reasonable observer" test and the presumption of impartiality. The fact that the SCSL has done so supports this, particularly considering that the statutory requirements of the SCL are more similar to those of the ICTY and the ICTR than to those of the SCSL.

6 The International Criminal Court

6.1 *The Statutory Requirements*

6.1.1 The Statute and Rules of Procedure and Evidence

Perhaps in response to the challenges faced at the ICTY and the ICTR, the ICC has very detailed rules and procedures governing the independence and impartiality of its judges in its statute, Rules of Procedure and Evidence ("ICC Rules") and binding Code of Judicial Ethics. Article 40 of the Rome Statute provides for the independence of judges in the performance of their functions.[138] It provides that judges shall not engage in any activity that is likely to interfere with their judicial function or "affect confidence in their independence."[139] Article 40 further provides that any question regarding the independence of a judge shall be decided by an absolute majority of the judges.[140]

Article 41 of the Rome Statute sets out the procedure for the excusal and disqualification of judges. Article 41(1) provides that the president may excuse a judge at his/her request from the exercise of his/her functions and Article 41(2) lists the specific instances in which a judge should be disqualified, and provides that the prosecutor or accused may request disqualification as well.[141] Article 41(2)(a) provides that a judge shall not participate "in any case in which his or her impartiality might reasonably be doubted on any ground."[142] The wording thus seems to follow the reasonable observer test as developed by

137 Rule 15*bis* is identical in the ICTY Rules and the ICTR Rules. *See supra* notes 42–45 and accompanying text.

138 Rome Statute, *supra* note 106, Art. 40.

139 *Id.*, Art. 40(2).

140 *Id.*, Art. 40(4).

141 *Id.*, Art. 41(2)(b) (granting the prosecutor and the accused the right to disqualify a judge under Article 41).

142 *Id.*, Art. 41(2)(a).

the ICTY. It is unclear whether the presumption of impartiality would equally apply in the ICC.

Article 41(2)(a) further expressly provides that a judge shall be disqualified on grounds of impartiality if he/she has been involved in the case before the court or at the national level in any capacity, or on any other grounds as provided in the ICC Rules. Lastly, Article 41(2)(c) provides that any question as to the disqualification of a judge shall be decided by "an absolute majority of the judges"[143] and that the challenged judge may present comments on the matter, but shall not take part in the decision. The ICC Rules further elaborate upon these provisions and provide additional grounds for disqualification.

In particular, Rule 34 sets out the additional grounds for disqualification of a judge and provides more detail on the procedure to be followed in case of a challenge. Rule 35 further requires a judge to request recusal if circumstances exist or arise that might call his/her impartiality into question.[144] Rule 34 sets out examples of such circumstances that complement those set out in Article 41.[145] The grounds provided in Rule 34 include: personal interest in the case, including any personal or professional relationship with any of the parties;[146] involvement in his/her private capacity in any legal proceedings involving the accused;[147] performance of functions prior to taking office during which he/she could be expected to have formed an opinion on the case in question on the parties or their legal representatives that "objectively, could adversely affect the required impartiality of the person concerned";[148] and expression of opinions "through the communications media, in writing or in public actions, that objectively, could adversely affect the required impartial-

143 The case law has interpreted "an absolute majority of the judges" to indicate a plenary session and has convened such a plenary session in the application of Article 41 of the Rome Statute. *See Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-3040-Anx, Decision of the Plenary of Judges on the Defence Application of 20 February 2013 for the Disqualification of Judge Sang-Hyun Song from the Case of *The Prosecutor v. Thomas Lubanga Dyilo* (June 11, 2013), http://www.icc-cpi.int/iccdocs/doc/doc1603064.pdf [hereinafter Lubanga Decision]; *see also infra* Part 6.2 (discussing the jurisprudence).

144 For more detail on these provisions, particularly discussions during the preparatory phase of the Statute, Rules and Code, see McDermott, *supra* note 76.

145 *See supra* notes 142–44.

146 International Criminal Court, Rules of Procedure and Evidence, Rule 34(1)(a), http://www.icc-cpi.int/iccdocs/PIDS/legal-texts/RulesProcedureEvidenceEng.pdf [hereinafter ICC Rules].

147 *Id.*, Rule 34(1)(b).

148 *Id.*, Rule 34(1)(c).

ity of the person concerned."[149] Ensuring objectivity with regard to the legal representatives may be difficult given that "international criminal law is a very small community. Judges [and lawyers] are more likely to have worked together, studied together."[150]

Rule 34(2) further details the procedure to be followed in a request for disqualification: the request shall be made in writing "as soon as there is knowledge of the grounds on which it is based," shall state the grounds, attach any relevant evidence, and shall be transmitted to the person concerned who is entitled to present written submissions.[151] This wording suggests that a party waives its right to request disqualification where it is not sought as soon as there is knowledge of the grounds for disqualification. Rule 38 deals with the replacement of a judge in the event of disqualification in a much less detailed manner than all other criminal courts and tribunals. Rule 38 simply provides that "replacement shall take place in accordance with the pre-established procedure in the Statute, the Rules and the Regulations."[152] It is unclear what pre-established procedure it is referring to. The only relevant provision in the Rome Statute seems to be Article 74, which deals with the requirements of the decision and provides that

> [t]he Presidency may, on a case-by-base basis, designate, as available, one or more alternate judges to be present at each stage of the trial and to replace a member of the Trial Chamber if that member is unable to continue attending.[153]

This is clearly different than the ICTY, the ICTR, and the SCL that provide for the consent of the accused if the case has proceeded past opening statements. It is unclear how the due process rights of the accused are secured without a consent requirement when the case has proceeded past the oral arguments phase as in the other tribunals. Nonetheless, the end result seems the same since the judges may proceed with the case even without the consent of the accused where they consider it in the interests of justice to do so.

149 *Id.*, Rule 34(1)(d).

150 Brandeis Inst. for Int'l Judges, Integrity and Independence: The Shaping of the Judicial Persona 3 (2007).

151 ICC Rules, *supra* note 147, Rule 34(2).

152 *Id.*, Rule 38(2).

153 Rome Statute, *supra* note 106, Art. 74.

6.1.2 The Code of Judicial Ethics of the ICC

Article 45 of the Rome Statute also provides that before taking up their duties, judges must make a "solemn undertaking in open court to exercise his or her respective functions impartially and conscientiously."[154] Rule 5 of the ICC Rules provides the text of the undertaking. This is similar to the declaration required in the ICTY and the ICTR, but the undertaking in the ICC is given more teeth and substance through the adoption of the binding Code of Judicial Ethics and elaboration of the undertaking in Rule 5. The Code of Judicial Ethics was adopted pursuant to the undertaking required by Article 45, the principles "concerning judicial independence, impartiality and proper conduct specified in the Statute and Rules," the "need for guidelines of general application to contribute to judicial independence and impartiality" and the "special challenges facing the judges of the Court in the performance of their responsibilities."[155]

Article 3 of the Code of Judicial Ethics provides more substance to the requirement of judicial independence and expressly prohibits judges from engaging in any activity that is likely to interfere with the judicial function. This is an elaboration of Article 40(2) of the Rome Statute and is given more substance in Article 10 of the Code of Judicial Ethics, which adds that "judges shall not exercise any political function."[156] Article 4 sets out the requirements of impartiality and provides that the appearance of impartiality shall be ensured and that judges shall avoid any conflict of interest "or being placed in a situation which might *reasonably be perceived* as giving rise to a conflict of interest."[157] These provisions thus seem to follow the approach adopted by the ICTY and the ECHR, as noted above. Again, it is unclear whether the presumption of impartiality would also apply in the ICC. Given the more detailed provisions governing impartiality in the ICC, however, one can assume that it would not. Such a presumption is unnecessary since the statutory requirements are more clear and detailed.

Article 5 sets out the requirements of judges' integrity and expressly provides that they shall not receive gifts or remuneration. Article 6 requires judges to respect the confidentiality of the consultations that relate to their judicial functions and the "secrecy of deliberations."[158] Interestingly, although this may

154 Rome Statute, *supra* note 106, Art. 45.

155 International Criminal Court, Code of Judicial Ethics, ICC-BD/02-01-05, pmbl., http://www.icc-cpi.int/NR/rdonlyres/A62EBC0F-D534-438F-A128-D3AC4CFDD644/140141/ICCBD020105_En.pdf [hereinafter ICC Code of Ethics].

156 *Id.*, Art. 10.

157 *Id.*, Art. 4 (emphasis added).

158 *Id.*, Art. 6.

be an implicit requirement in all courts and tribunals, there is no such express requirement in relation to the ICTY and the ICTR. If there was, then the leaked e-mail of Judge Harhoff would arguably violate it, given the information divulged relating to the last minute change of vote of the Turkish judge. One can only wonder how this violation would be treated. In this regard, Article 9 of the Code of Judicial Ethics deals with public expression and association and expressly provides that judges "shall avoid expressing views which may undermine the standing and integrity of the Court."[159] Judge Harhoff's leaked e-mail (or perhaps the influence of Judge Meron on the other side of the coin) seems to have done just that.

Judge Harhoff's e-mail could be interpreted in two ways: leaked to uphold the standing and integrity of the ICTY by drawing attention to the increased role of politics in the face of the law, in order to counter this and restore its integrity; or as undermining the credibility of the tribunal as a whole with unsubstantiated allegations in breach of the secrecy of deliberations that call into question the legitimacy of the court itself. Regardless of how one looks at the e-mail, the Code of Judicial Ethics would certainly provide grounds to address the impropriety. Depending on the perspective, this could take the form of another judge, prosecutor, or the accused seeking the disqualification of Judge Harhoff or Judge Meron for failing to discharge their judicial functions in accordance with the Statute, Rules, and Code of Judicial Ethics.

In any event, the ICC has developed more detailed and strict requirements for the independence and impartiality of its judges than in the ICTY and the ICTR—a welcomed development. The approach mirrors that enunciated in the jurisprudence in the ICTY related to the reasonable observer and reasonable apprehension of bias, and the case law of the ICC has followed the test set out in the *Furundzija* case. Despite the more elaborate detailed provisions governing impartiality in the ICC, the ICC has reiterated the presumption of impartiality enunciated by the ICTY and reaffirmed the high burden to rebut it. A review of this case law follows.

6.2 *Jurisprudence*

The ICC noted in its first decision on an application for disqualification of a judge that the "relevant standard of assessment was whether the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias."[160] It thus adopted the reasonable observer test as developed

159 *Id.*, Art. 9(2).

160 *Prosecutor v. Abdallah Banda Abakaer Nourain & Saleh Mohammed Jerbo Jamus*, Case No. ICC-01/05-03/09-344-Anx, Decision of the Plenary of the Judges on the Defence

by the ICTY, but did not expressly refer to this line of jurisprudence.[161] It further affirmed the presumption of impartiality in line with the jurisprudence of the ICTY, noting that:

> The . . . disqualification of a judge was not a step to be undertaken lightly, [and] a high threshold must be satisfied in order to rebut the presumption of impartiality which attaches to judicial office, with such high threshold functioning to safeguard the interests of the sound administration of justice. When assessing the appearance of bias in the eyes of the reasonable observer, unless rebutted, it is presumed that the judges of the Court are professional judges, and thus, by virtue of their experience and training, capable of deciding on the issue before them while relying solely and exclusively on the evidence adduced in the particular case.[162]

The ICC has thus stressed that there is a high threshold for the disqualification of judges in international criminal courts and tribunals. This presumption of impartiality seems at odds with the more detailed provisions of the Judicial Code of Ethics at the ICC, which could potentially provide more grounds for disqualification. It could be the case that the detailed provisions of the Code could provide additional grounds for the accused to buttress the difficulty in overcoming the high burden of rebutting this presumption. As noted above, the Code expressly prohibits actions and activities that are not dealt with in the rules governing other international criminal tribunals. Thus, where the benefit of the doubt may go to the judges in fulfillment of the presumption of impartiality in other tribunals, the Code may expressly prohibit such acts or activities, which would in turn help rebut the presumption in that case in the ICC.

In the *Banda/Jerbo* decision above, the majority of the plenary judges dismissed the request for disqualification on the basis of a blog post written by Judge Chile Eboe-Osuji.[163] The blog post was written before the judge was appointed to the Court and discussed the relationship between the African

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Request for the Disqualification of a Judge of 2 April 2012, ICC-01/05-03/09-344-Anx, ¶ 11 (June 5, 2012) [hereinafter Banda/Jerbo Decision], http://www.icc-cpi.int/iccdocs/doc/doc1423447.pdf.

161 The jurisprudence of the Special Court of Sierra Leone expressly refers to the test developed in the *Furundzija* case and adopts the same standard, including the presumption of impartiality. *See supra* Part 4.

162 *Banda/Jerbo Decision*, Case No. ICC-01/05-03/09-344-Anx, ¶ 14.

163 *See id.*; McDermott, *supra* note 76.

Union and the ICC and the situation in Sudan, which involved *Banda* and *Jerbo*.[164] The majority found that the general comment in the blog cast no doubt on the impartiality of the judge, particularly in light of the strong presumption of impartiality.[165] The decision did not make any reference to the Code of Judicial Ethics.

In a subsequent case, the *Lubanga* decision, the ICC engaged with the Code of Judicial Ethics when faced with a request based on five provisions of the Code, namely:[166] the prohibition on engaging in any activity that is likely to interfere with the judicial functions or "affect confidence in their independence;"[167] the prohibition of conflict of interest, or being in situations that "might reasonably be perceived as giving rise to a conflict of interest;"[168] the requirement to exercise freedom of expression in a manner compatible with the judicial office "and that does not affect or appear to affect their judicial independence or impartiality;"[169] the prohibition from commenting on pending cases and "expressing views which may undermine the standing and integrity of the Court;"[170] and particularly the prohibition from engaging in any extra-judicial activity that is incompatible with their judicial function or that "may affect or may reasonably appear to affect their independence or impartiality."[171] In this case, an alleged incompatibility arose between Judge Sang-Hyun Song's concurrent role as judge and President of UNICEF Korea, since the accused was charged with the conscription and use of child soldiers.[172]

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164 The judges discussed the request for disqualification relating to the blog commentary in most detail, but the request also raised grounds relating to the nationality of the judge (as the same as the accused) and relating to the election campaign of the judge for his candidacy for election at the ICC. *See Banda/Jerbo Decision*, Case No. ICC-01/05-03/09-344-Anx, ¶¶ 15–21; For a discussion of the nationality issue, particularly that nationality as a grounds for impartiality was expressly considered and rejected for inclusion in the ICC Statute, see also McDermott, *supra* note 76.

165 *See Banda/Jerbo Decision*, Case No. ICC-01/05-03/09-344-Anx, ¶¶ 17–20.

166 *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-3040-Anx, Decision of the Plenary of Judges on the Defence Application of 20 February 2013 for the Disqualification of Judge Sang-Hyun Song from the Case of *The Prosecutor v. Thomas Lubanga Dyilo* (June 11, 2013).

167 ICC Code of Ethics, *supra* note 156, Art. 3(2).

168 *Id.*, Art. 4(2).

169 *Id.*, Art. 9(1).

170 *Id.*, Art. 9(2).

171 *Id.*, Art. 10(1).

172 *See Lubanga Decision*, Case No. ICC-01/04-01/06-3040-Anx, Decision of the Plenary of Judges on the Defence Application of 20 February 2013 for the Disqualification of Judge Sang-Hyun Song from the Case of *The Prosecutor v. Thomas Lubanga Dyilo*, ¶ 20 (June 11,

The Court first recalled the standard set in the *Banda/Jerbo* decision referred to above (the "reasonable observer" test) and reiterated the strong presumption of impartiality.[173] It referred to the presumption of impartiality as "a long-standing principle accepted in a number of different jurisdictions," and then proceeded to recount support in national jurisdiction, without expressly referring to the presumption of impartiality enunciated in the jurisprudence of the ICTY.[174] It also refers to support in national jurisdiction for the reasonable observer test again without reference to the jurisprudence of the ICTY in this regard.[175] Other international criminal courts, like the Special Court for Sierra Leone, have expressly referred to the ICTY's jurisprudence when adopting the same standard, as noted above. Perhaps the exclusive reliance on national courts in the ICC is grounded in the principle of complementarity and the primary role of national courts in prosecuting crimes within the jurisdiction of the ICC. This may explain why the ICC grounds the test and presumption in the jurisprudence of national courts rather than on the well-established test in the *Furundzija* case. Other tribunals, like the ICTY, have primacy over national courts and are thus less anchored to them.

The ICC nonetheless followed the same approach as noted above by setting out the "reasonable observer" test and the presumption of impartiality in the ICC. It found that a reasonable observer with knowledge of all the facts,

> including the limited nature of the Judge's work with UNICEF/Korea, the context and entire contents of the statements in the article in the *Korea Herald*, and the extent of the involvement of UNICEF in the appeals at hand, would not reasonably apprehend bias.[176]

This is the same result as in the *Furundzija* case and the *Norman* decision of the SCSL: just as involvement in a group advocating the rights of women cannot prejudice a case involving rape, involvement in a group advocating and representing the rights of children cannot prejudice a case involving child soldiers. However, UNICEF had a greater role in this case than the U.N. Commission

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2013). The request also raised disqualification on the grounds of statements made by the judge on the verdict and sentence in the case against Lubanga, but the decision engages with the argument related to his role in UNICEF in most detail. For a discussion of Article 10 of the Judicial Code of Ethics in this regard, see also McDermott, *supra* note 76.

173 *Lubanga Decision*, Case No. ICC-01/04-01/06-3040-Anx, ¶¶ 9–10.

174 *See id.*, ¶¶ 37–38, 48–50.

175 *Id.*, ¶¶ 35–36.

176 *Id.*, ¶ 50.

on the Status of Women, as UNICEF was an intervening party in this case.[177] Nonetheless, the judge in the *Furundzija* case was not a member of the U.N. Commission on the Status of Women while serving as a judge,[178] whereas the judge in the *Lubanga* case was. The ICC distinguished the case from the infamous *Pinochet* case[179] because the relationship between the judge and UNICEF was less direct than the relationship between Lord Hoffman and Amnesty International, the concerned judge in the *Pinochet* case.[180] The Court noted that the judge was only nominally the President of UNICEF/Korea, but in actual fact had appointed another individual as Acting President of the organization who ran it instead.[181] It also noted that Amnesty International had made submissions directly before Lord Hoffman in the House of Lords as intervening party, whereas UNICEF had not made any submissions before the judge in the *Lubanga* case in the Appeals Chamber; its submissions were limited to proceedings before the Trial Chamber.[182] The approach of the ICC is thus in line with the other international criminal courts and tribunals discussed herein in setting the "reasonable observer" test and reaffirming the strong presumption of impartiality and the corresponding high burden to rebut it.

As an interesting procedural point, a question was raised in the same case and an additional case regarding whether Article 41(2) of the Rome Statue (on the disqualification of judges) could apply to judicial assistants as well as judges.[183] The prosecutor argued that an adviser or clerk to a judge cannot work

177 *See id.*, ¶ 44.

178 *See Prosecutor v. Anto Furundzija*, Case No. IT-95-71/1-A99, Appeals Chamber, Judgment, ¶ 166 (Int'l Crim. Trib. for the Former Yugoslavia July 21, 2000).

179 Lord Hoffman was disqualified from sitting in the case in the House of Lords of the United Kingdom against General Pinochet because of his involvement with Amnesty International, an intervening party in that case. *See* Andrea Bianchi, *Immunity Versus Human Rights: The* Pinochet *Case*, 10(2) EJIL 237, 237–277 (1999) (providing one of the many examples of an overview of the saga involved in this case).

180 *Lubanga Decision*, Case No. ICC-01/04-01/06-3040-Anx, ¶ 44.

181 *Id.*

182 *Id.*

183 *See Prosecutor v. Joseph Kony, Vincent Otti et al.*, Case No. ICC-02/04-01/05, Decision on the Prosecutor's Request to Separate the Senior Legal Adviser to the Pre-Trial Division from Rendering Legal Advice Regarding the Case (Oct. 31, 2006), http://www.icc-cpi.int/iccdocs/doc/doc1922560.pdf; *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Prosecutor's Application to Separate the Senior Legal Adviser to the Pre-Trial Division from Rendering Legal Advice Regarding the Case (Oct. 27, 2006) [hereinafter Lubanga Decision on Prosecutor's Application]. Both cases concern the same legal advisor and the factual background concerning the application of Article 41 to the legal advisor to the judge who had worked on the cases in the office of the prosecutor.

on cases in which he or she has already been involved as a prosecuting lawyer.[184] It seems reasonable to suggest that an individual who has previously worked for the prosecution should recuse him/herself from the position of adviser to a judge in that case, although the Statute and Rules do not address the impartiality of judicial advisors.[185] In both cases, the Pre-Trial Chamber requested the president to convene a plenary of judges to consider whether Article 41 could apply to a senior legal advisor to the chamber and separated the legal advisor "from any functions he might have in relation to the case"[186] as a provisional measure.[187] The president convened the plenary that then noted that the concerned legal advisor had been separated from any functions relating to the case and therefore considered that the issue was addressed by the president of the Pre-Trial Division. The fact that the separation from the case ordered by the president of the Pre-Trial Division was a provisional measure was not considered or discussed by the plenary. It seems odd that stating that

> a provisional measure pending determination of the matters raised . . . by the appropriate organ of the Court, the President of the Pre-Trial Division has separated the Senior Legal Advisor . . . from, *inter alia*, the case[188]

is enough to consider the matter "addressed." Provisional measures are provisional in nature, they hardly seem like the proper mechanism to adequately address and close the matter. Perhaps the lack of discussion indicates that the provisional measures cease to be provisional and that the proper approach is to separate the individual from all functions related to the case, arguably in accordance with Article 41 of the Statute.[189]

The plenary of judges considered

184 *Id.*

185 McDermott, *supra* note 76.

186 *Kony et al.*, Case No. ICC-02/04-01/05, at 3.

187 *See id.*; *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/07, Decision of the President on the Request of the President of the Pre-Trial Division of 20 October 2006 (Nov. 7, 2006); *Lubanga Decision on Prosecutor's Application*, Case No. ICC-01/04-01/06.

188 *See Lubanga Decision on Prosecutor's Application*, Case No. ICC-01/04-01/06.

189 *See supra* notes 192–93 and accompanying text. In any case, there would certainly be something in the staff rules and regulations governing staff members of the court (both in the Office of the Prosecutor and Judges Chambers) that would prevent such a blatant violation of the independence and impartiality of the judiciary (and by extension, those responsible for fulfilling the judicial function).

> further that the Prosecutor's Application may be construed as amounting to a request for disqualification of the judges or as a "question as to the disqualification of a judge," as such to be decided by an absolute majority of the judges, in accordance with article 41, paragraph 2 of the Statute.[190]

This seems to suggest that the disqualification of judges' advisors or clerks may be addressed under Article 41 of the Statute, but the decisions are far from clear. However, commentaries on the Statute have interpreted these cases as

> declin[ing] [the President of the Pre-Trial Division's] request on the basis that the remaining judges in a later meeting unanimously held that Article 41 did not apply, since the request had nothing to do with the disqualification of a judge.[191]

The precise wording of the decision as reflected above does not coincide with this interpretation which seems to suggest the opposite, that the prosecutors request in that case "may be construed as amounting to a request for disqualification of the judge" within the meaning of Article 41.

It thus seems that both judges and their advisors may be challenged under Article 41 of the Statute and that the "reasonable observer" test and the presumption of impartiality apply. However, it is unclear whether the presumption of impartiality would apply to a judge's advisor by extension, although it is unlikely given the high offices of the international judiciary and the high burden that accompanies the presumption of impartiality. The presumption of impartiality results from the nature of the judiciary itself: by virtue of their training and experience (and in order for any dispute settlement system to function smoothly), judges are "capable of deciding on the issue before them while relying . . . on the evidence adduced in the particular case."[192] It is questionable whether this same esteem and experience may be accorded to junior lawyers working as advisers and clerks, especially when considering the high burden accompanying the presumption and the delicate due process rights of the accused.

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190 *Kony et al.*, Case No. ICC-02/04-01/05, at 4.

191 McDermott, *supra* note 76.

192 *Banda/Jerbo Decision*, Case No. ICC-01/05-03/09-344-Anx, Decision of the Plenary of the Judges on the Defence Request for the Disqualification of a Judge of 2 April 2012, ICC-01/05-03/09-344-Anx, ¶ 14 (June 5, 2012); *see infra* at 33.

7 Comparison with Other International Courts and Tribunals

Considering that the guarantee of a competent, independent, and impartial tribunal established by law is a fundamental requirement of the rule of law, each different legal regime has adopted its own approach to ensure that judges are independent and impartial. For the most part, these approaches reflect the above approaches and encompass the necessary principles to ensure independence and impartiality. Nonetheless, there are some differences in the various approaches, which will be highlighted below.

7.1 *The Approach of the International Centre for the Settlement of Investment Disputes*

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) allows the challenge of arbitrators on grounds that include a lack of independence and impartiality. It has been suggested, however, that the threshold for a successful challenge is higher than under other regimes.[193]

Recent decisions demonstrate a shift towards a higher threshold for the disqualification of arbitrators in the International Centre for Settlement of Investment Disputes ("ICSID") regime.[194] One tribunal has held that it is essential to determine whether a challenged arbitrator "manifestly lacks the quality of being a person who may be relied upon to exercise independent judgment."[195] This suggests that a reasonable doubt as to his/her independence would not be

193 James Crawford, *Challenges to Arbitrators in ICSID Arbitrations, in* PCA Peace Palace Centenary, Seminar Confronting Global Challenges: From Gunboat Diplomacy to Investor-State Arbitration 1 (Oct. 11 2013). For a full account of the disqualification of arbitrators under the ICSID Regime and the applicable rules and standards therein, see Chapter 2 by Meg Kinnear and Frauke Nitschke in this volume. Article 57 of the ICSID Convention provides that a party may propose the disqualification of an arbitrator "on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14." This raises several questions, most notably whether "manifest" describes the *seriousness* of the lack of one of the qualities or the *standard* to which the lack thereof must be established. There has not been a uniform approach in the jurisprudence. Some tribunals have considered the relevant inquiry as to whether the *evidence* of unreliability is manifest, meaning that it is clear, while others have considered whether the *degree* of the unreliability is manifest, meaning that it is *serious*.

194 Crawford, *supra* note 193, at 2.

195 *Id*. at 3; *see also Suez et al. v. Argentine Republic*, ICSID Case No. ARB/03/17, ICSID Case No. ARB/03/19, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal (Oct. 22, 2007).

enough[196] (i.e. the "reasonable observer" test developed by the ICTY would not suffice to disqualify an arbitrator). Rather, it suggests that obvious evidence as to a lack of independence is required. However, the presumption of impartiality enunciated by the ICTY and the expressed high threshold for disqualification could be in line with the higher threshold of the ICSID Convention and the clear and obvious evidence required to rebut the presumption of impartiality.

Nonetheless, the second *Suez* decision from 2008 further suggests that the standard of "reasonable doubt" is different and incompatible with the requirement of "manifest lack" in Article 57.[197] This case considered a challenge to arbitrators under Article 10.1 of the UNCITRAL Rules, which expressly adopts a standard of "reasonable doubt," and an additional challenge under Article 57 of the ICSID Convention.[198] Regarding the UNCITRAL Rules, the Tribunal determined that the relevant question is whether

> a reasonable, informed person viewing the facts [would] be led to conclude that there was a justifiable doubt as to the challenged arbitrator's independence or impartiality.[199]

This approach thus reflects the approach of the ICC and the ICTY, although again, it is unclear whether the presumption of impartiality as enunciated by them would push the threshold as high as that under the ICSID Convention.

With regard to the standard under the ICSID Convention, the Tribunal held that in order to disqualify an arbitrator under Article 57,

> the Respondent . . . must prove such facts that would lead an informed reasonable person to conclude that [the challenged arbitrator] clearly or obviously lacks the quality of being able to exercise independent judgment and impartiality.[200]

One tribunal also noted the difference between the standard under the ICSID Convention and that encompassed in the International Bar Association

196 Crawford, *supra* note 193, at 3.

197 *Id.*

198 *Id.*; *see Suez et al. v. Argentine Republic*, ICSID Case No. ARB/03/17, ICSID Case No ARB/03/19, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal (May 12, 2008).

199 *Id.*, ¶ 22.

200 *Id.*, ¶ 29.

Guidelines on Conflict of Interest in International Arbitration ("IBA Guidelines"). It held that

> the conflict of interest text incorporated in [IBA Guideline] 2(b) is significantly different from that in Article 57 of the Convention and is easier to satisfy. The [IBA] standard requires resignation or disqualification "if facts or circumstances have arisen since the appointment that from a reasonable third person's point of view, having knowledge of the relevant facts, give rise to *justifiable doubts* as to the arbitrators impartiality or independence."[201]

The jurisprudence of various tribunals suggests two trends.[202] First is that the requirement of a 'manifest' lack of independence permits disqualification only when certain or almost certain lack of independence is proved.[203] However, this seems to encapsulate exactly what the ICTY described as necessary to rebut the presumption of impartiality. Second is the express confirmation that the "reasonable doubt" standard contained in the UNCITRAL Rules, IBA Guidelines, and the approach of the ICTY, the ICTR, the SCSL and the ICC, is not applicable in ICSID disqualification cases.[204] Again, although the standard in international criminal courts and tribunals is that of the reasonable observer/apprehension of bias as seen above, it is unclear whether the enunciated presumption of impartiality creates a higher threshold in line with the ICSID Convention.

Nonetheless, the ICSID Convention sets a higher threshold than other regimes because the reasonable doubt or observer test would not disqualify an arbitrator under Article 57. However, it may not be a higher threshold than that enunciated by the ICTY, the ICTR, the SCSL and the ICC, given the presumption of impartiality as discussed above. It is easier to disqualify a judge under the approach of international criminal courts and tribunals where a reasonable observer would apprehend bias, rather than it being actually proved to exist. However, despite the reasonable apprehension/observer test developed by these courts and tribunals, the presumption of impartiality and the expressly enunciated high threshold to rebut it, leave unanswered ques-

201 Crawford, *supra* note 193, at 7 (quoting *ConocoPhillips Co. et al v. Venezuela*, ICSID Case No ARB/07/30, Decision on the Proposal to Disqualify L Yves Fortier QC, Arbitrator, ¶ 59 (Feb. 27, 2012) (emphasis added by Tribunal)).

202 *Id.*

203 *Id.*

204 *Id.*

tions as to whether the threshold is as high as that in the ICSID regime. Given the higher stakes involved in international criminal courts surrounding the gravity of international crimes (and potential role of politics) and the potential deprivation of the liberty of the accused, there should be a lower threshold to demonstrate a lack of independence and impartiality in the context of international criminal courts. The presumption of impartiality as enunciated by these international criminal courts and tribunals could thus interfere with the due process rights of the accused.

7.2 *The Approach of the World Trade Organization*

The approach of the World Trade Organization ("WTO") seems to represent a middle ground between the high threshold of ICSID's "manifest lack" and the lower "reasonable observer" approach of international criminal courts and tribunals (setting aside the issue of the presumption of impartiality).[205] In fact, the approach mirrors the IBA Guidelines to a large degree by setting the standard of 'justifiable doubt' as discussed above.

Article 17(3) of the Dispute Settlement Understanding of the WTO deals with the composition of the Appellate Body ("AB"). Unlike other statutory documents, it does not expressly refer to the requirements of independence and impartiality, but instead provides that AB members "shall be unaffiliated with any government" and "shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest."[206] The formulation in the Dispute Settlement Understanding of the WTO is less detailed and specific with regards to the requirements of independence and impartiality.

The Working Procedure for Appellate Review[207] requires each person covered by the rules to be independent and impartial, to avoid any direct

205 For a full account and overview of the approach of the WTO, see Chapter 6 by Gregory J. Spak and Ron Kendler in this volume.

206 World Trade Organization, Understanding on Rules and Procedures Governing the Settlement of Disputes, Art. 17(3), https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm (last visited Apr. 00, 2015).

207 The Working Procedures for Appellate Review therefore provide for the substance of the requirements of independence and impartiality and the procedure for disqualification in case of failure to adhere to those requirements. In particular, Annex II thereof establishes rules of conduct for the understanding on rules and procedures governing the settlement of disputes, "[a]ffirming that the operation of the DSU would be strengthened by rules of conduct designed to maintain the integrity, impartiality and confidentiality of proceedings." *See* the Working Procedures for Appellate Review, Annex II, Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, pmbl. (Jan. 4, 2005), https://www.wto.org/english/tratop_e/dispu_e/ab_e.htm [Working

or indirect conflict of interests, and to respect the confidentiality of the proceedings.[208] To ensure the observance of these principles, the rules of conduct require covered persons to disclose

> the existence or development of any interest, relationship or matter that that person could reasonably be expected to know and that is likely to affect, or give rise to *justifiable doubts* as to, that person's independence or impartiality[209]

and to take due care to avoid any direct or indirect conflict of interests in respect of the subject matter of the proceeding.[210]

The approach of the WTO thus seems to reflect the lower threshold of the IBA Guidelines noted above, in line with the approach of international criminal courts and tribunals. Again, the presumption of impartiality enunciated by these criminal courts and tribunals makes it unclear where they fall on this spectrum. On the one hand, the criminal courts and tribunals expressly adopt the "reasonable observer" test as set out by the *Furundzija*, case, which seems in line with the lower standard above. On the other hand, the presumption of impartiality, and the express high threshold to rebut the presumption, may bring these tribunals more in line with the higher threshold of the ICSID Convention. Moreover, a "justifiable doubt" could perhaps set a slightly higher threshold than "reasonable doubt," but any imbalance in that regard seems countered by the presumption of impartiality that prevails in the regimes that adopt the "reasonable doubt" standard.

7.3 *The Approach of the International Court of Justice*

The Statute and Rules of Court of the International Court of Justice ("ICJ") also contain the essence of the requirements of independence and impartial-

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Procedures for Appellate Review]. Perhaps the lack of express mention of independence is a reflection of the fact that the World Trade Organization ("WTO") is a "member driven" organization in which states are reluctant to grant such extensive independent powers to an Appellate Body. Moreover, the involvement of the Dispute Settlement Body in the administration of the rules and procedure, the authority to establish panels, and the adoption of reports could seriously call the independence of the process into question if it were expressly included as a requirement. For the role of the Dispute Settlement Body, see Article 2(1) of the Dispute Settlement Understanding of the WTO.

208 Working Procedures for Appellate Review, *supra* note 208, ¶ II, Governing Principle, Observance of the Governing Principle, ¶ III(1)(2).

209 *Id.*, Observance of the Governing Principle, ¶ III(1)(2) (emphasis added).

210 *Id.*, ¶ III, Observance of the Governing Principle, ¶ 1.

ity, and provide for the right to challenges in the event that the requirements are not respected.[211] The provisions governing the ICJ, however, are far less detailed than those governing international criminal courts and tribunals, and there does not seem to be a clear line of jurisprudence as to the requirements like that set out in the latter regimes.

The Statute of the ICJ provides that the Court "shall be composed of a body of independent judges, elected regardless of their nationality" who possess the qualifications required for appointment to the highest judicial offices, or have recognized competence in international law. Article 20 of the Statue of the ICJ provides that all judges must make a solemn declaration in open court that he/she will exercise his/her powers "impartially and conscientiously."[212] The substance of the declaration is contained in Article 4 of the Rules of Court. This mirrors the undertaking in the ICC since it is both provided for in the Statute and elaborated upon in the rules, whereas it is only mentioned in the rules of court for the ICTY and ICTR. However, the declaration perhaps has more force in the context of the ICC where it is backed up by the binding Code of Judicial Ethics.

Whether the express formulations of the statutory documents of each regime are the same or not, the requirement of an independent and impartial tribunal established by law is a fundamental requirement of the rule of law that each court or tribunal must endeavor to ensure. Moreover, it represents one of the most basic human rights in a society governed by the rule of law. The ability to challenge judges for a lack of such independence and impartiality is a natural consequence of that right. Although the express formulations may vary, the essence of the requirements of independence and impartiality is present in each regime reviewed above. However, it is most developed in the statutory requirements of the ICC where the human rights of the accused are the most relevant, particularly since a decision potentially deprives the accused of freedom.

The less detail provided in the approach of the ICJ is perhaps explained by the fact that the ICJ does not have jurisdiction over individuals, but states. The due process rights of responding states are perhaps not as delicate as the due process rights of an individual charged with an international crime. The more detailed provisions of the WTO on the other hand may be explained by the delicate economic interests at play in each dispute within the auspices of the WTO. In any case, it seems that the approach of the ICTR, the ICTY, and the ICC

211 For an overview of the regime at the International Court of Justice, see Chapter 1 by Chiara Giorgetti in this volume.

212 ICJ Statute, *supra* note 54, Art. 20.

rightly sets a lower threshold for the disqualification of judges for a lack of independence and impartiality to ensure the protection of the accused. However, it is unclear whether the presumption of impartiality as enunciated by these international criminal courts and tribunals signifies a higher threshold in the context of these regimes.

8 Conclusion

The independence and impartiality of a court and its judges are fundamental requirements to the rule of law and are a basic human right. The above has demonstrated that international criminal courts face particular difficulties in ensuring this right, given the inherently political nature of international criminal law and the presumption of guilt attached to those accused of heinous international crimes. Perhaps in response to these challenges, the rules and procedures to ensure such independence and impartiality seem to be more elaborate in the ICC in particular, and in the jurisprudence of the ICTY as followed and enhanced by the ICTR, the SCSL, and the ICC.

In response to these specific challenges, the ICC has developed its Code of Judicial Conduct that gives teeth to the requirements of independence and impartiality. One can assume that given these detailed rules and procedures, there may be more possibilities to rebut the presumption of impartiality before the ICC than before other international criminal courts.

CHAPTER 8

Issue Conflicts and the Reasonable Expectation of an Open Mind: The Challenge Decision in *Devas v. India* and Its Impact

Romain Zamour

1 Introduction

An 'issue conflict' is generally understood as a conflict arising from an arbitrator's relationship with the subject matter of the dispute.[1] This contrasts with traditional conflicts of interest arising from an arbitrator's relationship with a party to the dispute or with counsel. Two situations are commonly cited as giving rise to issue conflicts: when an arbitrator is concurrently acting as counsel in a different case with a common issue (dual role scenario), and when the arbitrator has previously expressed views on a particular issue raised by the dispute (closed-mind scenario). The concept of 'issue conflict' has attracted "[m]ounting discussion and concern."[2]

Issue conflicts are of particular concern in investor-state arbitration.[3] First, investor-state arbitration involves the interpretation of a limited number of often similarly worded treaty clauses, resulting in similar or identical issues

* The author would like to thank Brooks W. Daly for his advice.

1 *See* Judith Levine, *Dealing with Arbitrator "Issue Conflicts" in International Arbitration*, 5(5) Transnat'l Disp. Mgmt. (July 2008), originally published in 61 Disp. Resol. J. 60 (2006).

2 Report of ICCA-ASIL Joint Task Force on Issue Conflicts in Investor State Arbitration, Discussion Draft, ¶ 9 (Mar. 10, 2015) [hereinafter ICCA-ASIL Report], *available at* http://www.arbitration-icca.org/media/2/14260745308760/discussion_draft_-_10_march_2015-3.pdf (last visited on May 30, 2015). The International Council for Commercial Arbitration ("ICCA")—American Society of International Law ("ASIL") Joint Task Force on Issue Conflicts in Investor State Arbitration (the "Task Force") was created in November 2013 to "evaluate and report on issue conflicts in investor-state arbitration and to make recommendations on best practices going forward." *Id.*, ¶ 10. The ICCA-ASIL Task Force released a discussion draft on March 10, 2015.

3 *See* Jan Paulsson, The Idea of Arbitration 151 (2013) ("There are also types of cases where the recurrence of certain familiar questions is so predictable as to give rise to concerns of so-called issue conflicts. . . . The problem is exacerbated . . . when awards are generally published and capable of generating force as precedents"); ICCA-ASIL Report, *supra* note 2, ¶ 15. Some

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arising in different cases. Second, in investor-state arbitration, unsettled issues of law (*e.g.* substantive protections provided in investment treaties) are often relevant to the tribunal's decision, which is less frequently the case in commercial arbitration, where disputes are more likely to turn on facts, and domestic commercial law may be settled. Third, in investor-state arbitration, awards deciding issues of international law are public and tend to be cited as persuasive authority, becoming "subsidiary means for the determination of rules of law" in the sense of Article 38(1)(d) of the Statute of the International Court of Justice.[4] Fourth, the field of investor-state arbitration involves a limited number of lawyers, with the same individuals often acting both as counsel and arbitrator.

This chapter focuses on the closed-mind scenario.[5] In particular, the recently published challenge decision in *Devas v. India*,[6] which quickly attracted criticism,[7] marks a significant development in the understanding of the principles applicable to closed-mind issue conflicts in investor-state arbitration. This chapter examines the implications of this decision and the principles it elucidates.

2 The Challenge Decision in *Devas v. India*

The challenges arose in an arbitration brought by CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telecom Devas Mauritius

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even believe that the notion of issue conflict is "perhaps the most significant matter affecting the credibility of investor-state arbitration" today. *Id.*, ¶ 13.

4 Statute of the International Court of Justice, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179, June 26, 1945, art. 38(1)(d).

5 The ICCA-ASIL Task Force, unsatisfied with the term 'issue conflict,' sometimes refers to the problem as the problem of 'inappropriate predisposition.' ICCA-ASIL Report, *supra* note 2, ¶¶ 16–20.

6 *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Ltd., & Telecom Devas Mauritius Ltd. v. Republic of India*, PCA Case No. 2013-09, UNCITRAL, Decision on the Respondent's Challenge to the Hon. Marc Lalonde as Presiding Arbitrator and Prof. Francisco Orrego Vicuña as Co-Arbitrator (Sept. 30, 2013), *available at* http://www.italaw.com/sites/default/files/case-documents/italaw3161.pdf.pdf. (last visited on May 30, 2015).

7 *See generally* Stephan W. Schill, *Arbitrator Independence and Academic Freedom*, 15 J. World Inv. & Trade 1, 4 (2014) (calling the *Devas* challenge decision an "alarming development"); *see also* ICCA-ASIL Report, *supra* note 2; Stephan Schill, *Arbitrator Independence and Academic Freedom*, EJIL: Talk! (May 30, 2014), *available at* http://www.ejiltalk.org/arbitrator-independence-and-academic-freedom/ (last visited on May 30, 2015).

Limited (the Claimants) against the Republic of India (the Respondent), under the 1976 Arbitration Rules of the United Nations Commission on International Trade Law (the "1976 UNCITRAL Arbitration Rules"), pursuant to the Agreement Between the Government of the Republic of India and the Government of the Republic of Mauritius for the Promotion and the Protection of Investments, which entered into force on June 20, 2000 (the "Treaty").[8] Article 8(2)(d)(i) of the Treaty provides that the appointing authority shall be the president, the vice-president, or the next senior judge of the International Court of Justice, who is not a national of either contracting party.[9] In this case, the then-president of the International Court of Justice, President Peter Tomka, acted as appointing authority and decided on the challenges.

The Respondent challenged the Presiding Arbitrator, the Honorable Marc Lalonde, and the arbitrator appointed by the Claimants, Professor Francisco Orrego Vicuña, for an alleged lack of impartiality under Article 10(1) of the 1976 UNCITRAL Arbitration Rules arising from an issue conflict (closed-mind scenario). By a decision dated September 30, 2013, President Tomka sustained the challenge to Professor Orrego Vicuña and rejected the challenge to Mr. Lalonde.[10]

The Respondent argued that "strongly held and articulated positions" by the two challenged arbitrators on the "controversial legal standard of relevance here" embodied in the 'essential security interests' clause as found in Article 11(3) of the Treaty gave rise to justifiable doubts as to their impartiality.[11] The clause reads in relevant part:

> The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action which is directed to the protection of its essential security interests.[12]

The Respondent pointed to three International Centre for Settlement of Investment Disputes ("ICSID") tribunals chaired by Professor Orrego Vicuña

8 *Devas*, PCA Case No. 2013-09, ¶ 1.

9 *Id.*; Agreement Between the Government of the Republic of India and the Government of the Republic of Mauritius, art. 8(2)(d)(i) (June 20, 2000) [hereinafter India-Mauritius Treaty].

10 *Devas*, PCA Case No. 2013-09, ¶¶ 65, 67. A significant portion of the decision is dedicated to the question of whether the Respondent's challenges were timely. This chapter leaves that question aside and focuses on the merits of the challenge decision. *See id.*, ¶¶ 42–50. For a discussion of time limits in challenge procedures, see Chapter 9 by Judith Levine in this volume.

11 *Id.*, ¶¶ 17–18.

12 India-Mauritius Treaty, *supra* note 9, art. 11(3).

that held that the 'essential security interests' provision in the 1991 Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment incorporated the customary international law standard of necessity as reflected in Article 25 of the International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts:[13] *CMS Gas Transmission Co. v. Argentine Republic*;[14] *Sempra Energy International v. Argentine Republic*;[15] *Enron Corp. & Ponderosa Assets, L.P v. Argentine Republic*.[16] In two of those cases, *CMS* and *Sempra*, Mr. Lalonde served as co-arbitrator.[17] The Respondent noted that annulment committees were constituted to review the three arbitral awards rendered by the tribunals in those cases and that the annulment committees in the two cases in which the challenged arbitrators served together both concluded that the ruling on that point constituted manifest error, while the annulment committee in the third case annulled the award because the tribunal erred in its interpretation of the necessity defense.[18] The Respondent further referred to a book chapter published in 2011, in which Professor Orrego Vicuña reiterated and "strongly defended" his position.[19]

The Respondent maintained that its challenges should be upheld in the "interests of fundamental fairness" and referred to an academic article opining that

> to preserve the appearance of impartiality, [an arbitrator's having taken a clear position in a concurring or dissenting opinion] should suffice to disqualify the arbitrator.[20]

13 *Devas*, PCA Case No. 2013-09, ¶ 19 & n. 6.

14 *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award (May 12, 2005).

15 *Sempra Energy Int'l v. Argentine Republic*, ICSID Case No. ARB/02/16, Award (Sept. 28, 2007).

16 *Enron Corp. & Ponderosa Assets, L.P v. Argentine Republic*, ICSID Case No. ARB/01/3, Award (May 22, 2007).

17 *Devas*, PCA Case No. 2013-09, ¶ 19.

18 *Id.*

19 *Id.*, ¶ 22; Francisco Orrego Vicuña, *Softening Necessity, in* Looking to the Future: Essays on International Law in Honor of W. Michael Reisman 741–51 (Mahnoush H. Arsanjani et al., eds., 2011).

20 *Devas*, PCA Case No. 2013-09, ¶ 20; Caline Mouawad, *Issue Conflicts in Investment Treaty Arbitration*, 5(4) Transnat'l Disp. Mgmt. 1, 12–13 (2008).

The Respondent asserted that "its challenge carries additional weight, and is unprecedented, on the basis that it involves two arbitrators implicated in the same way."[21]

The Claimants argued that

> the mere fact that an arbitrator has decided a particular legal issue in a past case involving a different treaty and different parties, is not a proper basis for challenging that arbitrator's impartiality.[22]

They cited the *Universal Compression International Holdings, S.L.U. v. Venezuela* challenge decision for the proposition that

> the international investment arbitration framework would cease to be viable if an arbitrator was disqualified simply for having faced similar factual or legal issues in other arbitrations.[23]

The Claimants further referred to three other challenge decisions to support their position that "having rendered an opinion on an issue is not a basis for challenging impartiality."[24] The Claimants underlined that the 2004 International Bar Association ("IBA") Guidelines on Conflicts of Interest in International Arbitration ("2004 IBA Guidelines") expressly provide that no conflict or bias is created when an arbitrator has previously published a general opinion concerning an issue arising in the arbitration.[25] The Claimants averred that the Respondent's theory would lead to "tactical challenges to duly appointed arbitrators."[26]

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21 *Devas*, PCA Case No. 2013-09, ¶ 27.

22 *Id.*, ¶ 30 (citing the Claimants' Response at 16).

23 *Id.*, ¶ 31; *Universal Compression Int'l Holdings, S.L.U. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Proposal to Disqualify Professor Brigitte Stern and Professor Guido Santiago Tawil, Arbitrators, ¶ 83 (May 20, 2011).

24 *Devas*, PCA Case No. 2013-09, ¶ 32; *Tidewater Inc., et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/05, Decision on Claimants' Proposal to Disqualify Professor Brigitte Stern, ¶¶ 65–66 (Dec. 23, 2010); *Urbaser S.A. & Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan, ¶ 45 (Aug. 12, 2010); *AWG Grp. v. Argentina/Suez, Sociedad General de Aguas de Barcelona S.A. v. Argentina*, ICSID Case No. ARB/03/17, Decision on the Proposal for Disqualification of a Member of the Arbitral Tribunal, ¶ 21 (Oct. 22, 2007).

25 *Devas*, PCA Case No. 2013-09, ¶ 32.

26 *Id.* (quoting the Claimants' Response at 15).

Professor Orrego Vicuña, in his comments on the challenge, asserted that the questions involved in the cases he previously decided are unrelated to the provisions of the Treaty in this case.[27] He added that the Respondent's assertion that it is "likely" that "the question of state of necessity" may be raised is "not specific enough to justify a challenge" and stressed that

> the question concerning state of necessity in the Argentina-United States Bilateral Investment Treaty . . . [is] unrelated to the provision of the India-Mauritius Bilateral Investment Treaty.[28]

Professor Orrego Vicuña reiterated his impartiality and denied that he had made any "strong public declarations" on any relevant issue.[29]

Mr. Lalonde, in his comments on the challenge, noted that the Treaty and the facts at issue in the case differ from those in the cases to which the Respondent refers,[30] underlined that the decisions in which he was involved were rendered "well before the decisions of the annulment committees,"[31] and maintained that he intended to approach any eventual question of essential security interests in this case "with an open mind."[32]

President Tomka first recalled the standard for disqualification under the 1976 UNCITRAL Arbitration Rules.[33] He noted that the Respondent

> considers that previous statements attributable to arbitrators reflect their pre-determined view and that the arbitrators might have a "professional interest" in a particular result to avoid contradicting their earlier decisions.[34]

He stated that the intention of the Respondent to rely on the 'essential security interests' provision in Article 11(3) of the Treaty "seem[ed] credible, not just a pretext to mount the present challenge."[35] He asserted that

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27 *Id.*, ¶ 33.
28 *Id.*, ¶ 34.
29 *Id.*, ¶ 35.
30 *Id.*, ¶ 36.
31 *Id.*, ¶ 37.
32 *Id.*, ¶ 38.
33 *Id.*, ¶ 40.
34 *Id.*, ¶ 52 (quoting the Respondent's Request at 1–2).
35 *Id.*, ¶ 57.

> [t]he conflict is based on a concern that an arbitrator will not approach an issue impartially, but rather with a desire to conform to his or her own previously expressed view.[36]

He noted that some challenge decisions and commentators have stated that "knowledge of the law or views expressed about the law are not *per se* sources of conflict that require removal of an arbitrator" and added that "a prior decision in a common area of law does not automatically support a view that an arbitrator may lack impartiality."[37] Thus, President Tomka concluded that, to sustain any challenge, he had to find that there was

> an appearance of pre-judgment of an issue likely to be relevant to the dispute on which the parties have a reasonable expectation of an open mind.[38]

President Tomka asserted that the fact that Professor Orrego Vicuña in three cases and Mr. Lalonde in two cases adopted a consistent view on the concept of 'essential security interests' is "not surprising, as those tribunals applied the same provision to similar facts, prior to the issuance of the first of the three annulment decisions."[39] Turning specifically to the challenge to Professor Orrego Vicuña, President Tomka noted that the former "further affirmed" his position in an academic article, in which he criticized the decision of the *CMS* annulment committee,[40] and that in his comments on the challenge he still referred to "the questions concerning state of necessity in the Argentina-United States Bilateral Investment treaty."[41] According to President Tomka, the article "suggests that, despite having reviewed the analyses of three different annulment committees, [Professor Orrego Vicuña's] views remained unchanged."[42] Stating that "Professor Orrego Vicuña is certainly entitled to his views, including to his academic freedom" but that "equally the Respondent is entitled to have its arguments heard and ruled upon by arbitrators with an open mind," President Tomka sustained the challenge to Professor Orrego Vicuña.[43]

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36 *Id.*, ¶ 58.

37 *Id.*

38 *Id.*

39 *Id.*, ¶ 59.

40 *See* Orrego Vicuña, *supra* note 19, at 741–51.

41 *Devas*, PCA Case No. 2013-09, ¶¶ 62–63. For a discussion of how an arbitrator's comment on a challenge may itself be a ground for disqualification, see Chapter 11 by Judge Charles N. Brower, Sarah Melikian, and Michael P. Daly in this volume.

42 *Id.*, ¶ 64.

43 *Id.*

When it came to the challenge to Mr. Lalonde, President Tomka found that his "more limited pronouncements" are not sufficient to give rise to justifiable doubts regarding his impartiality.[44] He noted, in particular, that Mr. Lalonde "has not taken a position on the legal concept in issue subsequent to the decisions of the three annulment committees."[45] President Tomka concluded that "there is no appearance of his prejudgment on the issue of 'essential security interests' " and rejected the challenge to Mr. Lalonde.[46]

3 Understanding the Operative Principle in the *Devas v. India* Challenge Decision

3.1 *The Distinction Between Issues of Law and Issues of Fact*

It is well established that an arbitrator may be disqualified for an appearance of pre-judgment of an issue of fact or of application of law to fact relevant to the dispute.[47] The challenge in *Devas*, however, concerned pure issues of law. President Tomka took pains to note that "knowledge of the law or views expressed about the law are not *per se* sources of conflict that requires removal of an arbitrator" and that "a prior decision in a common area of law does not automatically support a view that an arbitrator may lack impartiality."[48] The controversial issue, however, was whether (i) "knowledge of the law or views expressed about the law" or (ii) "a prior decision in a common area of law" *may* support the view that an arbitrator lacks impartiality. President Tomka implicitly decided that they may, if they give rise to

> an appearance of pre-judgment of an issue likely to be relevant to the dispute on which the parties have a reasonable expectation of an open mind.[49]

This is a controversial, but not unprecedented, development.

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44 *Id.*, ¶ 66.

45 *Id.*

46 *Id.*, ¶¶ 66–67.

47 *See Perenco Ecuador Ltd. v. Republic of Ecuador*, PCA Case No. IR-2009/1, In the Matter of a Challenge to be Decided by the Secretary General of the Permanent Court of Arbitration Pursuant to an Agreement Concluded on October 2, 2008 in ICSID Case No. ARB/08/6, Decision on Challenge to Arbitrator (Dec. 8, 2009); Paulsson, *supra* note 3, at 150. For a discussion of the *Perenco* challenge decision, see Chapter 11 by Judge Charles N. Brower, Sarah Melikian, and Michael P. Daly in this volume.

48 *Devas*, PCA Case No. 2013-09, ¶ 58.

49 *Id.*

In *Tidewater Inc., et al. v. Bolivarian Republic of Venezuela*,[50] one of the grounds on which the claimants challenged Professor Brigitte Stern was that, as part of her involvement as arbitrator in another case—*Brandes Investment Partners LP v. Bolivarian Republic of Venezuela*[51]—she would have to decide whether the Venezuelan Law on the Promotion and Protection of Investments provides a basis for Venezuela's consent to ICSID arbitration, and that this

> w[ould] amount to prejudging the identical issue presented in this case, without the Claimants having an opportunity to argue the issue before Professor Stern has made up her mind.[52]

In rejecting the challenge, the non-challenged arbitrators, Professor Campbell McLachlan (President) and Dr. Andrés Rigo Sureda, underlined that there was no "overlap in the underlying facts" between *Brandes* and the case at hand.[53] They adopted the formulation of a French court, according to which there is

> neither bias nor partiality where the arbitrator is called upon to decide circumstances of fact close to those examined previously, but between different parties, and even less so when he is called upon to determine a question of law upon which he has previously made a decision.[54]

Jan Paulsson has taken a similar position, asserting that "a predisposition is plainly disqualifying only if it relates directly to the relevant case," and adding that "[d]octrinal sympathies or antipathies have generally been thought not to be disqualifying, even if they concern the legal propositions advanced by an arbitrant."[55]

The 2004 IBA Guidelines also make a distinction between abstract issues of law and matters relating to a specific case. Thus, while section 3.5.2 (Orange List) indicates that "[t]he arbitrator [having] publicly advocated a specific

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50 *See generally Tidewater Inc., et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/05, Decision on Claimants' Proposal to Disqualify Professor Brigitte Stern, ¶¶ 65–72 (Dec. 23, 2010).

51 *See Brandes Inv. Partners LP v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/3, Award (Aug. 2, 2011).

52 *Tidewater*, ICSID Case No. ARB/10/05, ¶ 66.

53 *Id.*

54 *Id.*, ¶ 67 (quoting Jean-François Poudret & Sébastien Besson, Comparative Law of International Arbitration 353–54 (Stephen V. Berti & Annette Ponti, trans., Sweet & Maxwell, 2d ed. 2007)).

55 Paulsson, *supra* note 3, at 150.

position regarding the case that is being arbitrated, whether in a published paper or speech or otherwise," may give rise to justifiable doubts as to the arbitrator's impartiality and must be disclosed, section 4.1.1 (Green List), under the heading "4.1. Previously expressed legal opinions," provides that

> [t]he arbitrator [having] previously published a general opinion (such as in a law review article or public lecture) concerning an issue which also arises in the arbitration (but this opinion [being] not focused on the case that is being arbitrated)

may not give rise to justifiable doubts as to the arbitrator's impartiality.[56] The recently published 2014 IBA Guidelines on Conflicts of Interest in International Arbitration ("2014 IBA Guidelines") have rephrased the distinction without altering its substance. While section 3.5.2 (Orange List) indicates that "[t]he arbitrator [having] publicly advocated a position on the case, whether in a published paper, or speech, or otherwise," may give rise to justifiable doubts as to the arbitrator's impartiality and must be disclosed, section 4.1.1 (Green List), under the heading "4.1. Previously expressed legal opinions," provides that

> [t]he arbitrator [having] previously expressed a legal opinion (such as in a law review article or public lecture) concerning an issue that also arises in the arbitration (but this opinion [being] not focused on the case)

may not give rise to justifiable doubts as to the arbitrator's impartiality.[57]

One critique of the challenge decision in *Devas v. India* focuses on the "important distinction between law and facts."[58] Thus, while "an arbitrator can rightly be challenged if he or she has expressed views in prior academic writing that are fact-specific to the case at hand,"[59] the arbitrator may not be for "express[ing] abstract views on how the applicable law in an investment treaty arbitration must be understood and interpreted."[60] In a somewhat para-

56 Int'l Bar Assoc., Guidelines on Conflict of Interest in International Arbitration (2004), http://www.ibanet.org/Search/Default.aspx?q=IBA+2004+Guidelines&page_num=1 (last visited May 30, 2015).

57 Int'l Bar Assoc., Guidelines on Conflict of Interest in International Arbitration (2014), http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx (last visited May 30, 2015).

58 *See* Schill, *supra* note 7, at 4; *see also* Schill, EJIL, *supra* note 7.

59 Schill, *supra* note 7, at 5.

60 *Id.* at 6.

doxical argument, this critique faults President Tomka for "part[ing] with an earlier decision on a similar issue"[61]—*Urbaser S.A. & Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*[62]—and criticizes the reasoning in *Urbaser* for "miss[ing] an important distinction between law and facts."[63]

In *Urbaser*, the claimants challenged Professor Campbell McLachlan on the basis of his previously published academic views on the proper interpretation of Most Favored Nation clauses and on the necessity defenses advanced by Argentina in other cases.[64] The claimants submitted that these previously published academic views amounted to prejudgment of two crucial issues in the arbitration.[65] The non-challenged arbitrators, Professor Andreas Bucher (President) and Mr. Pedro J. Martinez-Fraga, rejected the challenge. Their reasoning was ambiguous. On the one hand, the non-challenged arbitrators emphatically rejected the claimants' position, calling it "extremely strange."[66] On the other hand, the non-challenged arbitrators did not categorically exclude the possibility of disqualifying an arbitrator for having pre-judged a pure issue of law. According to them:

> The requirement of independent and impartial judgment means that an arbitrator's previously adopted opinion, whether published or not, shall not be of such force as to prevent the arbitrator from taking full account of the facts, circumstances, *and arguments* presented by the parties in the particular case.[67]

It is only after a painstaking analysis of Professor McLachlan's academic views that the non-challenged arbitrators rejected the challenge.[68] Far from "stress[ing] the differences of roles of a scholar, on the one hand, and an arbitrator, on the other,"[69] and "miss[ing] an important distinction between law

61 *Id.* at 5.

62 *See Urbaser S.A. & Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan (Aug. 12, 2010).

63 Schill, *supra* note 7, at 5.

64 *See Urbaser*, ICSID Case No. ARB/07/26, ¶¶ 20–25.

65 *See id.*

66 *Id.*, ¶ 48; *see also id.*, ¶¶ 44–48.

67 *Id.*, ¶ 49 (emphasis added).

68 *See id.*, ¶¶ 50–59.

69 Schill, *supra* note 7, at 5.

and facts,"[70] as the critique suggests, they specifically rejected what they called these "artificial distinctions."[71] In a key passage they stated:

> [T]he Two Members are not convinced that distinctions like the one based on the notion of "general opinion" as it is used to define the attitudes to be put on the "green list" according to the IBA Guidelines make much sense. Such a distinction between "general" and "specific" views is of little value when it comes to characterizing academic work. The hypothesis of research done by a scholar on a merely "general" level is a description more caricatured than that of actual academic work. As well, it is not much more convincing to draw a strict dividing line between opinions expressed as a scholar and those to be formed as an arbitrator. While it is correct to say that a scholar's opinion might change and is unrelated to the pattern of facts and arguments related to a particular case, Claimants are right to the extent that they argue that such opinion may nevertheless be a factor of influence when it comes to considering the same or similar issues in a particular dispute. In other words, a legal scholar who becomes an ICSID arbitrator does not lose his/her capacity of being a scholar that conveys academic opinions, which might become relevant to the legal analysis undertaken in the resolution of a particular dispute. Irrespective of such more artificial distinctions, the focus has to be put on statements made by Prof. McLachlan as they stand in order to determine whether they prevent him from taking an independent and impartial judgment in the instant case.[72]

Thus, it appears that the reasoning in the challenge decision in *Devas* is not unprecedented. Far from "part[ing]"[73] with *Urbaser*, the *Devas* decision may be seen as part of a trend that includes *Urbaser*.[74]

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70 *Id.*

71 *Urbaser*, ICSID Case No. ARB/07/26, ¶ 52.

72 *Id.*

73 Schill, *supra* note 7, at 8.

74 The *Devas* challenge decision is already being relied on by parties and discussed by arbitrators in other proceedings. *See* İçkale İnşaat Ltd. Şirketi v. Turkmenistan, ICSID Case No. ARB/10/24, Decision on Claimant's Proposal to Disqualify Professor Philippe Sands, ¶¶ 74 n. 23, 80 n. 29, 85–86, 107, 109, 121–22 (July 11, 2014). For a discussion of the position taken by the Secretary-General of the Permanent Court of Arbitration on closed-mind scenario issue conflicts, see Chapter 3 by Sarah Grimmer in this volume (summarizing six challenges of this nature, two of which led to the challenged arbitrator's resignation).

3.2 *Reasonable Expectations of an Arbitrator's Open Mind*

According to the *Devas* challenge decision, an arbitrator must be disqualified in case of

> an appearance of pre-judgment of an issue likely to be relevant to the dispute on which the parties have a reasonable expectation of an open mind.[75]

Whether an issue is "likely to be relevant to the dispute" might constitute a difficult question if raised at the original disclosure stage for arbitrators,[76] but does not present an insuperable difficulty for the decision-maker at the challenge stage. In the *Devas* challenge decision, President Tomka was content to assert that the intention of the Respondent to rely on the "essential security interests" provision in Article 11(3) of the [Treaty] "seem[ed] credible, not just a pretext to mount the present challenge," solely on the face of the Notice of Arbitration.[77] President Tomka did not elaborate on the 'likely to be relevant to the dispute' test. The test has an objective side, as there is an objective continuum of 'relevance.' An issue without any relevance does not affect the final decision at all, however decided. The most relevant issues are outcome-determinative. Additionally, the test has a subjective side. How and when an issue is raised and the good faith of the party raising the issue inform the analysis. For instance, if a party suddenly pleads an issue at a late stage in the

75 *Devas*, PCA Case No. 2013-09, ¶ 58.

76 At the appointment stage and the original disclosure stage, it is often difficult for arbitrators to know whether a given issue is "likely to be relevant to the dispute." *See* ICCA-ASIL Report, *supra* note 2, ¶ 167. In fact, one might argue that an arbitrator opining on the relevance of an issue to the dispute at an early stage, before the issue has been sufficiently pleaded or even evoked by the parties, would give rise to an appearance of partiality or pre-judgment. This difficulty is real but not insurmountable. Disclosure obligations are on-going obligations. Under the *Devas* standard, arbitrators have the duty to regularly evaluate the likeliness that a given issue will be relevant to the dispute. This likeliness evolves as the parties plead their case. Similarly, disclosure obligations will evolve in the course of the proceedings.

77 *Devas*, PCA Case No. 2013-09, ¶ 57. *But see* Tidewater Inc., et al. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/05, Decision on Claimants' Proposal to Disqualify Professor Brigitte Stern, ¶ 69 (Dec. 23, 2010).

proceedings, with the apparent hope of derailing the proceedings by mounting a late issue conflict challenge, that party should face a high burden in showing that the issue is "likely to be relevant to the dispute."

Let us now turn to the more difficult and important question of whether the parties "have a reasonable expectation of an open mind" on a certain issue. According to Jan Paulsson,

> [I]t is sometimes said that litigants are entitled to judges who will examine their case with an open mind. . . . But litigants will be certain of an opportunity to put their case to perfectly open minds only if they are prepared to be judged by very young children.[78]

The proposition is, however, inapposite. An "open mind" is not a "virgin mind," or an "empty mind," or an "ignorant mind."[79] The 'openness' of a mind does not characterize a static state of mind that could be captured instantaneously at a given moment, but rather an act of the mind, a process: the dynamic capacity to hear an argument. As President Tomka said, "the Respondent is entitled *to have its arguments heard and ruled upon* by arbitrators with an open mind."[80] A closed mind will be the same before and after argument, no matter what the argument is. Reasonable expectations of an arbitrator's open mind are reasonable expectations to be heard.

Parties certainly have an expectation to be heard by an arbitrator with an open mind on all issues of fact. When it comes to relevant issues of law, the position is more nuanced. Some issues of law are well settled and perfectly non-controversial, and parties cannot expect novel arguments requiring the rejection of established law to be entertained. The challenge decision in *Devas* finds that parties are entitled to be heard by an arbitrator with an open mind

78 Paulsson, s*upra* note 3, at 150; *see Urbaser s.a. & Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan, ¶ 40 (Aug. 12, 2010) ("No arbitrator and, more generally, no human being of a certain age is, in absolute terms, independent and impartial. Simply put, every individual is conveying ideas and opinions based on its moral, cultural, and professional education and experience.").

79 *See* Sophie Nappert, *Bias in International Commercial Arbitration Versus Investment Arbitration: Are There Different Standards? Should There Be?*, in Contemporary Issues in International Arbitration and Mediation—The Fordham Papers 2009 152 (Arthur W. Rovine ed., 2010) (noting that "arbitrators are expected to have open minds, not empty minds").

80 *Devas*, PCA Case No. 2013-09, ¶ 64 (emphasis added).

on relevant issues of law that are controversial, unsettled, on which a 'jurisprudence constante' has not formed yet. Thus, President Tomka asserted that the fact that Professor Orrego Vicuña in three cases and Mr. Lalonde in two cases adopted a consistent view on the concept of 'essential security interests' was "not surprising, as those tribunals applied the same provision to similar facts, prior to the issuance of the first of the three annulment decisions."[81] The consistent views adopted by the challenged arbitrators in three and two cases respectively all predated the issuance of the first of the three annulment decisions, which formally made the interpretation of the concept of 'essential security interests' a controversial issue, subject to contradictory rulings.

The unsettled nature of the issue informed President Tomka's decision to disqualify Professor Orrego Vicuña, and not Mr. Lalonde. President Tomka specifically noted that Professor Orrego Vicuña's academic publication "in particular suggests, that, *despite having reviewed the analyses of three different annulment committees*, his view remained unchanged."[82] Mr. Lalonde, on the other hand, "has not taken a position on the legal concept in issue *subsequent to the decisions of the three annulment committees*."[83] According to a critique of the challenge decision, "[c]omparing the challenges against Messieurs Lalonde and Orrego Vicuña, it seems that the academic article written by Prof. Orrego Vicuña made all the difference."[84] This is true, but misleading. What was crucial was not the academic nature of the view expressed by Professor Orrego Vicuña, but the timing of the view expressed; it so happened that the view expressed subsequent to the decisions of the annulment committees took the form of an academic publication. All relevant circumstances should be part of the analysis of whether there is an appearance of pre-judgment, but the importance of the medium of expression should not be exaggerated. There is nothing in President Tomka's decision that indicates that had Professor Orrego Vicuña's academic opinion been expressed in an arbitral award, the decision would have been different.

Similarly, the fact that the three relevant decisions in which Professor Orrego Vicuña participated were later annulled is not crucial. President Tomka did not expressly or implicitly take sides in the controversy concerning the

81 *Id.*, ¶ 59.

82 *Id.*, ¶ 64 (emphasis added).

83 *Id.*, ¶ 66 (emphasis added).

84 Schill, *supra* note 7, at 8.

proper interpretation of the concept of 'essential security interests.'[85] What the exact powers of an annulment committee are, and what weight should be given to its decisions, is irrelevant for purposes of the challenge decision. The annulment committees, by taking positions contradictory to the ones reached in the annulled awards, made clear that the issue of the interpretation of the 'essential security interest' clause was a controversial and unsettled one, one on which parties are entitled to an arbitrator's open mind.

A critique of the challenge decision argues that

> [a]rbitrators have to decide on [pure questions of law] by themselves based on the principle *iura novit curia*, and therefore do not need to be "impartial" towards the legal submissions of the parties.[86]

Jan Paulsson notes that

> in most courts a lawyer will get nowhere if he seeks to recuse of a judge on the grounds that the latter is known to be sceptical of a legal theory upon which the lawyer wishes to rely.[87]

The question is: Should the principle *iura novit curia*, which undoubtedly applies to judges in many legal systems, apply to arbitrators as well? The *Devas* challenge decision must be read to answer this question in the negative. As arbitral tribunals are constituted for each case, expectations of the arbitrator are different than those of the municipal judge. It is regrettable that President

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85 A critique of the challenge decision asserts:

"Anyone is free to question whether [Professor Orrego Vicuña] has the right understanding of the international law at stake, but whatever the merits are of such criticism they do not affect, in my view, the impartiality and independence necessary to sit as an arbitrator."

Id. at 6. This, again, is true, but misleadingly suggests that President Tomka did question Professor Orrego Vicuña's understanding of the issue at stake.

86 *Id*. Somewhat contradictorily, the article further states:

"Certainly, an arbitrator in any event should also hear the parties' legal arguments and should consider whether to reassess his or her prior views on matters of law, but he or she would not be challengeable based on holding even firm prior views on the legal issues at hand."

Id. One wonders: What if these prior views on the legal issues at hand are so firm that the arbitrator will precisely be unable to (or apparently unable to) hear the parties' legal arguments and consider whether to reassess his or her prior views on matters of law?

87 Paulsson, supra note 3, at 150.

Tomka did not elaborate further on this issue, but the implications of his decision on this point are clear.[88]

4 The Impact of the *Devas v. India* Challenge Decision

4.1 *Pool of Arbitrators, Academic Freedom, and Arbitral Honesty*

A vigorous critique of the "alarming"[89] challenge decision in *Devas* argues that the decision will have the deleterious effects of "reduc[ing] the pool" of potential arbitrators and to "discourage more broadly meaningful writing on investment law and investor-state arbitration."[90]

First, undeniably, if a more robust concept of issue conflict develops, more potential arbitrators will be conflicted, and by definition, certain arbitrators will not be available for appointment in some cases. This, of course, is true of any development that strengthens conflict rules for arbitrators. If there was no requirement of independence and impartiality, more arbitrators would be available for appointment, and parties would have absolute freedom to appoint arbitrators. The parties' freedom to appoint the arbitrator of their choice must be balanced with the requirements of independence and impartiality.[91] Mechanically, the parties' freedom of choice and the need for independence and impartiality are balanced by appropriate disclosure rules, challenge rules, and challenge procedures. Therefore, the question is: Does the *Devas* principle strike the right balance, or does it inappropriately tip the scales in favor of impartiality and against freedom of choice? It has been suggested that a more robust conception of issue conflicts is incompatible with the "system" of investor-state arbitration.[92] The argument is reminiscent of arguments made against robust rules against repeat appointments by States, on the basis that

88 For academic views suggesting that there are good reasons not to apply the *iura novit curia* principle to arbitrators because of the different institutional designs of courts and arbitral tribunals, see Paulsson, *supra* note 3, at 151; Tony Cole, *Arbitrator Appointments in Investment Arbitration: Why Expressed Views on Points of Law Should Be Challengeable*, IISD, Investmenttreatynews (Sept. 23, 2010), http://www.iisd.org/itn/2010/09/23/arbitrator-appointments-in-investment-arbitration-why-expressed-views-on-points-of-law-should-be-challengeable-2/ (last visited May 30, 2015).

89 Schill, *supra* note 7, at 4.

90 *Id.* at 6–7.

91 *See generally* ICCA-ASIL Report, *supra* note 2, ¶¶ 21–33.

92 *See Urbaser S.A. & Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan, ¶ 46 (Aug. 12, 2010); *see also Universal*

> the number of States and experienced arbitrators is limited and that if a State cannot nominate the same arbitrator in several cases, the freedom of States to choose an arbitrator would be undermined.[93]

Apocalyptic predictions preceding and following the *Devas* challenge decision have so far not proven true.[94] In fact, the *Devas* challenge decision, while "reduc[ing] the pool" of potential arbitrators, may well have the effect of diversifying the pool of actual arbitrators.[95]

Second, it has been suggested that the *Devas* decision will

> disincentivize already established actors in the field to make meaningful contributions to legal scholarship on investment law, as writing a law review article may have the effect of costing future appointments.[96]

President Tomka addressed the argument as follows:

Compression Int'l Holdings, S.L.U. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/5, Decision on Proposal to Disqualify Professor Brigitte Stern and Professor Guido Santiago Tawil, Arbitrators, ¶ 83 (May 20, 2011); *Tidewater Inc., et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/05, Decision on Claimants' Proposal to Disqualify Professor Brigitte Stern, ¶ 68 (Dec. 23, 2010); *Urbaser*, ICSID Case No. ARB/07/26, ¶¶ 48, 54; ICCA-ASIL Report, *supra* note 2, ¶ 135 ("[K]nowledgeable observers, including the Chairman of the ICSID Administrative Council and several members of the Task Force, have warned that viewing participation in an earlier award on a legal issue as disqualifying could have adverse consequences for the international arbitration system.").

93 *Universal Compression*, ICSID Case No. ARB/10/5, ¶ 44; *see also Tidewater*, ICSID Case No. ARB/10/05, ¶ 27. For a discussion of repeat arbitrator appointments as a basis for challenges, see Chapter 10 by Luke A. Sobota in this volume.

94 *See İçkale İnşaat Ltd. Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Decision on Claimant's Proposal to Disqualify Professor Philippe Sands, ¶¶ 74 n. 23, 80 n. 29, 85–86, 107, 109, 121–22 (July 11, 2014).

95 Schill, *supra* note 7, at 6.

96 *Id.*; *see* ICCA-ASIL Report, *supra* note 2, ¶ 100 ("Members of all perspectives urged that international arbitration benefits significantly from vigorous and open discussion of contemporary legal issues by knowledgeable persons. In their view, scholarly or professional publications addressing issues at a general level (but not discussing details of the particular dispute in which they have been named) should not be seen as impairing impartiality. It would be a significant loss for such informed commentary to be chilled by fear of a possible future challenge to the author on account of the views expressed.").

> Professor Orrego Vicuña is certainly entitled to his views, including to his academic freedom. But equally the Respondent is entitled to have its arguments heard and ruled upon by arbitrators with an open mind. Here, the right of the latter has to prevail.[97]

"Academic freedom" is not an operative principle of dispute settlement, and in a dispute settlement context, the requirement of impartiality must prevail.[98] In an academic context, academic freedom will prevail in its own sphere. A judge might never become a United States Supreme Court justice because of a controversial academic article he wrote when he was a young scholar. A politician might lose an election because of an opinion piece he wrote as a student editor of a university newspaper. These hypotheticals do not offend academic freedom or the freedom of the press. Ideas and words have consequences. In fact, this is why academic freedom matters.

Third, one might argue that the *Devas* decision will encourage arbitrators, as arbitrators, to perform their function in a less honest or transparent way. Arbitrators will refrain from issuing concurring or dissenting opinions. They will strive to reach *sui generis*, fact-specific decisions, and will refrain from cutting the Gordian knot of controversial issues of law.[99] This is a serious, yet unverifiable and unquantifiable, concern.

4.2 *The Future of Issue Conflict Challenges*

The *Devas* challenge decision was based on Article 10(1) of the 1976 UNCITRAL Arbitration Rules, which provides that "[a]ny arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence."[100] There is no reason to limit it to the UNCITRAL Arbitration Rules context. The potential for convergence of the independence

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97 *Devas*, PCA Case No. 2013-09, ¶ 64.

98 ICCA-ASIL Report, *supra* note 2, ¶ 143 ("It may indeed be that allowing challenges alleging issue conflict can chill useful publication or professional development, or dry up the supply of arbitrations with necessary knowledge and experience, all to the detriment of the investment arbitration system. However, these values relate to the welfare of the system; they operate in a different sphere from a party's right to have a claim decided by an impartial arbitrator.")

99 *See generally* Zachary Douglas, *The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails*, 2(1) J. Int'l Disp. Settlement 97, 113 (2011).

100 UNCITRAL Arbitration Rules, G.A. Res. 31/98, UNCITRAL, 31st Sess., Supp. No. 17 at art. 10(1), U.N. Doc. A/31/17 (Apr. 28, 1976), *available at* http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf (last visited on May 30, 2015).

and impartiality standards of ICSID and of the UNCITRAL Rules has recently been noted.[101] Indeed, the *Devas* challenge decision has already been relied on by a party and discussed by the tribunal in at least one ICSID case.[102] The *Devas* challenge decision has the potential to transform the understanding of issue conflicts in the entire field of investor-state arbitration. It is controversial, but not unprecedented. It is not an outlier and will likely not become one.

Arbitration rules of procedure do not go into the details of facts that constitute a breach of the standard of independence and impartiality. That is not their role. The substantive standards for conflict are particularized in ethical codes of conduct and case law. Issue conflicts remain to receive appropriate attention in ethical codes of conduct. It is a worthwhile, if arduous, task to attempt to clarify the case law on issue conflicts and to inform its development with the publication of ethical guidelines or other form of guidance.[103] In so doing, the *Devas* challenge decision must be accounted for.

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101 *See generally* Karel Daele, Case Comment, *Saint Gobain v Venezuela* and *Blue Bank v Venezuela: The Standard for Disqualifying Arbitrators Finally Settled and Lowered*, 29(2) ICSID REV. 296 (2014). For a discussion of challenges of arbitrators in ICSID arbitration, see Chapter 2 by Meg Kinnear and Frauke Nitschke in this volume.

102 *See İçkale İnşaat Ltd. Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Decision on Claimant's Proposal to Disqualify Professor Philippe Sands, ¶¶ 74 n. 23, 80 n. 29, 85–86, 107, 109, 121–22 (July 11, 2014).

103 *See* ICCA-ASIL Report, *supra* note 2, ¶ 158 ("To the extent that inappropriate predisposition is a legitimate problem warranting concern, there was no consensus as to whether the Task Force should simply record the status of the problem or attempt guidelines or other measures to address it. While there was little—if any—support for attempting to devise formal guidelines, some felt that deeper analysis of the issue might assist arbitrators in making appropriate disclosures and counsel and decision-makers in assessing possible challenges.").

CHAPTER 9

Late-in-the-Day Arbitrator Challenges and Resignations: Anecdotes and Antidotes

Judith Levine

1 Introduction

This chapter focuses on arbitrator challenges and resignations that occur at a late stage in proceedings and the tools available to minimize their disruptive effect. While some late challenges and resignations are inevitable, spurious late challenges and resignations have been identified amongst the arsenal of "guerrilla" tactics deployed by parties to slow down, derail, or undermine arbitral proceedings.[1]

Section 2.1 of this chapter considers the role of time limits as a preliminary procedural safeguard to ensure challenges are brought as soon as parties learn of the underlying circumstances. Time limits cannot, however, prevent challenges when the underlying circumstances complained of are new events of the types described in section 2.2. Tools to discourage late challenges and minimize their disruptive impact on proceedings are discussed in section 2.3. Section 3.1 reflects on the relationship between challenges and arbitrator resignations. Section 3.2 reviews scenarios where resignations have occurred at an advanced stage of proceedings. Section 3 describes some of the tools adopted by tribunals, institutions, and courts to deal with the disruptive impact of late (and sometimes questionable) resignations.

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1 *See* Günther J. Horvath et al., *Categories of Guerrilla Tactics, in* Guerrilla Tactics in International Arbitration 9 (Günther Horvath & Stephan Wilske, eds., 2013) [hereinafter Guerrilla Tactics]; Victoria R. Orlowski, *Upping the Arsenal—Using the ICC Rules to Counteract Guerilla Tactics, in* Guerrilla Tactics *supra*, § 2.02, at 57; Simon Greenberg, *Tackling Guerrilla Challenges Against Arbitrators: Institutional Perspective*, Transnat'l Disp. Mgmt. 7 (2010); M. Scott Donahey, *Defending the Arbitration Against Sabotage*, 13 J. Int'l Arb. 93, 104 (1996).

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2 Arbitrator Challenges Late in Proceedings

Arbitrator challenges are most frequently brought in the early phases of proceedings. According to some, challenges are less likely to be successful the later in the process they are brought.[2] It is generally accepted that a challenge "can severely disrupt the arbitration if it occurs at an advanced stage of the proceedings,"[3] particularly if it arises immediately before a hearing or deadline. Irrespective of its merits, a challenge may lead to suspension of proceedings, rescheduling of hearings and a distraction of attention away from the case itself for many weeks or even months.[4]

2.1 *Time Limits*

2.1.1 Set Periods of Time to File a Challenge

To discourage eleventh hour challenges and ensure parties bring forward challenges as early as possible, time limits are set in most arbitration rules. For example, Article 13(1) of the United Nations Commission on International Trade Law ("UNCITRAL") Rules requires a party to send notice of its challenge within fifteen days after the arbitrator is appointed or within fifteen days after the circumstances giving rise to the challenge become known to that party.[5] The drafters intended this

2 *See* Gary B. Born, International Commercial Arbitration 1559 (1st ed. 2009); Chapter 2 by Meg Kinnear & Frauke Nitsche & Chapter 3 by Sarah Grimmer in this volume; Donahey, *supra* note 1, at 104.

3 Yves Derains & Eric A. Schwartz, A Guide to the ICC Rules of Arbitration 185 (2005); *see also* Nigel Blackaby et al., Redfern and Hunter on International Arbitration 4.91 (2009) [hereinafter Redfern and Hunter]; Karel Daele, Challenge and Disqualification of Arbitrators in International Arbitration § 2–094, at 103 (2012); Horvath et al., *supra* note 1, §1.02, at 9; William W. Park, *Arbitrator Integrity: The Transient and the Permanent*, 46 San Diego L. Rev. 629, 633 (2009).

4 *See* Int'l Bar Assoc., Guidelines on Conflict of Interest in International Arbitration, commentary to General Standard 3(e) (2014) [hereinafter 2014 IBA Conflict Guidelines], http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx (last visited Apr. 15, 2015); *see also* William W. Park, *Arbitration's Discontents: Of Elephants and Pornography*, 17 Arb. Int'l 263, 270 (2001) (noting that challenges take time and money, even if they are ultimately rejected).

5 UNCITRAL Arbitration Rules, GA/RES/31/98, Art. 13(1) (Dec. 15, 1976) [hereinafter 1976 UNCITRAL Rules].

> to prevent parties from abusing the challenge mechanism by bringing up areas of concern of which they had been aware for some time, just to delay proceedings that appeared to be going against them.[6]

Specific periods of time are also set out in the rules of the Permanent Court of Arbitration ("PCA"), the London Court of International Arbitration ("LCIA"), the International Chamber of Commerce ("ICC"), and the International Centre for Dispute Resolution ("ICDR").[7] The UNCITRAL Model Law and many national arbitration laws similarly include a time limit for bringing challenges.[8]

In dismissing challenges on the basis of a time bar, the PCA Secretary-General has noted that time limits

> protect the integrity of the proceedings by compelling parties with knowledge of facts that might disqualify an arbitrator to make such facts known and to seek their determination immediately

or be deemed to have waived any objection.[9]

An example of the fifteen-day time limit being applied was *AWG v. Argentina*, an investor-state arbitration under the UNCITRAL Rules, proceeding in parallel with two International Centre for Settlement of Investment Disputes ("ICSID") cases before the same tribunal.[10] The cases began in 2003, jurisdiction was

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6 David C. Caron & Lee M. Caplan, The UNCITRAL Arbitration Rules: A Commentary 242 (2012).

7 Permanent Court of Arbitration Rules, art. 13(1) (Dec. 17, 2012) (thirty days); London Court of International Arbitration Rules, art. 10.3 (Oct. 1, 2014) (fourteen days); International Chamber of Commerce Rules of Arbitration, art. 14.2 (Jan. 1, 2012) (thirty days); International Centre for Dispute Resolution International Arbitration Rules, art. 14.1 (June 1, 2014) (fifteen days). The thirty-day provision in the PCA 2012 Rules, which are formulated specially to deal with disputes involving states, is a "more generous time period" to "account [] for the time that may be required by some states to conduct thorough conflict checks or consider the significance of any disclosure made by the arbitrator." Brooks W. Daly, Evgeniya Goriatcheva & Hugh A. Meighen, A Guide to the PCA Arbitration Rules ¶ 4.56 (2014).

8 UNCITRAL Model Law on International Commercial Arbitration, U.N. Doc. A/40/17, art. 13(2), June 21, 1985 (fifteen days) [hereinafter UNCITRAL Model Law]; *see also* Dutch Arbitration Act, art. 1035(2) (Dec. 1, 1986) (four weeks).

9 For challenge practice of the PCA Secretary-General, see Chapter 3 by Sarah Grimmer in this volume, describing at least challenges which were deemed untimely.

10 *Suez v. Argentine Republic*, ICSID Case No. ARB/03/17, *Suez & Vivendi v. Argentine Republic*, ICSID Case No. ARB/03/19 and *AWG Group v. Argentine Republic* (UNCITRAL), (hereinafter "Suez & AWG Group"), Decision on the Proposal for the Disqualification of a Member of

upheld in 2006, and a hearing on the merits was set for October 29, 2007. On October 12, 2007, Argentina challenged the claimants' arbitrator on the basis of an award issued on August 20, 2007, in another case against Argentina involving the same arbitrator. Argentina alleged that other award was "so flawed . . . that [the arbitrator's] very participation in that decision 'reveals a prima facie lack of impartiality. . . .' "[11] The co-arbitrators held that the challenge in the UNCITRAL proceedings was untimely on the basis of it being brought fifty-three days after the circumstances were known, i.e., thirty-eight days after the fifteen-day deadline had expired.[12] Notably, the arbitrators rendered their decision swiftly, in time to preserve the October hearing dates.

Frequently when challenges are rejected for timeliness the decision-maker nevertheless proceeds to consider and dispose of the challenge on its merits, as was done in the *AWG* case and some recent challenges resolved by the PCA Secretary-General and at the LCIA.[13] This is often done at the request of the parties, out of concern that their extensively argued and bona fide challenge might be dismissed on formalistic grounds, or in the expectation that the decision may be relevant at a later stage if the award is challenged. In some cases, particularly when the timing issues are thorny, appointing authorities have chosen to dismiss the challenges on substantive grounds and therefore sidestepped any decision on timeliness as unnecessary.[14]

2.1.2 ICSID Requirement to File "Promptly"

Article 9 of the ICSID Arbitration Rules requires that a disqualification proposal be filed "promptly" and in any event before the proceeding is declared closed.[15] Promptness is not defined by a set period of days but on a "case by case basis." As described in *Cemex v. Venezuela*,

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the Arbitral Tribunal (Oct. 22, 2007), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC689_En&caseId=C18.

11 *Id.*, ¶ 13.

12 *Id.*, ¶¶ 21, 26. The co-arbitrators similarly rejected the challenge in the ICSID cases, but on the basis that it was not made "promptly" per the requirement in the ICSID Convention, discussed below.

13 In a recent UNCITRAL Rules case where the challenge was untimely brought, seventeen days after the circumstances became known, the PCA Secretary-General assessed the merits of the challenge in any event.

14 *See, e.g.*, *Alpha Projektholding GMBH v. Ukraine*, ICSID Case No. ARB/07/16, Decision on Respondent's Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz, ¶ 82 (Mar. 19, 2010).

15 *See* Chapter 2 by Meg Kinnear & Frauke Nitschke in this volume. The French rule is "*dans les plus brefs délais*," and the Spanish version requires the challenging party to act "*sin demora*" (without delay).

> [T]he text of Rule 9(1) implies that such a proposal must be made as soon as the party concerned learns of the grounds for a possible disqualification.[16]

The sanction for the failure to object promptly is waiver of the right to make an objection.[17]

Typically ICSID challenges that are raised within one month have been accepted as "prompt" for purposes of the rule,[18] and in some cases up to two

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16 *CEMEX Caracas Investments B.V. & CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on the Respondent's Proposal to Disqualify a Member of the Tribunal, ¶ 36 (Nov. 6, 2009) (citing Christoph H. Schreuer, The ICSID Convention: A Commentary 1200 (2d. ed. 2009).

17 ICSID Rules of Procedure for Arbitration Proceedings, Rule 27 (2006) [hereinafter ICSID Arbitration Rules], *available at* https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf; *id*., Rule 9, n. B; *see also Abaclat & Others v. Argentine Republic* ("Abaclat II"), ICSID Case No. ARB/07/5, Decision on the Proposal to Disqualify a Majority of the Tribunal, ¶ 68 (Feb. 4, 2014); *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, ¶ 73 (Dec. 13, 2013).

18 Karel Daele has identified a number of decisions in which a challenge was deemed to be prompt. *See* Daele, *supra* note 3, at 124 n. 19 (citing *Nations Energy Corp., Electric Mach. Enter., Inc., y Jaime Jurado v. Republic of Panama*, ICSID Case No. ARB/06/19, Decision on the Proposal to Disqualify Dr. Alexandrov (September 7, 2011), http://www.italaw.com/sites/default/files/case-documents/ita0561.pdf (7 days); *OPIC Karimum Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/14, Decision on the Proposal to Disqualify Professor Philippe Sands, Arbitrator (May 5, 2011), http://www.italaw.com/sites/default/files/case-documents/ita0588.pdf (12 days); *Urbaser S.A. et. al., v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan (Aug. 12, 2010); http://www.italaw.com/sites/default/files/case-documents/ita0887.pdf (10 days); *African Holding Co. of America, Inc. & Société Africaine de Constr. au Congo S.A.R.L. v. Democratic Republic of the Congo*, ICSID Case No. ARB/05/21, Decision on Jurisdiction (July 29, 2008), http://www.italaw.com/sites/default/files/case-documents/ita0016.pdf (7 days); *EDF Int'l S.A., SAUR Int'l S.A. & León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Challenge Decision Regarding Professor Gabrielle Kaufmann-Kohler (June 25, 2008), http://www.italaw.com/sites/default/files/case-documents/ita0262.pdf (7 days); *Suez, Sociedad General de Aguas de Barcelona S.A. & Interaguas Servicios Integrales de Agua S.A. v. Argentine Republic together with Suez, Sociedad General de Aguas de Barcelona S.A. & Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal (May 12, 2008), http://italaw.com/documents/Suez-VivendiChallenge2.pdf (7 days); *Sempra Energy Int'l v. Argentine Republic together with Camuzzi Int'l S.A. v. Argentine Republic*, ICSID

months or more.[19] Some factors that have been taken into account when assessing promptness include whether the party could reasonably have become aware of the circumstances at an earlier phase through better diligence,[20] how long it would reasonably have taken to analyze the effect of the new circumstances, the length and complexity of the written proposal to disqualify, the stage of proceedings and disruption caused by the challenge, and the attitude of the challenging party in accommodating the schedule pending the challenge.[21]

Case. ARB/03/02, Challenge Decision of the Chairman of the Administrative Council of ICSID (June 5, 2007), unpublished (9 days); *Generation Ukraine v. Ukraine*, ICSID Case No. ARB/00/9, Challenge Decision (July 5, 2001), unpublished, referred to in Award of Sept. 6, 2003, 44 I.L.M. 404 (2005) (7 days); *Zhinvali Dev. Ltd. v. Republic of Georgia*, ICSID Case No. ARB/00/1, Decision (Jan. 19, 2001), unpublished, referred in Award of Jan. 24, 2003 (3 days)); *see also RSM Prod. Corp. v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Claimant's Proposal for the Disqualification of Dr. Gavan Griffith QC, ¶¶ 70–75 (Oct. 23, 2014) (noting that "[e]very submission requires preparation and coordination between lawyers and clients" and accepting 28 days as prompt); Saba Fakes v. Republic of Turkey, ICSID Case No. ARB/07/20, Jurisdiction Award, ¶¶ 5–8 (July 14, 2010) (10 days).

19 In *Amco Asia Corp. v. Indonesia*, ICSID Case No. ARB/81/1, Decision on the Proposal to Disqualify an Arbitrator (June 24, 1982), cited in Decision on Jurisdiction, 1 ICSID Reports 399, ¶ 2 (Sept. 25, 1983), where the challenge was brought after forty-one days, and Asset Recovery v. Argentina, where the challenge was brought after fifty-eight days, the timing was not questioned. *See also* Daele, *supra* note 3, ¶ 3–009, at 125 (citing *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on the Respondent's Proposal to Disqualify a Member of the Tribunal, ¶ 16 (Sept. 23, 2008) (finding a challenge timely when brought six weeks after a conflict disclosure, but only because the challenging party had been in communication with the other side and the arbitrator during that period). Forty-two days was acceptable, "[h]aving regard to the grounds on which the Proposal is based, and allowing for the time which the Respondent says that it needed in order to learn of the facts giving rise to the challenge" and "complete a 'thorough analysis.'" *Abaclat & Others v. Argentine Republic* ("Abaclat I"), PCA Case No. IR 2011/1, ICSID Case No. ARB/07/5, Recommendation Pursuant to the Request by ICSID Dated November 18, 2011 on the Respondent's Proposal for the Disqualification of Professor Pierre Tercier and Professor Albert Jan van den Berg Dated September 15, 2011, ¶¶ 68–69 (Dec. 19, 2011), *available at* https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC4894_En&caseId=C95.

20 *See CEMEX*, ICSID Case No. ARB/08/15, ¶¶ 43–44; *see also Alpha Projektholding GMBH v. Ukraine*, ICSID Case No. ARB/07/16, Decision on Respondent's Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz (Mar. 19, 2010).

21 *Suez & AWG Group*, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, ¶ 26 (Oct. 22, 2007); Daele, *supra* note 3, ¶ 3–018, at 129–30 (citing *Carnegie Minerals (Gambia) Ltd. v. Republic of Gambia*, ICSID Case No. ARB/09/19,

ICSID challenges have failed the promptness test in a number of cases. As already mentioned, in the two ICSID cases heard concurrently with *AWG v. Argentina*, it was not prompt for the respondent to bring a challenge fifty-three days after the complained of event. In *Cemex v. Venezuela*,[22] the challenging party was found to have waived its right to challenge when it filed a five-page disqualification proposal more than six months after becoming aware of all material facts. In *Azurix v. Argentina I*,[23] the respondent waited more than two years after the challenged arbitrator's disclosure about his firm's clients' unrelated claims against Argentina and more than eight months after learning of his firm appointing the claimant's counsel as arbitrator in an unrelated case.[24] In dismissing the challenge, the co-arbitrators noted, "By any reasonable standard it cannot be said in the present case that the party putting forward its Proposal has acted promptly. . . ."[25]

In *Burlington v. Ecuador*, a challenge was brought against a presiding arbitrator, partly on the ground of that arbitrator having been appointed eight times by the same law firm. That part of the challenge was dismissed for lack of promptness, on the basis that four of the eight appointments were actually

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Decision of Two Members on the Proposal for the Disqualification of a Member of the Tribunal, ¶ 90 (May 17, 2011) (unpublished)).

22 *CEMEX*, ICSID Case No. ARB/08/15.

23 *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic (Sept. 1, 2009), http://www.italaw.com/sites/default/files/case-documents/ita0065.pdf.

24 *Id.*, ¶¶ 31–33.

25 *Id.*, ¶ 35 (quoting *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Challenge to the President of the Tribunal, ¶¶ 7–8 (Feb. 25, 2005). The *ad hoc* committee later constituted to hear the annulment application in this case noted that such a committee

> "cannot decide for itself whether or not a decision [on disqualification of an arbitrator] was correct, as this would be tantamount to an appeal against such a decision. All that an *ad hoc* committee can consider is whether the provisions and procedures prescribed under Articles 57 and 58 of the ICSID Convention and ICSID Arbitration Rule 9 were complied with."

Id., ¶ 282. Another ICSID *ad hoc* annulment committee held that a party who raised a complaint about the lack of impartiality of an arbitrator for the first time in the context of an annulment proceeding, 147 days after the complained of conduct, had effectively waived its Rule 9 objection. *CDC Group PLC v. Republic of the Seychelles*, ICSID Case No. ARB/02/14, Decision of the Ad Hoc Committee on the Application for Annulment of the Republic of Seychelles, ¶ 53 (June 29, 2005), http://italaw.com/documents/CDCSeychellesAnnulmentDecision.pdf.

known to the challenging party for several years, and the subsequent appointments had been in the public domain for more than three months before the challenge.[26]

Unlike cases under the UNCITRAL Rules, ICSID proceedings are automatically suspended upon challenge and will not resume until the challenge is rejected or a new arbitrator is appointed.[27] This can result in significant delays to proceedings. One commentator has suggested that the imprecise "promptness" standard under the ICSID Convention, combined with the automatic suspension of ICSID proceedings, has led to a prevalence of "strategic challenges" in investor-state arbitration.[28]

2.1.3 Actual Versus Constructive Knowledge as Trigger for Time Bar

Whether the time limit should be measured from the date a party *actually* acquired knowledge, as opposed to when it reasonably ought to have acquired knowledge is a question that occasionally arises in applying a challenge time bar.

Article 13(1) of the UNCITRAL Rules frames the fifteen-day limit by reference to when circumstances "became known to that party." A leading commentary

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26 *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, ¶ 72–75 (Dec. 13, 2013).

27 *See* ICSID Arbitration Rules, *supra* note 17, Rule 9(6); *see also* Chapter 2 by Meg Kinnear & Frauke Nitsche in this volume. For example, the challenge process took six months in *EDF International. v. Argentine Republic. EDF Int'l S.A., SAUR Int'l S.A. & León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Challenge Decision Regarding Professor Gabrielle Kaufmann-Kohler (June 25, 2008), http://www.italaw.com/sites/default/files/case-documents/ita0262.pdf.

28 Noah Rubins, *Particularities When Dealing with State Entities, in* Guerrilla Tactics, *supra* note 1, §2.03 ("Knowing that the applicable ICSID rules call for non-discretionary suspension of the proceedings (resulting in an automatic extension of the impending deadline by weeks or even months), the temptation of the respondent to challenge the arbitrator—even if the chances of success are very small—may be irresistible. The likelihood of strategic conduct is still greater due to ICSID's vague deadline for advancing a challenge, noted above. It is far easier for a party to choose the most advantageous moment in the established calendar to freeze the existing deadlines when the timeliness of the motion will be decided according to a 'promptness' standard, rather than the fifteen-day limit imposed under the UNCITRAL Rules. Indeed, this may be one factor explaining the prevalence of arbitrator challenges in investor-state arbitration."); *see also* Judith Levine, *Navigating the Parallel Universe of Investor-State Arbitrations Under the UNCITRAL Rules, in* Evolution in Investment Treaty Law and Arbitration 388–392 (Chester Brown & Kate Miles, eds., Cambridge Univ. Press, 2011); James D. Fry & Juan Ignacio Stampalija, *Forged Independence and Impartiality: Conflicts of Interest of International Arbitrators in Investment Disputes*, 30(2) Arb. Int'l 189, 258 (2014).

points out that "[t]he provision could have, but notably does not include, the phrase 'should have known' or 'ought to have known.' "[29] The drafters of the Rules in fact rejected such language.[30] Those deciding challenges under the UNCITRAL Rules have also confirmed that the trigger event is "actual knowledge." For example, the appointing authority for the Iran-U.S. Claims Tribunal ("IUSCT") has accepted that the rule entails evidence of actual knowledge.[31] Similarly, the Deputy Secretary-General of ICSID, applying the UNCITRAL Rules in *Vito G. Gallo v. Canada* noted the requirement of "proof of actual knowledge." The President of the International Court of Justice, the appointing authority per the investment treaty in *CC Devas* (*Mauritius*) *Ltd et al., v. India*, also found the text of the UNCITRAL Rules to be sufficiently clear as to support an actual knowledge test. The circumstances giving rise to that challenge included the fact that two of the arbitrators had twice sat together in cases entailing a similar issue as that in dispute before them, and that one had written an article defending his position on that issue. The respondent had only found out about those facts when its new counsel told them, even though the facts may have been accessible several years earlier. The claimants had argued that an actual knowledge interpretation "creates an unworkable and risky standard" whereby

> counsel could wait to inform his or her client of circumstances giving rise to justifiable doubt at any stage in the proceeding, permitting a party to present a challenge without regard to the egregiousness of counsel's strategic maneuver.[32]

President Tomka nevertheless found that the respondent had not raised a frivolous challenge intended to subvert the object and purpose of the fifteen-day limit and noted, moreover, that the claimants suffered no prejudice by him entertaining the challenge at that stage of the proceedings.[33]

Actual knowledge may be imputed to a respondent state if relevant officials had actual prior knowledge of the circumstances in the past, even if certain

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29 Caron & Caplan, *supra* note 6, at 245.

30 *Id.* at 245, n. 260.

31 Decision of the Appointing Authority, Judge W.E. Haak, in the Challenge of Judges Assadollah Noori, Koorosh Ameli & Mohsen Aghahosseini, Apr. 19, 2006, ¶ 25 at 4.

32 *CC/Devas* (*Mauritius*) *Ltd., Devas Employees Mauritius Private Ltd., & Telcom Devas Mauritius Ltd. v. Republic of India*, PCA Case No. 2013-09, UNCITRAL, Decision on the Respondent's Challenge to the Hon. Marc Lalonde as Presiding Arbitrator and Prof. Francisco Orrego Vicuña as Co-Arbitrator, ¶¶ 48 (Sept. 30, 2013).

33 *Id.*, ¶¶ 48–50.

members of the legal team learned of events more recently. This happened in a challenge at the IUSCT based on a practice by Iranian judges of remitting a portion of their wages to the Iranian government. The challenge was raised in 2006, but evidence emerged that U.S. officials had actual knowledge of the practice in the 1980s.[34] Similarly, in *Azurix v. Argentina*, the co-arbitrators rejected

> an argument that the new Attorney-General of Argentina had only been informed of the matter recently, on the basis that the right to object did not belong to the Attorney General *in persona* but to the Argentine Republic.[35]

The ICSID Convention does not define the obligation to file "promptly" by reference to when the circumstances of the grounds for challenge became known to the challenging party.[36] The issue of actual versus constructive knowledge was discussed (but not decided) in *Alpha Projectholding v. Ukraine*.[37] Over two years after the arbitration had commenced, the respondent challenged the claimant's arbitrator on the basis of having been informed the previous month that the arbitrator had attended Harvard Law School at the same time as the claimant's counsel. The two unchallenged arbitrators declined to rule on whether the challenge was time-barred, "although other arbitrators charged

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34 As recounted in Caron & Caplan, *supra* note 6, at 246–47. *See also* Chapter 4 by Lee M. Caplan in this volume; Daele, *supra* note 3, ¶ 3–051, at 144 (citing Decision of the Appointing Authority on the Challenge by the U.S. of Judges Noori, Ameli and Aghahosseini, Apr. 19, 2006, *reprinted in* 21(7) Mealey's Int'l Arb. Rep. 1B (2007)).

35 *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, ¶ 269 (Sept. 1, 2009), http://www.italaw.com/sites/default/files/case-documents/ita0065.pdf.

36 For an example of where constructive knowledge seems to have been accepted, see *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña (Dec. 13, 2013). Part of the challenge based on facts in the public domain for over three months was held not to have been prompt. For an example of where actual knowledge seems to have been accepted as a test, see *Abaclat I*, PCA Case No. IR 2011/1, ICSID Case No. ARB/07/5, Recommendation Pursuant to the Request by ICSID Dated November 18, 2011 on the Respondent's Proposal for the Disqualification of Professor Pierre Tercier and Professor Albert Jan van den Berg Dated September 15, 2011, ¶¶ 68–69 (Dec. 19, 2011), *available at* https://icsid.worldbank.org/ICSID/alphaFrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC4894_En&caseId=C95.

37 *Alpha Projektholding GMBH v. Ukraine*, ICSID Case No. ARB/07/16, Decision on Respondent's Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz (Mar. 19, 2010).

with resolving only this issue might reasonably reach the conclusion that it is."[38] They nevertheless indicated views on the question of constructive knowledge:

> [A]s appealing as such a construct may appear, the Two Other Members think it preferable not to divine some carefully crafted, modern-day duty to perform a routine examination into the background of a party and its counsel at an early date, failing which a party may be found to have not promptly objected. . . . While the global realities of this computerized, digitized age might reasonably lead to . . . a recognition of a constructive duty to perform basic Internet research in the early stages of a proceeding[], the Two Other Members conclude that they need not determine this issue in order to reach a decision in this case.[39]

The Swiss courts have embraced a theory of constructive knowledge when applying the legislative requirement that arbitrator challenges be brought "without delay."[40]

2.1.4 Circumventing the Time Bar by "Accumulation" of Facts or "Reconsideration" Requests

In some challenge cases parties have sought to circumvent any time restrictions by trying to link the past events to more recent ones. For example, in September 1989, Iran challenged President Robert Briner of the IUSCT, on the basis of news reports that he had violated Indian foreign exchange laws. Iran argued that

> these latest events should not be considered an isolated incident, but rather should be viewed by the Appointing Authority as they related to the whole context of President Briner's past behavior.[41]

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38 *Id.*, ¶ 82.

39 *Id.*, ¶¶ 79–81.

40 In Switzerland, a party may be time-barred not only based on when it acquired actual knowledge but also on when it could have become aware if it had done its proper due diligence, including via internet searches. *See* Daele, *supra* note 3, ¶¶ 3-078–3-081, at 155–57 (citing *X v. Y S.A.*, Decision of April 4, 2008, 26(3) ASA Bull. 580 (2008); *X v. Ass'n Y*, Decision of March 20, 2008, 26(3) ASA Bull. 656 (2008); *A & B v. Int'l Olympic Comm., Int'l Ski Fed'n & CAS*, Decision of May 27, 2003, 21(3) ASA Bull. 601 (2003)).

41 *See* Charles N. Brower & Jason D. Brueschke, The Iran–United States Claims Tribunal 176–77 (1998); *see also* Chapter 4 by Lee M. Caplan in this volume; Barton Legum, *Investor-State Arbitrator Disqualified for Pre-Appointment Statements on Challenged Measures*, 21(1) Arb. Int'l 241, 241 (2005).

The appointing authority dismissed the challenge. First, he found that even if Dr. Briner had violated the Indian foreign exchange law, such a violation alone would not engender justifiable doubts as to his impartiality or independence. Second, since Iran challenged Dr. Briner based on the entire context of his past behavior, such a challenge ran afoul of the time limit in the Rules requiring challenge notices to be given "within fifteen days after the circumstances . . . became known to [the challenging] party."[42]

In a recent UNCITRAL Rules challenge, bias was alleged based on a number of procedural decisions over many years. The challenging party contended that the most recent decision (which was within the fifteen-day limit) was part of a "pattern of conduct" that necessitated consideration of the past events. The PCA Secretary-General, in rejecting the challenge, observed that:

> Even if a "pattern of conduct" could constitute a circumstance giving rise to justifiable doubts, it is difficult to see what that pattern is in the above-listed complaints. The types of conduct complained of are diverse and unrelated. . . . The alleged consequences of the tribunal's conduct are also diverse and unrelated. . . . The fact that [the respondent] was dissatisfied or even affronted in each instance does not make the instances form a recurring "pattern" of similar conduct that could only have culminated when the Tribunal refused to reconsider [its most recent procedural decision].

The one event that fell inside the time limit was the tribunal's decision to reject a party's request to reconsider an earlier decision. The party resisting the challenge noted that under this approach "anyone could bring a challenge whenever they want simply by asking a tribunal to reconsider a prior decision."[43]

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42 *Decision of the Appointing Authority, September 25, 1989*, in Iran–United Sstates Claims Tribunal Reports 396, 398 (M.E. Macglashan & E. Lauterpacht, eds., vol. 21, 1990).

43 A separate ground of the challenge (based on some of the same events) was "failure to act" under Article 13 of the 1976 UNCITRAL Rules. In respect of that ground, the claimant conceded that the time bar application was more "nuanced" and both parties agreed that it was necessary for the PCA Secretary-General to take into account "all circumstances," including the prior conduct of proceedings, in order to assess whether the most recent event constituted a failure to act. In any event, the Secretary-General noted that the range of actions complained of in the failure to act ground were difficult to characterize as a pattern of any sort, and that seeing as he was to reject the ground on its merits, the "question of whether every aspect of this challenge was brought in a timely manner is not outcome-determinative." *See infra* notes 98–103 and accompanying text.

An "accumulation of circumstances" was made in another recent UNCITRAL Rules challenge before the PCA. The PCA Secretary-General considered the relevant date as

> not the date on which any one of the circumstances invoked by the Respondent became known to it, but the date on which it became aware of a sufficient number of circumstances to form the basis of a challenge.

He assessed the record and considered that the relevant accumulation would have happened at a certain point that was over a year in advance of the challenge. The only event that had taken place within the fifteen-day limit was an email from the arbitrator confirming facts that were already known to the parties for five years. It could not be properly considered as the "proverbial final straw that broke the camel's back."

In *Abaclat v. Argentina*, the Chairman of the ICSID Administrative Council accepted a challenge as falling within the acceptable range of promptness, when it was filed within a few weeks after the tribunal ruled on the respondent's request for an extension of time "and facts surrounding that request."[44] This was a decision after repeated requests by respondent to extend a calendar set in a November 2012 procedural order.[45] The claimants argued that the challenge was untimely because Argentina had "failed to assert any request for disqualification, or any intention to file, when the purported issue arose more than a year ago."[46] Similarly, a challenge in *ConocoPhillips v. Venezuela* was held to be "prompt" when it was filed one day after the tribunal issued a decision rejecting a request to reconsider an award issued six months earlier.[47]

In both of the above ICSID cases, arbitrators were effectively being challenged on the basis of decisions they had made many months earlier, but by virtue of repeat requests for reconsideration, the decisions had been refreshed for purposes of promptness. There does not seem to be a set rule in that scenario. It may be that a disgruntled party seeking reconsideration wanted to exhaust all possible means of redress before resorting to a challenge proceeding. As

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44 *Abaclat II*, ICSID Case No. ARB/07/5, Decision on the Proposal to Disqualify a Majority of the Tribunal, ¶ 69 (Feb. 4, 2014).

45 *Id.*, ¶ 51.

46 *Id.*, ¶ 61.

47 *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V., & ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify a Majority of the Tribunal, ¶ 40 (May 5, 2014). Two further challenges are pending at the time of publication. See ICSID, Case Details (Feb. 6, 2015 and Mar. 25, 2015), https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/07/30&tab=PRD.

discussed in the following section, challenges that are based on dissatisfaction with procedural or substantive decisions by tribunals almost invariably fail.

2.2 *Typical Scenarios for Late-in-the-Day Challenges*

2.2.1 Dissatisfaction with the Tribunal's Adverse Rulings

A common scenario for challenges at an advanced stage in proceedings is when a party is dissatisfied with a tribunal's ruling on procedure or substance.

Arbitrators have wide discretion in the conduct of proceedings. Allegations that arbitrators have demonstrated bias in the exercise of their discretion over the management of proceedings are usually rejected. The commentary to a digest of LCIA challenge decisions reports that such challenges have been

> overwhelmingly unsuccessful and, at times, are seen by the Divisions [of the LCIA Court] to be little more than "vexatious attempt[s] to hinder" or "delay" the proceedings, or attacks on an award or procedural order.[48]

In a recent challenge under the UNCITRAL Rules, the PCA Secretary-General was asked to find bias based on a series of the tribunal's procedural decisions. The decisions related to the timing of evidence collection, application of confidentiality rules, allocation of certain issues to different phases of the case, and the timing and content of some substantive decisions. According to the challenging party, these decisions evinced partiality and led to the breakdown of "trust between litigant and forum." It was common ground that

> the mere existence of an adverse ruling is insufficient to prove an apparent lack of impartiality or independence, regardless of how much the affected party might disagree with the ruling.

The PCA Secretary-General noted that the "justifiable doubts" standard was objective. Although the subjective concerns or feelings of the challenging

48 Thomas W. Walsh & Ruth Teitelbaum, *The LCIA Court Decisions on Challenges to Arbitrators: An Introduction*, 27(3) Arb. Int'l 283, 302 (2011) (citing LCIA Ref. No. UN 0239 (June 22, 2001, July 3, 2001 & Oct. 3, 2001)) (alleging bias in the scheduling of hearings and the consideration of evidence); LCIA Ref. No. 7990 (May 21, 2010) (alleging bias in the denial of additional time to procure funding); LCIA Ref. Nos. 81209, 81210 (Nov. 16, 2009) (alleging bias in the denial of additional time to re-engage counsel); LCIA Ref. No. 3431 (July 3, 2003, Dec. 18, 2003 & Feb. 18, 2004) (alleging bias in the denial of additional time to prepare submissions); LCIA Ref. No. 96/X22 (July 22, 1998) (alleging bias due to "misconduct").

party may prompt a challenge, they cannot be decisive. He stressed that in resolving the challenge, he should "not assume the role of an appellate magistrate and assess the correctness of the tribunal's decisions." He remarked that:

> In the course of an arbitration as lengthy and complex as the present one, there will inevitably be procedural victories and defeats on both sides. It is not the function of an appointing authority to check the scoreboard is even, or that each procedural decision is even correct. I make no findings as to the correctness or wisdom of the Tribunal's decisions. Nevertheless, the objective element of the justifiable doubts test does leave limited room for the appointing authority to assess the reasonableness of a tribunal's actions in the sense that it might determine that a tribunal's decisions are so manifestly unreasonable that bias is the most likely explanation for them. By contrast, when the challenge is based on a tribunal's decisions and there is evidence suggesting those decisions were reasonable, it is more difficult to justify doubts as to the tribunal's impartiality.

The PCA Secretary-General reviewed and rejected each of the grounds for the bias challenge.[49]

Similar statements have been made in the context of ICSID challenges. For example, in *Abaclat v. Argentina*, after the tribunal rejected an interim

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49 In formulating the above-quoted standards, the PCA Secretary-General took note of challenge decisions at the IUSCT Decision of the Appointing Authority, September 19, 1989, in Iran-United Sstates Claims Tribunal Reports, *supra* note 42, at 388. Justice Charles Moons held doubts as to the arbitrator's impartiality or independence can only be justifiable

> "if the infringement or misapplication admits of no other explanation than that it has its cause in lack of impartiality or independence on the part of the challenged arbitrator and that any other cause, such as an error or misunderstanding . . . can be ruled out."

Justice Moons thus rejected a challenge against Judge Robert Briner regarding his assessment of evidence, noting that

> "[g]iven the freedom granted the arbitrators . . . to make their awards to the best of their knowledge and conviction, it cannot be concluded from an arbitrator's choices in this area that he is not impartial or independent."

Id. at 388. Over a decade later, the IUSCT appointing authority rejected a challenge against two arbitrators noting,

> "[T]he Appointing Authority's role in challenge proceedings is not to assess the correctness of the arbitrator's decision, nor to assume the functions of an appellate magistrate in review of the procedural and substantive matters surround[ing] the issuance of [an award]."

Decision of the Appointing Authority, Judge W.E. Haak, on the Challenges against Judge Krzysztof Skubieszewski and Gaetano Arangio-Ruiz, Mar. 5, 2010, at 33.

measures request and upheld jurisdiction and admissibility, the respondent unsuccessfully proposed the disqualification of the majority arbitrators (some five years after the arbitration commenced). The PCA Secretary-General recommended that the disqualification proposal be rejected as it was based on legal arguments directed at the substance of the tribunal's rulings. The Secretary-General observed:

> [I]f the existence of an adverse ruling were sufficient to establish a lack of independence and impartiality, no ruling by an adjudicator would ever be possible. It is not the function of an arbitrator to reach conclusions which are mutually acceptable to the Parties or which are neutral in their effects. It follows from the foregoing that the mere fact of an adverse ruling against the party proposing disqualification does not establish, let alone suggest, a lack of independence or impartiality.[50]

Two years later, the respondent, dissatisfied with the tribunal's procedural rulings on scheduling, confidentiality, expert appointment, case management, and data management processes, again challenged the majority. Rejecting that challenge, the Chairman of the ICSID Administrative Council noted that in this lengthy and complex proceeding, the tribunal had issued an extensive number of procedural orders and directions to the parties, each time following thorough argument by each of the parties and due deliberation among the members of the tribunal, sometimes granting and sometimes denying the parties' requests. He noted:

> The mere existence of an adverse ruling is insufficient to prove a manifest lack of impartiality or independence. . . . If it were otherwise, proceedings could continuously be interrupted by the unsuccessful party, prolonging the arbitral process.[51]

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50 *Abaclat I*, PCA Case No. IR 2011/1, ICSID Case No. ARB/07/5, Recommendation Pursuant to the Request by ICSID Dated November 18, 2011 on the Respondent's Proposal for the Disqualification of Professor Pierre Tercier and Professor Albert Jan van den Berg, dated September 15, 2011, ¶ 63 (Dec. 19, 2011).

51 *Abaclat II*, ICSID Case No. ARB/07/5, Decision on the Proposal to Disqualify a Majority of the Tribunal, ¶ 80 (Feb. 4, 2014); *see also Suez & AWG Group*, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, ¶¶ 35–36 (Oct. 22, 2007); *ConocoPhillips*, ICSID Case No. ARB/07/30, ¶¶ 53–56. *But see Caratube Int'l Oil Co. v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch, ¶¶ 88–91 (Mar. 20, 2014), http://www.italaw.com/

Many ICSID cases confirm that "an adverse ruling itself is no permissible ground for a disqualification."[52] A challenge in *Quiborax v. Venezuela* following the issuance of a provisional measures ruling was rejected.[53] In *ConocoPhillips v. Venezuela*, in March 2014, the majority refused a request for clarification of certain parts of its September 2013 decision on jurisdiction and liability.[54] The following day, the respondent proposed the disqualification of the majority arbitrators, "on grounds of lack of the requisite impartiality."[55] The Chairman of the ICSID Administrative Council rejected the challenge, noting that subjective dissatisfaction with a ruling on procedure is not enough to satisfy the requirements for a disqualification and that the tribunal had "adopted a reasonable procedure that was within its discretion to regulate the conduct of proceeding."[56]

The above examples all relate to decisions taken by Tribunals *during* the course of the arbitration proceedings. The timing of a challenge becomes particularly suspicious when it is brought *after* the final result of the case has become known to the parties.

For example, in a recent investor-state case administered by the PCA, the tribunal's decision on jurisdiction was imminent. For planning purposes, in order to reserve dates for a possible merits hearing, the parties asked the tribunal to inform them of the impending decision on jurisdiction, with reasons to follow. After the tribunal advised that it would be declining jurisdiction, the claimant challenged the respondent's arbitrator, on the basis of his connections and activities with the respondent state, circumstances which were known since the outset of the case. The challenge delayed the issuance of a reasoned award and entailed much attention by the parties, arbitrators, and registry. The challenge was rejected by the appointing authority under the treaty. The tribunal

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sites/default/files/case-documents/italaw3133.pdf (overlapping facts, witnesses, and legal issues with prior case).

52 *RSM Prod. Corp. v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Claimant's Proposal for the Disqualification of Dr. Gavan Griffith QC, ¶ 80 (Oct. 23, 2014).

53 *See* Lisa Richman & Sabine Konrad, *Investment Treaty Arbitration Update*, 12 Arb. World 14 (May 2010), http://www.klgates.com/arbitration-world-05-27-2010/ (citing Quiborax, S.A., Non Metallic Minerals S.A. & Allen Fosk Kaplún v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2).

54 *ConocoPhillips*, ICSID Case No. ARB/07/30, ¶¶ 5, 6, 9.

55 *Id.*, ¶ 10.

56 *Id.*, ¶¶ 53–56.

ordered the claimant to pay 100% of the costs incurred in connection with the challenge.[57]

By the time a party is disappointed by the contents of an arbitral award, it will usually be too late to challenge the arbitrators.[58] Some disgruntled losing parties have nevertheless tried to invoke the correction/additional award mechanisms in arbitral rules to postpone the tribunal becoming *functus officio* long enough to be challenged. The author is aware of at least three such cases in the commercial context. One was a commercial dispute under the UNCITRAL Rules. The losing party had filed a request for an additional award pursuant to Article 37 of the 1976 UNCITRAL Rules and the following day challenged the arbitrators. The PCA was asked to designate the appointing authority.[59] The second was an ICC case in which the respondent filed an application for correction of the final award and at the same time introduced a challenge against all three arbitrators, based on the tribunal's assessment of the evidence. The third was an ICC case in which the losing party, having sacked its counsel and claiming not to have received the award, challenged the arbitrators two weeks after the award was issued.[60] In all three cases the challenges were rejected.

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57 The final award on costs is confidential and on file with the PCA.

58 ICSID Arbitration Rules, *supra* note 17, Art. 9(1) requires that challenges be filed "in any event before the proceeding is declared closed" which will normally have happened before a party finds out the results contained in an award. As for national law, Fouchard, Gaillard, and Goldman note a constraint on very late challenges to arbitrators in international commercial arbitration. For instance, when the seat of the arbitration is Paris, the jurisdiction of the Paris Tribunal of First Instance is "of course limited in time," ending at the same time as the arbitral proceedings. They mention one arbitration in which a party challenged a sole arbitrator on the very day he rendered the award. The Paris Tribunal of First Instance concluded that it no longer had jurisdiction:

> "As the arbitrator has discharged his duties, there can no longer be any difficulty regarding the constitution of the arbitral tribunal such as might warrant the intervention of the President of the Paris Tribunal of First Instance. The plaintiff should therefore resort to the recourse available against the arbitral award if it considers that there are grounds on which to set aside the award."

John Savage & Emmanuel Gaillard, Fouchard, Gaillard Goldman on International Commercial Arbitration 878 (1999) (quoting Tribunal de grande instance [TGI] [Annahold BV v. L'Oréal, 1st Decision] Paris, réf., July 2, 1990, 1996 Rev. Arb. 483 (Fr.)).

59 The designation was pursuant to the 1976 UNCITRAL Rules, *supra* note 5, Art. 6(2). The case is confidential and on file with the PCA.

60 Both cases were confidential matters discussed in anonymous terms by former ICC Deputy Secretary-General in Simon Greenberg, *Tackling Guerrilla Challenges Against Arbitrators: Institutional Perspective*, 7(2) Transnat'l Disp. Mgmt. ¶ 22 (2010).

2.2.2 Concerns Raised over Remarks of an Arbitrator

Some late stage challenges arise after arbitrators have made remarks directly or indirectly concerning the specific cases pending before them.[61]

In his chapter in this book, Judge Brower refers to the case of *Perenco v. Ecuador*, in which he was challenged on the basis of a media interview.[62] In May 2009, the respondent took actions contrary to provisional measures recommended by the tribunal. In August 2009, six months before a scheduled hearing in the arbitration, Judge Brower was interviewed about a wide variety of topics, and was asked what he saw "as the most pressing issues in international arbitration." He responded:

> There is an issue of acceptance and the willingness to continue participating in it, as exemplified by what Bolivia has done and what Ecuador is doing. Ecuador currently is expressly declining to comply with the orders of two ICSID tribunals with very stiff interim provisional measures, but they just say they have to enforce their national law and the orders don't make any difference. But when recalcitrant host countries find out that claimants are going to act like those who were expropriated in Libya, start bringing hot oil litigation and chasing cargos, doing detective work looking for people who will invoke cross-default clauses in loan agreements, etc., the politics may change. After a certain point, no one will invest without having something to rely on.

The PCA Secretary-General noted that for the challenge to be sustained it was not necessary to find he was actually biased against Ecuador or had

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61 This scenario is to be distinguished from challenges based on an arbitrator's writings on previously expressed opinions about issues in dispute that were not made in the context of the specific case in which they are challenged. As to issue conflicts, see generally Chapters 1 by Chiara Giorgetti and 8 by Romain Zamour in this volume and Judith Levine, *Dealing with Arbitrator "Issue Conflicts" in International Arbitration*, 61 Disp. Resol. J., 60 (Feb.–Apr. 2006) [hereinafter Levine, *Arbitrator Issue Conflicts*]. It is unusual for issue conflicts to be raised late in the proceedings, as an arbitrator's writings are generally known when appointed. An exception arose in a recent PCA challenge when the claimant raised a new claim partway through the proceedings that suddenly made the arbitrator's views on that topic relevant. The challenge was rejected in any event.

62 *Perenco Ecuador Ltd. v. Republic of Ecuador & Empresa Estatal Petroleos del Ecuador*, ICSID Case No. ARB/08/6, Decision on Challenge to Arbitrator (Dec. 8, 2009); *see* Chapter 2 by Meg Kinnear & Frauke Nitschke; Chapter 11 by Judge Charles Brower in this volume.

actually prejudged the merits of the dispute.[63] Rather, the question to be resolved was

> whether . . . a reasonable and informed third party [would reach the conclusion] that there [is] a likelihood that [Judge Brower] may be influenced by factors other than the merits of the case as presented by the parties in reaching his decision.[64]

While the Claimant argued that the interview contained "an innocuous summary of publicly known facts," the Secretary-General found that

> the combination of the words chosen by Judge Brower and the context in which he used them ha[d] the overall effect of painting an unfavourable view of Ecuador in such a way as to give a reasonable and informed third party justifiable doubts as to Judge Brower's impartiality.[65]

Having sustained the challenge on that ground, the Secretary-General noted that the mere fact of having spoken with the media would have been insufficient on its own to sustain a challenge. He noted:

> There is no general or absolute prohibition in the IBA Guidelines against international arbitrators speaking with the press or making public statements about pending cases. The IBA Guidelines instead focus on an inquiry into justifiable doubts brought about by *particular* "facts or circumstances" in any given challenge. Obviously, if an arbitrator chooses to discuss a pending case with the press, he or she risks opening up the possibility of making statements that could give rise to justifiable doubts about his or her impartiality. But there is no basis in the IBA Guidelines on which to accept Respondent's argument that Judge Brower's decision to give the interview *in and of itself* should lead to his disqualification.[66]

The *Šešelj* case at the International Criminal Tribunal for the Former Yugoslavia ("ICTY") illustrates how extra-curial remarks made by a decision-maker can

63 The parties had agreed in advance that any challenges would be resolved by the PCA Secretary-General according to the IBA Guidelines on Conflicts of Interest in International Arbitration.

64 *Perenco*, ICSID Case No. ARB/08/6, ¶ 45 (citations omitted).

65 *Id.*, ¶ 48.

66 *Id.*, ¶ 61.

lead to a challenge and serious delays to proceedings.[67] A judge's "private letter" to fifty-six friends, later published around the world, gave rise to concerns about his impartiality with respect to Serbian military leaders and doctrinal questions relevant to the trial before him and led to his disqualification. It took over a year for the replacement judge to get up to speed, and in the meantime, the health of the accused deteriorated to such an extent that he was provisionally released.[68]

Remarks that are made in the arbitration itself have also been the basis of challenges. For example, in *National Grid v. Argentina*, during cross-examination of a witness, the claimant's arbitrator stated that:

> It's now clear that there are certain facts that the witness is not familiar with, but I suppose that the basis of his testimony has to do with the hypothetical situation and it's not hypothetical because we are all here. We know the facts generally speaking that there was major harm or major change in the expectations of the investment.[69]

The respondent challenged the arbitrator, asserting that the last sentence quoted showed prejudgment on disputed issues. The LCIA rejected the challenge, but noted that if the sentence were taken in isolation,

> a reasonable third person might indeed gain the impression that [the Claimant's nominated arbitrator] had already taken a firm view on issues which are key to the final result of the arbitration.[70]

However, the LCIA concluded "it would be inappropriate" to review the arbitrator's statement in isolation and that, when the arbitrator's intervention was viewed in context, concerns about the pre-judgment of the case could not be "reasonably entertained."[71]

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67 *Prosecutor v. Šešelj*, Case No. IT-03-67-T, Decision on Defence Motion for Disqualification of Judge Frederik Harhoff and Report to the Vice-President, ¶ 13 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 28, 2013), http://www.icty.org/x/cases/seselj/tdec/en/130828.pdf; *see* Chapter 7 by Makane Mbengue in this volume.

68 *Prosecutor v. Vojislav Šešelj*, ICTY IT-03-67-T, Order on the Provisional Release of the Accused Proprio Motu (Nov. 6, 2014).

69 *Nat'l Grid PLC v. Argentine Republic*, Case No. UN 7949, Decision on the Challenge to Mr Judd L. Kessler, London Court of International Arbitration, ¶¶ 31–33 (Dec. 3, 2007).

70 *Id.*, at ¶ 92.

71 *Id.*, ¶¶ 92–93, 102; *see* Walsh & Teitelbaum, *supra* note 48, at 305–06.

In *RSM v. St. Lucia*, the tribunal, by majority, ordered the claimant to post security for costs. The claimant sought to disqualify one arbitrator on the basis of comments made in his "assenting reasons," including his statements that the business plan of professional third party funders "is to embrace the gambler's Nirvana: Heads I win, and Tails I do not lose" and his reference to "the emergence of a new industry of mercantile adventurers as professional BIT claims funders," along with his position that

> once it appears that there is third party funding of an investor's claims, the onus is cast on the claimant . . . to make a case why security for costs orders should not be made.[72]

According to the claimant, the comments were negative and radical in tone and prejudged the question whether a funded claimant will comply with a cost award. They allegedly showed bias not just against third-party funders but also against funded parties and in general favoritism towards respondent state parties. The co-arbitrators deciding the challenge noted that the assenting reasons did not deal in any respect with the substance of the contractual dispute. They focused on the manner in which the arbitrator had expressed his views. They accepted that he had used "strong and figurative metaphors" but those served primarily to clarify and emphasize his point on the connection between security for costs and third-party funding. They did not find that the chosen words established an underlying bias against third-party funders or the claimant in particular. They observed that:

> The means of expressing a point of view or articulating an argument may vary from one arbitrator to another, and different arbitrators possess varied characteristics, including their habits of drafting decisions and the wording used. As long as such wording does not clearly reveal any preference for either party, it cannot serve as a ground for challenge.

They regarded the arbitrator's language as "radical and perhaps extreme in tone, but not to a degree as to justify a disqualification."[73]

A final example of an arbitrator's remarks being the basis of a challenge is *Burlington v. Ecuador*. Here it was the arbitrator's explanations given in the context of the challenge itself that led to his being disqualified. The arbitrator

72 *RSM Prod. Corp. v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Claimant's Proposal for the Disqualification of Dr. Gavan Griffith QC, ¶ 41 (Oct. 23, 2014).

73 *Id.*, ¶¶ 84, 86.

concluded his explanations with allegations about the ethics of counsel for the respondent state. The challenge was upheld on the basis of those comments alone, which were found to "manifestly evidence[] an appearance of lack of impartiality with respect to the Republic of Ecuador and its counsel."[74] Arbitrators should accordingly be circumspect and measured in their comments on challenges.[75]

2.2.3 Concerns Raised over Comportment of an Arbitrator

Just as things that arbitrators say or write during proceedings may give rise to challenges, so too can the manner in which they comport themselves. In a commercial case under the UNCITRAL Rules, the PCA Secretary-General was asked to decide a challenge based on an arbitrator's conduct during hearings. The respondent challenged one of the arbitrators on the basis of certain events that had taken place in the course of the hearings during the previous two years which supposedly "demonstrate[d] lack of independence and impartiality." The respondent alleged that the cumulative effect of the arbitrator's conduct, as well as each of the individual instances alone, were sufficient to disqualify him. Amongst the complaints were that the arbitrator pre-judged issues, interrupted the respondent's counsel, interfered with cross-examination, helped the claimants with their case, generally had "an overbearing presence, controlled the arbitration and could control the deliberations," showed little respect for the governing law, made sarcastic comments to ridicule counsel for respondent, conducted himself intemperately and insensitively, and used his personal knowledge in the arbitration. The Secretary-General rejected the challenge as being time-barred but nevertheless, at the request of the claimant, considered the arguments on the substance and set out his reasons why the conduct complained of was also insufficient to justify a challenge. Having reviewed documents, transcripts, and audio-recordings and after a hearing with the parties, the Secretary-General did not accept that any of the instances referred to by the respondent raised justifiable doubts as to the arbitrator's impartiality. Among other things, his interventions were principally to seek clarification, his firm questioning (and even interruption) of counsel was a

74 *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, ¶¶ 79–80 (Dec. 13, 2013).

75 *See also* Walsh & Teitelbaum, *supra* note 48, at 308 (referencing LCIA Ref. No. 1303 (Nov. 22, 2001)) where the comments in response to the challenge showed "self-evident tension" and "ill feeling" between the arbitrator and counsel, creating circumstances that gave rise to justifiable doubts as to the arbitrator's impartiality.

> legitimate exercise of [the arbitrator's] power and duty as an arbitrator to understand and test the positions that were being put to him by respondent's counsel.

The Secretary-General noted that in the context of adversarial proceedings it is a delicate matter to make jokes and agreed that the atmosphere in the hearings may have been very tense, and perhaps the arbitrator's "forceful character and often confrontational approach" contributed to that, but while this conduct may cause some difficult for some counsel, it was entirely within [the arbitrator's] mandate as a member of the tribunal. Similar findings have been made in ICSID and LCIA arbitrator challenges.[76]

Animosity between counsel and arbitrator rose to new levels in an LCIA case, where the arbitrator accused counsel of stealing grapes from the delib-

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76 ICSID: In *Burlington v. Ecuador*, one of the grounds of challenge related to the arbitrator's conduct in questioning the parties at a hearing and in a teleconference. The arbitrator defended his position noting that

> "[f]or an arbitrator to ask questions at a hearing is a fundamental right that it [*sic*] is not to be suppressed. . . . Both parties had the opportunity to answer such questions and no complaints were made in this respect."

The Chairman of the ICSID Administrative Council accepted this, noting that "the right of arbitrators to ask questions and satisfy themselves of the legal merits of the arguments put forward by the parties." *Burlington*, ICSID Case No. ARB/08/5, ¶¶ 61, 77. *See* Challenge Digests, LCIA Ref. No. 81224, Decision Rendered 15 March 2010, *in* 27(3) Arb. Int'l 461 (2011). LCIA: In an LCIA challenge decided in 2010, a party complained that one of the arbitrators " 'came across as a person who had predetermined the case,' " in " 'prompting the claimant with arguments in support of their case' and challenging 'each of the assertions made by the Counsel [to the respondent].' " The respondent complained that the arbitrator " 'exhibited impatience through his body language which is ultimately the reflection of his mind' " and made allegedly racist remarks about dealings in the respondent's country. The vice president of the Court rejected the challenge. She noted that the arbitrator had appeared to have given little room to the respondent's counsel and accepted that his attitude "could look somewhat closed and even rude." Nonetheless, this was not considered "sufficient to hold that he had a closed mind towards the issues in question." Further, the vice president noted that the arbitrator's questions were "typically preceded by an 'if,' showing that other options were still open." She noted that under English law, the formation and expression of a preliminary view "was part and parcel of the normal process of considering a case." In conclusion, the vice president observed that

> "whilst the [arbitrator] expressed views on certain issues and sometimes adopted an attitude which could be perceived as rude, 'preliminary views' and 'strong terms' on the arbitrator's side, albeit 'it would have been wiser to keep his thoughts for himself,' do not qualify as a basis for a challenge."

Id., ¶¶ 2.4, 2.7, 5.4–5.5, 5.8.

erations room and then lying about it. In that case, the arbitrator was successfully challenged. The LCIA Division described his conduct as " 'incompatible with the expected behaviour of an arbitrator' " and that the incident had created an " 'obvious conflict' " that not only gave the appearance of bias but also presented a real possibility of actual bias.[77]

In an ICC case, it is recounted that "repetitive tactics" over several years had caused one chairman to lose his composure towards a co-arbitrator during the tribunal's deliberations. Notes from the deliberation had leaked to the respondent who challenged the chairman alleging he had lost his legitimacy and legality by refusing to hear his colleague's point of view and that the tribunal was not working cohesively. In a "rare decision," the ICC Court rejected the challenge but initiated replacement proceedings against the chairman.[78] The ICC Court was

> put in the difficult position of deciding whether to replace the Chairman who lost his composure or the co-arbitrator who breached . . . confidentiality . . . and who the other arbitrators claimed was the catalyst in the break-down.

The ICC considered the potential risk to any award that may have been rendered and attempted to salvage the arbitration by removing the chairman only and maintaining the balance of both co-arbitrators who had been in the arbitration since it commenced.[79]

One point made by the ICC counsel recounting the above case is that even if an arbitrator's conduct does not lead to sustaining a challenge in that case, it may have an impact on the ICC's attitude towards that arbitrator when considering future appointments, which is another reason for arbitrators to maintain a measured and civil composure.[80]

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77 Walsh & Teitelbaum, *supra* note 48, at 308–09 (citing LCIA Ref. No. UN3490, ¶¶ 6.12–6.14 (Oct. 21, 2005 & Dec. 27, 2005)).

78 Orlowski, *supra* note 1, at 62–64. At the same time the ICC wrote to the respondent's co-arbitrator who was said to have provoked the chairman and expressed concerns about the breach of confidentiality of tribunal deliberations and sought assurances in the future. Meanwhile the claimant's co-arbitrator tendered her resignation in protest at the replacement of the chairman, and the claimant also challenged the respondent's co-arbitrator.

79 *Id.* at 64.

80 *Id.*

2.2.4 Change in Counsel/Arbitrator Relationships

There is a risk of late stage challenges when new counsel is introduced midway through proceedings, and the new counsel has a relationship with the arbitrators. This scenario might lead to a challenge or resignation of the arbitrator (as had happened three years into the case in *Vannessa Ventures Ltd. v. Venezuela*)[81] or the disallowance of the counsel to appear (as had happened in *Hrvatska Elektroprivreda v. Slovenia*).[82] In the latter case, at an "extremely late stage of proceedings" one party announced that new counsel would be appearing at the hearing, and he happened to be a door tenant at the same chambers as the tribunal's president. The other party objected but did not challenge the arbitrator. Rather, the tribunal exercised its "inherent power to take measures to preserve integrity of its proceedings" and, finding the counsel's participation inappropriate, ruled that he could no longer participate.[83] Subsequent tribunals have characterized the *Hrvatska* decision as an "*ad hoc* sanction for the failure to make proper disclosure in good time."[84]

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81 *Vanessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Award (Jan. 16, 2013), http://www.italaw.com/sites/default/files/case-documents/italaw1250.pdf. That case was commenced at ICSID in July 2004, the Tribunal was constituted in 2005, jurisdictional objections were raised by the respondent in 2006, and the jurisdictional hearing was scheduled for May 2007. Two weeks before the hearing, a revised list of hearing participants was sent to the tribunal, revealing the name of a lawyer that had ongoing professional ties with the chairman of the tribunal. Having heard the parties' submissions on this relationship, the chairman of the tribunal resigned at the hearing, and another of the arbitrators also resigned shortly thereafter. *See* Philippe Sands, *Conflict and Conflicts in Investment Treaty Arbitration: Ethical Standards for Counsel, in* Evolution in Investment Treaty Law and Arbitration 19, 31 (Chester Brown & Kate Miles, eds., Cambridge Univ. Press, 2011); *see also* Chapter 13 by Hansel Pham in this volume.

82 *Hrvatska Elektroprivreda v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Tribunal's Ruling Regarding the Participation of David Mildon QC in Further Stages of the Proceedings (May 6, 2008), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC950_En&caseId=C69.

83 *Hrvatska Elektroprivreda v. Republic of Slovenia*, ICSID Case No. ARB/OS/24, Order Concerning the Participation of a Counsel, ¶ 33 (May 6, 2008), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC950_En&caseId=C69; *see* Filip De Ly, Mark Friedman & Luca Radicati Di Brozolo, Comm. on Int'l Com. Arbitration, Int'l Law Ass'n, Report for the Biennial Conference in Washington D.C. April 2014 12 (2014), http://www.ila-hq.org/download.cfm/docid/C3C11769-36E2-4E93-8FDA357AA1DABB2F.

84 *Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision of the Tribunal on the Participation of a Counsel, ¶ 25 (Jan. 14, 2010), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1370_En&caseId=C72.

Indeed, "proper disclosure in good time" allows for a practical solution to possible conflicts created as a result of a new counsel (or even new arbitrators) coming on board at a late stage in proceedings, namely waiver. For example, in *Eureko v. Slovak Republic* a replacement arbitrator, who was a member of the same barristers' chambers as the presiding arbitrator, joined the tribunal several months into the proceeding. The PCA drew the parties' attention to the fact that both were members of the same chambers, and the award records that both parties confirmed in that they had no objection.[85] Similarly, in a recent PCA case, almost two years into the case, the claimant announced new counsel, who was a member of the same chambers as counsel for the respondent and the presiding arbitrator. The PCA alerted the parties and gave them an opportunity to comment. The award records that neither party objected to the situation.

To preempt the problem of new counsel even earlier, a clause can be inserted in the terms of appointment or procedural rules along the lines of the example in the *Atlanto-Scandian Herring Arbitration* at the PCA:[86]

> To avoid future conflicts of interest after the appointment of members of the Tribunal, the Parties agree that any proposed additions to or changes in their representatives . . . shall be communicated to the Tribunal and shall only take effect if the Tribunal does not object for reasons of conflict of interest.

Some arbitral institutions have developed new rules in an attempt to eliminate problems caused by the announcement of new counsel part way into the proceedings. The new LCIA rules expressly address the problem, by providing that any change or addition shall only take effect subject to the tribunal's approval, which shall be decided by taking into account all circumstances, including the party's right to choose their representatives, the stage of proceedings, and cost efficiency.[87] The 2014 International Bar Association Guidelines

85 *Eureko B.V. v. Slovak Republic*, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, ¶ 17 (Oct. 26, 2010), http://server.nijmedia.nl/pca-cpa.org/showfile.asp?fil_id=1661.

86 Atlanto-Scandian Herring Arbitration (Denmark in Respect of the Faroe Islands v. European Union), PCA Case No. 2013-30, Rules of Procedure, Art. 3.1 (Mar. 15, 2014), http://pca-cpa.org/showfile.asp?fil_id=2524.

87 London Court of International Arbitration Rules, Arts. 18.3–18.4 (Oct. 1, 2014) [hereinafter LCIA Rules]. The Australian Centre for International Commercial Arbitration is also planning to adopt a similar clause in their 2015 rules. Australian Centre for International

("IBA Guidelines") also address this issue by requiring parties to inform all participants of the identity of their counsel and relationships with other counsel or arbitrators "at the earliest opportunity, and upon any change" in the counsel team.[88]

2.2.5 New Conflicts Due to Professional Activities of Arbitrator or Arbitrator's Law Firm

Many international arbitrators are members of law firms and changes in the work arrangements at firms or new engagements by colleagues have led to challenges late in the proceedings.

One example was *Vito G. Gallo v. Canada*. Two years into the case, the parties were informed that the law firm for whom the respondent's appointed arbitrator worked as "independent counsel" was advising the Government of Mexico on trade and investment matters. The arbitrator himself was involved in providing some legal advice to Mexico. The claimant challenged the arbitrator. Mexico, as a state party to the North American Free Trade Agreement ("NAFTA"), had a legal right to participate in the proceedings pursuant to Article 1128 of NAFTA. The appointing authority noted that until Mexico decided whether or not to intervene, the arbitrator's work for Mexico inevitably put the parties in a "distracting and unsettled situation." He found that there would be justifiable doubts about the arbitrator's independence if he were not to discontinue his advisory services to Mexico for the remainder of the arbitration. The arbitrator was given seven days to "choose whether he will continue to advise Mexico, or continue to serve as an arbitrator in this case." The arbitrator chose to resign.[89]

In a recent interstate PCA arbitration, about eighteen months into proceedings, one of the arbitrators accepted an "of counsel" position at a law firm at which some of his colleagues represented clients in matters adverse to one of the parties in the PCA arbitration. That party challenged his ongoing service as an arbitrator and the arbitrator withdrew from the case.[90]

In *ConocoPhillips v. Venezuela*, the respondent challenged the claimant's arbitrator more than three years after the tribunal had been constituted when he disclosed a merger between the law firm of which he was a partner and another firm, which, according to the respondent, was " 'more adverse to

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Commercial Arbitration Rules, Exposure Draft, Arts. 6.2–6.3 (Sept. 25, 2015), www.acica.org.au [hereinafter ACICA Rules].

88 2014 IBA Conflict Guidelines, *supra* note 4, ¶ 7(a).

89 *Vito G. Gallo v. Government of Canada*, NAFTA/UNCITRAL, Decision on the Challenge to Mr. J. Christopher Thomas, QC, ¶¶ 35–36 (Oct. 14, 2003).

90 The challenge proceedings are confidential and are on file with the PCA.

Respondent than any other law firm in the world.' "[91] The arbitrator, who had not been involved in the merger discussions and had no prior knowledge of the breadth and significance of the matters adverse to the respondent, disclosed the merger at the first possible opportunity. During the course of the challenge, the arbitrator announced that he would be resigning from the firm and setting up his own independent practice. Taking into account the facts and circumstances, as well as the standards articulated in the ICSID Convention (as distinct from the IBA Guidelines or other instruments with a "justifiable doubts" standard), the co-arbitrators rejected the proposal to disqualify the arbitrator.[92]

Somewhat controversially, "advance waivers" have been proposed by some practitioners as a solution to deal with new conflicts that have little to do with the arbitrator personally, but are caused by the arbitrator's membership of large global law firms. An advance waiver is a request by an arbitrator (usually upon accepting the appointment) that the parties waive their rights to bring challenges against the arbitrator if he or she, or his or her law firm, has a conflict of interest in the future. They are designed to avoid last minute challenges occurring at a stage in proceedings when the parties have spent considerable resources advancing proceedings towards a hearing.[93] This concept is mentioned in the commentary to the 2014 IBA Guidelines. The IBA Guidelines place an ongoing duty on the arbitrator to review the activities of his or her law firm.[94] That said, the IBA Guidelines suggest that "the growing size of law firms" is a modern reality that requires a balance and while the

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91 *ConocoPhillips Co. et al., v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator, ¶ 25 (Feb. 27, 2012). As at the time of publication, yet another challenge has been brought by the respondent against the same arbitrator. See ICSID, Case Details (Feb. 6, 2015), *supra* note 47.

92 *Id.*

93 *See* Paula Hodges QC, et al., *Publication of New Guidelines on Conflict of Interests in International Arbitration—The Key Changes*, Arbitration Notes, Herbert Smith Freehills (Dec. 4, 2014), http://hsfnotes.com/arbitration/2014/12/04/publication-of-new-iba-guidelines-on-conflict-of-interests-in-international-arbitration-the-key-changes/.

94 2014 IBA Conflict Guidelines, *supra* note 4, General Standard 3(b) ("The IBA Arbitration Committee has considered the increasing use by prospective arbitrators of declarations in respect of facts or circumstances that may arise in the future, and the possible conflicts of interest that may result, sometimes referred to as 'advance waivers'. Such declarations do not discharge the arbitrator's ongoing duty of disclosure under General Standard 3(a). The Guidelines, however, do not otherwise take a position as to the validity and effect of advance declarations or waivers, because the validity and effect of any advance declaration or waiver must be assessed in view of the specific text of the advance declaration or waiver, the particular circumstances at hand and the applicable law."). Nevertheless, they acknowledge that when considering the relevance of facts or circumstances to determine

> arbitrator must, in principle, be considered to bear the identity of his or her law firm . . . the activities of the arbitrator's firm should not automatically create a conflict of interest.[95]

It is worth noting in this category (though a detailed discussion is beyond the scope of this chapter) that the "double-hatting" scenario, where an arbitrator may, at an advanced stage of the proceedings, take on a counsel engagement on behalf of clients in unrelated disputes that nevertheless raise similar issues.[96] Non-legal professional roles can likewise lead to conflicts part way through a case, such as an arbitrator taking a position on the board of directors of a major bank in *Suez v. Argentine Republic* and of one of the parties, in *Holiday Inns v. Morocco* discussed under section 3.2.2 below.[97]

2.2.6 Failure to Act

Finally, there have been late stage challenges on the basis of an arbitrator's alleged "failure to act." Article 12(3) of the 2010 UNCITRAL Rules provides for challenges "[i]n the event that an arbitrator fails to act." Only a handful of cases have applied that provision.[98] Under an earlier version of the rule, a judge of the IUSCT was challenged when it was alleged that he had not been reviewing submissions, was relying on his assistants to do his work, was insuf-

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whether a potential conflict of interest exists, or whether disclosure should be made, the activities of an arbitrator's law firm, if any, and the relationship of the arbitrator with the law firm, should be considered in each individual case. The fact that the activities of the arbitrator's firm involve one of the parties shall not necessarily constitute a source of such conflict, or a reason for disclosure. Similarly, if one of the parties is a member of a group with which the arbitrator's firm has a relationship, such fact should be considered in each individual case but shall not necessarily constitute, by itself, a source of a conflict of interest, or a reason for disclosure. *See id.*, General Standard 6(a).

95 *See id.*, Explanation to General Standard 6(a).

96 *See, e.g.*, Levine, *Arbitrator Issue Conflicts, supra* note 61, at 58 (discussing *Republic of Ghana v. Telekom Malaysia Berhad*, District Court of The Hague, Challenge No. 17/2004, Petition No. HA/RK 2004.778, Decision in Respect of the Written Challenge (Nov. 5, 2004), http://italaw.com/sites/default/files/case-documents/ita0922.pdf); *see also* Daele, *supra* note 3, ¶ 3–100, at 164 (quoting Ghana v. Telekom Malaysia, District Court of The Hague, Challenge No. 13/2004, Petition No. HA/RK 2004.667, 23(1) ASA Bull. 186 (2005)); Fry & Stampalija, *supra* note 28, at 189–263.

97 *See Suez & AWG Group*, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal (Oct. 22, 2007); Holiday Inns S.A. & Others v. Morocco, ICSID Case No. ARB/72/1 (Jan. 13, 1972).

98 Unavailability of arbitrators and delays in issuing decisions have occasionally caused some parties to request the resignation of arbitrators.

ficiently informed of the issues, and sluggishly presided over a chamber with a large backlog of unresolved cases.[99] The challenge was rejected on the following test:[100]

> It is also clear, in the light of the negotiating history, that the drafters of Article 13(2) of the UNCITRAL Rules were reluctant to jeopardize the independence of an arbitrator by allowing the efficiency of his working methods to be an object of review.
>
> However, taking into account the purpose of the provision—to safeguard the regular progress of the adjudicatory process—it is reasonable to assume that the phrase "fails to act" also covers the situation in which an arbitrator, though not completely inactive, consciously neglects his arbitral duties in such a way that his overall conduct falls clearly below the standard of what may be reasonabl[y] expected from an arbitrator.

In a more recent challenge under the 1976 UNCITRAL Rules, a party complained to the PCA Secretary-General that the arbitrators had "persistently failed to devote the necessary time to rule on important issues in this arbitration."[101] The arbitrators had allegedly taken several years to decide on a step in the taking of evidence and rule on certain procedural applications, and had allocated specific issues for determination at a later phase of proceedings. According to the challenging party,

> the core responsibility of a tribunal is to resolve disagreements between the parties and ensure an orderly proceeding, and it must take the time to do that.[102]

The other side rejected the failure-to-act challenge as based entirely on complaints about the manner in which the tribunal organized the proceedings, a matter which falls outside the scope of review by an appointing authority. They said the complaints were baseless and ignored the full circumstances of

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99 *Decision of the Appointing Authority, September 24, 1991, reprinted in* 27 Iran-United States CTR 331 (1991-II).

100 *Id.* at 332 (emphasis added).

101 Note that an arbitrator's capacity to commit time was the subject of a PCA challenge at the outset of proceedings, based on the number of cases that arbitrator had. The challenge was rejected by the PCA Secretary-General. *See* Chapter 3 by Sarah Grimmer in this volume.

102 Given that the challenge submissions and decision are confidential, they are on file with the PCA.

the tribunal having diligently carried out its duties over many years, holding multiple hearings, and issuing numerous procedural orders and awards.

The PCA Secretary-General established that in order to uphold a challenge on the basis of failure to act, he must (i) be satisfied that the arbitrators have consciously neglected their duties; (ii) take account of their overall conduct; and (iii) find that the conduct falls clearly below the standard of what may be reasonably expected from an arbitrator. This last element is an objective one, meaning the test is based on what a reasonable and informed third party would conclude, and not the subjective perceptions or feelings of the parties. That the conduct must fall "clearly" below reasonable expectations means that the ground can only be made out in exceptional and serious circumstances. It was common ground that mere dissatisfaction with a tribunal's substantive, procedural or case-management decisions is insufficient to ground a challenge and that an appointing authority does not serve the role of an appellate magistrate. The objective element of the failure-to-act test nevertheless does leave limited room to assess the reasonableness of a tribunal's actions in the sense that if there is some evidence that the tribunal acted reasonably, it is less likely that its conduct fell "clearly below the standard of what may be reasonably expected from an arbitrator" and if the tribunal manifestly acted unreasonably, it is more likely that its conduct "fell clearly below the standard of what may be reasonably expected from an arbitrator." Applying these standards, as well as Dutch law standards cited by the parties, the Secretary-General rejected the challenge.[103]

2.3 *Tools to Discourage Late Challenges and Minimize Their Impact*

Based on the above survey one can discern a number of ways to minimize the impact of late-in-the-day challenges on proceedings and ensure that parties think carefully before bringing them.

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103 Article 1031 of the Dutch Arbitration Act provides that an authority deciding a challenge

> "may, having regard to all circumstances, terminate the mandate of the arbitral tribunal if, despite repeated reminders, the arbitral tribunal carries out its mandate in an unacceptably slow manner."

The PCA Secretary-General considered that the use of "unacceptably slow" suggested a very high bar to make out the test, as confirmed by the legislative history, which suggested that the provision apply only in "cases of serious indifference." He noted that commentaries on the Dutch law also explain that delays due to the complicated nature of a case or resulting from the conduct of the parties or matters beyond the tribunal's control will not be attributed to a tribunal performing in an unacceptably slow manner. Prof. H.J. Snijders, *GS Burgerlijke Rechtsvordering*, Art. 1031 DCCP, n. 2.

As discussed in section 2.1, time bars may be applied to reject challenges brought too long after the grounding circumstances became known to the parties and prevent parties waiting until an opportune time in the proceedings to launch a challenge. If the underlying circumstances really do arise at an advanced stage in the proceedings, the challenge should be resolved in as short a period as possible. Parties can agree on an accelerated process for decision (e.g. one round of written submissions, no reasons). A fast-track process is even possible when the parties wish to make oral submissions to supplement their extensive written ones, as was demonstrated in a recent decision of the PCA Secretary-General, which permitted a teleconference hearing that was conducted in such a way as not to disrupt the pleading schedule.[104]

It has been pointed out that arbitrations under rules that automatically suspend the proceedings are particularly susceptible to disruption, but at least a couple of ICSID cases demonstrate that even with automatic suspension, a decision can be made swiftly enough to get proceedings back on track without sacrificing a hearing schedule.[105] In systems that do allow tribunals to exercise discretion in continuing the proceedings, some have noted that a decision to proceed may have the "advantage of discouraging frivolous challenges that are no more than dilatory tactics resorted to by one of the parties."[106]

To avoid late challenges based on the discovery of conflicts relating to an arbitrator's law firm, thorough conflict checks and careful and prompt disclosure are obvious measures that can be taken by arbitrators. This allows parties to make informed choices earlier on with respect to challenges, which could even lead to a compromise solution. In one NAFTA case, upon learning of a possible conflict at the arbitrator's law firm, the concerned party chose not to challenge

104 The PCA Secretary-General noted that "[t]he appointing authority enjoys discretion in the conduct of proceedings" and cited Caron and Caplan for the proposition that

> "[t]he UNCITRAL Rules do not define the appointing authority's decision-making process. . . . The drafters of the UNCITRAL rules apparently chose to leave these issues up to the discretion of the appointing authority, presumably to ensure sufficient flexibility so the process could be tailored to the circumstances of each arbitration and could avoid taking on a life of its own. In practice, appointing authorities have enjoyed wide latitude in developing the terms of procedure for resolving a challenge, including by establishing a schedule for receiving submissions and responses from the parties . . . , and by holding hearings, if necessary, to resolve more complicated factual and legal matters related to the challenge."

105 Noah Rubins, *Particularities When Dealing with State Entities, in* Guerrilla Tactics, *supra* note 1, at 75–76, §2.03.

106 Mohammed Bedjaoui, *Challenge of Arbitrators, in* International Arbitration in a Changing World 99–100 (Albert Jan van den Berg, ICCA Congress Series, Issue No. 6 1993).

but instead accept the situation with assurances from the arbitrator.[107] Waivers of a less defined and future-based nature are more controversial.

The problem of surprise announcements of legal representatives partway through the hearing can be addressed through a number of mechanisms, including case-specific procedural rules, early disclosure followed by case-specific waivers, and applying innovations in the LCIA Rules and IBA Guidelines.[108]

With respect to an arbitrator's conduct or comportment being the source of the challenge, such challenges are likely to fail when they relate to the ordinary exercise of arbitrator functions, but in extreme cases they may be successful. It is advisable for arbitrators to exercise restraint and moderation in their comments, and maintain a minimum level of civility. Even when a challenge is rejected, there may nevertheless be consequences for arbitrators whose behaviour is questionable. The ICC for example would bear in mind such circumstances when considering future appointments. If the conduct does not justify a challenge being upheld but nevertheless shows a breakdown in relations amongst the tribunal, the ICC has on occasion, replaced a presiding arbitrator only

> in the hope that such decision may unblock the proceedings, be more cost-effective—by preserving the collective knowledge of the arbitral tribunal—and maintain the balance of the case.[109]

When it appears to the tribunal, institution, or courts that a challenge is spurious, there may be consequences for parties or their lawyers, as in the PCA case discussed in section 2.1.1 that led to an order of costs against the party to pay for the tens of thousands of dollars expended dealing with a meritless challenge at the tail end of a proceeding.[110] For parties that adopt the delaying

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107 *See* Luke Eric Peterson, *Ethical Screen Erected in NAFTA Case to Ensure that Arbitrator Remains Cut Off from His Law Firm's Prosecution of a Separate Claim, Investment Arbitration Reporter*, Inv. Arb. Rep. (Mar. 18, 2014), http://www.iareporter.com/articles/20140319 (reporting that a spokesperson for the Canadian Department of Foreign Affairs, Trade and Development stated that Canada had "requested that an ethical screen be established, and one is currently in place").

108 *See supra* Part 2.2.4 (outlining initiatives).

109 Orlowski, *supra* note 1, at 58.

110 *See also* Fry & Stampalija, *supra* note 28, at 258 (noting that "[m]ost of the cases analysed do not decide the allocation of cost [of the challenge] in the challenge decision, but leave it to a later stage of the proceeding or even for the final award"); Walsh & Teitelbaum, *supra* note 48, at 312–13 (discussing LCIA cases attracting awards of costs for unmeritori-

tactic of repeatedly challenging arbitrators, the Annex to the 2014 LCIA Rules provides that,

> A legal representative should not engage in activities intended unfairly to obstruct the arbitration or to jeopardise the finality of any award, including repeated challenges to an arbitrator's appointment . . . known to be unfounded by that legal representative.[111]

If a tribunal decides that this guideline has been violated, it may decide how to exercise its discretion to impose any or all of the sanctions listed in Article 18.6 of the Rules, which include written reprimands, written cautions as to future conduct in the arbitration, and "any other measure necessary to fulfill within the arbitration the general duties required of the Arbitral Tribunal."[112]

Some commentators have suggested that one way to discourage spurious challenges is to require a bond be posted in challenge decisions.[113] Others have noted that a summary procedure might be useful to dispose of frivolous challenges, but at the same time pointed out that often what appear outwardly to be spurious challenges might spring from strong-held subjective concerns such that it is difficult to judge at the outset as illegitimate.[114]

Providing reasons for challenges (as has been the recent practice of the PCA)[115] and disseminating information about challenge decisions (as in the LCIA digests and publications such as this book), may also serve a deterrent function by showing that spurious challenges are likely to fail and may

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ous challenges, specifically that "[t]he LCIA challenge decisions typically conclude with a direction as to the allocation of the costs of the challenge. These costs directions are given at the discretion of the LCIA Court. When a challenge is unsuccessful, the Division generally declares that the administrative costs of the challenge should be borne by the challenging party, and the allocation of the non-challenging party or parties' costs is reserved for the tribunal. However, on occasion, a Division will direct an unsuccessful challenging party to pay the administrative and party costs of the challenge proceeding") (citations omitted); David W. Rivkin, *Ethics in International Arbitration*, 2014 Seoul Arb. Lecture (Dec. 9, 2014), http://www.debevoise.com/~/media/files/insights/news/2014/davidrivkin seoularbitrationlecture.pdf.

111 LCIA Rules 2014, *supra* note 87, ¶ 2, at Annex.

112 *Id.*, ¶ 18.6.

113 Fry & Stampalija, *supra* note 28, at 258.

114 *See* Greenberg, *supra* note 1, at 8, ¶ 30.

115 Permanent Court of Arbitration Rules 2012, Art. 13(5) ("In rendering a decision on the challenge, the appointing authority may indicate the reasons for the decision, unless the parties agree that no reasons shall be given.").

have serious consequences for the parties or their counsel. Initiatives taken by professional bodies such as American Society International Law ("ASIL"), International Council for Commercial Arbitration ("ICCA"), and the IBA may also help parties and their counsel navigate the grayer areas of challenges.[116]

3 Arbitrator Resignations Late in Proceedings

As with late challenges, the "resignation of an arbitrator can severely disrupt an arbitration, particularly if it occurs at a late stage of the proceedings."[117] This section examines the relationship of resignation to challenges, typical scenarios for late resignations, and the tools available to discourage them and minimize their impact on proceedings.

3.1 *Resignations upon Challenge*

In practice, a significant portion of the challenges are resolved by an arbitrator resigning.[118] Most rules give the arbitrators an escape hatch to resign without implying acceptance of the validity of the challenge.[119] In *Pey Casado v. Chile* an arbitrator believed a challenge to be unfounded but nevertheless considered the "proper approach [was] to allow these proceedings to continue without the distraction posed by [his] involvement." He resigned, noting that

116 Such as the Joint ASIL/ICC A taskforce on issue conflicts; IBA Guidelines. One of the reasons this field has been inevitably difficult to regulate is because so much turns on the specific facts of each case.

117 Derains & Schwartz, *supra* note 3, at 185; *see also* Jason Fry, Simon Greenberg & Francesca Mazza, *The Secretariat's Guide to ICC Arbitration*, ¶ 3–601 (Paris 2012) [hereinafter *Secretariat's Guide to ICC Arbitration*] ("An arbitrator's resignation at an inconvenient time can be extremely disruptive to an arbitration.").

118 This is borne out by the statistics set out in Meg Kinnear and Frauke Nitschke's and Sarah Grimmer's chapters in this book.

"While only four decisions have disqualified an arbitrator, the composition of the tribunal changed in 30% of the cases where a disqualification application was brought. This reflects the fact that many arbitrators who are challenged elect to resign before a decision is issued, regardless of the merits of the disqualification proposal."

See Chapter 2 by Meg Kinnear & Frauke Nitschke in this volume.

119 *See, e.g.*, UNCITRAL Arbitration Rules, A/65/465, Art. 13(3) (Dec. 6, 2010), http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf [hereinafter 2010 UNCITRAL Rules] ("When an arbitrator has been challenged by a party, all parties may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his or her office. In neither case does this imply acceptance of the validity of the grounds for the challenge.").

contesting the challenge would have entailed a distracting and lengthy process of evidence gathering.[120]

A question arises as to whether arbitrators have a duty to the parties *not* to resign if they consider the challenge to be unfounded and for dilatory purposes. Derains and Schwartz note that an arbitrator might consider that

> whatever the actual merits of the challenge, it would be in the best interests of the arbitration and of both parties ultimately for the arbitrator to be replaced, in order to permit the arbitration to proceed in a better climate of confidence and trust and to minimize the likelihood of recourse against the arbitral Award when it is rendered.[121]

In such a case, the decision whether to stay or to go "inevitably involves the consideration of a number of different factors that may be particular to the case in question."[122] According to Redfern and Hunter, when the challenge is unfounded, "the arbitrator should not resign, but should permit the matter to be dealt with by the relevant challenge procedure." They acknowledge that "this course may create delay" but stress that "it helps to discourage unmeritorious disruptive tactics."[123]

3.2 *Typical Scenarios for Resignations Late in Proceedings*

3.2.1 Personal Reasons, Including Health

Resignation might be inevitable for personal reasons through no fault of any participant.[124] For example, in *Vanessa Ventures v. Venezuela*, the presiding arbitrator resigned due to bad health five months before a scheduled hearing. The replacement process took some time and the hearings had to be cancelled.[125]

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120 Philippe Sands Letter to ICSID Secretariat, Jan. 10, 2014, relating to *Victor Pey Casado v. Republic of Chile*, ICSID Case No. ARB/98/2.

121 Derains & Schwartz, *supra* note 3, at 195.

122 *Id.* at 185. *But see Salini Costruttori S.p.A & Italstrade S.p.A v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, ¶ 9 (Nov. 9, 2004) (noting Eric Schwartz's resignation upon a challenge).

123 Redfern and Hunter, *supra* note 3, ¶ 4.138.

124 Somewhat tenuously in the category of "personal reasons," *MTD v. Chile* saw an entire tribunal tender their resignation to ICSID because they were unable to serve on the basis of the fees agreed by the parties. *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, ¶¶ 7, 8, 12–17 (May 25, 2004), http://www.italaw.com/sites/default/files/case-documents/ita0544.pdf.

125 *Vanessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Award, ¶¶ 20, 30 (Jan. 16, 2013).

The ill health of a family member prevented one arbitrator from traveling and he thus decided to resign in *İçkale İnşaat Limited Şirketi v. Turkmenistan*.[126] The resignation led to a delay, which was further drawn out when the replacement arbitrator was challenged.[127]

Context and timing can make health-related resignations appear suspect. In one PCA case, a party requested postponement of an imminent hearing after settlement negotiations broke down. The tribunal refused the request but the next day, the arbitrator appointed by the party that had requested the postponement resigned for health reasons. Similarly, only a few weeks before oral hearings were scheduled to begin in *Sudan v. Turiff Construction Co*., Sudan withdrew from the arbitration and shortly thereafter its arbitrator resigned citing "personal reasons" without further explanation.[128]

3.2.2 New Professional Endeavor of Arbitrator

Another common scenario for mid-proceeding resignations is when the arbitrator takes professional steps that may conflict with arbitrating a particular case.[129] For example, in *National Grid v. Argentina*, the arbitrator appointed

126 *İçkale İnşaat Ltd. Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Decision on Claimant's Proposal to Disqualify Professor Philippe Sands (July 11, 2014), http://www.italaw.com/sites/default/files/case-documents/italaw3260.pdf.

127 Swift replacements can obviously lessen the impact of health-related resignations. *See ADC Affiliate Ltd. & ADC & ADMC Mgmt. Ltd v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal, ¶¶ 17–21 (July 17, 2003), http://www.italaw.com/sites/default/files/case-documents/ita0006.pdf. Ill-heath has also been the cause for several judges to resign in international criminal courts. *See, e.g*., *Prosecutor v. Slobodan Milosevic*, Case No. IT-02-54-T, Order Replacing a Judge in a Case Before a Trial Chamber (June 10, 2004), www.icty.org/x/cases/slobodan_milosevic/tord/en/040610.htm (replacing Judge Richard May, who had to resign due to health reasons); Press Release, Judge Deschenes Resigns for Medical Reasons (Apr. 29, 1997), http://www.icty.org/sid/7541; Press Release, Resignation of Judge Claude Jorda (2007), www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2007/Pages/resignation%20of%20judge%20claude%20jorda.aspx.

128 *See* Stephen M. Schwebel, International Arbitration: Three Salient Problems 288–90 (1987) [hereinafter Schwebel, Three Salient Points].

129 Resignations on the basis of new professional appointments are not uncommon at the international criminal courts and tribunals. *See, e.g*., Press Release, Resignation of ICC Judge Anthony T. Carmona (Mar. 20, 2013), www.icc-cpi.int/en_menus/icc/press and media/press releases/Pages/pr885.aspx (resignation of a judge to assume the office of President of the Republic of Trinidad and Tobago); Press Release, Resignation of Judge Navanethem Pillay, (2008), www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/press%20releases%20%282008%29/Pages/resignation%20of%20judge%20navanethem%20pillay.aspx (resignation of a judge following appointment as

by the claimant resigned almost four years into the proceedings after the U.S. Senate appointed him as United States Executive Director to the World Bank.[130] In the PCA arbitrations brought by former shareholders of Yukos against Russia, the claimants' appointee resigned (over a year into proceedings) when he was appointed by the U.S. President to an official position.[131]

In a long running interstate PCA case, one arbitrator resigned (on his own initiative) about six months into the proceedings when he was retained as counsel in an unrelated case against the respondent. Another arbitrator resigned (after a challenge request) almost four years into the case after he took an "of counsel" position at a global law firm, which was acting adversely to one of the parties in the case.[132]

The acceptance by an arbitrator to serve on a company board of directors can also lead to conflict. In *Holiday Inns v. Morocco*, the arbitrator appointed by the claimants, more than four years into the case, informed his colleagues that he had become an "outside director" of one of the claimants. He submitted his resignation subject to the condition that the claimants appoint his successor. The two co-arbitrators decided that the condition was improper and should be disregarded and they decided to withhold the tribunal's consent to the resignation. Therefore, the vacancy was filled by the Chairman of the ICSID Administrative Council in accordance with Article 56(3) of the ICSID Convention, the provisions of which are discussed in section 3.3 below.[133] The then-Secretary-General of ICSID has since described the arbitrator's conduct as an "egregious impropriety."[134]

U.N. High Commissioner for Human Rights); Press Release, Resignation of Judge Maureen Harding Clark (2006), www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2006/Pages/resignation%20of%20judge%20maureen%20harding%20clark.asp (resignation of a judge following her appointment to serve on High Court of Ireland).

130 *Nat'l Grid PLC v. Argentine Republic*, Case No. UN 7949, Decision on the Challenge to Mr Judd L. Kessler, London Court of International Arbitration, ¶ 30 (Dec. 3, 2007); *Nat'l Grid PLC v. Argentine Republic*, UNCITRAL, Decision on Jurisdiction, ¶ 1 (June 20, 2006).

131 *Veteran Petroleum Ltd. (Cyprus) v. Russian Federation*, PCA Case No. AA 228, Interim Award on Jurisdiction and Admissibility, ¶¶ 14–16 (Nov. 30, 2009).

132 Given that the record relating to resignations is confidential, this source is on file with the PCA.

133 *Holiday Inns S.A. & Others v. Morocco*, ICSID Case No. ARB/72/1 (Jan. 13, 1972); *see* Schreuer, *supra* note 16, ¶ 43, at 1196.

134 Aron Broches, ICSID, *in* Preventing Delay and Disruption of Arbitration (I) and Effective Proceedings in Construction Cases (II) 286 (Albert Jan van den Berg, ed., Int'l Council for Comm. Arb., Cong. Series No. 5, 1991) [hereinafter Preventing Delay].

3.2.3 New Counsel

Additions to a party's legal team part way through proceedings can lead to conflicts resulting in resignations. In *Vanessa Ventures v. Venezuela*,[135] two arbitrators resigned during the hearing on jurisdiction, which was held almost three years into the case. Shortly before the hearing was scheduled, the tribunal received a list of hearing participants, which included a freshly named counsel with personal and professional connections to two of the arbitrators. Having heard the parties' reactions, the two arbitrators resigned during the hearing. Problems such as these could now be avoided upon the initiatives described in section 2.2.4 above.

3.2.4 Late Discovery or Emergence of Conflict

In a few cases, arbitrators have not done an adequate conflict search and have found out only after their appointments that a conflict owing to work done by others in their firm ought to have been disclosed. Sometimes this happens early enough so as only to cause minor inconvenience, as in a recent case under the PCA's Environmental Rules when the presiding arbitrator resigned immediately upon discovering that one of her partners had been acting for several years for an affiliate to the respondent party. The PCA made a replacement appointment in less than two weeks.[136]

In a case administered by the PCA under *ad hoc* procedures, the presiding arbitrator from a large U.S. law firm resigned after one of his partners took

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135 *Vanessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Award, ¶¶ 17–19 (Jan. 16, 2013).

136 The timing was less fortunate in the case of *Ometto v. ASA Bioenergy*. In this case, the arbitrator failed to put in all possible search terms in the conflict database of his law firm. He was unaware of the conflict until after the award had been rendered. "Facing an award of damages exceeding $110 million," the losing party began an "extensive investigation" into potential conflicts of the arbitrators. Only after this post-award investigation by the losing party did the arbitrator become aware of any conflict. The Southern District of New York refused to vacate the award, noting that while the firm's so-called "conflicts system" left much to be desired (and had since been improved), such a deficiency was not tantamount to "evident partiality." It strained the judge's credulity to imagine that the arbitrator had

> "intentionally omitted [certain search terms] in the hope that his partners might therefore feel free to obtain future. . . . business [from the party] without knowing of any potential conflict or informing him of same."

Thus, the award could not be vacated on the ground of "evident partiality." *See Ometto v. ASA Bioenergy Holding A.G.*, 12 CIV 1328 JSR, 2013 WL 174259 (S.D.N.Y. Jan. 9, 2013) aff'd, 549 F. App'x 41 (2d Cir. 2014) *cert. denied*, 134 S. Ct. 2877 (U.S. 2014).

on counsel work in a separate arbitration under a bilateral investment treaty ("BIT") where some of the same issues could arise. Having disclosed the situation to the parties, and having received an objection from at least one of them, the arbitrator resigned. The replacement procedures were not clear however and it took several months to reconstitute the tribunal.[137]

3.2.5 Suspect Resignations

There are, sadly, some situations where resignation of a party-appointed arbitrator seems to be the result of bad faith collusion with a party.[138] The problem was studied and discussed at some length for the 1990 International Council for Commercial Arbitration Congress in Stockholm.[139] A classic example cited in those discussions was *Republic of Colombia v. Cauca Co.*,[140] in which the tribunal had a maximum of 210 days to render its award. The Colombian arbitrator participated for 203 days, by which point little remained to be done except formalize the holdings at which the tribunal had arrived. The Colombian arbitrator found himself in the minority and resigned, charging that the majority intended to render an award in excess of jurisdiction. The agent for Colombia submitted that as a result of the resignation no further act of the tribunal could have any force or effect. The majority nevertheless proceeded to issue the award, which Colombia sought to annul in U.S. courts. The court upheld the validity of the award and found that the resignation was designed to prevent a decision or render any award invalid, which was not only "reprehensible in character, but was fraudulent in its tendencies."[141] The U.S. Supreme Court held, on appeal, that ignoring the resignation and proceeding with the award was the "only way of saving the proceedings from coming to naught." Whatever technical rules applied for a three person tribunal,

137 Give that the case details are confidential, the source is on file with the PCA.

138 *See, e.g., Himpurna California Energy Ltd. v. Republic of Indonesia*, Final Award of Oct. 16, 1999, XXV Yearbook Comm. Arb. 186 (2000).

139 For more on this, see topic 8 entitled *Resignation of a Party-Appointed Arbitrator* and topic 9 entitled *Remedies Against Arbitrators Who Obstruct the Arbitral Proceedings* in Preventing Delay, *supra* note 134, at 270–313, with contributions by, *inter alia*, Judge Stephen M. Schwebel, Professor Emmanuel Gaillard, V.V. Veeder QC, Professor Iván Szász, Stephen Bond, and Aron Broches.

140 Judge Stephen M. Schwebel, *Practice of Public International Law Arbitral Tribunals, in* Preventing Delay, *supra* note 134, 270–71 (citing *Republic of Colombia v. Cauca Co. et al.*, 106 Fed. 524 (1903), aff'd. per curiam, 113 Fed. 1020; rev. on other grounds, 190 U.S. 524 (1903)).

141 *Id.* at 271 (citing 106 Fed. 337, 348–49).

> neither party could defeat the operation of the submission . . . by withdrawing or adopting the withdrawal of its nominee when the discussions were closed.[142]

The type of scenario that occurred in the *Cauca* case, involving a party-appointed arbitrator withdrawing at an extremely disruptive point in the proceedings, with the apparent knowledge, involvement, or support of the appointing party, is thankfully rare. Similar scenarios have, however, reportedly occurred in cases administered by the ICC, PCA, Iran-U.S. Claims Tribunal, in the 1930s Mixed Claims Commission "sabotage cases" between the United States and Germany, and in the notorious *Himpurna* arbitration of 1999 (in which the Indonesian-appointed arbitrator was coerced back onto a plane to Indonesia, apparently at the hands of the respondent, and the two remaining arbitrators decided to proceed without him).[143] What is clear now is that there are tools available to ensure that such conduct is not rewarded, and that certain rights, such as the party's choice of a replacement arbitrator or the arbitrator's fee entitlements, are curtailed in circumstances of wrongdoing.

3.3 *Tools to Discourage Late Resignations and Minimize Their Impact*

In decades past, and in purely *ad hoc* proceedings, a dubious late resignation might lead to a procedural quandary, but today the main sets of arbitration rules and legislation provide for four types of solutions to spurious late resignations, while still accounting for situations where resignations are legitimate and unavoidable.

First, the rules may require that the resigning arbitrator seek the consent of the institution or co-arbitrators, as for example under the ICC Rules and the ICSID Convention.[144]

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142 *Id.* (citing Colombia v. Cauca Co., 190 U.S. 524, 527–28 (1903)).

143 *See, e.g.*, Orlowski, *supra* note 1; Greenberg, *supra* note 1. Arbitrator resignations on the eve of hearings have occurred on at least three occasions in PCA cases. *See Himpurna*, Final Award of Oct. 16, 199; Karl-Heinz Böckstiegel, *Practices of Various Arbitral Tribunals, in* Preventing Delay, *supra* note 134, at 272.

144 *See* World Bank, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Art. 56 [hereinafter ICSID Convention], *available at* https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc_en-archive/ICSID_English.pdf; ICSID Arbitration Rules, *supra* note 17, Rule 8; International Chamber of Commerce Arbitration Rules, Art. 15 (2012), http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Rules-of-arbitration/ICC-Rules-of-Arbitration/ [hereinafter ICC Arbitration Rules]; Schreuer, *supra* note 16, at 1192–94. The ICC reports that "[b]etween 2001 and 2010, a total of 208 resignations were tendered, five of which were rejected" by the ICC. *Secretariat's Guide to ICC Arbitration, supra* note 117, ¶ 3–601, at 181.

Second, a party might be deprived of its right to appoint a replacement arbitrator. Under ICSID Article 56(3), when consent to a party-appointed arbitrator's resignation is declined by the remaining arbitrators, the replacement arbitrator is appointed not by the party, but by the Chairman of the ICSID Administrative Council from the ICSID panel.[145] That rule "reflects the suspicion that the party [that made the original appointment] may not be a stranger to the resignation"[146] and is aimed at preventing the possibility of collusion between the arbitrator and the appointing party to frustrate or slow down the proceedings. This has been invoked twice. The first is in the *Holiday Inns v. Morocco* case, described in section 3.2.2 above. The second was in *Enron v. Argentina*, when the resignation occurred at a very late stage of the proceedings, after the filing of post-hearing briefs.[147] The 2010 UNCITRAL Rules in Article 14(2) provide that upon the request of a party, an appointing authority may appoint the substitute arbitrator if it determines that

> in view of the exceptional circumstances of the case, it would be justified for a party to be deprived of its right to appoint a substitute arbitrator.[148]

The appointing authority may only do so after allowing the parties and remaining arbitrators an opportunity to express their views. This power did not exist under the 1976 version of the Rules, and has been welcomed as a "major departure" from the 1976 Rules.[149]

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145 ICSID Convention, *supra* note 144, Art. 56; ICSID Arbitration Rules, *supra* note 17, Rule 8; ICC Arbitration Rules, *supra* note 144, Art. 15(1); Schreuer, *supra* note 16, at 1192–94. These provisions are relevant in a pending ICSID case, in which one of the arbitrators has recently resigned. See ICSID Case Details, *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/07/30&tab=PRD. For a discussion of the multiple disqualification proposals filed in that same case, see *supra* notes 47, 54–56, 91–92.

146 Schreuer, *supra* note 16, at 1194 (citing Aron Broches, *Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965, Explanatory Notes and Survey of its Application*, 18 Yearbook Com. Arb. 706 (1993).

147 *Id.* at 1196 (citing *Enron Corp., Ponderosa Assets L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, ¶ 39 (May 22, 2007)).

148 2010 UNCITRAL Rules, *supra* note 119, Art. 14(2).

149 *Id.*, Art. 14. Caron and Caplan have described it as a major departure from the 1976 UNCITRAL Rules and as an improvement thereon. Caron & Caplan, *supra* note 6, at 314–317; *see also* Permanent Court of Arbitration, Arbitration Rules 2012, Art. 14(2) (Dec. 17, 2012), *available at* http://www.pca-cpa.org/showpage.asp?pag_id=1188 [hereinafter PCA Arbitration Rules]; Daly, Goriatcheva & Meighen, *supra* note 6, ¶¶ 4.62–4.65.

Third, depending on the stage of the proceedings, the rules, and the law of the place of arbitration, the remaining arbitrators may be entitled to proceed as a truncated tribunal.[150] Some rules, such as Article 12(4) of the PCA 2012 Rules, expressly allow a tribunal to exercise its discretion to proceed truncated.[151] The 2010 UNCITRAL Rules provide for the possibility only "after the closure of the hearings."[152] The 1976 UNCITRAL Rules were not so explicit, with at least one tribunal notoriously holding that a

> tribunal has not only the right, but the obligation, to proceed when, without valid excuse, one of its members fails to act, withdraws or . . . even purports to resign.[153]

The view that there is an inherent power to proceed truncated has support amongst some distinguished commentators, but is not universally held.[154] In an *ad hoc* case, the appropriate course would depend upon the specific

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150 *See* PCA Arbitration Rules, *supra* note 149, Art. 12(4); 2010 UNCITRAL Rules, *supra* note 119, Art. 14(2).

151 PCA Arbitration Rules, *supra* note 149, Art. 12(4) ("If an arbitrator on a tribunal of three, five, or more persons fails to participate in the arbitration, the other arbitrators shall, unless the parties agree otherwise, have the power in their sole discretion to continue the arbitration and to make any decision, ruling or award, notwithstanding the failure of one arbitrator to participate. In determining whether to continue the arbitration or to render any decision, ruling or award without the participation of an arbitrator, the other arbitrators shall take into account the stage of the arbitration, the reason, if any, expressed by the arbitrator for such non-participation, and such other matters as they consider appropriate in the circumstances of the case."); *see also id.*, Art. 15 ("If an arbitrator is replaced, the proceedings shall resume at the stage where the arbitrator who was replaced ceased to perform his or her functions, unless the arbitral tribunal decides otherwise.").

152 2010 UNCITRAL Rules, *supra* note 119, Art. 14(2); *see* ICC Arbitration Rules, *supra* note 144, Art. 15(5) ("Subsequent to the closing of the proceedings, instead of replacing an arbitrator who has died or been removed by the Court pursuant to Articles 15(1) or 15(2), the Court may decide, when it considers it appropriate, that the remaining arbitrators shall continue the arbitration. In making such determination, the Court shall take into account the views of the remaining arbitrators and of the parties and such other matters that it considers appropriate in the circumstances.").

153 *See* Himpurna California Energy Ltd. v. Republic of Indonesia, Final Award of Oct. 16, 1999, ¶ 5, XXV Yearbook Comm. Arb. 186 (2000).

154 *See, e.g.*, Schwebel, Three Salient Problems, *supra* note 131; *cf.* Born, *supra* note 2, at 1590–92 ("The better analysis, in the absence of express or implied agreement by the parties to a truncated tribunal, is that an obstructive arbitrator must be replaced and that a truncated tribunal is not permissible. Where successive resignations threaten to obstruct the arbitral process, an arbitral institution or national court may appoint a replacement arbitrator (on the theory that the right to unilaterally nominate an arbitrator has been waived or

terms of the parties' agreement and the law of the arbitral seat.[155] National legislation might also clarify the consequences of an improper resignation. For example, in Mauritius, if

> a party or the other members of the arbitral tribunal consider that an arbitrator has resigned for unacceptable reasons or refuses or fails to act without undue delay,

they

> may apply to the PCA to request the replacement of the arbitrator or the authorisation for the [remaining arbitrators] to continue the arbitration without the participation of that arbitrator.[156]

Fourth, there may be consequences as to liability or fee entitlements for arbitrators who resign in bad-faith.[157] Such remedies were also discussed in depth at the 1990 ICCA Congress, and have been the subject of some legislative developments since, including a provision in the 1996 English Arbitration Act for courts to review the fees of resigned arbitrators.[158] A detailed examination of those remedies under national laws is beyond the scope of this book chapter. It suffices to note that irrespective of any pecuniary consequences, arbitrators should "think carefully before resigning" because as the ICC warns, "[c]ertain

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forfeited). Any other approach ignores the parties' agreement (to arbitrate before three arbitrators).").

155 In an *ad hoc* case administered by the PCA, the two remaining arbitrators declined to proceed truncated because the parties' contract clearly provided for filling vacancies caused by resignations and neither the agreement nor the *lex arbitri* permitted truncated tribunals, and they came short of making a finding of bad faith.

156 International Arbitration Act 2008, Act. No. 37, Govt. Gazette of Mauritius, No. 119, Art. 16(2) (Dec. 13, 2008), *available at* http://www.miac.mu/download/The_International_Arbitration_Act_2008.pdf; *see also id.*, Art. 17 (discussing repeat hearings).

157 For example, for arbitrations conducted in England, there are relevant provisions in the English Arbitration Act 1996 which subject such entitlements to the English courts. Arbitration Act 1996, ch. 23, § 25 (Eng.); *see also id.*, § 27 (discussing provisions on the filling of vacancies in the event of resignation); *cf.* Walsh & Teitelbaum, *supra* note 48, at 313 ("In LCIA Reference No. 0256 (Feb. 13, 2002), the Division directed that in light of its conclusion that the challenged arbitrator had acted unfairly and in deliberate breach of the LCIA Rules, it 'did not think it right that the arbitrator's outstanding fees or any associated expenses should be paid out of what then remained of the deposit, especially since this had been furnished entirely by the [challenging party].").

158 *See* Emmanuel Gaillard, *Laws and Court Decisions in Civil Law Countries, in* Preventing Delay, *supra* note 137, at 274.

types of resignation will reflect very poorly on the arbitrator" and thus will have an impact on reputation and future appointments.[159]

4 Conclusion

The above survey shows that it is becoming more and more difficult to get away with disruptive tactics in the form of late-in-the-day arbitrator challenges and resignations.

With respect to challenges, time limits act as a primary procedural safeguard to ensure that parties bring challenges as soon as they learn of the underlying grounds for challenge. However, time limits cannot prevent late challenges relating to new events. If the "new events" underlying a challenge consist of unwelcome procedural or substantive decisions, then according to a consistent line of decisions and commentaries, the challenge procedure will not be allowed to serve as an appeal mechanism in disguise and will be rejected. Setting out the reasons for, and disseminating the outcomes of such challenges would help inform parties of this likely outcome. Challenges due to new counsel can be avoided by early announcements of representatives and provision in the relevant rules for tribunal consent to changes. Challenges due to arbitrators' comments, comportment, or conflicts might best be avoided if arbitrators perform thorough conflict checks and make full and ongoing disclosures, allowing the parties to consider their options in moving forward. Arbitrators should also carefully consider the consequences of any conduct or commentary that reaches beyond the ordinary course of their duties in managing proceedings. The possibility of cost orders or counsel sanctions may also dissuade parties from bringing spurious late challenges. For any late stage challenge, legitimate or otherwise, the arbitrators or relevant appointing authorities can assist by ensuring a swift resolution with minimal disruption to the procedural calendar.

As with challenges, the disruptive effects of late stage resignations, legitimate or otherwise, can be avoided with swift replacements. Depending on the applicable procedural and legal regimes, when a resignation appears to have come about as a result of collusion or bad faith, the consequences may include depriving a party of the right to appoint the substitute and allowing the remaining arbitrators to proceed without a substitute at all. Collusive arbitrators should also be aware of potential consequences for their personal liability, fee entitlements, and reputations.

159 *Secretariat's Guide to ICC Arbitration, supra* note 117, ¶ 3–600.

CHAPTER 10

Repeat Arbitrator Appointments in International Investment Disputes

Luke A. Sobota

1 Introduction

Party autonomy is fundamental to arbitration, which requires the voluntary agreement of both sides. The power to choose the terms and procedures of the arbitration is precisely what attracts and retains its users. Yet when transposed into international investment arbitration—where the issues often have broader public significance and transcend the interests of the parties—the concept of party autonomy has given rise to skepticism and even criticism.[1] Some question the legitimacy of party-appointed arbitrators deciding important issues bearing upon sovereign prerogatives and potentially creating a significant charge on the public fisc. Whether sound or unsound, these types of criticisms at the very least underscore the need for scrupulousness when it comes to arbitrator impartiality and independence.

With the growth of investor-state arbitration, it has become more common for arbitrators to face disqualification proposals on a variety of grounds, including personal circumstances that may reflect a predisposition toward one party or its positions. This chapter explores a specific ground for challenge to a party-appointed arbitrator: repeat appointments by the same party or law firm. After reviewing the somewhat inconsistent approach to such disqualification proposals in recent International Centre for Settlement and Investment Disputes ("ICSID") decisions, this chapter suggests that the issue of repeat appointments be analyzed under an objective standard that focuses upon the appearance of bias rather than actual bias. Although one might be prepared to accept that repeat appointments do not necessarily (or even often) result in actual bias, perceptions are especially important in investor-state arbitration; doubts about the effect of repeat appointments are pervasive, irrespective of the personal qualities and individual circumstances of the arbitrators

1 *See generally* Sundaresh Menon, Keynote Address, *International Arbitration: The Coming of a New Age for Asia* (*and Elsewhere*), *in* 17 ICCA Cong. Series 6, 6–27 (Albert Jan van den Berg ed., 2013); Jan Paulsson, The Idea of Arbitration (2013).

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in question. An objective standard would offer greater clarity in appointments, facilitate prompt resolution of disqualification proposals (or obviate them entirely), and promote the integrity of international investment dispute resolution as a whole.

1.1 *The Issue with Repeat Arbitrator Appointments*

Some consider that repeat appointments are "neutral" because in each successive case the arbitrator exercises "the same independent arbitral function."[2] Arbitrators indeed owe a duty to both parties, and are bound to maintain neutrality and independence while resolving the dispute in accordance with the applicable law and admissible evidence. Arbitrators faithfully discharging their duty should be unaffected by the fact that they were previously appointed by the same party or counsel in another case.[3] Nor can it be presumed, many argue, that a repeat appointment derives from the appointing party's perception that the arbitrator may be biased in its favor.[4] Selecting an arbitrator is an important, complex, and difficult decision for both states and investors, and they rationally may aim to select arbitrators who not only possess requisite skills and experience, but also credibility and integrity.[5] The identification of such attributes is easiest with respect to arbitrators who have a demonstrated track record, whether through scholarship or prior awards.[6]

> [I]t is quite natural that a party and its counsel will wish to appoint the 'best' arbitrator available for a given case and that prior experiences with that potential arbitrator are of course adequate to give that assurance.[7]

From this vantage, a repeat appointment may be understood as a positive reflection upon the arbitrator's expertise or fairness: "Repeat appointments

2 *Tidewater Inc. v. Venezuela*, ICSID Case No. ARB/10/5, Decision on Claimants' Proposal to Disqualify Professor Brigitte Stern, Arbitrator, ¶ 60 (Dec. 23, 2010). ("Tidewater").

3 William W. Park, *Arbitrator Integrity*, in The Backlash Against Investment Arbitration 208 (Michael Waibel, Asha Kaushal, et al., eds., 2010).

4 *Id.* at 200–01.

5 *Id.*

6 Maria Rivera-Lupu & Beverly Timms, *Repeat Appointment of Arbitrators by the Same Party or Counsel: A Brief Survey of Institutional Approaches and Decisions*, 2012 Spain Arb. Rev., no. 15, 103, 104 (2012).

7 *Caratube Int'l Oil Co. v. Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch, ¶ 108 (Mar. 20, 2014). ("Caratube").

may be as much the *result* of the arbitrator's independence and impartiality as an indication of justifiable doubts about it."[8]

In contrast, others view repeat appointments as creating "at least the appearance of undue influence" and "an unfair advantage for the appointing party."[9] This perception stems in part from "[t]he reality that everything a party does once a dispute has broken out is focused on winning."[10] Viewed in this light, when it comes to a party's second, third, or fourth time appointing the same arbitrator, the other side may reasonably assume that something is at play.[11] The concern is most obvious if the financial remuneration from the appointments is significant (with the attendant hope of future appointments) or if the arbitrator in a prior case has already decided an overlapping issue in favor of the appointing party (or acquired extra-record knowledge pertinent to the case).[12] But there are also nagging doubts that a relationship of familiarity or even loyalty may have developed between the arbitrator and the appointing party. And counsel for the appointing party might enjoy a tactical advantage over their counterparts because of their greater familiarity with the arbitrator's decision-making process and predilections.[13] With each successive

8 *Tidewater Inc.*, ICSID Case No. ARB/10/5, ¶ 61; *see also* Daphna Kapeliuk, *The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators*, 96 Cornell L. Rev. 47, 65 (2010) ("[T]he arbitrators' professional reputation could provide a key incentive for them to remain as impartial and fair as possible."). Under this view, a repeat appointment is as much a reflection of confidence in an arbitrator's capabilities as it is a reflection of an appointing party's autonomy. Fatima-Zahra Slaoui, *The Rising Issue of "Repeat Arbitrators": A Call for Clarification*, 25 Arbitration Int'l, no. 1, 2009, at 109.

9 *Tidewater Inc.*, ICSID Case No. ARB/10/5, ¶ 13.

10 Paulsson, *supra* note 1, at 165.

11 Jan Paulsson, *Ethics, Elitism, Eligibility*, 14 J. Int'l Arb., no. 4, 1997, at 14 ("Whatever their motivation, arbitrators tend to want to be *reappointed*. In the case of an arbitrator who considers that his only chance lies with the party which has already named him once, this might result in more or less dissimulated, but nevertheless systematic, favouritism."); Karel Daele, *Challenge and Disqualification on the Ground of Independence Issues, in* Challenge and Disqualification of Arbitrators in International Arbitration 269, 344 (Karel Daele ed., 2012) ("[T]here is a justified concern that an arbitrator who becomes reliant upon a single party or a single law firm for the majority of his/her appointments may find his/her independence compromised and may favour the appointing party or law firm's arguments so that he/she may secure the flow of future appointments.").

12 *Tidewater Inc.*, ICSID Case No. ARB/10/5, ¶ 13.

13 Natalia Giraldo-Carrillo, *The "Repeat Arbitrators" Issue: A Subjective Concept*, 19 Colom. J. Int'l L. 95 (2011) (describing circumstances presented to an Austrian court, where the claimant questioned an arbitrator's impartiality based on preconceived opinions

appointment, there is a greater fear that an arbitrator may be unduly influenced, consciously or unconsciously, by the appointing party or its counsel.[14]

Thus, whatever the force of the arguments in favor of viewing repeat appointments as "neutral," many nonetheless perceive the practice to be problematic, and their preoccupation is not illegitimate. Concerns over the integrity of arbitrators are particularly pernicious in the investment arbitration context. Investor-state disputes, taking place at the juncture of international trade and commerce, are large, important, and public.[15] Those issuing awards in these disputes must be—and must be perceived to be—neutral, fair, and independent. Yet the legitimacy of the institution of investment arbitration has been questioned on numerous grounds, with some challenging the propriety of entrusting authoritative review of key sovereign decisions to arbitrators with limited oversight.[16] Against the backdrop of these and other criticisms, it becomes all the more important that the institutions and actors comprising investor-state arbitration take steps to ensure that there be no reasonable doubts as to a party-appointed arbitrator's impartiality and integrity.

2 The Current Treatment of Repeat Arbitrator Appointments

2.1 *Insight from the 2014 IBA Guidelines*

Accounting for the competing considerations of party autonomy and procedural fairness, the International Bar Association's 2014 Guidelines on Conflicts of Interest in International Arbitration ("IBA Guidelines") state that repeat appointments of the same arbitrator "give rise to justifiable doubts as to the arbitrator's impartiality or independence."[17] The IBA Guidelines constitute

in a pending case based upon involvement with previous cases); Doak Bishop & Lucy Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration*, 14 Arb. Int'l, no. 4, 1998, at 24–25.

14 Slaoui, *supra* note 8, at 107.

15 Menon, *supra* note 1, at 13.

16 Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 Fordham L. Rev. 1544–45, 1584 (2005); Menon, *supra* note 1, at 13–14.

17 IBA Council, IBA Guidelines on Conflicts of Interest in International Arbitration (2014). The IBA Guidelines were first promulgated in 2004 and, as discussed in this chapter, have been relied upon by parties in pursuit of disqualification applications in a variety of fora. The version adopted in 2014 does not depart from the 2004 version with respect to the issue of repeat arbitrator appointments.

"the most comprehensive work to date defining the framework by which the impartiality of arbitration in the international arena can be most effectively assured."[18] As noted by the Chairman of ICSID's Administrative Counsel, the IBA Guidelines "are widely recognized in international arbitration as the pre-eminent set of guidelines for assessing arbitrator conflicts."[19] Its standards, while not binding by their terms, are widely followed with respect to (i) the disclosures arbitrators should make upon their appointment and (ii) the applications made for disqualification during the course of the arbitration.

Part II of the IBA Guidelines establishes three color coded lists of "specific situations indicating whether they warrant disclosure or disqualification of an arbitrator."[20] Known as the 'Red List,' 'Orange List,' and 'Green List,' they categorize the type of circumstances that may or may not warrant disclosure and disqualification. Within the three-color framework, the IBA Guidelines propose that the arbitrator analyze the facts and circumstances relevant to her personal position as they would be viewed by a reasonable third party. If, through such a lens, the facts and circumstances give rise to justifiable doubts as to the arbitrator's impartiality and independence, then that information must be disclosed by the arbitrator. Following disclosure, the other party is allocated thirty days to evaluate the situation and, if so inclined, to challenge the appointment.

In particular, the Orange List provides a non-exhaustive catalogue of situations where a disqualifying conflict of interest may be present and the underlying circumstances should be disclosed by the arbitrator.[21] The IBA Guidelines do not specify when disqualification based upon repeat appointments might be appropriate. But, positing that repeat appointments create "justifiable doubts" about impartiality or independence,[22] the Orange List provides that disclosure may be proper under the following circumstances:

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18 The IBA Guidelines were developed for use in international commercial arbitration but, as set forth in their introduction, "[a] consensus [has] emerged . . . that the Guidelines apply to both commercial and investment arbitration, and to both legal and non-legal professionals serving as arbitrators." IBA Guidelines, *supra* note 17, at ii.

19 *Universal Compression Int'l Holdings, S.L.U. v. Venezuela*, ICSID Case No. ARB/10/9, Decision on the Proposal to Disqualify Professor Brigitte Stern and Professor Guido Santiago Tawil, Arbitrators, ¶ 74 (May 20, 2011). ("Universal Compression").

20 IBA Guidelines, *supra* note 17, at 2.

21 Slaoui, *supra* note 8, at 103–119.

22 IBA Guidelines, *supra* note 17, at 5.

(i) The arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of the party (section 3.1.3);
(ii) The arbitrator currently serves or has served within the past three years as arbitrator in another arbitration on a related issue involving one of the parties or an affiliate of one of the parties (section 3.1.5); or
(iii) The arbitrator has within the past three years received more than three appointments by the same counsel or the same law firm (section 3.1.7).

The more liberal standard for repeat appointments by the same counsel stems from the fact that concerns of overlapping issues and extra-record knowledge are less acute where the cases involve different parties. In addition, it has been considered "nearly unavoidable" that incidental business contacts and "at least some degree of acquaintance" may exist between arbitrators and advocates:

> It is hard to imagine—and might even be considered professional blunder by some—that counsel for a party appoints an arbitrator without having a very good idea about the arbitrator's qualities. This is most easily ascertained if some form of professional contact was established between the party's counsel and the arbitrator before the arbitrator's appointment. As long as this contact is not used to actively undermine the arbitrator's independence with regard to a particular proceeding, a lack of impartiality can hardly be assumed.[23]

This only goes so far, however, since counsel are the agents of their clients, and they have extensive and direct contact with the arbitral panel. Similar concerns of improper influence and undue tactical advantage thus exist with repeat appointments of the same arbitrator by the same counsel, resulting in their inclusion on the Orange List.[24]

2.2 *Standards and Decisions Concerning Disclosures and Disqualifications*

Arbitral disclosures are encouraged by most arbitral institutions and have become routine. By design, the standard for disclosures is separate from and

23 Lars Markert, *Challenging Arbitrators in Investment Arbitration: The Challenging Search for Relevant Standards and Ethical Guidelines*, 3 Contemp. Asia Arb. J. 237, 255 (2010).

24 Giraldo-Carrillo, *supra* note 13, at 93 (describing circumstances where a party may repeatedly appoint an arbitrator in hopes of creating predictable arbitral outcomes and gaining a strategic advantage through the arbitrator's prior knowledge of the relevant facts).

lower than the standard that applies for a proposal for disqualification based upon the disclosures.[25] As discussed below, disqualification of party-appointed arbitrators based upon disclosure of repeat appointments by the same party or firm has been rare. Although the major arbitral institutions have different standards for disqualification, they uniformly place the bar high and ICSID disqualification decisions indicate the need for proof of some additional factor atop the existence of the repeat appointments themselves.

2.2.1 The UNCITRAL Standard for Disqualification of an Arbitrator

The 2010 UNCITRAL Arbitration Rules (the "UNCITRAL Rules") provide the following guidance concerning arbitrator disclosures:

> When a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose *any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence*. An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties and the other arbitrators unless they have already been informed by him or her of these circumstances.[26]

Where a party seeks the disqualification of an arbitrator, the UNCITRAL Rules require the party to demonstrate circumstances that "give rise to justifiable doubts" regarding the arbitrator's independence or impartiality.[27] The appointing

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25 Houchih Kuo, *The Issue of Repeat Arbitrators: Is It a Problem and How Should the Arbitration Institutions Respond?*, 4 Contemp. Asia Arb. J. 247, 251–54 (2011).

26 UNCITRAL Arbiration Rules, G.A. Res. 65/22, U.N. Doc. A/RES/65/22, art. 11 (Aug. 15, 2010) (emphasis added).

27 *Id.* art. 12(1) ("A party may challenge the arbitrator appointed by it only for reasons of which it becomes aware after the appointment has been made."). This language was first promulgated in the UNCITRAL Model Law on International Commercial Arbitration, Art. 12(1), and is also the basis for the national arbitration laws of many states. UN Model Law on International Commercial Arbitration, G.A. Res. 61/33, U.N. Doc. A/RES/61/33, art. 12(1) (July. 7, 2006) ("UNCITRAL Model Law"). This same standard is echoed among many other leading arbitral institutions. *See, e.g.*, London Court of International Arbitration Rules, art. 10.3 (2014); Arbitration Institute of the Stockholm Chamber of Commerce Rules, art. 15(1) (2010). Along these same lines, the ICC has declined to confirm arbitrators where a "reasonable basis" for the challenge exists and may also consider possible difficulties that may arise at the time of enforcement of the award. *See* Rivera-Lupu & Beverly Timms, *Repeat Appointment of Arbitrators by the Same Party*

authority in a NAFTA case stated that "under the UNCITRAL [] Rules doubts are justifiable . . . if they give rise to an apprehension of bias that is, to the objective observer, reasonable."[28] As applied, the test does not seek to ascertain whether the challenged arbitrator truly harbors any bias,[29] but rather whether the circumstances could create a reasonable perception of a lack of impartiality or independence.[30] Accordingly, disqualification may be warranted for "prudential" concerns to help ensure the arbitration's perceived legitimacy.[31]

2.2.2 The ICSID Standard Applicable to Investment Arbitrations

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention"), under which most investment arbitration disputes are adjudicated, provides that a party may propose disqualification of an arbitrator under Articles 14(1) and 57.[32]

Article 14(1) requires that an arbitrator (i) have high moral character, (ii) enjoy recognized competence, and (iii) can "be relied upon to exercise independent judgment."[33] The third of these qualities requires not just independence (freedom from control) but also impartiality (freedom from bias).[34] Although related, independence and impartiality are distinct attributes that entail discrete inquiries.

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or Counsel: A Brief Survey of Institutional Approaches and Decisions, Spain Arb. Rev., no. 15, 2012, at 116.

28 *Gallo v. Canada*, PCA Case No. 55798, Decision on the Challenge to Mr. J. Christopher Thomas, ¶ 19 (Oct. 14, 2009) (quoting *Challenge Decision of 11 January 1995*, [1997] 22 Y.B. Comm. Arb. 227, 234).

29 *ICS Inspection v. Argentina*, PCA Case No. 2010–9, Decision on Challenge to Arbitrator, ¶ 5 (Dec. 17, 2009); *see also Gallo*, PCA Case No. 55798, ¶¶ 33, 36 (rejecting the disqualification application but directing the arbitrator to decide whether to continue in his role as arbitrator or counsel).

30 *Gallo*, PCA Case No. 55798, ¶¶ 32–33.

31 *ICS Inspection*, PCA Case No. 2010–9, ¶ 5.

32 *See generally* Chapter 11 by Meg Kinnear in this volume, at 57.

33 ICSID Convention, Regulations and Rules, Apr. 10, 2006, 17 U.S.T. 1270, 575 U.N.T.S. 159, art. 14(1) [hereinafter ICSID Convention].

34 Professor James Crawford, *Confronting Global Challenges: From Gunboat Diplomacy to Investor-State Arbitration*, Remarks at the PCA Peace Palace Centenary Seminar in The Hague, Netherlands (Oct. 11, 2013), *available at* www.pca-cpa.org/shownews.asp?nws_id=398&pag_id=1261&ac=view.

> [W]hile impartiality refers to the absence of bias or predisposition towards one party, independence relates to the absence of external control, in particular of relations with a party that might influence an arbitrator's decision.[35]

Independence turns upon whether the arbitrator is somehow beholden to the appointing party or its counsel as the result of a pre-existing, current, or anticipated relationship.[36] Depending on the metric, this inquiry can be performed from a fairly objective point of view based upon verifiable facts (*e.g.*, counsel has appointed the arbitrator x times resulting in the payment of $y in arbitral fees, comprising z% of the arbitrator's annual compensation). While independence informs impartiality, the latter is concerned with the arbitrator's neutrality of thought as he approaches an arbitration, which calls for a more subjective analysis. Indeed, the arbitrator's state of mind and thought processes can never be fully known to the parties or the individuals tasked with making this assessment.[37]

In furtherance of the requirements of Article 14(1), Article 57 of the ICSID Convention provides in relevant part:

> A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14.[38]

Taken together, the provisions allow disqualification of an arbitrator upon sufficient proof of a "manifest lack of [independent judgment]."[39] This standard

35 *Caratube*, ICSID Case No. ARB/13/13, ¶ 53.

36 Giraldo-Carrillo, *supra* note 13, at 86.

37 *Id.* at 87.

38 ICSID Convention, *supra* note 33, art. 57.

39 *Id.* arts. 14(1), 57. The meaning of the word 'manifest' in Article 57 as it relates to each of the qualities required of an arbitrator under Article 14 has been questioned and debated at length. *See* Crawford, *supra* note 34 (concluding that recent trends reveal that (i) the requirement that a lack of independence be 'manifest' allows disqualification only where a near-certain lack of independence is proven and (ii) the 'reasonable doubt' standard as outlined in the UNCITRAL Rules is not applicable in disqualification applications pursued in the context of ICSID arbitrations).

has proven controversial, with commentary ranging from those who find it "appropriate,"[40] to "arguably high,"[41] to "near[ly] impossible" to satisfy.[42]

The implications of the 'manifest' standard are reflected in three recent proposals to disqualify party-appointed ICSID arbitrators due to repeat appointments.[43] In each case, the arbitrator in question had been appointed by the Bolivarian Republic of Venezuela ("Venezuela"). Despite differences in the underlying facts, all of the disqualification proposals were rejected because the challenging party had failed to establish the existence of an aggravating factor in addition to the repeat appointments themselves, such as the arbitrator's financial dependence on the appointing party or exposure to information not in the record.

2.2.2.1 Tidewater

In *Tidewater Inc., et al., v. Bolivarian Republic of Venezuela*,[44] Venezuela selected Professor Brigitte Stern, a French national, as its party-appointed arbitrator. At the time she accepted her appointment, Professor Stern failed to provide a statement of (i) her past and present professional business and other relationships and (ii) a list of circumstances that may cause her "reliability for independent judgment to be questioned by a party."[45] The claimants questioned this failure, which led to Professor Stern entering a full disclosure in which she

40 Rachel Bendayan, *Better the Arbitrator You Know Than the One You Don't?*, Norton Rose Fulbright Publ'ns (July 2011), http://www.nortonrosefulbright.com/knowledge/publications/53477/better-the-arbitrator-you-know-than-the-one-you-dont.

41 Andrew Newcombe, *Disqualification Based on Multiple Appointments—Divergence in Recent ICSID Decisions?*, Kluwer Arbitration Blog (June 23, 2011) http://kluwerarbitrationblog.com/blog/2011/06/23/disqualification-based-on-multiple-appointments%E2%80%94divergence-in-recent-icsid-decisions/.

42 Peter Ashford, *Arbitrators' Repeat Appointments and Conflicts of Interest*, Cripps Harries Hall LLP Publ'ns (Feb. 2011), http://www.crippslink.com/index.php?option=com_content&id=1146:arbitrators-repeat-appointments-and-conflicts-of-interest&Itemid=537.

43 *Tidewater Inc.*, ICSID Case No. ARB/10/5; *Universal Compression*, ICSID Case No. ARB/10/9, Decision on the Proposal to Disqualify Professor Brigitte Stern and Professor Guido Santiago Tawil, Arbitrators, ¶ 74 (May 20, 2011); *OPIC Karimum Corp. v. Venezuela*, ICSID Case No. ARB/10/14, Decision on the Proposal to Disqualify Professor Philippe Sands, Arbitrator (May 5, 2011). ("OPIC Karimum Corp.").

44 *Tidewater Inc.*, ICSID Case No. ARB/10/5. See Chapter V by Loretta Malintoppi and Andrea Carlevaris in this volume, at 153.

45 *Id.* ¶ 6.

noted that she had been appointed four times in the past six years by Venezuela and three times by Venezuela's counsel.[46]

The claimants challenged Professor Stern's appointment, focusing their argument on the bright-line test for disclosure provided by the IBA Guidelines. Specifically, the claimants submitted that Professor Stern had been appointed by Venezuela twice as many times as would give rise to "justifiable doubts" under section 3.1.3 of the Orange List.[47] The claimants insisted that repeat appointments create the potential for undue influence or the appearance of undue influence.[48] They added that such practices confer an unfair advantage to the appointing party because the arbitrator may have heard the appointing party's position multiple times, whereas the opposing party has but one opportunity to present its views, by which time the arbitrator may be past persuasion.[49] They specifically pointed to a potentially overlapping jurisdictional issue that might be decided by Professor Stern in one of the other cases, before hearing arguments in *Tidewater*.[50] Separately, the claimants submitted that the three recent appointments by Venezuela's counsel created an additional reason to doubt Professor Stern's impartiality according to section 3.1.7 of the Orange List.[51] The claimants argued that partiality was further reflected in Professor Stern's failure to disclose these facts at the outset of the proceedings.[52]

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46 Professor Stern was selected as Venezuela's party-appointed arbitrator in two other cases where the tribunal had been constituted, *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/06, in 2004, and *Brandes Investment Partners LP v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/3, in 2008. She was also party-appointed in one other case where constitution of the tribunal was still pending, *Universal Compression International Holdings, S.L.U. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/9. *Tidewater Inc.*, ICSID Case No. ARB/10/5, ¶ 8.

47 IBA Guidelines, *supra* note 17, § 3.1.3 ("The arbitrator has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties, or an affiliate of one of the parties.").

48 *Tidewater Inc.*, ICSID Case No. ARB/10/5, ¶ 13.

49 *Id.*

50 Specifically, the claimants argued that *Brandes* and *Tidewater* both involved a question as to whether the Venezuelan Law on Promotion and Protection of Investments provides a basis for Venezuela's consent to ICSID arbitration. The claimants alleged that the issue was likely to be resolved first in the *Brandes* case, resulting in her pre-judging the issue before the claimants in *Tidewater* were heard on the issue. *Tidewater Inc.*, ICSID Case No. ARB/10/5, ¶ 18.

51 IBA Guidelines, *supra* note 17, § 3.1.3.

52 *Tidewater Inc.*, ICSID Case No. ARB/10/5, ¶ 16.

Venezuela opposed disqualification on the basis that the information that Professor Stern failed to disclose was already publicly known.[53] Venezuela further argued that the claimants' reliance on the IBA Guidelines was improper because the Guidelines were designed for commercial arbitrations and, in any event, call for an analysis of an arbitrator's activities only within the past three years, not a longer timespan as suggested by the claimants.[54] For her part, Professor Stern affirmed her independence; explained that she is convinced by the "intrinsic value" of an argument, not the number of times she hears it; and maintained that the number of "most experienced arbitrators" is limited and that it would undermine the freedom of states to choose their arbitrators if they cannot nominate the same arbitrator in several cases.[55] Some agree with Professor Stern's characterization of repeat appointments as "neutral" and perceive arbitrators as exercising the same independent arbitral function in each case.

The decision on disqualification fell to the other two members of the ICSID tribunal. They determined that Professor Stern's non-disclosure did not call into question her independence or impartiality because it reflected an "honest exercise of judgment on her part in the belief that publicly available information did not require specific disclosure."[56]

As to the repeat appointments themselves, the panel determined that the IBA Guidelines were "useful," but that its determination had to be made in accordance with the strictures of Articles 14(1) and 57 of the ICSID Convention.[57] It noted that repeat appointments are an Orange List item for which the IBA Guidelines call for disclosure, not disqualification.[58] Emphasizing Article 57's requirement that there be a "manifest lack of independence or impartiality,"[59] the panel held that repeat appointments alone do not call for disqualification unless the applicant can point to other factors demonstrating that the arbitrator is not independent and impartial.[60]

> Depending on the particular circumstances of the case, either fewer or more appointments [than the IBA Guidelines] might, in combination

53 *Id.* ¶ 22.
54 *Id.* ¶ 23.
55 *Id.* ¶¶ 25–27.
56 *Id.* ¶¶ 55–57.
57 *Id.* ¶ 41.
58 *Id.* ¶ 43.
59 *Id.* ¶ 63.
60 *Id.* ¶ 64.

> with other factors, be needed to call into question an arbitrator's impartiality.[61]

The panel identified two additional considerations: (i) the prospect of continued and regular appointment, with the attendant financial benefits, and (ii) a material risk of extra-record influences as a result of the knowledge derived from the other cases.[62]

Applying these precepts, the panel found that there was no risk of dependence upon Venezuela given that Professor Stern "has held or currently holds arbitral appointments in many ICSID cases."[63] The panel further noted that in the only two decisions rendered in the other arbitrations, Professor Stern had "joined unanimous preliminary decisions rejecting applications made by Venezuela."[64] In response to the claimants' concern of pre-judging, the panel stated that it was "premature" to determine whether the two cases would present the same legal issue; it further noted its agreement with an approach adopted by the French courts:

> [T]here is "neither bias nor partiality where the arbitrator is called upon to decide circumstances of fact close to those examined previously, but between different parties, and even less so when he is called upon to determine a question of law upon which he has previously made a decision."[65]

The panel added that a contrary rule would render ICSID "unworkable."[66]

2.2.2.2 OPIC Karimum

In *OPIC Karimum Corp. v. Bolivarian Republic of Venezuela*, the claimant challenged the appointment of Professor Philippe Sands QC on the grounds that he had been appointed five times by either Venezuela or its counsel over a period of five years.[67] The claimant referenced ICSID Convention Articles 14(1)

61 *Id.* ¶ 59.

62 *Id.* ¶ 62.

63 *Id.* ¶ 64.

64 *Id.*

65 *Id.* ¶ 67 (quoting Cour d'appel [CA][regional court of appeal] Paris, Oct. 14, 1993, Rev. Arb. 1994, 380, note Bellet (Fr.) *cited in* Jean-francois Poudret & Sebastien Besson, Comparative Law of International Arbitration 421 (Stephen Berti & Annette Ponti, trans. 2007)) *see also* Chapter VIII by Romain Zamour in this volume, at 235.

66 *Id.* ¶ 68.

67 *OPIC Karimum Corp.*, ICSID Case No. ARB, ¶ 18 (May 5, 2011).

and 57 and explained that "the requirement of impartiality implies the 'absence of a bias or predisposition toward one of the parties.' "[68] Accordingly, the claimant maintained that it was not necessary to prove actual bias, but only the appearance of bias.[69] As in *Tidewater*, the claimant referenced the IBA Guidelines' Orange List factors and argued that Professor Sands's multiple "points of connection" to Venezuela exceeded the Orange List threshold and created justifiable doubt as to the propriety of his appointment.[70]

In response, Venezuela stressed that the ICSID Convention establishes a test of "manifest" lack of independence or impartiality.[71] Venezuela further argued that the IBA Guidelines are not mandatory, and even if they were applied, disqualification on their basis would not be automatic.[72] In his submission, Professor Sands rejected the claim of dependence, explaining, *inter alia* that "during the calendar year 2010 'the proportion of [his] total income that was obtained from sitting as an arbitrator was less than 5.89%.' "[73]

The deciding panel, consisting of the other two arbitrators, issued its decision five months after *Tidewater*. The panel determined that a "relatively high burden" applied for disqualification proposals concerning arbitrators acting in ICSID arbitrations: Article 57's 'manifest' requirement mandates that the lack of independence be "clearly and objectively established."[74] "Accordingly," the panel continued, "it is not sufficient to show an appearance of a lack of impartiality or independence."[75] The panel, however, did not accept the proposition advanced in *Tidewater* that repeat arbitrator appointments are "neutral."[76] To the contrary, it stated that confidence in investor-state arbitration

> may be adversely affected by a perception that multiple appointments of the same arbitrator by a party or its counsel arise from a relationship of familiarity and confidence inimical to the requirement of independence established by the Convention.[77]

68 *Id.* ¶ 15.
69 *Id.* ¶ 16.
70 *Id.* ¶ 19.
71 *Id.* ¶ 26.
72 *Id.* ¶ 27.
73 *Id.* ¶ 40.
74 *Id.* ¶ 45.
75 *Id.* ¶ 46.
76 *Id.* ¶ 47.
77 *Id.*

Rejecting as "unpersuasive" the notion that a party chooses its arbitrator based on her "independence and competence," the panel instead found that the choice of arbitrator is a "forensic decision" reflecting the party's "prospects of success in the dispute."[78] The panel viewed repeat appointments as "an objective indication of the view of parties and their counsel that [they are] more likely to be successful with the multiple appointee."[79] The panel further stated that the IBA Guidelines, while not binding, correctly identify repeat appointments as bearing upon impartiality and independence.[80]

Notwithstanding its divergence with *Tidewater* as to the concerns arising from repeat appointments, the panel determined that the claimant failed to establish the requisite "manifest" lack of independence. Finding the repeat appointments by themselves insufficient, the panel determined that no additional factor was present, as Professor Sands had "extensive independent income sources" and was not financially dependent upon the appointments by Venezuela or its counsel.[81]

2.2.2.3 Universal Compression International Holdings

Universal Compression International Holdings, S.L.U. v. Bolivarian Republic of Venezuela[82]—decided fifteen days after *OPIC Karimum*—also involved a challenge to Venezuela's appointment of Professor Stern on the grounds that she had been appointed by Venezuela in at least three other pending ICSID cases (including *Tidewater*) and by the same counsel to Venezuela on two prior occasions.[83] Professor Stern did not disclose her other appointments at the

78 *Id.*

79 *Id.*

80 *Id.* ¶ 48.

81 *Id.* ¶¶ 52, 55.

82 *Universal Compression*, ICSID Case No. ARB/10/9, (May 20, 2011).

83 *Id.* Venezuela simultaneously challenged the arbitrator appointed by the Claimant, Professor Guido Santiago Tawil, because of his alleged close professional ties with several members of counsel for the Claimant. *Universal Compression*, ICSID Case No. ARB/10/9, ¶ 15. That application was denied by the Chairman of ICSID's Administrative Council. *Id.* ¶ 107. Specifically, the Chairman found that it was not "evident" that the mere fact of a relationship between him and counsel for *Universal Compression* gave rise to a "manifest" lack of impartiality, especially considering that this situation is included in the IBA Guidelines' Green List of acceptable relationships that do not require any disclosure. *Id.* ¶ 101.

outset of the proceedings,[84] but provided a supplemental disclosure several months later, shortly after the disqualification proposal was filed in *Tidewater*.[85]

The claimant's application trained upon Professor Stern's alleged inability to "inspire full confidence" regarding her impartiality and independence.[86] The application relied heavily upon the IBA Guidelines and claimed that Professor Stern's independence was undermined by her prior appointments by Venezuela and its counsel, as well as involvement in ICSID cases dealing with the same legal issues.[87] The claimant argued that, despite the different claimants, these cases involved common factual and legal issues, such that Professor Stern would

> not be learning of Venezuela's actions and its defenses afresh in the present case—because she ha[d] already been exposed to them in the first two cases and [would] likely soon hear them in the *Tidewater* case—[which] increases the probability that she [would be] unable to judge the present case impartially and independently.[88]

The claimant also indicated that the standard under Article 57 concerned only the level of evidentiary proof:

> [T]he "manifest" criterion merely means that an arbitrator's lack of Article 14(1) qualities is clear; it does not mean that a claimant must show that the arbitrator manifestly lacks these qualities.[89]

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84 *Universal Compression*, ICSID Case No. ARB/10/9, ¶ 9.

85 *Id.* ¶¶ 6, 10. Professor Stern's disclosure itemized the same information as the disclosure she submitted in *Tidewater*, namely, that she had been appointed as Venezuela's party-appointed arbitrator in *Vannessa Ventures Ltd. v. Venezuela*, ICSID Case No. ARB(AF)/04/06 in 2004, *Brandes Investment Partners LP v. Venezuela*, ICSID Case No. ARB/08/3 in 2008, and *Tidewater Inc. v. Venezuela*, ICSID Case No. ARB/10/5 in 2010. *See id.* ¶ 10. Two of those cases involved appointment of Professor Stern by the same counsel to Venezuela. *See id.* ¶ 26.

86 *Universal Compression*, ICSID Case No. ARB/10/9, ¶ 24.

87 *Id.* ¶¶ 25–26.

88 *Id.* ¶ 25 (noting that all four cases involve claimants who are "foreign investors in service industries in Venezuela, who [allege] that Venezuela has seized property through expropriatory measures").

89 *Id.* ¶ 21.

As it had done in *Tidewater* and *OPIC Karimum*, Venezuela highlighted the textual standard under the ICSID Convention and argued that there was no "manifest" lack of independence or impartiality.[90] Venezuela added that a challenge must be based upon objective facts which, in the eyes of a reasonable and informed third party, demonstrate that the arbitrator at issue lacks independence or impartiality.[91]

In his decision, the Chairman of ICSID's Administrative Council began by clarifying the proper standard under Article 57, emphasizing that "the notion of impartiality is viewed objectively" and that the term "manifest" imposes a "relatively heavy burden of proof on the party making the proposal."[92] He found "no objective fact" showing that Professor Stern's independence or impartiality had been "manifestly impacted by the multiple appointments."[93] The Chairman further found that Professor Stern's past appointment in more than twenty other ICSID cases showed she was "not dependent—economically or otherwise—upon [Venezuela]."[94] He dismissed as "speculative" the claimant's argument of overlapping issues, echoing *Tidewater*'s conclusion that the investment arbitration framework cannot function if arbitrators are forestalled from addressing similar issues in subsequent arbitrations.[95] His inquiry concluded that Professor Stern satisfied the applicable ICSID standard and that there was no "manifest lack of independence or impartiality."[96]

2.3 *Questions Arising Out of the Existing ICSID Standard*

While the panels in *Tidewater* and *OPIC Karimum* came to opposite conclusions with respect to the 'neutrality' of repeat appointments, they ultimately resolved the issue of disqualification the same way: negatively. Both decisions, as well as *Universal Compression*, suggest that disqualification requires some factor in addition to the mere presence of repeat appointments. This is compatible with the IBA Guidelines' to treat repeat appointments as a basis for disclosure, not automatic disqualification. But the inquiry into "additional factors" required the panels to look into the individual circumstances of the challenged arbitrators, including votes in prior cases and aspects of their

90 *Id.* ¶ 29.
91 *Id.* ¶ 30.
92 *Id.* ¶ 71.
93 *Id.* ¶ 77.
94 *Id.*
95 *Id.* ¶¶ 78, 83.
96 *Id.* ¶ 96.

personal income.[97] In application, then, these decisions focus on actual bias that may result from repeat arbitrator appointments.[98] But this approach fails to address the lingering doubts raised by the appearance of impartiality inherent in repeat appointments. The emphasis upon the challenged arbitrator's individual circumstances, moreover, offers scant guidance for future cases.

In support of their test, the co-arbitrators in *Tidewater* noted that "national courts" considering disqualification for multiple arbitral appointments "normally reject them in the absence of aggravating circumstances."[99] The rationale behind these domestic holdings, however, should give some pause. For example, in the United States, the Federal Arbitration Act provides for the enforcement of arbitral awards absent, *inter alia*, "evident partiality" by the arbitrator.[100] This demanding standard reflects the limited role of national courts in reviewing arbitral awards.[101] Arbitral institutions, in contrast, have a greater role and responsibility in promoting the integrity of the proceedings they administer. The U.S. standard is also premised upon the notion that the parties, by agreeing to select their own arbitrators from a tight-knit community, have chosen expertise "at the expense of complete impartiality."[102] The Seventh Circuit Court of Appeals thus rejected a challenge to repeat appointments in the reinsurance context because the arbitrator's interest in future employment was "endemic to arbitration that permits parties to choose who will decide" the disputes.[103] More recently, the same court—again emphasizing party autonomy and choice—upheld an arbitration award against a claim of arbitrator bias (the arbitrator had been appointed by the same party in a related arbitration) on the theory that an arbitrator is "disinterested" so long as he lacks "a financial or other personal stake in the outcome."[104] Decisions like these acknowledge, as did the panel in *OPIC Karimum*, that an appearance of partiality arises from multiple appointments of the same arbitrator, but they let it pass on the assumption that this is what the parties have chosen, *i.e.*, the

97 See Chapter III by Sarah Grimmer in this volume, at 99.

98 Giraldo-Carrillo, *supra* note 13, at 87.

99 *OPIC Karimum Corp.*, ICSID Case No. ARB, ¶ 61.

100 The Federal Arbitration Act, 9 U.S.C. § 10(a)(2) (2002) (noting that a U.S. court may vacate an arbitrator's award "[w]here there was evident partiality . . . in the arbitrator[]"); *see also Commonwealth Coatings Corp. v. Cont'l Casualty Co.*, 393 U.S. 145 (1968).

101 Kuo, *supra* note 25, at 259 (citing Nigel Blackaby et al., Redfern and Hunter on International Arbitration 277 (2009)).

102 *Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters Benefit Funds*, 748 F. 2d 79, 83 (2d Cir. 1984).

103 *Trustmark Ins. Co. v. John Hancock Life Ins. Co.* (*U.S.A.*), 631 F. 3d 869, 873 (7th Cir. 2011).

104 *Id.*

loss of impartiality is part and parcel of the parties' agreement to arbitrate with their own arbitrators.

Although this tradeoff between expertise and impartiality may be acceptable in certain forms of commercial arbitration, particularly in highly specialized industries, it is unlikely to satisfy the expectations of participants in and observers of investor-state arbitration as it exists today. Noting the growth, sophistication, and importance of international investment arbitration, the Chief Justice of Singapore, Sundaresh Menon, has reflected that:

> [T]he modern arbitrator must recognize that international investment arbitration at least is no longer simply a manifestation of party autonomy in the resolution of private disputes. The arbitrator today is the custodian of what is rapidly becoming the primary justice system integral to the proper functioning of international trade and commerce.[105]

The notion of the arbitrator as the 'custodian' of the 'primary' system of international adjudication calls for reconsideration of the balance that has been struck between party autonomy and procedural fairness. And it is important to recognize that expertise and judicial temperament are not mutually exclusive—this is not an either-or proposition. Both sides in investment arbitration justifiably expect neutrality in the arbitrators called upon to decide what are often very significant disputes. If parties want to appoint their own arbitrator, they also want the other side's arbitrator to be open to reason. Most parties, both private and sovereign, would say "yes" in response to the following question:

> [W]ould you like it if we find a way to keep the other side from appointing somebody who may turn out to be partisan and obstreperous?[106]

Yet when it comes to disqualification, it is harder to remove an international arbitrator than it is a U.S. federal judge. As the Seventh Circuit Court of Appeals has held, the standard for disqualification is higher for arbitrators than for domestic judges out of respect for the parties' freedom of contract.[107] Under U.S. law, a federal judge "shall disqualify himself in any proceeding in which his or her impartiality might reasonably be questioned."[108] The purpose of this law

105 Menon, *supra* note 1, at 13. See Chapter VIII by Romain Zamour in this volume, at 240 ("the dynamic capacity to hear an argument").

106 Paulsson, *supra* note 1, at 164.

107 *Merit Ins. Coatings Co. v. Leatherby Ins. Co.*, 714 F. 2d 673 (7th Cir. 1983).

108 28 U.S.C. § 455(a). *See generally* Charles Gardner Geyh, Judicial Disqualification: An Analysis of Federal Law (2010), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/

is to "avoid even the appearance of partiality;"[109] its concern "is not the reality of bias or prejudice but its appearance."[110] In contrast, the co-arbitrators in *OPIC Karimum* stated unequivocally that, with respect to international arbitrators, "it is not sufficient to show an appearance of a lack of impartiality or independence."[111] It is puzzling that disqualification would be more difficult in international arbitration considering that it lacks many of the safeguards that protect litigants in (well-functioning) domestic judicial systems, such as judicial appointment through a transparent vetting and confirmation process, guaranteed salaries, fixed terms, *de novo* appellate review, the existence of binding precedent, and less personal and professional interactions between bench and bar. If anything, the absence of such mechanisms in the arbitral realm calls for greater vigilance with respect to independence and impartiality.

The 'additional factors' test in *Tidewater, OPIC Karimum*, and *Universal Compression*, moreover, ignores the fact that many observers reasonably perceive repeat appointments to be problematic, irrespective of the personal integrity of the arbitrator in question.[112] These decisions focus upon the individualized circumstances of the challenged arbitrator, but actual bias does not seem to be a real concern in this context. Most persons selected as international arbitrators can plausibly be expected to have high ethical and intellectual standards and to be capable of disregarding the circumstances of their appointment from their analysis of the case. It would be quite extraordinary to think that an arbitrator would lose her independence of judgment as the result of a repeat appointment. Not only is actual bias the wrong question, it is an extremely difficult one to answer. Each of these decisions involved a fairly invasive and probing inquiry into the challenged arbitrators personal and professional circumstances without any clearly defined metric:

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judicialdq.pdf/$file/judicialdq.pdf; Ellen M. Martin, Disqualification of Federal Judges for Bias Under 28 U.S.C. Section 144 and Revised Section 455, 45 Fordham L. Rev. 139 (1976).

109 *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 858–862 (1988).

110 *Liteky v. United States*, 510 U.S. 540, 548 (1994); *see also Caperton v. AT Massey Coal Co., Inc.*, 129 S. Ct. 2252, 2266 (2009) (explaining that judicial reform has led almost all of the U.S. States to implement "[t]he ABA Model Code's test for appearance of impropriety [which seeks to determine] 'whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired'" (quoting Annotated Model Code of Judicial Conduct Canon 2 (2004)).

111 *OPIC Karimum Corp.*, ICSID Case No. ARB/10/14, ¶ 46.

112 Paulsson, *supra* note 1, at 279.

(1) *Tidewater* emphasized that in the only two decisions reached thus far in her other cases, Professor Stern had voted with her co-arbitrators against Venezuela. Is that proof of independence or merely an indication that Venezuela's position on those issues was unsound? Had Professor Stern dissented from those decisions, would that demonstrate dependence or bias? Is it the place of a disqualification panel to revisit the merits of prior rulings?
(2) *OPIC Karimum* found that Professor Sands had extensive and independent income sources. What if half of his income came from arbitral appointments? What about all? What if the arbitral fees from the Venezuela appointments cumulatively reached into the millions of dollars?
(3) *Universal Compression* noted that Professor Stern was not dependent, economically or otherwise, upon the appointments from Venezuela because she served on more than twenty ICSID panels. Would it tip the balance if that number were only ten? What about five?

This is not to call into question the ultimate findings in these decisions, but rather to highlight the inherent difficulty in trying to gauge what factors might or might not indicate whether a particular arbitrator is negatively affected by repeat appointments. Since no one can know for certain the mindset of another, the task inevitably devolves into making very difficult—if not subjective and arbitrary—judgment calls. The effort is fraught with indeterminacy. The endemic difficulties in the inquiry also undermine the persuasiveness of the conclusion. Reasonable doubts remain no matter what evidence is marshaled to show the absence of actual bias on the part of the arbitrator. The appearance of impartiality arising from multiple appointments, in short, is difficult to extirpate—and this, to repeat, is an area where perceptions matter greatly.

2.3.1 Moving Toward a More Objective Standard

The decisions in *Tidewater, OPIC Karimum*, and *Universal Compression* were influenced by the high 'manifest' standard for disqualification under the ICSID Convention. Subsequent ICSID disqualification decisions, however, have tempered the interpretation of Articles 14(1) and 57. As Professor Chiara Giorgetti summarizes in a recent comment, there appears to be a shift in the interpretation of the 'manifest' threshold toward something "more in line with the more common 'appearance of bias' standard."[113]

113 Chiara Giorgetti, *Towards a Revised Threshold for Arbitrators' Challenges Under ICSID?*, Kluwer Arbitration Blog (July 3, 2014), http://kluwerarbitrationblog.com/blog/2014/07/03/towards-a-revised-threshold-for-arbitrators-challenges-under-icsid/.

In *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*,[114] Venezuela challenged the claimant's party-appointed arbitrator, Jose Maria Alonso, because lawyers in other offices of his law firm, Baker & McKenzie, represented a different investor claimant in an ICSID case against Venezuela.[115] In considering the proposal for disqualification, the Chairman of ICSID's Administrative Council applied "an objective standard based on a reasonable evaluation of the evidence by a third party."[116] He interpreted Article 57's use of the word 'manifest' as meaning "evident" and "obvious," indicating that it is an evidentiary standard relating "to the ease with which the alleged lack of the qualities can be perceived."[117] The Chairman also determined—contrary to the decision in *OPIC Karimum*—that

> Articles 57 and 14(1) of the ICSID Convention do not require proof of actual dependence or bias; rather it is sufficient to establish the appearance of dependence or bias.[118]

Turning to the facts, the Chairman determined that the similarity of issues between the two cases would cause a reasonable third party to find an appearance of lack of impartiality.[119] The Chairman therefore upheld the challenge to Mr. Alonso's appointment.[120]

The same standards were reiterated and applied in *Caratube International Oil Co. LLP & Mr. Devincci Salah Hourani v. Republic of Kazakhstan*, where the claimant challenged Kazakhstan's appointment of Bruno Boesch based upon his prior appointment in an UNCITRAL case against Kazakhstan and multiple prior appointments by Kazakhstan's counsel.[121] The claimant argued that Mr. Boesch would pre-judge the merits of the pending case and not be able to exercise independent and impartial judgment given his involvement in the UNCITRAL case.[122] The deciding panel, consisting of the unchallenged

114 *Blue Bank Int'l & Trust (Barbados) Ltd. v. Venezuela*, ICSID Case No. ARB/12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal (Nov. 12, 2013).

115 *Id.* ¶¶ 22, 66.

116 *Id.* ¶ 60.

117 *Id.* ¶ 61.

118 *Id.* ¶ 59.

119 *Id.* ¶ 68.

120 *Id.* ¶ 69.

121 *Caratube* Case No. ARB/13/13, ¶¶ 71, 74–75 (Mar. 20, 2014).

122 *Id.* ¶ 27.

arbitrators, agreed with the claimant's analysis that the UNCITRAL case arose out of a common factual context.[123] The panel further determined that Mr. Boesch could not be expected "to maintain a 'Chinese wall' in his own mind"[124] and that he "may well be affected by information acquired in the other arbitration."[125] Employing the standard of "appearance" of bias, the panel determined that Mr. Boesch should be disqualified.

These recent decisions interpret the 'manifest' standard under Article 57 of the ICSID Convention in a way that more closely resembles the 'justifiable doubt' standard found in the UNCITRAL Rules.[126] Most significantly, these decisions reject the need for proof of "actual dependence or bias" and adopt an objective standard based upon the "appearance of dependence or bias." Whether or not this doctrinal change will result in more disqualifications in cases of repeat appointments,[127] it augurs against the subjective and individualized inquiries that marked the decisions in *Tidewater, OPIC Karimum*, and *Universal Compression*.

2.3.1.1 *The Utility of an Appearance-of-Bias Test*

The shift toward a more stringent and objective test is a positive one. In considering the issue of repeat appointments of the same arbitrator by the same

123 *Id.* ¶ 75.

124 *Id.*

125 *Id.* ¶ 75 (quoting EnCana Corp. v. Ecuador, UNCITRAL, LCIA Case No. UN3481, Partial Award on Jurisdiction, ¶ 45 (Feb. 27, 2004)).

126 "The ICSID Convention does not require proof of actual dependence or actual bias; rather, it is sufficient to establish the appearance of dependence or bias. The appearance of bias must be established 'on the basis of a reasonable evaluation of the evidence by a third party.'" Meg Kinnear, Panel Discussion at the American Society of International Law Conference: Challenge of Arbitrators at ICSID—An Overview (Apr. 12, 2014) (forthcoming in *ASIL Proceedings*) (citing *Caratube*, ICSID Case No. ARB/13/13, ¶¶ 54–57; Blue Bank Int'l & Trust (Barbados) Ltd. v. Venezuela, ICSID Case No. ARB/12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, ¶¶ 59–61 (Nov. 12, 2013); Urbaser S.A. et al., v. Argentine Republic, ICSID Case No. ARB/07/26, Decision on Claimants' Proposal to Disqualify an Arbitrator, ¶ 43 (Aug. 12, 2010)).

127 The panel noted in Caratube, that Mr. Boesch's prior appointments by respondent and its counsel did not, standing alone, justify disqualification. *Id.* ¶ 106. It adhered to the requirement that there be "other objective circumstances demonstrating that these prior appointments manifestly influence his ability to exercise independent judgment in the present arbitration. . . . What is decisive is not a party's or its counsel's expectation that the arbitrator appointed by them will decide in their favor, but the appointed arbitrator's ability to exercise independent judgment." *Id.* ¶ 107.

party or counsel, we begin in *media res*. Wholly apart from the issue of repeat appointments, there are already many significant challenges to the legitimacy of international investment arbitration. Repeat appointments, moreover, are associated with the broader debate over the propriety of unilateral party-appointments generally.[128] Selecting a proper disqualification standard is thus a piece of the more general obligation upon the institutions and actors in the field to protect and promote inter-state arbitration, and to do so with rigor.

The determination of actual bias entails an elusive, perhaps delusive, inquiry into the mind of the challenged arbitrator. It is impossible to divine the thought processes of another, and in some cases there could be subconscious influences unappreciated by the arbitrator himself. Mere proclamations of impartiality are insufficient. Those involved with and affected by investment arbitration decisions should have full confidence in the system, and this is promoted by ensuring that there are no reasonable doubts as to the arbitrator's independence from the appointing party or its counsel.

An appearance-of-bias test furthers this aim. In contrast with the ultimately inconclusive inquiry into an arbitrator's actual bias, a test based upon the

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128 Jan Paulsson, for instance, has suggested that parties should give more serious consideration to the advantages of providing (as do the LCIA Arbitration Rules failing a contrary stipulation) that all arbitrators should be chosen jointly or selected by a neutral body:

> Disputants tend to be interested in one thing only: a favourable outcome. In arbitration, they exercise the opportunity to make unilateral appointments, like everything else, with that overriding objective in view. The only solution which will be reliable in all circumstances is that an arbitrator, no matter the size of the tribunal, should be chosen jointly or selected by a neutral body. This essential aspect of the process should no longer be misused as a sales argument for arbitration. Confidence-enhancement is properly focused on procedural rights . . . rather than risking the ineluctable contamination of the ideal—that of an arbitrator trusted by both sides—by a hidden operational code of clientilism.

Paulsson, *supra* note 1, at 279. In Professor Paulsson's view, the current party-appointed arbitration model "result[s] [in] an expensive curiosity, namely a panel on which only the president is a true arbitrator." *Id.* at 164. In response, Gary Born has stated,

> One of the defining attributes of international arbitration has been the parties' intimate involvement in that process. A key characteristic of that is the parties' ability to choose one of the members of the tribunal. That gives them buy-in to the process and is one of the distinguishing features between arbitration and national court litigation. Taking that away would do grievous harm to the institution of arbitration.

Sebastian Perry, *When GAR Met Gary*, Global Arbitration Rev. (Nov. 26, 2014), http://globalarbitrationreview.com/news/aricle/33167/ (last visited Jan. 20, 2015). *See generally* Bishop & Reed, *supra* note 13, at 5–12; Kuo, *supra* note 25, at 251–54; Slaoui, *supra* note 8, at 103–19; Crawford, *supra* note 34; Ashford, *supra* note 42.

appearance of bias is relatively simple and straightforward: can the arbitrator's impartiality reasonably be questioned? Practical guidance may be had from those jurisdictions that have adopted the UNCITRAL Model Law, where the standard is one of 'justifiable doubt' as to an arbitrator's impartiality or independence.[129] As applied in Australia, this standard has been articulated as follows:

> [A]pprehended bias as a [basis for] disqualification [exists where] . . . in all the circumstances, a fair-minded lay observer with knowledge of the material objective facts might entertain a reasonable apprehension that the [adjudicator] might not bring an impartial and unprejudiced mind to the resolution of the matters before him.[130]

By focusing solely on the context of the appointment, there would be no need to perform an individualized inquiry into 'additional factors,' such as the arbitrator's other sources of income or her rulings in prior arbitrations.[131] An objective standard can be applied cleanly and efficiently, providing greater clarity and predictability to the parties as they select their arbitrators. And by focusing on objective perceptions, the standard goes to the residual doubts informed third parties might rationally harbor about an arbitrator's motivations.

Consistent with a more objective test, one possibility would be to deem a repeat appointment that exceeds the disclosure threshold set out in the IBA Guidelines as presumptively disqualifying on the theory that it creates a reasonable apprehension of bias. For example, since the IBA Guidelines provide that an arbitrator should disclose two appointments by the same party in three years, this rule would prevent a third appointment during the same time period. Although an outer limit on the number of repeat appointments is necessarily arbitrary, it tracks the reality that, with each additional appointment, graver doubts are raised about the arbitrator's impartiality and the appointing party's tactical strategy.

Of course a numeric cap would curtail, to some extent, the freedom of parties to choose their arbitrator. But the strength of the claim that there are insufficient qualified and experienced arbitrators from which parties can choose is waning in the face of the expansion and maturation of investment arbitration. As noted in the *Caratube* decision:

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129 UNCITRAL Model Law, *supra* note 27, art. 12.

130 *Gascor v. Ellicot*, [1997] 1 VR 332, 340.

131 *See supra* Part 2.2.2.

> [T]here exists a sufficient number of potential arbitrators for an appointment to be made without any appearance being given of an existing link, real or suspected, between the arbitrator and the appointing party and its counsel.[132]

And while limited in the number of repeat appointments they can accept, arbitrators should benefit from a bright line test that minimizes perceptions of partiality. An arbitrator viewed as partisan will be less effective in persuading the other arbitrators on the panel, which in turn could lead to fewer appointments. Indeed, if arbitrators are thought to be compromised by repeat appointments, their acceptance of them may be self-defeating. Judge Charles Brower, for one, has publicly stated he will not accept appointments in violation of the IBA Guidelines:

> I do not accept appointments, and have not been urged to accept appointments, by the same party or on the recommendation of the same counsel within the preceding three years. In fact, this situation is easy to avoid. . . .[133]

A hard and fast rule on repeat appointments would have the salubrious effect of minimizing or even obviating disqualification proposals. It would simplify the appointment process and save both parties the time and expense of disqualification proposals. Disqualification is a strong medicine. It can be seen as a personal attack on the ethics of an arbitrator of high standing. This puts the parties considering making a proposal, and arbitral institutions and co-arbitrators asked to decide the proposal, in a sensitive and difficult position. The co-arbitrators called upon to cast judgment on the challenged arbitrator know that it could be them facing disqualification in the next case. An objective standard would provide greater *ex ante* clarity and make this uncomfortable task easier. Rather than having to study the challenged arbitrator's

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132 *Caratube*, ICSID Case No. ARB/13/13, ¶ 108. See also Chapter VIII by Romain Zamour in this volume, at 244 (Reducing the pool of potential arbitrators, "may well have the effect of diversifying the pool of applicants").

133 *See generally* Chapter XI by Charles N. Brower in this volume, at 336. See Chapter XI by Charles N. Brower in this volume, at 335 (characterizing the claimant's submissions as "fictitious, false and malevolent").

personal circumstances, the co-arbitrators could make a more objective—and detached—analysis of the situation as perceived by a reasonable third party.[134]

Perhaps most important, minimizing the practice of repeat appointments would enhance the credibility of the international investment arbitration regime by minimizing doubts as to the impartiality and independence of party-appointed arbitrators. Such doubts are especially pernicious in this setting, where participation by the parties is voluntary and the stakes are high. The public scrutiny of investment arbitral awards, which affect sovereign decisions and taxpayer dollars, calls for an equally close scrutiny of arbitrator appointments.

For these reasons, the issue of repeat arbitrator appointments by the same party or law firm might best be handled by deeming presumptively disqualifying any appointment beyond the threshold for disclosure under the IBA Guidelines.

134 It may be countered that making disqualification easier would only fuel the flames of what many perceive to be an abuse of challenge applications for dilatory and strategic reasons. Abusive practices certainly should be curtailed through time limits and appropriate sanctions. Judith Levine recommends applying time bars "to reject challenges brought too long after the grounding circumstances". Chapter IX in this volume, at 279. But abuse at one end of the spectrum does not negate the need for integrity at the other. The standard for disqualification in the case of repeat appointments must stand or fall on its own merit. And there would be little room for abuse with respect to a clear numeric limit on repeat appointments.

CHAPTER 11

Tall and Small Tales of a Challenged Arbitrator

The Honorable Charles N. Brower, Sarah Melikian and Michael P. Daly

1 Introduction

In providing an historical perspective on arbitrator challenges during the American Society of International Law's 2014 Annual Conference, the Secretary-General for the International Centre for the Settlement of Investment Disputes ("ICSID"), Meg Kinnear, traced ICSID's experience back to the first-ever challenge lodged in *Amco Asia* v. *Indonesia*.[1] As counsel for Indonesia in that case, I was responsible for filing the challenge against the Claimant's appointee. Over 30 years later, I can report that in my capacity as an arbitrator, I have been challenged six times (that I can remember). Of note, in the Iran-United States Claims Tribunal's thirty-three year history, I am the only United States member to have been challenged by Iran—and, in another case, to have been challenged by the party that appointed me.

These experiences have provided me with a unique insight into the issues that arise in arbitrator challenges and the mechanics involved in resolving them. In the current debate over the 'crisis of legitimacy' in international arbitration,[2] there has not been much focus on challenges, or on how they are decided. However, it is worth considering these perspectives.

2 Background on How Challenges Are Decided

The distinctions in challenge decisions have more to do with the different arbitral institutions than with the varying standards. Consider, for example, the

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* All first person references in this Chapter are to Charles N. Brower.

1 *See Amco Asia Corp. v. Indonesia*, ICSID Case No. ARB/81/1, Decision on a Proposal to Disqualify an Arbitrator dated June 24, 1982 (unreported); *see also Amco Asia Corp. v. Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, ¶ 2 (Sept. 24, 1983) (describing unreported decision on proposal to disqualify an arbitrator).

2 *See generally* Charles N. Brower & Sadie Blanchard, *What's in a Meme? The Truth About Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States*, 52 Columbia J. Transnt'l L. 689 (2014) (describing and responding to the current assault on international investment arbitration).

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International Court of Arbitration of the International Chamber of Commerce ("ICC"), where you do not know who will decide the challenge. This is because under Article 14(3) of the ICC Rules, "*The Court* shall decide on the admissibility, and at the same time, if necessary, on the merits of a challenge."[3] Yet the ICC Court is not a 'court' in the normal sense of the word, but a large administrative body charged with the responsibility of overseeing the ICC arbitration process. It is composed of a chairman, a list of vice presidents, and other members appointed by the ICC's main governing body, the ICC Council in which each National Committee of the ICC is represented.[4] As of October 2014, the ICC Court's membership stood at 142, representing eighty-eight countries. Until 2009, every challenge to an arbitrator serving in an ICC arbitration was decided at the Court's plenary session, taking place once per month and involving up to sixty of the sitting members of the Court.[5] Since 2009, most challenges have been submitted to the ICC Court's weekly Committee Session, which consists of a constantly rotating group of three members, and if the Committee considers that a particular challenge might succeed, it submits the process back to the monthly plenary session.[6] In short, given that the Court is composed of many members who never meet in full complement, the result of a challenge can depend on who shows up for the meeting.

The reasons behind an ICC challenge decision can vary considerably, and the ICC therefore does not provide grounds for its decisions. Whereas most institutions do not stipulate whether or not they will provide any such reasons, the ICC has specifically set out that it will *not* do so. According to the ICC Rules:

> The decisions of the Court as to the appointment, confirmation, challenge or replacement of an arbitrator shall be final, and the reasons for such decisions shall not be communicated.[7]

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3 International Chamber of Commerce Rules of Arbitration, Art. 14(3) (2012) (emphasis added); *see also id.*, Art. 15(1) (providing for the replacement of an arbitrator "upon acceptance by *the Court* of a challenge") (emphasis added).

4 *See* International Court of Arbitration of the International Chamber of Commerce: List of Current Members, http://www.iccwbo.org/About-ICC/Organization/Dispute-Resolution-Services/ICC-International-Court-of-Arbitration/List-of-Current-Court-Members/ (last visited Oct. 26, 2014); *see also* Karel Daele, Challenge and Disqualification of Arbitrators in International Arbitration § 4–026, at 182 (2012).

5 Daele, *supra* note 4, § 4–026, at 182.

6 *Id.* § 4–027, at 182.

7 ICC Rules of Arbitration, Art. 11(4) (2012).

Whether this decision stems from the desire to avoid embarrassment to the challenged arbitrator or otherwise, it leaves the parties with no indication as to how the decision-making body, whatever its composition, arrived at its conclusion.

Similarly, the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC") does not issue reasoned decisions by its board, another large body tasked with resolving arbitrator challenge disputes. Article 15(4) of the SCC Rules provides that unless the non-challenging party agrees to the challenge, "the [SCC] Board shall make the final decision on the challenge."[8] This board is composed of one chairperson, two or three vice chairpersons, and a maximum of twelve additional members, each appointed for a period of three years.[9] Decisions on applications to challenge arbitrator appointments are addressed at monthly board meetings by a majority vote of all the members of the board.[10] At any given time, about half of the board members are non-Swedish nationals, who typically attend the monthly meetings via telephone.[11]

Parties to an arbitration proceeding in arbitral institutions such as the ICC and SCC typically receive their decisions in the form of a single-sentenced letter that does not provide any further elaboration. The lack of reasoned explanations in such decisions has resulted in significant criticism from the international arbitral community. For example, Gary Born states:

> Reasons underlying decisions on arbitrator challenges should be routinely provided to the parties to enhance the transparency of the arbitral process. . . . Parties pay significant fees to the bodies that make the decisions in relation to arbitrator challenges, and it is not appropriate for them to be denied information about the reasons for a decision on the crucial subject of the fitness for office of an arbitrator. The reasoning is of fundamental interest to the parties, in particular to the challenging party, who may have serious concerns about the suitability of an arbitrator to continue to act in the proceedings. Providing parties with decisions in response to arbitrator challenges would increase the parties' confidence in the decision-making process of the bodies ruling on arbitrator chal-

8 Arbitration Institute of the Stockholm Chamber of Commerce: Arbitration Rules, Art. 15(4) (2010).

9 Arbitration Institute for the Stockholm Chamber of Commerce: About the SCC, http://www.sccinstitute.com/about-the-scc/news/2015/new-scc-board-members/ (last visited June 6, 2015).

10 Daele, *supra* note 4, § 4–032, at 185.

11 *Id.*

> lenges. A reasoned decision is likely to hold greater legitimacy in the eyes of the parties, and would make the decision-making bodies more accountable for their reasoning. It is also more likely to be considered seriously if the challenge decision is ever appealed to the state court.[12]

By contrast to the ICC and SCC procedures, the London Court of International Arbitration ("LCIA") does provide grounds for the decisions it issues on arbitrator challenges. Although the 1998 LCIA Rules were silent on this issue,[13] the LCIA still made it a practice of providing reasoned decisions. To solidify this practice, the 2014 LCIA Rules explicitly provide for reasoned decisions:

> The LCIA Court's decision shall be made in writing, with reasons; and a copy shall be transmitted by the Registrar to the parties, the challenged arbitrator and other members of the Arbitral Tribunal (if any).[14]

The LCIA explains that it provides reasons because it

> considers that the parties (particularly the party bringing the challenge) and the arbitrators (particularly the arbitrator who has been challenged) should be made aware of the LCIA Court's view of the matters said to give rise to doubts as to the arbitrator's independence or impartiality.[15]

In practice, challenges are usually resolved by a division of three members of the LCIA Court.[16]

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12 Gary Born, *Institutions Need to Publish Arbitrator Challenge Decisions*, Kluwer Arbitration Blog (10 May 2010), http://kluwerarbitrationblog.com/blog/2010/05/10/institutions-need-to-publish-arbitrator-challenge-decisions/ (last visited Oct. 26, 2014).

13 London Court of International Arbitration Rules, Art. 10.4 (1998).

14 London Court of International Arbitration Rules, Art. 10.6 (2014); *see also id.*, Art. 29.1 (providing for "reasoned decisions on arbitral challenges under Article 10").

15 London Court of International Arbitration, *Frequently Asked Questions*, http://www.lcia.org//Frequently_Asked_Questions.aspx (last visited Oct. 26, 2014).

16 London Court of International Arbitration Rules, Arts. 3.1, 10.4 (1998) ("The functions of the LCIA Court under these Rules shall be performed in its name by the President or a Vice-President of the LCIA Court or by a division of three or five members of the LCIA Court appointed by the President or a Vice-President of the LCIA Court, as determined by the President."); London Court of International Arbitration Rules, Arts. 3.1, 10.6 (2014) ("The functions of the LCIA Court under the Arbitration Agreement shall be performed in its name by the President of the LCIA Court (or any of its Vice-Presidents, Honorary Vice-Presidents or former Vice-Presidents) or by a division of three or more members of the

Recently, the LCIA even published a collection of these decisions in a Special Edition of "Arbitration International," providing an abstract for each of the over thirty arbitrator challenges that had been decided by the LCIA Court up through 2011.[17] The project began in 2006 when the LCIA voted to publish its challenge decisions after considering a proposal to meet the arbitration community's need for a greater understanding of the parameters of arbitrator independence and impartiality.[18] What resulted are sanitized editions of the LCIA challenge decisions that protect the confidentiality of the parties and the arbitrators, and are redacted without compromising the reasoning of the decisions. The digests also include the names of the LCIA Court members who took part in the decisions.[19] The published decisions do not serve as binding precedent for future challenges, but they are intended to provide useful guidance that may give counsel pause before lodging a challenge in the future.[20] As noted by LCIA President, William ("Rusty") Park:

> People tend to talk in generalities about impartiality and independence. However, the devil lurks in the details. . . . [M]y guess is that the digests will be read with thoughtful interest.[21]

Similarly, the Permanent Court of Arbitration ("PCA") and ICSID both issue reasoned decisions on challenges. However, unlike the ICC or LCIA, it is not the 'court' of the PCA that decides those challenges, but rather its Secretary-General as the "appointing authority," presumably advised by the institution's legal counsel.[22] Additionally, sometimes the PCA is asked to select another institution or even an individual to decide the challenge. As expected,

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LCIA Court appointed by its President or any Vice-President (the 'LCIA Court').."); Thomas W. Walsh & Ruth Teitelbaum, *The LCIA Court Decisions on Challenges to Arbitrators: An Introduction*, 27(3) Arbitration International 283, 285–86 (2011) ("In practice, the challenges are usually resolved by a Division of three members of the Court.").

17 *See Challenge Digests*, 27(3) Arbitration International 315, 315–473 (2011).

18 Walsh & Teitelbaum, *supra* note 16, at 283.

19 *Id*. at 284.

20 *Id*.

21 Annalise Nelson, *The LCIA Arbitrator Challenge Digests: An Interview with William (Rusty) Park*, Kluwer Arbitration Blog (Nov. 23, 2011).

22 *See* Permanent Court of Arbitration, Arbitration Rules, Art. 13(5) ("In rendering a decision on the challenge, the appointing authority may indicate the reasons for the decision, unless the parties agree that no reasons shall be given."); *see also id*., Art. 6(1) ("The Secretary-General of the Permanent Court of Arbitration shall serve as appointing authority.").

the particular qualifications of the individuals who are appointed in that capacity vary.

At ICSID, challenges to one member of a three-arbitrator Tribunal are submitted to the Tribunal for the other (non-challenged) members to decide in the first instance. If the other Tribunal members find themselves "equally divided," or if the Tribunal has only a sole arbitrator, or if two or all three Members of a three-arbitrator Tribunal are challenged, then pursuant to ICSID Convention Article 58, the decision will be made by the Chairman of the Administrative Council, presumably on the recommendation of the ICSID Secretary-General.[23] The identity of the decision-makers and the mechanics of the decision-making process indeed appear to play a critical role in the outcome of arbitrator challenges in the ICSID context. A review of ICSID cases shows that challenges, in the rare cases when they are successful, almost always result from decisions issued by the Chairman of the Administrative Council rather than from the unchallenged members of the Tribunal.[24] In fact, the first instance in the nearly 50-year history of ICSID where two unchallenged arbitrators agreed to disqualify a third member of an ICSID Tribunal did not occur until 2014.[25]

Personally, I am of the opinion that challenge decisions should be reasoned and published. This allows the arbitration community, including arbitrators themselves, to be as informed as possible about the standards they are obligated to fulfill, so they may then avoid those circumstances that form the basis of a successful challenge. Ultimately, I do not believe that there is such a difference in institutional rules or standards, but the varied outcomes are due to how standards are applied. It is easy to see the difference between having a challenge decided by the challenged member's two colleagues as compared to any member who happens to show up for an ICC Court meeting.

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23 ICSID Convention, Art. 58 ("The decision on any proposal to disqualify a conciliator or arbitrator shall be taken by the other members of the Commission or Tribunal as the case may be, provided that where those members are equally divided, or in the case of a proposal to disqualify a sole conciliator or arbitrator, or a majority of the conciliators or arbitrators, the Chairman shall take that decision."); *see also* ICSID Arbitration Rule 9.

24 *See* Luke Peterson, *Analysis: The Scope for ICSID Arbitrators to Agree to Hand on to ICSID the Task of Resolving Challenges to Colleagues*, Investment Arbitration Reporter (Mar. 18, 2014) ("It may not be a coincidence then, that in *every* case where a challenged individual's fate was left in the hand of his tribunal colleagues, the challenge failed. Meanwhile, in the three instances where ICSID arbitrators are known to have been disqualified the decisions to disqualify [were] taken *not* by the challenged individual's co-arbitrators, but rather by the Chairman of ICSID's Administrative Council.") (emphasis in original).

25 *See Caratube Int'l Oil Co. v. Kazakstan*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification (Mar. 20, 2014).

3 Basis for Challenges

Arbitrators can be challenged for a variety of reasons. Returning to the first ICSID disqualification request in which I represented the Respondent, *Amco Asia Corp. v. Indonesia*,[26] we challenged the Claimant's appointee on the basis that the arbitrator in question had provided tax advice to the individual controlling all three corporate Claimants, and the arbitrator's law firm had shared a joint office and profit-sharing arrangement with the Claimant's counsel for many years.[27] Unlike the challenge procedures typically followed nowadays which can take several months, the disqualification request in *Amco Asia* was argued and resolved within three days.[28] The other two unchallenged members of the Tribunal decided the request between themselves under Article 58 and denied it, noting that while arbitrators sitting in ICSID disputes must exercise absolute impartiality, the ICSID system of party appointments inherently presumes some level of acquaintance between a party and its appointed arbitrator which should not, in and of itself, be sufficient to disqualify the arbitrator.

Another notable example that comes to mind is the challenge of an arbitrator for views he or she has expressed in scholarly publications, when similar questions may be at issue in a current proceeding. This was the case of Professor Campbell McLachlan, who was challenged in his first-ever appointment as arbitrator in an ICSID case, *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*.[29] One of the issues in *Urbaser* was the application of the Most Favored Nation (MFN) Clause in the Spain-Argentina bilateral investment treaty ("BIT"), which the Claimants argued should give them access to the more relaxed dispute settlement provisions of Argentina's BITs with Peru, Chile, the United States and France, which did not require that the dispute first be submitted to the courts

26 *Amco Asia Corp. v. Indonesia*, ICSID Case No. ARB/81/1.

27 As noted above, the decision rendered by the Tribunal is unpublished. For details concerning the challenge, see Christoph H. Schreuer et al., The ICSID Convention: A Commentary 1202–03 (2d ed. 2009); M. Michael Tupman, *Challenge and Disqualification of Arbitrators in International Commercial Arbitration*, 38 Int'l & Comp. L.Q. 26, 44 (1989); Audley Sheppard, Arbitrator Independence in ICSID Arbitration, *in* International Investment Law for the 21st Century 139–40, 144 (2009).

28 *See Amco Asia Corp. v. Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, ¶ 2 (Sept. 24, 1983).

29 *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26.

of the host country. In his 2007 book, "International Investment Arbitration, Substantive Principles," Professor McLachlan had written the following:

> [I]t is essential when applying an MFN clause to be satisfied that the provisions relied upon as constituting more favourable treatment in the other treaty are properly applicable, and will not have the effect of fundamentally subverting the carefully negotiated balance of the BIT in question. It is submitted that this is precisely the effect of the heretical decision of the Tribunal on objections to jurisdiction in *Maffezini v. Spain*. . . .
>
> It is submitted that the reasoning of the Tribunal in *Plama* [*v. Bulgaria*] is to be strongly preferred over that in *Maffezini*.
>
> The application of MFN protection will not be justified where it subverts the balance of rights and obligations which the parties have carefully negotiated in their investment treaty. In particular, it will not apply to the dispute settlement provisions, unless the parties expressly so provide.[30]

The Claimants challenged Professor McLachlan on the basis that he had "already prejudiced an essential element of the conflict that is the object of [the] arbitration [at issue]."[31] As is often the case when a party to a dispute challenges an arbitrator, Professor McLachlan submitted a statement in response in which he noted:

> It is important to distinguish the task of the legal scholar from that of the arbitrator. When writing a book or article, the scholar must express views on numerous general issues of law, based on the legal authorities and other material then available to him. . . . [T]he task of the arbitrator is completely different. It is to judge the case before him fairly as between the parties and according to the applicable law. This can only be done in the light of the specific evidence, the specific applicable law and the submissions of counsel for both parties.[32]

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30 *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan, Arbitrator, ¶ 21 (Aug. 12, 2010) (quoting Campbell McLachlan, Laurence Shore & Matthew Weiniger, International Investment Arbitration, Substantive Principles 254–57, 263 (2007)).

31 *Id.*, ¶ 23.

32 *Id.*, ¶ 31 (quoting from Prof. McLachlan's statement dated May 5, 2010).

I happen to think the Claimants in *Urbaser* raised a good challenge, an opinion I have shared with Professor McLachlan. But, in their decision, his co-arbitrators rejected the application, finding that

> [i]f Claimants' view were to prevail . . . the consequence would be that no potential arbitrator of an ICSID Tribunal would ever express views on any such matter, whether . . . procedural, jurisdictional, or touching upon the substantive rights deriving from BITs.[33]

Instead, his co-arbitrators considered that Professor McLachlan's opinions were made "in his capacity as a scholar and not in a decision that could have some kind of a binding effect upon him," such that his opinion would be subject to change "as required in light of the current state of academic knowledge."[34]

As would be expected, the Tribunal's subsequent Decision on Jurisdiction, in which jurisdiction was accepted, dealt with the MFN issue in a very artful way.[35] The Tribunal found that the Claimants were not required to comply with the eighteen-month local litigation requirement contained in Article X of the Spain-Argentina BIT without directly addressing the Claimants' MFN argument, the subject related to the challenge request.[36] In particular, the Tribunal determined that the ordinary meaning of Article X of the BIT at issue led to the conclusion that an investor was compelled to resort to domestic courts as a precondition to file a claim in international arbitration under the BIT.[37] However, the same provision provided for bilateral requirements—that is, the BIT only imposed a duty on an investor to the extent that the Host State could meet its own obligation of making available a competent court capable of rendering a decision on the substance within eighteen months.[38] After conducting a careful analysis of statistical evidence for Argentina's courts, the Tribunal concluded that none of the possible means for litigating domestically put forward by the Respondent were suitable to meet the Host State's requirements under Article X, as each would far exceed the eighteen-month limit.[39]

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33 *Id.*, ¶ 48.

34 *Id.*, ¶ 51.

35 *See Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction, ¶ 203 (Dec. 19, 2011).

36 *Id.*, ¶¶ 39, 47, 203.

37 *Id.*, ¶¶ 130–31.

38 *Id.*, ¶¶ 131, 148, 192.

39 *Id.*, ¶¶ 194–202.

Thus, the Claimants were not required to engage in local litigation and any analysis of the MFN provision became unnecessary.

The case of *Perenco Ecuador Limited v. the Republic of Ecuador & Empresa Estatal Pertoleos del Ecuador* provides another notable example.[40] Having been personally challenged in this arbitration, I share a piece of cautionary advice: be careful of what you say. A few years ago, I was asked by an old friend to give an interview for his publication, "The Metropolitan Corporate Counsel." In response to one question concerning my opinion about the most pressing issues for international arbitration in the future, I noted that certain countries, like Ecuador and Bolivia, were leaving ICSID and considering renunciation of one or more of their BITs, which could lead to problems.[41] Based on the interview, the Respondents filed a challenge against me.

Perenco was an ICSID case, but the parties had entered into an agreement at the outset of their dispute to 'side step' the normal ICSID disqualification procedures. Instead, they agreed that the PCA Secretary-General would decide any challenges in consideration of the International Bar Association Guidelines on Conflicts of Interest in International Arbitration ("IBA Guidelines"), not the ICSID Convention and Arbitration Rules.[42] The IBA Guidelines differ from the ICSID disqualification standards set forth in Articles 14 and 57 of the Convention in that they do not require a "manifest lack" of the prescribed qualities.[43] They

40 *Perenco Ecuador Ltd. v. Ecuador*, ICSID Case No. ARB/08/06.

41 The exchange was the following: "Editor: Tell us what you see as the most pressing issues in international arbitration. Brower: There is an issue of acceptance and the willingness to continue participating in it, as exemplified by what Bolivia has done and what Ecuador is doing. Ecuador currently is expressly declining to comply with the orders of two ICSID tribunals with very stiff interim provisional measures, but they just say they have to enforce their national law and the orders don't make any difference. But when recalcitrant host countries find out that claimants are going to act like those who were expropriated in Libya, start bringing hot oil litigation and chasing cargos, doing detective work looking for people who will invoke cross-default clauses in loan agreements, etc., the politics may change. After a certain point, no one will invest without having something to rely on." *See Perenco Ecuador Ltd v. Ecuador*, PCA Case No. IR-2009/1 (ICSID Case No. ARB/08/6), Decision on Challenge to Arbitrator, ¶ 27 (Dec. 8, 2009).

42 *Id.*, ¶¶ 2, 31.

43 ICSID Convention, Art. 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."); *id.*, Art. 57 ("A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a *manifest lack of the qualities required by paragraph (1) of Article 14*. A party to arbitration proceedings may, in

contain a "General Principle" that arbitrators shall be "impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so during the entire arbitration proceeding."[44] Additionally, under a second general standard on "Conflict of Interest," an arbitrator shall no longer act where there are "justifiable doubts as to the arbitrator's impartiality or independence," which arise

> if a reasonable person 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 as presented by the parties.[45]

As noted in the PCA decision, it was not necessary to find that I was "actually biased," but the Secretary-General found that my comments gave rise to justifiable doubts about my impartiality, as well as an appearance that I had prejudged the issues at stake.[46] However, the Secretary-General rejected the Respondents' arguments that my "decision to go public" (by giving the interview) demonstrated a lack of impartiality and rejected the Claimant's argument that my experience and reputation were relevant factors in considering "independence and impartiality."[47] The Secretary-General also rejected the Respondents' allegation that my statements amounted to a breach in confidentiality, as well as their argument that the stage of the proceedings was a relevant consideration.[48]

What made this case different was that the PCA became involved in the challenge because of the Parties' agreement, contrary to the mandatory ICSID procedures.[49] The PCA has been involved in a number of other ICSID arbitrator challenges, but this practice developed when the Chairman of

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addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV [setting forth the standards concerning the constitution of a Tribunal]."") (emphasis added).

44 IBA Guidelines on Conflict of Interest in International Arbitration, General Standard 1 (2004).

45 *Id.*, General Standard 2.

46 *Perenco Ecuador Ltd v. Ecuador*, PCA Case No. IR-2009/1 (ICSID Case No. ARB/08/6), Decision on Challenge to Arbitrator dated Dec. 8, 2009 ¶ 58.

47 *Id.*, ¶¶ 61–62.

48 *Id.*, ¶¶ 65–66, 68. In particular, he rejected Respondent's argument that a disqualification would cause minimal disruption to the proceedings (because they were at an early stage), and he rejected the assertion that my comments in the interview had revealed any confidential information from the arbitration.

49 *See* Chapter 2 by Meg Kinnear and Frauke Nitschke in this volume.

the ICSID Administrative Council asked the PCA to provide a non-binding "recommendation."[50] The decision of the PCA Secretary-General in *Perenco*, however, was not simply a recommendation but rather it purported to be a final decision. Thus, ICSID did not accept the PCA resolution as a disqualification within the meaning of the ICSID Convention. This issue has been thoroughly analyzed on the Kluwer Arbitration Blog under the title "Perenco v. Ecuador: Was There a Valid Arbitrator Challenge Under the ICSID Convention?"[51] In fact, the procedural details of the *Perenco* arbitration that are listed on the ICSID website do not make any reference to the challenge procedure before the Secretary-General of the PCA.[52]

Because a challenged member of an ICSID Tribunal remains on the Tribunal pending a valid decision on the challenge,[53] I could have theoretically remained on the *Perenco* Tribunal even after the PCA issued its decision, in which case Ecuador would have been required to re-file a challenge in accordance with ICSID's framework. Instead, I voluntarily resigned from the Tribunal, with the consent of the Claimant and my co-arbitrators. When the challenge was initially made, I inquired privately of the Claimant, which had appointed me, whether it wished me to resign (as is my practice whenever I am challenged by the party that did not appoint me). The Claimant eventually agreed that I resign so as to abide by its agreement with Ecuador and to ensure that any future award in the Claimant's favor would not be open to criticism that the Tribunal had not been properly constituted. The consent of my co-arbitrators was required in order to permit the Party that had appointed me to appoint my substitute, rather than such appointment having to be made by ICSID.[54]

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50 *See, e.g., Abaclat & Others v. Argentina*, PCA Case No. IR 2011/1 (ICSID Case No. ARB/07/5), Recommendation dated Dec. 19, 2011 Pursuant to the Request by ICSID dated November 18, 2011 on Respondent's Proposal for the Disqualification of Professor Pierre Tercier and Professor Albert Jan van den Berg dated Sept. 15, 2011; Schreuer, *supra* note 27, at 1212.

51 Federico Campolieti & Nicholas Lawn, *Perenco v. Ecuador: Was There a Valid Arbitrator Challenge Under the ICSID Convention?* Kluwer Arbitration Blog (Jan. 28, 2010) (explaining why the PCA decision was a nullity from the perspective of ICSID).

52 *See* ICSID Website: *Perenco Ecuador Limited v. Republic of Ecuador* (ICSID Case No. ARB/08/6): Case Details, *available at* https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?caseno=ARB/08/6&tab=PRD (last visited June 6, 2015); *see also* Daele, *supra* note 4 § 4–020, at 179.

53 Schreuer, *supra* note 27, at 1211.

54 *See* ICSID Arbitration Rule 8(2) ("If the arbitrator was appointed by one of the parties, the Tribunal shall promptly consider the reasons for his resignation and decide whether it consents thereto.").

Another unusual example occurred in the ICSID case of *Tanzania Electric Supply Company Limited v. Independent Power Tanzania Limited*.[55] By way of background, in 1999, the Claimant ("TANESCO"), a public utility company wholly owned by the Government of Tanzania, appointed me to the Tribunal. The Respondent ("IPTL") was a private company incorporated in Tanzania, but was a "foreign-controlled" entity as agreed upon by the Parties for purposes of jurisdiction pursuant to Article 25(2)(b) of the ICSID Convention.[56] The arbitration focused on a Power Purchase Agreement ("Agreement") between the two entities concerning an electricity generating facility in Tegeta, Tanzania. In 2001, the Tribunal hearing the case issued a Final Award along with several appendices outlining the Parties' respective rights and obligations under the Agreement, including TANESCO's obligation to follow a "Financial Model" that would determine monthly "capacity payments" it was required to make to IPTL.[57]

In 2008, seven years after the Award, IPTL submitted an application for interpretation of the Award because TANESCO had stopped providing its monthly capacity payments based on a dispute that had arisen between the Parties concerning the validity of the Financial Model. The same Tribunal that had issued the 2001 Final Award was reconstituted to consider IPTL's Request for Interpretation, and the Parties proceeded to file several rounds of written submissions. The interpretation proceeding was eventually discontinued as a result of a dispute among the IPTL shareholders. Before that time, however, I was challenged by TANESCO, the same party that had appointed me.

The challenge focused on two academic articles authored by one of my law clerks at the time, who had posted them on the Kluwer Arbitration Blog. TANESCO alleged that the blog entries (hypothetical scenarios about a dispute over a power plant tariff where one party fails to make its payment) were similar to the ongoing interpretation proceeding. As a result of the articles, TANESCO suggested that I had prejudged issues that our Tribunal had yet to decide. Upon receiving notice of TANESCO's request, I immediately undertook to complete certain steps it had requested, even though I did not agree with the substance of TANESCO's arguments. Specifically, I instructed my law clerk to disgorge to me all non-public materials relating to the case, refrain from any further work on the case, remove the two articles in question from the Kluwer website, and agree not to publish any non-public information about the

55 *Tanzania Electric Supply Company Limited v. Independent Power Tanzania Limited*, ICSID Case No. ARB/98/8, Final Award (July 12, 2001).

56 *Id.*, ¶¶ 1–13.

57 *Id.*, ¶¶ 53, 64 & Appendix F.

dispute. To further allay its concerns, I also offered to cooperate with TANESCO in any reasonable way.

Following this initial reaction, I took the opportunity to provide a more complete response to TANESCO, having reserved the opportunity to do so in my first communication. I explained that while I had no role in drafting the articles, in the spirit of mentoring and encouraging my law clerks to develop their own careers, I had provided this particular clerk with permission to write blog entries on the conditions that they be entirely hypothetical (hence exhibit no links to this case) and that I be permitted to police compliance with the first condition by reading the relevant articles before their submission to publication. My written response to TANESCO, copied to the other members of the Tribunal and Respondent, further set forth precisely why I continued to meet all of the requirements of Article 14(1) of the ICSID Convention, and it provided assurances that I had always adhered to the undertakings of the Declaration I had made in the case pursuant to Rule 6(2) of the ICSID Arbitration Rules.[58]

TANESCO persisted with the challenge, and my two co-arbitrators split on how to rule, thereby requiring that the decision go to the Chairman of the ICSID Administrative Council. While I firmly believed that the Claimant's request for my disqualification was without justification, I resigned in accordance with ICSID Arbitration Rule 8(2). I concluded that it was in the best interests of both ICSID and all others concerned that the dispute promptly be brought to an end and that TANESCO be provided with the opportunity to appoint as arbitrator someone in whom it had confidence.

It is very important to take the opportunity to respond to a challenge, which an arbitrator is permitted to do under the procedures of most institutions.[59] But in doing so, one must be sure not to say something that could then serve as a basis for disqualification! On that note, I will conclude with three interesting examples of disqualifications resulting from comments made by an arbitrator in response to a challenge.

First, in the long-running case, *Victor Pey Casado and President Allende Foundation v. Republic of Chile*,[60] the Respondent requested the disqualification of all three members of the arbitration tribunal, and it received three

58 *See* ICSID Arbitration Rule 6(2) (setting forth the declaration that each arbitrator shall sign before or at the First Session of the Tribunal); *see also supra*, note 45 (quoting Article 14(1) of the ICSID Convention).

59 *E.g.*, ICSID Arbitration Rule 9(3) ("The arbitrator to whom the proposal relates may, without delay, furnish explanations to the Tribunal or the Chairman, as the case may be.").

60 *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2.

different results. Following this, the Respondent's own party-appointed arbitrator immediately resigned. When the remaining two arbitrators declined to resign, ICSID's Secretary-General requested that the PCA Secretary-General provide a recommendation to the Chairman of ICSID's Administrative Council. The PCA recommended that Chile's proposal to disqualify the Tribunal President be rejected; but it recommended that the proposal to disqualify the Claimant's nominee, former International Court of Justice President Judge Mohammed Bedjaoui, be accepted. Apparently Chile had contended that Judge Bedjaoui's appointment as Foreign Minister of Algeria would pose diplomatic complications for Chile's foreign relations with Algeria, something that Judge Bedjaoui refuted.[61] Based on Judge Bedjaoui's reaction to the Respondent's initial request, the Respondent further alleged that he should be disqualified due to alleged bias and a lack of impartiality, and he was in fact disqualified.[62]

Professor Francisco Orrego Vicuña was recently disqualified in *Burlington Resources, Inc. v. Republic of Ecuador* under similar circumstances.[63] The Respondent in that case challenged Professor Vicuña on the basis that he had been appointed as arbitrator multiple times by the law firm that represented the Claimant in that case.[64] While the grounds for Respondent's initial challenge were not accepted by the Chairman of the ICSID Administrative Council because they were not promptly raised, Professor Vicuña was disqualified based on explanations he provided in response to the initial challenge,[65]

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61 The exact reasons underlying the challenge proposal and the resulting disqualification are not in the public domain, but there are various reports concerning this issue. *See* Schreuer, *supra* note 27, at 1206–07, 1212; Luke Peterson, *One of Two Arbitrators Disqualified in Pinochet-Era Expropriation Case at ICSID*, Investment Arbitration Reporter (Mar. 2, 2006); Luke Peterson & Damon Vis-Dunbar, *World Bank President Will Rule on Chile's Effort to Disqualify Tribunal in ICSID Case*, Investment Arbitration Reporter (Dec. 14, 2005).

62 Luke Peterson, *One of Two Arbitrators Disqualified in Pinochet-Era Expropriation Case at ICSID*, Investment Arbitration Reporter (Mar. 2, 2006).

63 *Burlington Resources, Inc. v. Ecuador*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña (Dec. 13, 2013).

64 *Id.*, ¶ 4.

65 The relevant portion of his response was the following: "Lastly there are some ethical assertions that cannot be left unanswered. Dechert admonishes this arbitrator to resign on ethical grounds as if Dechert's views were proven correct. This is certainly not the case. Moreover, the real ethical question seems to lie with Dechert's submissions and the handling of confidential information. To the best of this arbitrator's knowledge the correspondence concerning disclosure and other matters in *Pan American v. Bolivia* is part of the confidential record of that case. Dechert is in the knowledge of such correspondence

which were determined to "evidence[] an appearance of lack of impartiality with respect to" the Respondent and its counsel.[66]

The recently published collection of LCIA arbitrator challenge decisions provides a third example. In Case No. 1303, the Claimant challenged the sole arbitrator hearing the case on the grounds that the arbitrator had allegedly failed to disclose information about his role in his country's Chamber of Commerce and Trade Court of Arbitration, which were allegedly known for being unfair.[67] The LCIA division considering the challenge found no grounds to call into question the arbitrator's impartiality based on the issues raised in the Claimant's challenge. However, the division took into account the language used in the arbitrator's response in which he characterized the Claimant's submissions as "fictitious, false and malevolent."[68] The LCIA division upheld the challenge because

> the self-evident tension and ill-feeling that had arisen as a result of the challenge had created circumstances that may, of themselves, give rise to justifiable doubts as to the arbitrator's impartiality.[69]

4 Conclusion

So, of what should an arbitrator be aware when challenged, and what steps should he or she take? The most important thing is to speak with the party who appointed you and to offer to resign if the party does not want to incur the costs of a challenge procedure. I have been asked to resign because a party did not wish to finance the challenge proceedings.

As for challenges due to repeat appointments from the same firm or party, I have never been challenged on this basis. And the reason is simple: whenever I am asked to serve as arbitrator I, along with the counsel who has approached me, carefully review my appointments within the last three years.[70] During this

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as counsel for Bolivia, but it does not seem appropriate or ethically justified that this information be now used to the advantage of a different client of Dechert, as use that in any event should be consented to by the other party to that case." *Id.*, ¶ 61.

66 *Id.*, ¶ 80.

67 *LCIA Reference No. 1303, Decision Rendered November 22, 2001*, 27(3) Arbitration International 342, 343 (2011).

68 *Id.* at 344.

69 *Id.*

70 *See* IBA Guidelines on Conflicts of Interest in International Arbitration, Art. 3.1.3.

review, I consider whether the same counsel has previously appointed me in that period and, if so, how many times it has done so. I do not accept appointments, and have not been urged to accept appointments, by the same party or on the recommendation of the same counsel within the preceding three years. In fact, this situation is easy to avoid, unlike some of the other challenges that have been discussed, where the issues involved are more nuanced.

Additionally, one should by all means respond to the challenge. A thorough explanation from the challenged arbitrator may clarify things for the parties and provide reassurance to the party that filed the challenge that the arbitrator in question remains impartial. If, however, the response becomes an attack on the challenging party, the arbitrator faces the risk of creating new grounds to sustain the disqualification request.

CHAPTER 12

The Approach of Counsel to Challenges in International Disputes

Andrew B. Loewenstein

1 Introduction

Of the many issues that confront counsel while representing parties in disputes before international courts and tribunals, few are as fraught as having to decide whether to seek the disqualification of a judge or arbitrator before whom one is appearing. Not only does challenging a judge or arbitrator's fitness to sit as an adjudicator involve application of indeterminate rules to what are often *sui generis* factual circumstances, it inevitably requires counsel to navigate treacherous terrain. In the best of circumstances, counsel must argue that the actions of a judge or arbitrator have created the appearance that he or she lacks impartiality or independence; at worst, counsel has to make the case that a judge or arbitrator harbors actual bias and/or lacks independence. Counsel must handle these delicate matters with tact, sensitivity, and the full measure of respect that is due in international proceedings.

Seeking to disqualify a judge or arbitrator presents the further difficulty that it exposes the challenging party, and by extension, its counsel, to the charge—however unfounded it may be—that the disqualification proposal is being made for abusive, ulterior purposes, such as to delay the proceedings. The treatment of challenges in International Centre for Settlement of Investment Disputes ("ICSID") arbitration, where ICSID Rule 9(6) requires the case to be suspended while the disqualification proposal is pending, makes the party seeking disqualification especially vulnerable to that charge.[1] For this reason, challenge proposals often prompt vigorous objections, and sometimes even accusations of bad faith. In one ICSID case, the party opposing disqualification charged the other with engaging in a "transparent attempt to sabotage" the proceedings.[2] To be sure, the leveling of unkind words against the opposing

1 ICSID Convention, Regulations and Rules, rule 9(6), Oct. 14, 1966, 17 U.S.T. 1270 [hereinafter ICSID Convention].

2 *Burlington Resources, Inc. v. Ecuador*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuna, ¶ 39 (Dec. 13, 2013).

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side is, regrettably, an all-too-common feature of international arbitration, but it is fair to say that initiating challenge proceedings can elicit responses that are laced with particular vitriol.

The most salient characteristic that distinguishes the decision to seek disqualification from other decisions that counsel may be called upon to make, and the one which renders the choice especially difficult, is that the subject of the request is the adjudicator him or herself. Put simply, it is not the other party who stands accused of wrongdoing, but the judge or arbitrator. This presents thorny tactical considerations for counsel to consider when deciding whether a challenge should be pursued.

To begin with, counsel must weigh the possibility that the challenge may be unsuccessful, and that the challenged judge or arbitrator, by virtue of having had his or her qualifications for sitting as an adjudicator called into question, may become disposed against the party who brought the unsuccessful challenge. The risk is not only that the challenged judge or arbitrator will develop a conscious bias, although the possibility of that happening certainly exists. (For instance, in *Burlington Resources v. Ecuador*, an arbitrator was disqualified, not for the reasons set out in the original disqualification proposal, but because the arbitrator's observations on the challenge manifestly evidenced an appearance of lack of impartiality against the challenging party and its counsel).[3] Should the challenge prove unsuccessful, counsel must also contemplate whether the arbitrator may come to view its client's legal and factual submissions with less of an open mind than would have been the case had the challenge not been brought. It is, of course, impossible to determine whether this happens, but it is not fanciful to think that an arbitrator who believes he or she has been the subject of unfounded claims may become, even if unconsciously, more disposed to view the challenging party's other arguments with a greater degree of skepticism.

The possible effects a challenge may have on the unchallenged members of the court or tribunal, who will likely have their own views regarding the circumstances under which a disqualification proposal is appropriate, and whether the facts giving rise to the challenge qualify, should also be taken into account when deciding whether disqualification should be pursued. It is not unlikely that the unchallenged members may themselves have been, are currently, or can envision being, the subject of challenges in other cases, and so may have pre-existing sensitivities about the matter that could cause them to sympathize with the challenged arbitrator and/or look askance upon the decision to bring the challenge.

3 *Id.*, ¶¶ 78–80.

Nor should counsel underestimate how difficult it may be to disqualify a judge or arbitrator, especially those held in high esteem within the close-knit international arbitration community. The Secretary-General of the Permanent Court of Arbitration was unquestionably correct when he observed, in sustaining a challenge to the appointment of a well-respected arbitrator, that no "special deference" should be given to "arbitrators based on their level of experience or standing in the international community," and that the fact that an arbitrator is "highly regarded in the field" is "irrelevant" to the challenge inquiry.[4] Nonetheless, counsel should not lose sight of the difficulties that must be surmounted when challenging such individuals.

2 The Ethical Obligations of Counsel

Despite the difficulties outlined above that can complicate the pursuit of a judge or arbitrator's disqualification, there are circumstances in which challenges should be pursued. In determining whether this is the case, counsel should be guided by its overarching obligation to protect the interests of the client, including first and foremost, the right to an impartial and independent tribunal.

There are no binding transnational rules of professional responsibility governing the ethical obligations of lawyers; nor do such codes regulate the conduct of counsel who practice before the various international courts and arbitral tribunals. Nonetheless, in deciding whether a challenge should be brought, counsel must keep in mind that, as the IBA Guidelines on Party Representation in International Arbitration observes, he or she "acts on behalf of the *Party*."[5] Counsel must therefore subordinate all other considerations to the client's interests. This overriding principle is reflected in The Hague Principles on Ethical Standards for Counsel Appearing Before International Courts and Tribunals, which the Study Group of the International Law Association on the Practice and Procedure of International Courts and Tribunals adopted in 2010. They provide that

4 *Perenco Ecuador Ltd. v. Republic of Ecuador & Empresa Estatal Pertoleos Del Ecuador*, PCA Case No. IR-2009/1, Decision on Challenge to Arbitrator, ¶ 62 (Dec. 8, 2009).

5 IBA Guidelines on Party Representation in International Arbitration, cmt 1–3 (May 25, 2013) (emphasis added).

> [c]ounsel has a duty of loyalty to his or her client consistent with a duty to the international court or tribunal to contribute to the fair administration of justice and the promotion of the rule of law.[6]

This duty encompasses the obligation to

> loyally discharge his or her professional duties in the best interests of the client, placing those interests before his or her own or those of any third party to the proceedings.[7]

The ethical obligation of counsel to place the interests of the client at the forefront is, of course, not unique to the representation of clients before international courts and tribunals; it lies at the core of any effective legal representation. As the U.N. Basic Principles on the Role of Lawyers explain, the "duties of lawyers towards their clients" include

> [a]dvising clients as to their legal rights and obligations, and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients,

as well as "[a]ssisting clients in every appropriate way, and taking legal action to protect their interests."[8]

The principle is reflected in the codes of professional responsibility that regulate the legal profession on the domestic level. The American Society of International Law's Task Force on International Professional Responsibility observed that it is "more or less universally accepted" that "the lawyer should faithfully and effectively represent the client," and that "[v]irtually all systems impose on lawyers obligations to act with care."[9] For instance, Article 2.7 of the Code of Conduct for European Lawyers provides that

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6 The Hague Principles on Ethical Standards for Counsel Appearing Before International Courts and Tribunals, Study Group of the International Law Association on the Practice and Procedure of International Courts and Tribunals, ¶ 2.1 (Sept. 27, 2010).

7 *Id.* ¶ 3.1.

8 Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, Aug. 27–Sept. 7, 1990, *Basic Principles on the Role of Lawyers*, UN Doc. A/CONF.144/28/Rev. 1, 118, ¶ 13. Further, "[l]awyers shall always loyally respect the interests of their clients." *Id.*

9 *Report of the ASIL Task Force on International Professional Responsibility*, American Society of International Law, 19–20 (Dec. 2007).

> [s]ubject to due observation of all rules of law and professional conduct, a lawyer must always act in the best interests of the client and must put those interests before the lawyer's own interests or those of fellow members of the legal profession.[10]

This is also true in the United States. The American Bar Association's Model Rules of Professional Conduct, upon which the ethical rules of most U.S. states are based, explains in its Preamble that "As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system," and is obligated

> zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.[11]

Paramount among the interests of the client that counsel is obligated to protect is the need to have a dispute adjudicated before a court or tribunal that is—and is perceived to be—untainted by partiality or a lack of independence. It has been aptly observed that the

> principles of judicial independence and impartiality are at the core of our common conception of the judicial function, whether exercised at the national or international level.[12]

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10 Further, "[A] lawyer shall while maintaining due respect and courtesy towards the court defend the interests of the client honorably and fearlessly without regard to the lawyer's own interests or to any consequences to him—or herself or to any other person." Code of Conduct for European Lawyers, art. 4.3 (Nov. 24, 2006).

11 *Id.* ¶ 2, 9. Similarly, the Bar Standards Handbook for English barristers states:

"When acting as an advocate or conducting litigation, the role of a barrister is to present their client's case as effectively as possible. Justice requires that people appearing before a court should have a fair hearing. This in turn means that they should be able to have their case presented by skilled advocates who will do so fearlessly, independently and in the best interests of their client."

Foreword, Bar Standards Board Handbook, ¶ 3 (Jan. 2014). In particular, Core Duty No. 2 provides that barristers "must act in the best interests of each client." The Handbook further provides:

"The sound administration of justice also requires that those who are acting as an advocate, or conducting litigation, always observe their duty to the court, even where this conflicts with the interests of their client."

Id., at 6.

12 Philippe Sands, Campbell McLachlan & Cesare Romano, *Introduction: Papers Presented at the Villa La Pietra Symposium on the Independence and Accountability of the International Judge*, 2 L. & Pract. Int'l Cts & Tribunals 3, 2003.

As Judge Gilbert Guillaume has remarked:

> The international judiciary, like national judiciaries, cannot effectively perform its functions unless it enjoys the requisite independence and hence the trust of those subject to its jurisdiction. That independence must be provided for by the texts, in particular vis-à-vis States, but it must also hold sway over hearts and minds and a judge must constantly be at pains to banish bias and remain dispassionate.[13]

The need for an impartial and independent court or tribunal, and the equally important need for it to be perceived as such, is especially great where sovereign states are parties to international proceedings, and matters of sovereignty or other issues of significant public concern are at stake, such as claims for monetary compensation that would require payment from the public fisc. This requires counsel, when deciding whether to bring a challenge, to have special sensitivity to the needs of sovereign clients for tribunals that are independent and impartial, and that have the appearance of being so. As one commentator has observed, "The 'public interest' regarded by some as absent from international commercial arbitration is a key stakeholder in investment arbitrations," and the

> potentially dramatic effect on the citizens of a nation State of the determination made by an investment tribunal requires that there can be no question of the impartiality and independence of the tribunal members.[14]

Courts and tribunals have recognized this special need of sovereign states. The ICSID Annulment Committee in *Vivendi v. Argentina*, for instance, acknowledged that "extreme caution" is called for in assessing an arbitrator's potential conflicts of interest "in ICSID cases where the public interest is often strongly

13 Gilbert Guillaume, *Some Thoughts on the Independence of International Judges Vis-à-Vis States*, 2 L. & Pract. Int'l Cts & Tribunals 163 (2003). *See also, e.g.*, *Hrvatska Elektroprivreda v. Slovenia*, ICSID Case No. ARB/05/24, Order Concerning the Participation of David Mildon QC in Further Stages of the Proceedings, ¶ 30 (May 6, 2008) ("Undoubtedly, one of the 'fundamental rules of procedure' referred to in Article 52(1)(d) of the ICSID Convention is that the proceedings should not be tainted by any justifiable doubt as to the impartiality or independence of any Tribunal member.").

14 Christopher Harris, *Arbitrator Challenges in International Investment Arbitration*, 4 Transnat'l Dispute Mgmt. 1 (2008), http://www.transnational-dispute-management.com/article.asp?key=1269 (last visited Apr. 1, 2015).

engaged."[15] The challenge decision in the *OPIC Karimum Corp. v. Venezuela* ICSID arbitration made the same point, holding that the "requirement of impartiality and independence" found in "international commercial arbitration" also "applies in investor-State disputes, where the need for independence is at least as great."[16]

3 Determining Whether to Propose Disqualification

Broadly speaking, the benchmarks for a judge or arbitrator to be qualified to serve are similar across the various international dispute resolution regimes. The two key criteria are "impartiality," defined as "the absence of bias or predisposition towards a party," and "independence," defined as "the absence of external control."[17] As an ICSID challenge decision observed,

> The requirements of independence and impartiality serve the purpose of protecting the parties against arbitrators being influenced by factors other than those related to the merits of the case.[18]

Counsel's determination as to whether a challenge should be pursued is aided by the fact that whether a judge or arbitrator does not fulfill these criteria is evaluated objectively. Article 12(1) of the UNCITRAL Rules provides, "Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence." In *Suez v. Argentina*, this was interpreted as setting an objective standard "for determining the existence of

15 *Compania de Aguas del Aconquija S.A. & Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for Annulment of the Award Rendered on 20 August 2007, Annulment Proceeding, ¶ 219 (Aug. 10, 2010).

16 *OPIC Karimum Corp. v. Venezuela*, ICSID Case No. ARB/10/14, Decision on the Proposal to Disqualify Professor Philippe Sands, Arbitrator, ¶ 49 (May 5, 2011).

17 *Blue Bank Int'l & Trust (Barbados) Ltd. v. Venezuela*, ICSID Case No. ARB/12/20, Decision on the Parties' Proposals to Disqualify A Majority of the Tribunal, ¶ 59 (Nov. 12, 2013); *see also, e.g., Burlington Resources, Inc. v. Ecuador*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuna, ¶ 66 (Dec. 13 2013).

18 *Urbaser Sa & Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia ur Partzuegoa v. Argentina*, ICSID Case No. ARB/07/26, Decision on Claimant's Proposal to Disqualify an Arbitrator, ¶ 43 (Aug. 12 2010); *see also, e.g., Blue Bank*, ICSID Case No. ARB/12/20, ¶ 59; *Caratube International Oil Co. LLP & Mr. Devincci Salah Hourani v. Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch, ¶ 53 (March 20, 2014).

a circumstance that creates justifiable doubts as to an arbitrator's impartiality and independence." The relevant inquiry was posed as:

> Would a reasonable, informed person viewing the facts be led to conclude that there is a justifiable doubt as to the challenged arbitrator's independence and impartiality?[19]

In *National Grid PLC v. Argentina*, the Challenge Division of the London Court of International Arbitration, which applied the UNCITRAL Rules, held that

> the test for whether circumstances exist that give rise to justifiable doubts is an objective one, pursuant to which it has to be determined whether a reasonable, fair-minded and informed person has justifiable doubts as to the arbitrator's impartiality.[20]

The objective test is found as well in the PCA's Optional Rules for Arbitrating Disputes Between Two States, which are based on the UNCITRAL Rules. Article 9 provides that "[a]ny arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence." Although the English version of Article 14 of the ICSID Convention refers only to "independent judgment," numerous ICSID challenge decisions have recognized that "arbitrators must be both impartial and independent,"[21] and that whether an arbitrator possesses these characteristics should be assessed objectively.[22]

3.1 *Disclosures*

The starting point for counsel in determining whether there is a factual basis to sustain the making of a disqualification proposal is to review, carefully and thoroughly, the disclosures that have been made by the arbitrators. The UNCITRAL Rules and the PCA's Optional Rules for Arbitrating Disputes Between Two

19 *Suez & Ors v. Argentina*, ICSID Case No. ARB 03/19, ¶ 22 (May 12, 2008) (citing David D. Caron, Lee M. Caplan & Matti Pellonpaa, The UNCITRAL Arbitration Rules: A Commentary 210 (2005)).

20 *National Grid PLC v. Argentina*, Case No. UN 7949, Decision of the Challenge to Mr. Judd L. Kessler, Division of the LCIA Challenge Court, ¶ 80 (internal quotations omitted).

21 *Blue Bank*, ICSID Case No. ARB/12/20, ¶ 58; *see also, e.g.*, *Burlington Resources*, ICSID Case No. ARB/08/5, ¶ 65; *Caratube*, ICSID Case No. ARB/13/13, ¶ 52.

22 *See, e.g., Caratube*, ICSID Case No. ARB/13/13, ¶ 54; *Blue Bank*, ICSID Case No. ARB/12/20, ¶ 60.

States both require arbitrators to disclose "any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence."[23] In ICSID arbitration, arbitrators are required to submit a disclosure declaration with a statement describing the arbitrator's "past and present professional, business and other relationships (if any) with the parties" and "any other circumstance that might cause" the arbitrator's "reliability for independent judgment to be questioned by a party."[24] Guidance on specific factual scenarios warranting disclosure may be found in the IBA Guidelines on Conflicts of Interest in International Arbitration.

However, counsel should not rely exclusively on the arbitrators' own disclosures. One cannot assume that all circumstances that could give rise to justifiable doubts as to an arbitrator's impartiality or independence have been disclosed. Relevant information may have been omitted, knowingly or unknowingly. It is therefore prudent for counsel to supplement the review of disclosures with research into publicly available materials. This might include study of the experience and background of the arbitrators, their appointments in other proceedings either as counsel or as arbitrator, as well as their published decisions and writings. As the challenge decision in *Alpha Projektholding* observed:

> [I]t is standard practice to perform some investigation into the background and connections of an opposing party and its counsel in the early stages of an international arbitration. With the advent of the Internet and such applications as 'Google' and 'Wikipedia,' an inquiry of this nature has become simple and easy, and the electronic response is nearly instantaneous.[25]

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23 UNCITRAL Arbitration Rules, G.A. Res. 65/22, U.N. Doc. A/RES/65/22, art. 11 (Aug. 15, 2010) [hereinafter UNCITRAL Arbitration Rules]; Permanent Court of Arbitration, Optional Rules for Arbitrating Disputes Between Two States, art. 9 (Oct. 20, 1992) [hereinafter PCA Optional Rules].

24 ICSID Convention, *supra* note 1, rule 6; *see, e.g.*, *Universal Compression International Holdings, S.L.U. v. Venezuela*, ICSID Case No. ARB/10/09, Decision on the Proposal to Disqualify Professor Brigitte Stern and Professor Guido Santiago Tawil, Arbitrators, ¶ 92 (May 20, 2011) ("In order to ensure that parties have complete information available to them, an arbitrator's Arbitration Rule 6(2) declaration should include details of prior appointments by an appointing party, including out of an abundance of caution, information about publicly available cases.").

25 *Alpha Projektholding GMBH v. Ukraine*, ICSID Case No. ARB/07/16, Decision on Challenge to Arbitrator, ¶ 80 (March 19, 2010). While conducting additional investigation and/or waiting for an arbitrator to respond to a request for supplemental disclosures, it may be

In appropriate circumstances, counsel may consider seeking supplemental disclosures, should matters of potential concern be revealed by an arbitrator's disclosures and/or counsel's investigation, or if the disclosures appear to be incomplete. For instance, in *Cemex v. Venezuela*, the respondent requested "supplemental information and clarification" from the claimant's party-appointed arbitrator concerning the "exact nature" of his relationship with a law firm that was acting as counsel in another investment arbitration against the respondent. The arbitrator's response prompted the respondent to request "further clarifications," which ultimately resulted in the respondent seeking to disqualify the arbitrator based on his continuing relationship with that firm.[26] In *Tidewater*, when the respondent's party-appointed arbitrator crossed out the portion of the ICSID disclosure form which referred to her as having appended a statement describing past and present relationships with the parties and any other circumstances that might cause her reliability for independent judgment to be questioned by a party, the claimant requested that the arbitrator provide a complete declaration.[27] The arbitrator complied with this request, leading to a disqualification proposal.[28]

Counsel's ability to seek supplemental disclosures is not limited to the initial phase of the proceeding. During the pendency of the arbitration, should circumstances warrant, counsel should consider seeking supplemental disclosures as well. For instance, in *ConocoPhilips v. Venezuela*, three years after the constitution of the tribunal, the respondent, after being informed by an arbitrator that his law firm planned to merge with another firm which was adverse

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advisable for counsel to reserve the client's position with respect to a possible challenge. For example, in *Caratube*, the claimants, within a week of appointment of the respondent's party-appointed arbitrator, "flagged their concerns," and requested that he furnish additional information. After the constitution of the tribunal, the claimants requested that the arbitrator resign. When he refused, the ICSID Secretariat requested the claimants to confirm their intention to submit a proposal to challenge the arbitrator, and requiring that such a proposal be filed within one week. *Caratube*, ICSID Case No. ARB/13/13, ¶¶ 6–7, 11–12.

26 *Cemex Caracas Investments BV* (*Netherlands*), *Cemex Caracas II Investments BV* (*Netherlands*) *v. Venezuela*, ICSID Case No. 08/15, Decision on the Proposal to Disqualify a Member of the Tribunal, ¶¶ 10–12, 22–25 (Nov. 6, 2009).

27 *Tidewater, Inc. & Ors v. Venezuela*, ICSID Case No. ARB/10/5, Decision on Claimant's Request to Disqualify an Arbitrator, ¶ 6 (Dec. 22, 2010).

28 *Id.* ¶ 8. In *OPIC Karimum Corp.*, the claimant sought "clarification" of two points raised in the declaration of the respondent's party-appointed arbitrator. *OPIC Karimum Corp. v. Venezuela*, ICSID Case No. ARB/10/14, Decision on the Proposal to Disqualify Professor Philippe Sands, Arbitrator, ¶ 7 (May 5, 2011).

to the respondent in other matters, both proposed the arbitrator's disqualification and requested that he provide information about various aspects of the merger partner and his involvement in the merger discussions. When the arbitrator reported that he intended to resign from his firm, the respondent sought further disclosures concerning his future relationship with the firm.[29] Similarly, in *Burlington Resources, Inc. v. Ecuador*, after the tribunal issued a Decision on Liability, the respondent requested that the claimant's party-appointed arbitrator disclose all appointments that had been made by the claimant's counsel, including appointments accepted in cases after the arbitrator had submitted his disclosure statement. The arbitrator responded with the requested list, prompting a proposal for disqualification.[30]

3.2 *Evaluating the Factual Support*

The International Bar Association's Guidelines on Conflicts of Interest in International Arbitration can aid counsel in determining whether to bring a challenge. As the PCA observed in deciding the challenge in *ICS Inspection*, the IBA Guidelines "reflect international best practices and offer examples of situations that may give rise to objectively justifiable doubts as to an arbitrator's impartiality and independence."[31] The challenge decision in *Universal Compression* similarly noted, "The IBA Guidelines are widely recognized in international arbitration as the preeminent set of guidelines for assessing arbitrator conflicts."[32] In *Caratube*, the unchallenged arbitrators referred to the IBA

29 *ConocoPhillips Co. v. Venezuela*, ICSID Case. No. ARB/07/30, Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator, ¶¶ 9, 15, 20, 48 (Feb. 27, 2012).

30 *Burlington Resources, Inc. v. Ecuador*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuna, ¶ 4, 6–7 (Dec. 13 2013). Additional examples include the NAFTA arbitration in *Vito G. Gallo v. Canada*, where a year-and-a-half after the tribunal had been constituted, the respondent's party-appointed arbitrator brought to the parties' attention the fact that the law firm with which he had a consultancy agreement had been retained by the Mexican Government and that the arbitrator had agreed to work on the matter. After receiving this disclosure, the respondent made further inquiries of the arbitrator concerning the status and nature of the work for Mexico. *Vito G. Gallo v. Government of Canada*, UNCITRAL, PCA Case No. 55798, Decision on the Challenge to Mr. J. Christopher Thomas, QC, ¶¶ 7–10 (Oct. 14, 2009).

31 *ICS Inspection & Control Services Ltd. v. Republic of Argentina*, Decision on Challenge to Arbitrator, PCA Case No. 2010-9, 1, 4 (Dec. 18, 2009).

32 *Universal Compression International Holdings, S.I.U. v. Venezuela*, ICSID Case No. ARB/10/09, Decision on the Proposal to Disqualify Professor Brigitte Stern and Professor Guido Santiago Tawil, Arbitrators, ¶ 74 (May 20, 2011).

Guidelines as a "helpful instrument reflecting a transnational consensus on their subject matter."[33]

Counsel, however, should exercise a degree of caution when using the IBA Guidelines to determine whether disqualification should be pursued. Absent agreement by the parties, the Guidelines are not binding.[34] As the challenge decision in *Tidewater* observed, although they have an "indicative value" and "may furnish a useful indication, the IBA Guidelines are, nonetheless, "not a binding instrument."[35]

It is accordingly important for counsel to carefully consider how the contemplated challenge may be approached by those who will decide it. There are significant differences in approach, and much may hinge on the particular institution and/or individuals who will be called upon to decide the challenge. As has been observed:

> [W]hile international courts and tribunals generally incorporate rules relating to judicial independence in their statutes and rules of procedure, despite the increasing number of such courts and tribunals and the concomitant increase in the number of international judges, no common set of minimum standards has yet been elaborated in relation to the independence of the *international* judiciary. Indeed, more precise rules in this area have tended to be formulated by the most recently established judi-

33 *Caratube International Oil Co. LLP & Mr. Devincci Salah Hourani v. Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch, ¶ 59 (March 20, 2014). Similarly, in *Alpha Projektholding*, in considering the challenge, the two unchallenged arbitrators said they would "seek guidance" from the IBA Guidelines, which they found to be "instructive." Alpha Projektholding GMBH v. Ukraine, ICSID Case No. ARB/07/16, Decision on Challenge to Arbitrator, ¶ 56 (March 19, 2010).

34 *ICS Inspection*, PCA Case No. 2010–9, at 4 (stating that the IBA Guidelines "have no binding status in the present proceedings").

35 *Tidewater, Inc. & Ors v. Venezuela*, ICSID Case No. ARB/10/5, Decision on Claimant's Request to Disqualify an Arbitrator, ¶ 41 (Dec. 22, 2010); *see also, e.g., Burlington Resources*, ICSID Case No. ARB/08/5, ¶ 69; *Blue Bank Int'l & Trust* (*Barbados*) *Ltd. v. Venezuela*, ICSID Case No. ARB/12/20, Decision on the Parties' Proposals to Disqualify A Majority of the Tribunal, ¶ 62 (Nov. 12, 2013) ("The Chairman notes that the Parties have referred to other sets of rules or guidelines in their arguments, such as the IBA Guidelines. While these rules or guidelines may serve as useful references, the Chairman is bound by the standard set forth in the ICSID Convention. Accordingly, this decision is made in accordance with Articles 57 and 58 of the ICSID Convention."); *ConocoPhillips Co. v. Venezuela*, ICSID Case. No. ARB/07/30, Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator, ¶ 59 (Feb. 27, 2012) ("The IBA General Standards are not law for ICSID tribunals.").

> cial bodies, and each court or tribunal tends to develop unwritten practices in this area. Yet, standards vary considerably from court to court. To date, very little attention has been given to the meaning and application of the concepts of "independence" and "impartiality" in the international judicial context, and there has been no comprehensive, systematic exploration of the promotion and maintenance of independence in the international judiciary.[36]

This places a premium on seeking to understand how the decision-makers may approach the challenge decision. For instance, there is a divergence of views concerning the proper standard to be applied in challenges made in ICSID arbitrations. Article 57 of the ICSID Convention provides that, for a challenge to be successful, there must be a "manifest lack of the qualities" which arbitrators are required to have under Article 14(1), including, most relevantly, that they can be relied upon to exercise independent judgment. Challenge decisions applying Article 57 have divided over the interpretation of the word 'manifest.' As observed in *ConocoPhilips*, some decisions suggest that it means " 'obvious' or 'evident' and highly probable, not just possible," and thus that it "imposes a relatively heavy burden on the party proposing disqualification."[37] This view was adopted by the unchallenged arbitrators in *Tidewater*, who held:

> It is important to emphasize that the language of Article 57 places a heavy burden of proof . . . to establish facts that make it obvious and highly probable, *not just* possible, that [the arbitrator] is a person who may not be relied upon to exercise independent and impartial judgment.[38]

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36 Philippe Sands, Campbell McLachlan & Cesare Romano, *Introduction: Papers Presented at the Villa La Pietra Symposium on the Independence and Accountability of the International Judge*, 2 L. & Practice Int'l Courts & Tribunals 3, 7 (2003). William W. Park, *Arbitrator Integrity, in* The Backlash Against Investment Arbitration Michael 190 (Michael Waibel, et al., eds., 2010) ("[F]ew tasks present the vital urgency of establishing standards for evaluating the independence and impartiality of arbitrators.").

37 *ConocoPhillips*, ICSID Case. No. ARB/07/30, ¶ 56.

38 *Tidewater*, ICSID Case No. ARB/08/5, ¶ 39 (quoting Suez, Sociedad General de Aguas de Barcelona S.A. v. Argentina, ICSID Case Nos. ARB/03/07 & ARB/03/09, Decision on Second Proposal for Disqualification, ¶ 29 (May 12, 2009) (emphasis and alteration in original); *see also, e.g.*, OPIC Karimum Corp. v. Venezuela, ICSID Case No. ARB/10/14, Decision on the Proposal to Disqualify Professor Philippe Sands, Arbitrator, ¶ 45 (May 5, 2011); *Alpha Projektholding*, ICSID Case No. ARB/07/16, ¶ 39.

Other ICSID challenge decisions, however, have not interpreted 'manifest' as imposing this heightened standard of proof. For instance, in *Vivendi*, the unchallenged members of the annulment committee held:

> If the facts would lead to the raising of some *reasonable doubt* as to the impartiality of the arbitrator or member, the appearance of security for the parties would disappear and a challenge by either party would have to be upheld.[39]

In light of this divergence, the unchallenged arbitrators in *Saint Gobain v. Venezuela* observed that

> there is no clear-cut guideline as to the degree to which the facts invoked by the challenging party must substantiate the alleged lack of qualification.[40]

Another example of how individuals charged with deciding challenges can have different views regarding the same legal issue concerns whether, and in what circumstances, multiple appointments of the same arbitrator by a party may be cause for that arbitrator's disqualification.[41] The challenge decision in *Tidewater* held that multiple appointments, by themselves, do not suggest a lack of independence, stating that

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39 *Compania de Aguas del Aconquija S.A. & Vivendi Universal v. Argentina Republic*, ICSID Case No. ARB/97/3, Decision on the Challenge to the President of the Committee, ¶ 25 (Oct. 3, 2001) (emphasis added); *cf.* EDF International S.A. v. Argentine Republic, ICSID Case No. ARB/03/23, Challenge Decision Regarding Professor Gabrielle Kaufmann-Kohler, ¶ 64 (June 25, 2008) ("The relevant quality that has been put into question relates to independence. We must consider whether Professor Kaufmann-Kohler 'may be relied upon to exercise independent judgment.' If reasonable doubts exist on this matter, she should cease to serve in these proceedings.").

40 *Saint-Gobain Performance Plastics Europe v. Venezuela*, ICSID Case No. ARB/12/13, Decision on Claimant's Proposal to Disqualify Mr. Gabriel Bottini from the Tribunal under Article 57 of the ICSID Convention, ¶ 60 (Feb. 27, 2013). For further discussion on the divergence, see James Crawford, *Challenges to Arbitrators in ICSID Arbitrations*, PCA Peace Palace Centenary Seminar 2, 2–8 (Oct. 11, 2013) and chapter 2 by Meg Kinnear & Frauke Nitschke in this volume.

41 *See* Chapter 10 by Luke Sobota in this volume.

> the starting-point is that multiple appointments as arbitrator by the same party in unrelated cases are neutral, since in each case the arbitrator exercises the same independent arbitral function.[42]

However, the unchallenged arbitrators in *OPIC Karimum* took a different view, holding that they "do not agree" with *Tidewater*'s suggestion that "multiple appointments as arbitrator by the same party in unrelated cases are a neutral factor in considerations relevant to a challenge."[43] Instead, they expressed considerable concern for how multiple appointments could influence perceptions of independence and impartiality:

> [M]ultiple appointments of an arbitrator by a party or its counsel constitute a consideration that must be carefully considered in the context of a challenge. In an environment where parties have the capacity to choose arbitrators, damage to the confidence that investors and States have in the institution of investor-State dispute resolution may be adversely affected by a perception that multiple appointments of the same arbitrator by a party or its counsel arise from a relationship of familiarity and confidence inimical to the requirement of independence established by the Convention. The suggestion by the arbitrators in *Tidewater* that multiple appointments are likely to be explicable on the basis of a party's perception of the independence and competence of the oft appointed arbitrator is in our view unpersuasive. . . .[44]

As these examples illustrate, it is important for counsel to assess how the decision-makers are likely to approach the key issues that are presented by the challenge when evaluating whether disqualification of an arbitrator is likely to be achieved.

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42 *Tidewater*, ICSID Case No. ARB/08/5, ¶ 60. The challenge decision went on to hold that "there would be a rationale for the potential conflict of interest which may arise from multiple appointments by the same party if either (a) the prospect of continued and regular appointment, with the attendant financial benefits, might create a relationship of dependence or otherwise influence the arbitrator's judgment; or (b) there is a material risk that the arbitrator may be influenced by factors outside the record in the case as a result of his or her knowledge derived from other cases." *Id.* ¶ 62.

43 *OPIC Karimum*, ICSID Case No. ARB/10/14, ¶ 47.

44 *Id.*

4 Timing

4.1 *The Need to Challenge on a Timely Basis*

Counsel must pay close attention to issues of timing. It would not be conducive to the fair administration of justice if a party, having learned of facts that could support a proposal for disqualification, could retain that information and then seek to use it later, at a tactically more opportune time. Disqualification proposals that are not made on a timely basis therefore will be dismissed.[45]

Although the burden of proving that a challenge is not timely lies with the party opposing the challenge,[46] it is nonetheless important that counsel proceeds expeditiously when considering whether it should be pursued. Certainly, counsel must comply with the deadlines set out in the applicable rules. For instance, Article 13(1) of the UNCITRAL Rules provides that

> [a] party that intends to challenge an arbitrator shall send Notice of its challenge within 15 days after it has been notified of the appointment of the challenged arbitrator, or within 15 days after the circumstances mentioned in articles 11 and 12 became known to that party,

that is, upon learning of circumstances giving rise to justifiable doubts.[47] The PCA's Optional Rules for Arbitrating Disputes Between Two States allows challenges to be brought within thirty days of notification of the appointment or learning of the grounds for justifiable doubts.[48]

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45 *See* Chapter 9 by Judith Levine in this volume.

46 *Vito G. Gallo v. Government of Canada*, UNCITRAL, PCA Case No. 55798, Decision on the Challenge to Mr. J. Christopher Thomas, QC, ¶ 20 (Oct. 14, 2009).

47 UNCITRAL Arbitration Rules, *supra* note 23, art. 13. Similarly, Article 15(2) of the SCC Rules provide:

"A challenge to an arbitrator shall be made by submitting a written statement to the Secretariat setting forth the reasons for the challenge within 15 days from when the circumstances giving rise to the challenge became known to the party. Failure by a party to challenge an arbitrator within the stipulated time period constitutes a waiver of the right to make the challenge.Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, art. 15(2) (Jan. 1, 2010) [hereinafter SCC Rules]."

48 PCA Optional Rules *supra* note 23, art. 11(1). Similarly, Article 14(2) of the ICC Rules provide:

"For a challenge to be admissible, it must be submitted by a party either within 30 days from receipt by that party of the notification of the appointment or confirmation of the arbitrator, or within 30 days from the date when the party making the challenge was

Counsel's job with respect to timing is more complicated in ICSID arbitrations because the ICSID rules do not codify a specific deadline. Rule 9(1) of the ICSID Arbitration Rules simply provides that a challenge must be made "promptly and in any event before the proceeding is declared closed." The challenge decision in *ConocoPhilips* thus held,

> As the ICSID Convention and Rules do not specify a number of days within which a proposal for disqualification must be filed, the timeliness of a proposal must be determined on a case-by-case basis.[49]

Although it is sometimes suggested that "Rule 9(1) implies that such a proposal must be made as soon as the party concerned learns of the grounds for a possible disqualification,"[50] challenge decisions have demonstrated a degree of flexibility to accommodate the need for counsel to confer with the client. For instance, in *RSM Production Co. v. St. Lucia*, the unchallenged arbitrators held that since "every submission requires preparation and coordination between lawyers and clients, a proposal for disqualification filed 28 days after the decision allegedly evidencing bias" would be timely, "absent circumstances indicating the contrary."[51] Similarly, a proposal for disqualification filed on December 29, 2013 arising from a November 28, 2013 ruling by the tribunal was considered to fall "within an acceptable range."[52] Waiting longer risks having

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informed of the facts and circumstances on which the challenge is based if such date is subsequent to the receipt of such notification."

International Chamber of Commerce Rules of Arbitration, art. 14(2) (Jan 1, 2012) [hereinafter ICC Rules].

49 *ConocoPhillips Petrozuata B.V. et al., v. Venezuela*, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify a Majority of the Tribunal, ¶ 39 (May 5, 2014); *see also* Abaclat & Others v. Argentina, ICSID Case No. ARB/07/05, Decision on the Proposal to Disqualify a Majority of the Tribunal, ¶ 68 (Dec. 4, 2014). *Cemex Caracas Investments BV* (*Netherlands*), *Cemex Caracas II Investments BV* (*Netherlands*) *v. Venezuela*, ICSID Case No. 08/15, Decision on the Proposal to Disqualify a Member of the Tribunal, ¶ 36 (Nov. 6, 2009) (holding that since "Rule 9(1) does not fix a quantifiable deadline for submission of challenges," it is "on a case by case basis that tribunals must decide whether or not a proposal for disqualification has been filed in a timely manner").

50 *Cemex*, ICSID Case No. 08/15, ¶ 36.

51 *RSM Production Co. v. St. Lucia*, ICSID Case No. ARM/12/10, Decision on Claimant's Proposal for the Disqualification of Dr. Gavan Griffith, QC, ¶ 73 (Oct. 23, 2014).

52 *Abaclat*, ICSID Case No. ARB/07/05, ¶ 69. Unsurprisingly, submission of a disqualification proposal within ten days has been held to be timely. *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia ur Partzuergoa v. Argentina*, ICSID Case No. ARB/07/26, Decision on Claimant's Proposal to Disqualify an Arbitrator, ¶ 19 (Aug. 12, 2010).

the challenge dismissed. For instance, in *Azurix*, the challenge was rejected because it was made eight months after the respondent became aware of the facts upon which the challenge was based.[53] Other challenge decisions have variously held that disqualification proposals made 147 days, 6 months, 140 days, and as few as 53 days after learning the relevant facts, were not made promptly.[54]

Accordingly, it is prudent for counsel to prepare a proposal for disqualification with as much dispatch as possible. In fact, some challenges have been made even *before* the tribunal has been constituted. For instance, in *Blue Bank*, the complainant and respondent both submitted proposals to disqualify the opposing party's respective party-appointed arbitrator prior to the constitution of the tribunal. Upon the tribunal's formal constitution, the ICSID Secretariat transmitted the disqualification proposals to the tribunal.[55] In deciding the challenges, the Chairman of the ICSID Administrative Council observed that although the

> challenges did not become effective until the Tribunal was constituted, there is no doubt that both challenges were filed "promptly" in the sense of ICSID Arbitration Rule 9(1).[56]

4.2 *Due Diligence*

Some challenge decisions require parties, and by extension their counsel, to conduct due diligence on arbitrators, both during the initial phase of an arbitration and on a continuing basis, and deem objections to arbitral appointments to be waived if a challenge is not brought soon after the facts upon which is it based become publicly known. This is especially germane for challenges based on arbitrators' involvement in other proceedings, either as counsel or as arbitrators, information about which is publicly available, or based on their public statements and writings.

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53 *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, ¶ 269 (Sept. 1, 2009).

54 *Cemex*, ICSID Case No. 08/15, ¶¶ 41–44; *Suez and Ors v. Argentina*, ICSID Case Nos. ARB/03/17 & ARB/03/19, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, ¶ 26 (Oct. 22, 2007); CDC Group PLC v. Seychelles, ICSID Case No. ARB/02/14, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Republic of Seychelles, ¶ 53 (June 29, 2005).

55 *Blue Bank Int'l & Trust (Barbados) Ltd. v. Venezuela*, ICSID Case No. ARB/12/20, Decision on the Parties' Proposals to Disqualify A Majority of the Tribunal, ¶¶ 7–14 (Nov. 12, 2013).

56 *Id.* ¶ 65.

In *Burlington Resources*, for instance, the respondent challenged the claimant's party-appointed arbitrator based on the fact that he had been the recipient of multiple appointments by the claimant's counsel in cases that were publicly registered. The two unchallenged arbitrators posed the following question to the parties:

> Do parties to an ICSID arbitration have a duty to inquire about facts that may give rise to doubts as to an arbitrator's independence and impartiality? If such a duty exists, what is its source and scope?[57]

In response, the claimant argued that "good faith requires parties to exercise at least minimal due diligence with respect to the relationship of arbitrators and opposing counsel," and that

> [i]f there are facts that should have prompted a party to make further inquiry during an arbitral proceeding, the party may not later claim bias on the basis of those facts.[58]

The claimant further argued that this "reasoning is especially relevant in this case because" the appointments at issue were "public," such that the respondent "could easily have discovered the relevant appointments, for example, by a 'Google Alert.' "[59] For its part, the respondent maintained it "had no duty to continuously investigate arbitrators in the framework of the ICSID Convention," and that although "it is standard practice to investigate arbitrators at the initial moment of their appointment," this "does not create a positive duty to investigate an arbitrator throughout the proceeding."[60]

The Chairman of the ICSID Administrative Council, who was required to decide the challenge because the two unchallenged arbitrators failed to reach a decision, observed that of the appointments by counsel for the claimant, the respondent had known of four since June 2011, and that three other appointments had become public in October 2012, January 2013 and February 2013, respectively; thus the relevant information was publicly available on the ICSID website, before or by, 7 March 2013.[61] The Chairman therefore found that the

57 *Burlington Resources, Inc. v. Ecuador*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuna, ¶ 14 (Dec. 13 2013).

58 *Id.* ¶ 54.

59 *Id.*

60 *Id.* ¶ 35.

61 *Id.* ¶ 74.

respondent had "sufficient information" to challenge the arbitrator "on the basis of repeated appointments and non-disclosure of such appointments well before it did so on July 24, 2013."[62]

Other challenge decisions also appear to impose on counsel an obligation of due diligence, such that a party may be deemed to have constructive knowledge of facts in the public domain. In *Cemex*, the challenge was based on the fact that an arbitrator was alleged to have had a continuing relationship with the law firm representing the claimants in another investment arbitration against the respondent. In assessing whether the challenge was timely, the unchallenged arbitrators considered the claimant to have known that the law firm was acting for the claimants in the other arbitration as of the date the arbitration was registered with ICSID.[63] They do not appear to have assessed whether the respondent had actual knowledge as of that date, but rather seem to have imputed such knowledge by virtue of the fact that the matter was publicly registered. Similarly, in *Suez*, the unchallenged arbitrators suggested there can be circumstances where information about an arbitrator is sufficiently public that knowledge should be imputed to the challenging party, although the threshold had not been reached in that case:

> While the identity of directors of a publicly traded company, such as UBS, is a matter of public record, the knowledge of the fact that [the arbitrator] was a UBS director is not so public and wide-spread that one can reasonably assume that the Respondent actually knew or should have known of that fact.[64]

Not all challenge decisions, however, would require counsel to carry out due diligence by imputing to a party constructive knowledge of publicly available facts. For example, in *Vito G. Gallo*, the challenge decision rejected the position that "press coverage" concerning the arbitrator and his relationship with his former firm, as well as the "small size of the Canadian trade and investment

62 *Id.* ¶ 75. The Chairman ultimately upheld the challenge on a different basis, namely that the written comments furnished by the arbitrator in response to the challenge proposal manifestly evidenced an appearance of lack of impartiality with respect to the claimant and its counsel. *Id.*, ¶¶ 78–80.

63 *Cemex Caracas Investments BV (Netherlands), Cemex Caracas II Investments BV (Netherlands) v. Venezuela*, ICSID Case No. 08/15, Decision on the Proposal to Disqualify a Member of the Tribunal, ¶¶ 43–44 (Nov. 6, 2009).

64 *Suez & Ors v. Argentina and Joined Case*, ICSID Case No. ARB/03/19, Decision on the Second Proposal for the Disqualification of a Member of the Arbitral Tribunal, ¶ 45 (May 12, 2008).

bar," evidenced "constructive knowledge" of the arbitrator having "remain[ed] as counsel prior" to his disclosure. The decision held:

> Allowing the Respondent to invoke evidence of constructive knowledge (even if reasonably proved) would relieve the arbitrator of the continuing duty to disclose. This would unfairly place the burden on the Claimant to seek elsewhere the notice it should have received from the arbitrator.[65]

The challenge decision in *Alpha Projektholding*, where the respondent's challenge was based on the claimant's party-appointed arbitrator having concurrently studied at Harvard Law School with claimant's counsel, likewise refused to impose this obligation, although it appears to have remained open to the argument in principle. The unchallenged members of the tribunal put the issue as follows:

> Here, the Two Other Members are confronted with a proposal for disqualification which, on the one hand, was lodged more than two years after the distribution of [the arbitrator's] *curriculum vitae* but, on the other hand, was allegedly filed within weeks of the Respondent gaining actual knowledge of the overlap in the education of [the arbitrator] and [claimant's counsel]. The question before the Two Other Members is whether Respondent, in the absence of proof of actual knowledge, should be deemed to have had constructive knowledge of the shared educational experience at a much earlier time for purposes of the promptness analysis required under Rule 9(1).[66]

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65 *Vito G. Gallo v. Government of Canada*, UNCITRAL, PCA Case No. 55798, Decision on the Challenge to Mr. J. Christopher Thomas, QC, ¶ 24 (Oct. 14, 2009). In *Tidewater*, the two unchallenged arbitrators held that "as a general rule, arbitrators appointed to ICSID tribunals ought to disclose appointments to other arbitral tribunals by one of the parties or an affiliate within the previous three years. Even in the case of investment arbitration, not all of these appointments will necessarily be in the public domain, and they may require consideration in assessing the arbitrator's independence and impartiality. The Two Members agree with Tidewater that in general, in considering the scope of her duty of disclosure, the arbitrator may not count on the due diligence of the parties' counsel." *Tidewater, Inc. & Ors v. Venezuela*, ICSID Case No. ARB/10/5, Decision on Claimant's Request to Disqualify an Arbitrator, ¶ 51 (Dec. 22, 2010).

66 *Alpha Projektholding GMBH v. Ukraine*, ICSID Case No. ARB/07/16, Decision on Challenge to Arbitrator, ¶ 79 (March 19, 2010).

Despite acknowledging that counsel in international arbitrations routinely investigate the background of arbitrators, the challenge decision was reluctant to impose such a duty, holding that it is

> preferable not to divine some carefully crafted, modern-day duty to perform a routine examination into the background of a party and its counsel at an early date, failing which a party may be found to have not promptly objected, resulting in a waiver under Arbitration Rule 27.[67]

Nonetheless, the unchallenged arbitrators appear to have left open the possibility that such a duty may exist:

> The Two Other Members recall in this regard that Respondent's Proposal expressly contends that Respondent as an opposing party could not "reasonably" have been expected "to verify such circumstance [of the common attendance at Harvard Law School] from the very outset of the case." While the global realities of this computerized, digitized age might reasonably lead to the opposite conclusion (that is, to a recognition of a constructive duty to perform basic Internet research in the early stages of a proceeding), the Two Other Members conclude that they need not determine this issue in order to reach a decision in this case.[68]

In short, although whether, as a legal matter, counsel is obligated to carry out ongoing due diligence into potential arbitrator conflicts of interest remains unsettled, it is certainly prudent for counsel to do so.

5 Challenges Brought by the Opposing Party

When faced with a challenge brought by the opposing party, counsel may be tempted to automatically oppose the disqualification proposal. To be sure, the proposal may warrant vigorous opposition. This may especially be the case where the challenge, if successful, would deprive the client of its first choice for party-appointed arbitrator, although it would still have the right to appoint the replacement.[69] Nonetheless, counsel should resist the natural

67 *Id.* ¶ 81.

68 *Id.*

69 ICSID Convention, *supra* note 1, art. 58; PCA Optional Rules *supra* note 23, art. 12(2); UNCITRAL Arbitration Rules, *supra* note 23, art. 14.

inclination to oppose the disqualification proposal without first reflecting upon whether it may be in the client's interest to consent to the arbitrator's resignation.

The starting point is to evaluate dispassionately the likelihood that the challenge may be successful. If the proposal appears to have a significant chance of succeeding, it may not be worth opposing it, especially in circumstances where an expeditious conclusion to the arbitration is in the client's interest and opposition would delay the proceedings. It is also important to consider the risk that the influence of the client's party-appointed arbitrator may be compromised even if the challenge does not succeed. This may be a particular concern in ICSID arbitration, where the default is that challenge decisions are made by the unchallenged arbitrators, who may be disinclined to disqualify a colleague, and since, as discussed above, some arbitrators in ICSID cases impose a relatively high standard of proof. In these circumstances, there is a risk that the unchallenged arbitrators may choose to allow the challenged arbitrator to remain, but having learned of facts that call into question the arbitrator's independence or impartiality, may discount his or her input during the tribunal's deliberations.

Beyond these considerations, there are other reasons why counsel may wish to entertain whether it might be preferable not to oppose the challenge. Depending upon the seat of the arbitration, the opposing party, even if the challenge is unsuccessful, may be entitled to renew the challenge in the courts of the seat of the arbitration. For instance, Article 13(3) of the UNCITRAL Model Arbitration Law allows for an unsuccessful proposal for disqualification to be re-filed in the courts of the seat of the arbitration within thirty days of receiving notice of the decision rejecting the challenge.[70] This occurred in an UNCITRAL Rules arbitration seated in The Hague, where the respondent sought to disqualify the claimant's party-appointed arbitrator when he disclosed that he was simultaneously serving as counsel in another matter that involved attempting to revise a judgment in a case relied upon by the claimant. After the Secretary-General of the PCA rejected the challenge, the respondent filed a challenge with the Provisional Measures Judge of the District Court of The Hague. The District Court ruled that the arbitrator's simultaneous service

70 For a general discussion on the role of national courts in deciding challenges, see Jean-François Poudret & Sébastien Besson, Comparative Law of International Arbitration 355 (2007).

as arbitrator and counsel in the other matter raised "justifiable doubts about his impartiality."[71]

There is also a risk that the arbitral award could be annulled or vacated if it were later determined that the tribunal lacked independence or impartiality. In the ICSID context, the Annulment Committee in *Vivendi* expressed the view that the "role of the *ad hoc* Committee is to 'protect the integrity of the system." In that connection, it held that a tribunal's improper constitution due to an arbitrator's conflict is a "serious departure from a fundamental rule of procedure" that could "lead to annulment whenever justified within the context of the case under consideration."[72] Although the Committee concluded that the facts of the case did not warrant it exercising its discretion under Article 52 of the ICSID Convention to annul the award, the Committee was clear that, in appropriate circumstances, a conflict of interest could give rise to annulment.[73]

In non-ICSID arbitrations, national courts may vacate arbitral awards when an arbitrator is determined to have lacked impartiality or independence. As the designee of the Secretary-General of the PCA observed in deciding a challenge in an UNCITRAL Rules arbitration:

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71 *Republic of Ghana v. Telekom Malaysia Berhad*, Case No. HA/RK 2004, 667, Decision, District Court of the Hague (Oct. 18, 2004). The District Court ordered the arbitrator to decide whether he would resign as counsel in the other matter. After the arbitrator resigned as counsel, the District Court denied a subsequent challenge to his service as arbitrator. *Telekom Malaysia Berhad v. Republic of Ghana*, Case No. HA/RK 2004, 788, Decision, District Court of the Hague (Nov. 5, 2004).

72 *Compania de Aguas del Aconquija S.A. & Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for Annulment of the Award Rendered on 20 August 2007, Annulment Proceeding, ¶ 232 (Aug. 10, 2010).

73 The annulment committee in *Azurix* took a narrower approach, holding:

"Article 52(1)(a) cannot be interpreted as providing the parties with a *de novo* opportunity to challenge members of the tribunal after the tribunal has already given its award. A Committee would only be able to annul an award under Article 52(1)(a) if there had been a failure to comply properly with the procedure for challenging members of the tribunal set out in other provisions of the ICSID Convention."

Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, ¶ 280 (Sept. 1, 2009).

The Committee thus found that

"an *ad hoc* committee cannot decide for itself whether or not a decision under Article 58 was correct, as this would be tantamount to an appeal against such a decision. All that an *ad hoc* committee can consider is whether the provisions and procedures prescribed under Articles 57 and 58 of the ICSID Convention and ICSID Arbitration Rule 9 were complied with."

Azurix Corp., ICSID Case No. ARB/01/12, ¶ 282.

> As a practical matter, if a reviewing judicial authority at the conclusion of the proceedings were to disagree with a threshold conclusion that an arbitrator is not partial, the entire arbitration is at risk.[74]

For instance, in the United States, section 10 of the Federal Arbitration Act permits the court to set aside an arbitral award where, among other things, there was "evident partiality . . . in the arbitration."[75]

Finally, counsel should consider the risk that a court might not enforce an international arbitral award if it determines that the arbitration was tainted by bias or lack of independence. In this regard, the New York Convention allows States not to enforce international arbitral awards if, among other things, doing so would violate public policy or the tribunal was not constituted in accordance with the parties' agreement or, failing agreement, the law of the arbitral seat.[76] Thus, even if a proposal to disqualify an arbitrator is successfully opposed, the risk remains that a court could refuse to enforce the award under one or more of these grounds.[77]

6 Conclusion

In short, counsel may be called upon to consider a diverse array of complicated issues when advising clients on whether a disqualification proposal should be pursued. Some, such as whether the evidentiary threshold for sustaining the challenge is likely to be met, call for an objective application of the law to the facts. Others, such as weighing the risk that one or more members of the

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74 *Challenge Decision of 11 January 1995* (*Country X v. Company Q*), ¶ 10, 227 *in* Yearbook of Commercial Arbitration 1997–Vol. XXII (Albert Jan van den Berg ed., 1997). For an example, see Karel Daele, Challenge and Disqualification of Arbitrators in International Arbitration 62 (2011) describing the Paris Court of Appeal's annulment of a partial ICC award in *SA J&P Avax SA v. Societe Tecnimont SPA*, on the ground that "one of the arbitrators had failed to disclose and investigate a number of instructions that his law firm had received from a party in the arbitration."

75 Federal Arbitration Act, 9 U.S.C. § 10(2) (2012). For a discussion on the approach of U.S. courts to motions to vacate international arbitral awards on the grounds that an arbitrator lacked impartiality, see S.I. Strong, *International Commercial Arbitration: A Guide for U.S. Judges*, Federal Judicial Center, 1, 67–68 (2012).

76 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, arts. V(1)(d), V(2)(b), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.

77 Detlev F. Vagts, *The International Legal Profession: A Need for More Governance?*, 90 Am. J. Int'l L. 250, 254 (1996).

tribunal might react negatively to the challenge, detrimentally affecting their receptiveness to arguments presented by the client more generally, are tactical in nature. Both call upon counsel to exercise sound judgment.

Less obviously, advising clients on how to respond to a challenge made by the opposing party also requires counsel to engage in a thorough deliberative process. Counsel must objectively assess not only the likelihood that the disqualification proposal will be sustained, but also whether a successfully resisted challenge could nonetheless result in its party-appointed arbitrator's influence being diminished within the tribunal, delay the proceedings to the client's detriment, or even put the arbitral award at risk. Often, the appropriate response to a challenge by the other side will be to oppose the disqualification proposal vigorously; there may be occasions, however, when the better option is to consent to the arbitrator's resignation.

Counsel's approach when considering these issues should always be guided by its paramount obligation to place the interests of the client at the forefront. Should the decision be made to seek a judge or arbitrator's disqualification, prosecution of this delicate request should be pursued respectfully. Consideration for the individuals involved, and the judicial or arbitral process itself, requires no less.

CHAPTER 13

Challenges to Party Representatives and Counsel Before International Courts and Tribunals

Hansel T. Pham and M. Imad Khan

1 Introduction

For many years, there has been no binding uniform code of ethics or code of professional conduct that governs the conduct of counsel who appear before international courts and tribunals. There has instead been reliance on mandatory national rules that govern counsel conduct. Such national rules are limited in that they rarely, if ever, contemplate the unique circumstances that apply to the conduct of counsel before international courts and tribunals;[1] moreover they can differ substantially between jurisdictions in a number of important respects.[2]

Over the last five years, a number of efforts have been made to fill this void by international organizations and institutions, which have sought to develop ethical and professional guidelines for counsel and to provide explicit guidance on the disqualification or sanctioning of counsel. Even so, these guidelines are still not as ubiquitous or as fully developed as rules governing the conduct of judges and arbitrators serving on international courts and tribunals,[3] or even

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1 V.V. Veeder, *2001 Goff Lecture: The Lawyer's Duty to Arbitrate in Good Faith*, 18 Arbitration Int'l 431, 431–432 (2002).

2 *See* Catherine A. Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 Mich. J. Int'l L. 341, 357–378 (2002).

3 *See e.g.*, Basic Principles on the Independence of the Judiciary, U.N. Congress on the Prevention of Crime and the Treatment of Offenders, 7th Sess., U.N. Doc. A/CONF.121/22/Rev. 1 (1985); Study Group of the International Law Association on the Practice and Procedure of International Courts and Tribunals, Burgh House Principles on the Independence of the International Judiciary (2004), *available at* http://www.pict-pcti.org/activities/ILA_study_grp.html; International Bar Association, IBA Minimum Standards of Judicial Independence (1982), *available at* http://www.ibanet.org/Document/Default.aspx?DocumentUid=bb019013-52b1-427c-ad25-a6409b49fe29.

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those governing the conduct of counsel appearing before international criminal courts,[4] both of which are generally more advanced and universally present. As such, there are still a number of areas of uncertainty for counsel either seeking to challenge an opposing representative or seeking to avoid challenge herself. With this in mind, this chapter seeks to survey the current landscape of ethical and professional guidelines applicable to party representatives appearing before international courts and tribunals and to determine whether general principles or trends can be ascertained regarding rules governing counsel conduct.

2 Survey of Guidelines and Principles on Ethical and Professional Conduct for Counsel

Over the years, there have been a number of international efforts to codify ethical standards for counsel into guidelines or principles.[5] These include: (1) the International Code of Ethics (1956) put forward by the International Bar Association ("IBA");[6] (2) the Code of Conduct for European Lawyers (1988) as promulgated by the Council of Bars and Law Societies of Europe ("CCBE");[7]

4 *See e.g.*, Special Tribunal for Lebanon, Code of Professional Conduct for Defence Counsel and Legal Representatives of Victims Appearing Before the Special Tribunal for Lebanon (Dec. 14, 2012), *available at* http://www.stl-tsl.org/en/documents/code-of-conduct-for-counsel/code-of-professional-conduct-for-defence-counsel-and-legal-representatives-of-victims-appearing-before-the-special-tribunal-for-lebanon; International Criminal Court, Code of Professional Conduct for Counsel, Res. ICC-ASP/4/Res. 1 (Dec. 2, 2005), *available at* http://www.icc-cpi.int/NR/rdonlyres/BD397ECF-8CA8-44EF-92C6-AB4BEBD55BE2/140121/ICCASP432Res1_English.pdf; Special Tribunal for Lebanon, A Code of Professional Conduct for Counsel Appearing Before the Tribunal (Feb. 28, 2011), *available at* http://www.stl-tsl.org/en/documents/code-of-conduct-for-counsel/code-of-professional-conduct-for-counsel-appearing-before-the-tribunal; International Criminal Tribunal for Rwanda, Code of Professional Conduct for Defence Counsel (June 8, 1998).

5 *See* Arman Sarvarian, Professional Ethics at the International Bar 2 (2013).

6 International Bar Association, International Code of Ethics (1988) [hereinafter IBA, International Code of Ethics], *available at* http://www.ibanet.org/Document/Default.aspx?DocumentUid=A9AB05AA-8B69-4BF2-B52C-97E1CF774A1B. In 2011, the IBA revised and updated the International Code of Ethics when it adopted the "International Principles on Conduct for the Legal Profession." *See* International Bar Association, *IBA Publishes New Code of Conduct for the Global Legal Profession* (July 21, 2011), *available at* http://www.ibanet.org/Article/Detail.aspx?ArticleUid=bc99fd2c-d253-4bfe-a3b9-c13f196d9e60.

7 Council of Bars and Law Societies of Europe, *Code of Conduct for European Lawyers Adopted on Oct. 28, 1988, in* 7 Geo. J. Legal Ethics 1, 63 (1993); *see also* Council of Bars and Law Societies

(3) the U.N. Basic Principles on the Role of Lawyers (1990);[8] and (4) the Turin Principles of Professional Conduct for the Legal Profession in the Twenty-First Century (2002) as adopted by the Union Internationale des Avocats.[9] While these efforts were focused on developing a common code of ethical standards across national jurisdictions, they were not specifically developed for counsel appearing before international courts and tribunals.[10]

As discussed further below, international organizations have relatively recently attempted to codify ethical and professional guidelines for counsel appearing before international courts and tribunals. These efforts provide guidance to the international bar regarding their ethical and professional responsibilities. Nevertheless, rules regarding counsel conduct are not as fully developed or widely accepted as other rules of conduct (*i.e.*, those applicable to international judges and arbitrators and to counsel appearing before international criminal courts and tribunals). Therefore, some levels of uncertainty and unpredictability remain as to the standards that apply to the conduct of counsel appearing before international courts and tribunals.

2.1 *ILA Hague Principles on Ethical Standards for Counsel Appearing Before International Courts and Tribunals*

The Hague Principles on Ethical Standards for Counsel Appearing before International Courts and Tribunals ("Hague Principles") were developed, and ultimately adopted in 2010, by the Study Group of the International Law

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of Europe, Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers (2013), *available at* http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_CCBE_CoCpdf1_1382973057.pdf.

8 Basic Principles on the Role of Lawyers, U.N. Congress on Prevention of Crime and the Treatment of Offenders, 8th Sess., U.N. Doc. A/CONF.144/28/Rev. 1 (1990) [hereinafter U.N. Basic Principles on the Role of Lawyers].

9 General Assembly of the Union Internationale des Avocats, Turin Principles of Professional Conduct for the Legal Profession in the 21st Century (Oct. 27, 2002), *available at* http://www.americanbar.org/content/dam/aba/migrated/cpr/gats/uia_ex_1.authcheckdam.pdf.

10 *See e.g.*, U.N. Basic Principles on the Role of Lawyers, *supra* note 8, pmbl. ("The Basic Principles on the Role of Lawyers . . . which have been formulated to assist Member States in their task of promoting and ensuring the proper role of lawyers, should be respected and taken into account by Governments within the framework of their national legislation and practice and should be brought to the attention of lawyers as well as other persons . . . ."); IBA, International Code of Ethics, *supra* note 6, at 5 (indicating that "this Code applies to any lawyer of one jurisdiction in relation to his contacts with a lawyer of another jurisdiction or to his activities in another jurisdiction"); *see also* Sarvarian, *supra* note 5, at 2.

Association ("ILA") on the Practice and Procedure of International Courts and Tribunals. The Hague Principles were intended to apply broadly to "any person discharging the functions of counsel . . . before an international court or tribunal,"[11] with the recognition that these principles would not "displace any special provision made in the ethical rules of a particular international court or tribunal,"[12] such as those adopted by several international criminal courts and tribunals.

The Hague Principles confer on counsel a "duty" to ensure "so far as possible" compliance with the principles as well as any applicable national ethical rules.[13] They cover a number of standard ethical and professional topics covering: (1) relations with the client;[14] (2) conflicts of interest;[15] (3) relations with the international court or tribunal;[16] (4) presentation of evidence;[17] and (5) relations with third parties.[18]

While the Hague Principles express these many ethical duties and responsibilities for counsel in mandatory terms (*i.e.*, using the verb "shall"), there appears to be only one issue that specifically warrants the possibility of disqualification of counsel. Section 4 of the Hague Principles states that "counsel may be precluded from representing a client before an international court or tribunal" by virtue of conflict of interest with a current client, a former client, a third party, or the counsel's own interests.[19] Counsel can avoid preclusion or disqualification by making an appropriate disclosure of any conflicts and obtaining party consent.[20]

The Hague Principles also do not explicitly provide international courts and tribunals with the power to remove counsel. There is instead a more general and indirect reference to the duty of international courts and tribunals "to conduct the proceedings before them in a manner that ensures that the parties are

11 Study Group of the International Law Association on the Practice and Procedure of International Courts and Tribunals, The Hague Principles on Ethical Standards for Counsel Appearing Before International Courts and Tribunals, art. 1.1 (Sept. 27, 2010) [hereinafter ILA, Hague Principles], *available at* http://www.ucl.ac.uk/laws/cict/docs/Hague_Sept2010.pdf.

12 *Id.* pmbl.

13 *Id.* art. 1.3.

14 *Id.* arts. 3.1–3.6

15 *Id.* arts. 4.1–4.4.

16 *Id.* arts. 5.1–5.5.

17 *Id.* arts. 6.1–6.4.

18 *Id.* arts. 7.1–7.4.

19 *Id.* art. 4.

20 *Id.* art. 4.4.

treated fairly and with equality," coupled with a recognition of an international court or tribunal's "inherent power" to make "procedural or other orders or decisions concerning the role and conduct of counsel" in order to secure this objective.[21] The principles thus implicitly provide international courts and tribunals with the power to exclude counsel, especially in light of Section 4 which permits counsel exclusion in cases of conflict of interest.

2.2 *International Code of Ethics for Lawyers Practicing Before International Arbitral Tribunals*

As part of the Keynote Address during the 2010 International Council for Commerical Arbitration ("ICCA") Congress in Rio de Janeiro, R. Doak Bishop and Margrete Stevens presented a draft "International Code of Ethics for Lawyers Practicing before International Arbitral Tribunals," ("draft Code") which was subsequently published in 2011.[22] Like the Hague Principles, this draft Code sets forth a number of standardized requirements and restrictions on counsel conduct relating to independence,[23] confidentiality,[24] conflicts of interest,[25] the presentation of evidence,[26] and finally, relations with clients,[27] tribunals,[28] and opposing counsel.[29]

Whereas the Hague Principles deferred to national law and any existing ethical rules of a particular court or tribunal, the draft Code provides that its provisions "shall prevail over national ethics or other standards for the practice of law before international arbitral tribunals" in the event of a conflict.[30] The commentary to this proposed rule explains that the purpose behind this provision is "to ensure greater fairness in arbitral proceedings" and "to mitigate [conflicts between different state legal systems] by providing a consensus as to the appropriate ethical rules drawn from the differing practices of civil and common law states and the exigencies of international arbitration."[31]

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21 *Id.* pmbl.

22 R. Doak Bishop & Margrete Stevens, *Advocacy and Ethics in International Arbitration: International Code of Ethics for Lawyers Practicing Before International Arbitral Tribunals, in* Arbitration Advocacy in Changing Times, 15 ICCA Congress Series 408 (2011).

23 *Id.* Rule 2.

24 *Id.* Rules 4–6.

25 *Id.* Rules 13–14.

26 *Id.* Rules 23–26.

27 *Id.* Rules 7–12.

28 *Id.* Rules 19–21.

29 *Id.* Rules 27–28.

30 *Id.* Rule 1.

31 *Id.*

The draft Code also differs from the Hague Principles in that there is not even an indirect reference to the requirements for the disqualification of counsel or the authority of tribunals to remove counsel. Nor does the draft Code articulate any other consequences of breach by counsel of the proposed rules.

2.3 *IBA Guidelines on Party Representation in International Arbitration*

The IBA has a relatively long history of issuing codes, guidelines, and principles on the issue of counsel ethics and professionalism.[32] For example, the IBA adopted an International Code of Ethics in 1956 and proceeded to amend it until at least 1988.[33] Although this code set forth a number of widely accepted ethical principles relating to counsel conduct, it was not particularly targeted to the specific issues of practice before international courts and tribunals.

In 2011, the IBA adopted International Principles on Conduct for the Legal Profession, which set forth ten general exhortatory ideals for counsel conduct relating to independence, integrity, confidentiality, conflicts of interest, client relations, and fees.[34] The Commentary to these Principles discusses generally the international implications of each principle, primarily noting the differences in approaches across jurisdictions. Like Bishop and Stevens' draft Code, the IBA Principles do not provide any mechanism for challenging counsel for a violation of any of the principles, and indeed, the introduction to the principles confirms that they were not intended "to be used as criteria for imposing liability, sanctions, or disciplinary measures of any kind."[35]

Of most relevance to this chapter are the 2013 IBA Guidelines on Party Representation in International Arbitration ("IBA Guidelines"),[36] as they deal

32 The IBA Arbitration Committee promulgated the influential IBA Guidelines on Conflicts of Interest in International Arbitration in 2004 and as most recently amended in 2014. International Bar Association Council, IBA Guidelines on Conflicts of Interest in International Arbitration (Oct. 23, 2014), *available at* http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx. These particular guidelines, however, are primarily directed towards arbitrators as opposed to counsel.

33 IBA, International Code of Ethics, *supra* note 6.

34 International Bar Association, International Principles on Conduct for the Legal Profession (May 28, 2011) [IBA, Conduct for the Legal Profession], *available at* http://www.ibanet.org/Document/Default.aspx?DocumentUid=1730FC33-6D70-4469-9B9D-8A12C319468C; *see also* International Bar Association, General Principles for the Legal Profession (Sept. 20, 2006), *available at* http://www.ibanet.org/Document/Default.aspx?DocumentUid=e067863f-8f42-41d8-9f48-d813f25f793c.

35 IBA, Conduct for the Legal Profession, *supra* note 34, at 5.

36 International Bar Association, Guidelines on Party Representation in International Arbitration (May 25, 2013), *available at* http://www.ibanet.org/Document/Default.aspx?DocumentUid=6F0C57D7-E7A0–43AF-B76E-714D9FE74D7F.

most directly with the requirements and restrictions on counsel conduct before international tribunals. These Guidelines were prepared by the IBA Task Force on Counsel Conduct in International Arbitration ("Task Force"), which was established in 2008 to determine whether the lack of international guidelines on counsel ethics undermines the arbitral process, and if so, what should be done to mitigate any adverse impact. To that end, the Task Force commissioned a survey in 2010 to solicit input and feedback from the arbitration community on ethical issues that arise in international arbitration.[37] The Task Force's efforts ultimately resulted in the development of the IBA Guidelines, which were adopted by the IBA Council in May 2013.

The IBA Guidelines are notable in a number of respects. First, the IBA Guidelines do not repeat the general aphorisms about confidentiality, conflicts, fees, and relations with tribunals, clients, and opposing counsel that are present in prior codes and principles on counsel conduct. Rather, the IBA Guidelines focus on a limited number of issues that are specific to international arbitration and deal with them in considerable detail. For example, the IBA Guidelines do not simply contain a broad prohibition against *ex parte* communications with arbitrators. Instead, the IBA Guidelines and its Comments also list four instances where *ex parte* communications are not improper and enumerate at least six examples of topics that are appropriate to discuss with a prospective arbitrator.[38] Likewise, the IBA Guidelines go well beyond the traditional requirement of truthfulness in witness testimony by delving deeply into issues of what can and cannot be undertaken with respect to the preparation and compensation of witnesses and experts.[39]

Second, the IBA Guidelines contain even stronger language than the Hague Principles with respect to the potential disqualification of counsel due to a conflict of interest. Guideline 5 of the IBA Guidelines provides that, once a tribunal has been constituted, a person should not accept representation of a party when a relationship exists between that person and an arbitrator that would create a conflict of interest. Guideline 6 then empowers a tribunal to exclude a party representative to avoid such a conflict of interest:

> *The Arbitral Tribunal may, in case of breach of Guideline 5, take measures appropriate to safeguard the integrity of the proceedings, including the exclusion of the new Party Representative from participating in all or part of the arbitral proceedings*.[40]

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37 *Id.* pmbl.

38 *Id.* Guideline 8, cmts. Guidelines 7–8.

39 *See id.* at Guidelines 11, 18–25, cmts. Guidelines 9–11, 8–25.

40 *Id.* Guideline 6.

While the remedy of disqualification or exclusion of a party representative is only expressly allowed in cases of a conflict of interest between the representative and an arbitrator, the IBA Guidelines also differ from prior codifications in that it authorizes the tribunal to order a number of other remedies for counsel misconduct. Guideline 26, for example, provides as follows:

> *If the Arbitral Tribunal, after giving the Parties notice and a reasonable opportunity to be heard, finds that a Party Representative has committed Misconduct, the Arbitral Tribunal, as appropriate, may*:
>
> (*a*) *admonish the Party Representative*;
> (*b*) *draw appropriate inferences in assessing the evidence relied upon, or the legal arguments advanced by, the Party Representative*;
> (*c*) *consider the Party Representative's Misconduct in apportioning the costs of the arbitration, indicating, if appropriate, how and in what amount the Party Representative's Misconduct leads the Tribunal to a different apportionment of costs*;
> (*d*) *take any other appropriate measure in order to preserve the fairness and integrity of the proceedings*.[41]

In short, the IBA Guidelines not only provide new and detailed guidance that is narrowly tailored to the issues involving counsel ethics and professionalism that arise in international arbitrations, but they also empower arbitral tribunals to assess counsel conduct and impose sanctions where appropriate.

Attempts by the ILA, by Mr. Bishop and Ms. Stevens, and by the IBA to codify ethical and professional guidelines are certainly a step towards regulating the conduct of counsel appearing before international courts and tribunals. Indeed, these proposed guidelines evidence that a fair amount of progress

41 Guideline 27 then lists a number of factors that the tribunal should take into account in ordering any remedies for misconduct by a party representative, including:

> (*a*) *the need to preserve the integrity and fairness of the arbitral proceedings and the enforceability of the award*;
> (*b*) *the potential impact of a ruling regarding Misconduct on the rights of the Parties*;
> (*c*) *the nature and gravity of the Misconduct, including the extent to which the misconduct affects the conduct of the proceedings*;
> (*d*) *the good faith of the Party Representative*;
> (*e*) *relevant considerations of privilege and confidentiality; and*
> (*f*) *the extent to which the Party represented by the Party Representative knew of, condoned, directed, or participated in, the Misconduct*.

Id. Guideline 27.

has been made in this regard in a relatively short period of time. However, rules governing counsel conduct are not as fully developed as, for example, rules that govern the conduct of international judges or arbitrators. This suggests that there still exists a lack of consensus regarding basic and fundamental questions of the standards that apply to the conduct of counsel appearing before international courts and tribunals.

While the aforementioned guidelines agree on several topics relating to counsel conduct, they also differ in important respects. Each of these guidelines, for instance, recognizes that counsel may not engage in *ex parte* communications with a judge or arbitrator concerning the substance of the underlying dispute;[42] that counsel must not make false submissions to the tribunal;[43] and that counsel must maintain the confidences of their clients.[44] At the same time, however, these guidelines propose different rules with respect to remedies for counsel misconduct: both the Hague Principles and IBA Guidelines recognize that international courts and tribunals may assess counsel conduct and take disciplinary action against counsel for misconduct,[45] but the draft Code is silent regarding consequences for counsel misconduct. In the absence of any widely adopted guidelines to date, international courts and institutions have sought to develop their own rules and jurisprudence regarding counsel challenges and disqualification, as detailed in the following section.

3 Rules and Practice of International Institutions, Courts and Tribunals

With the exception of international criminal courts, most international institutions, courts, and tribunals do not provide any explicit guidelines regarding the ethical and professional responsibilities of counsel appearing before them. As discussed below, in the absence of such guidelines or rules, international courts and tribunals have tended to rely on their inherent powers to address these issues, albeit with inconsistent results at times. More recently, some

42 IBA, Conduct for the Legal Profession, *supra* note 34, Guideline 7; ILA, Hague Principles, *supra* note 11, art. 5.4; Bishop & Stevens, *supra* note 22, Rule 20.

43 IBA, Conduct for the Legal Profession, *supra* note 34, Guidelines 9–11; ILA, Hague Principles, *supra* note 11, art. 6.1; Bishop & Stevens, *supra* note 22, Rule 21.

44 ILA, Hague Principles, *supra* note 11, art. 3.4; Bishop & Stevens, *supra* note 22, Rule 4; *see* IBA, Conduct for the Legal Profession, *supra* note 34, Guidelines 10–11.

45 *See* IBA, Conduct for the Legal Profession, *supra* note 34, Guidelines 26–27; ILA, Hague Principles, *supra* note 11, pmbl., art. 4.

international institutions, like the London Court of International Arbitration, are responding to this void and adopting their own ethical and professional guidelines for counsel appearing before arbitral tribunals under its rules.

3.1 *International Court of Justice*

For purposes of comparison, it is notable that the Statute of the International Court of Justice contains a number of provisions on the qualifications, selection, and conduct of the members of the Court.[46] Article 24 of the Statute sets up a procedure for the recusal or removal of a member of the Court. Under Article 24(1), "[i]f, for some special reason, a member of the Court considers that he should not take part in the decision of a particular case," that judge may recuse himself by informing the President of the Court.[47] Articles 24(2) and (3) empower the President to notify a member of the Court of any special reasons why that member should not sit in a particular case and authorize the Court to settle the matter in the event of any disagreement between the President and the member in question.[48]

In contrast, the ICJ Statute does not contain any requirements or restrictions on the conduct of agents, counsel, or advocates before the Court. Nor is there any explicit mechanism in the ICJ Statute for challenging or disqualifying counsel. Instead, Articles 42(1) and (2) of the Statute simply confirm the rights of parties to "be represented by agents" and to "have the assistance of counsel or advocates."[49] Article 42(3) further guarantees that agents, counsel, and advocates "shall enjoy the privileges and immunities necessary to the independent exercise of their duties."[50] This could be read as excluding application of any national ethical or professional standards by national authorities.

The Court has provided some limited rules and guidance on potential conflicts of counsel appearing before the Court. While Article 17(1) of the ICJ Statute prohibits members of the Court from acting as "agent, counsel, or advocate in any case," until 2002, there was no such prohibition on *ad hoc* judges serving as a judge in one case before the Court while simultaneously appearing as counsel in another case.[51] This was changed by the Court through its adop-

46 *See* Statute of the International Court of Justice, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179, June 26, 1945, arts. 1–10, 13–17, 20 [hereinafter ICJ Statute].

47 *Id.* art. 24(1).

48 *See* Chapter 1 by Chiara Giorgetti in this volume.

49 ICJ Statute, *supra* note 45, arts. 42(1)–(2).

50 *Id.* art 42(3).

51 Andreas Zimmerman, Christian Tomuschat & Karin Oellers-Frahm, The Statute of the International Court of Justice: A Commentary 381 (2012).

tion of Practice Direction VII, which advises that parties "should . . . refrain from designating as agent, counsel or advocate in a case before the Court a person who sits as judge *ad hoc* in another case before the Court."[52] The Court subsequently went further in Practice Direction VIII by asking parties to refrain from designating as agent, counsel, or advocate not only *ad hoc* judges, but also Members of the Court, Registrars, Deputy-Registrars or other higher officials of the Court.[53] That said, the obligations appear to be directed only at the parties, not counsel.

In addition, the language of the Practice Directions does not explicitly create mandatory and enforceable prohibitions.[54] Indeed, non-compliance with the Practice Directions does not appear to have any consequences, as illustrated by Sir Elihu Lauterpacht's participation as judge and counsel in the *Bosnia Genocide* and *Avena and other Mexican Nationals* cases, respectively. In *Bosnia Genocide*, Sir Elihu Lauterpacht served as an *ad hoc* judge until his resignation in February 2002.[55] Less than a year later, in January 2003, Sir Elihu appeared before the ICJ on behalf of the United States in *Avena and other Mexican Nationals*,[56] in apparent contradiction of Practice Directions VII and VIII. It appears that there was no challenge raised to Sir Elihu's representation by the opposing party.[57]

3.2 *European Court of Justice and European Court of Human Rights*

Similar to the ICJ Statute, the European Court of Justice ("ECJ") Statute ("ECJ Statute") and Rules of Procedure contain provisions regarding the qualifications, selection, and conduct of the members of the Court.[58] The ECJ Statute

52 *Practice Direction VII*, ICJ, *available at* http://www.icj-cij.org/documents/index.php?p1=4&p2=4&p3=0 (last visited Apr. 1, 2015).

53 *Practice Direction VIII*, ICJ, *available at* http://www.icj-cij.org/documents/index.php?p1=4&p2=4&p3=0 (last visited Apr. 00, 2015).

54 Indeed, the Practice Directions neither add nor vary the obligations of State parties under the ICJ Statute or Rules. They consolidate the practice before the Court, express an interpretation of the texts governing the Court's practice, or express the wish of the Court that state parties will apply and observe the Rules of the Court in a certain way. *See* Zimmerman et al., *supra* note 50, at 520.

55 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 91, ¶ 29 (Feb. 26).

56 Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), Verbatim Record, 4 (Jan. 21, 2003).

57 Sarvarian, *supra* note 5, at 93.

58 *See e.g.*, Consolidated Version of the Statute of the Court of Justice of the European Union, Protocol No. 3 on the Statute of the Court of Justice of the European Union as

also restricts judges from taking part in cases "in which he has previously taken part as agent or adviser or has acted for one of the parties."[59] Where a judge considers that she should not take part in the judgment or examination of a particular case, she must inform the President of the Court; a final decision on the matter is to be taken by the Court.[60]

Unlike rules for judges of the Court, the ECJ Statute and Rules of Procedure do not outline a code of conduct governing the ethical and professional obligations of counsel that appear before it.[61] However, the ECJ's Code of Conduct provides guidance on potential conflicts of counsel appearing before the Court.[62] The Code of Conduct—which applies to current and former members of the ECJ, Court of First Instance, and Civil Service Tribunal[63]—provides that members "shall undertake" not to become involved: (1) in cases that were pending before the Court or Tribunal of which they were a Member when they ceased to hold office; and (2) in cases clearly connected with cases which they have dealt with as a judge.[64] Additionally, the Code of Conduct mandates that members must not "act as representatives of parties, in either written or oral pleadings, in cases before the Community judicature" for three years after ceasing to hold office.[65] Similarly, the European Court of Human Rights ("ECHR") mandates that former judges of the Court may not represent a party "in any capacity in proceedings before the Court relating to an application lodged before the date on which he or she ceased to hold office," and as regards those applications which were lodged with the Court subsequently, former judges may not represent a party "in any capacity in proceedings before the Court until a period of two years from the date on which he or she ceased to hold

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amended by Reg. No. 741/2012 of the European Parliament and of the Council, arts. 2–6, 9–18 (Aug. 11, 2012) [hereinafter ECJ Statute], *available at* http://curia.europa.eu/jcms/upload/docs/application/pdf/2012–10/staut_cons_en.pdf; Consolidated Version of the Rules of Procedure of the Court of Justice (Sept. 25, 2012) as amended on June 18, 2013, arts. 4–6 [hereinafter ECJ Rules of Procedure], *available at* http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/rp_en.pdf.

59 ECJ Statute, *supra* note 57, art. 18.

60 *Id.*

61 Sarvarian, *supra* note 5, at 117.

62 *Id.* at 130.

63 Code of Conduct of the Court of Justice of the European Communities, Official Journal of the European Union, C223/01, art. 1(1) (Sept. 22, 2007), *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:C:2007:223:FULL&from=EN.

64 *Id.* art. 6(2).

65 *Id.*

office has elapsed."[66] Thus, like the ICJ Practice Directions, the ECJ's Code of Conduct and the ECHR's Rules of Court provide freezing periods during which former members may not serve as party representatives.

Unlike the ICJ, however, both the ECJ and the ECHR implicitly confer on the respective courts disciplinary powers concerning counsel conduct. Article 19 of the ECJ Statute provides that "the Court shall have the powers normally accorded to courts of law, under conditions laid down in the Rules of Procedure."[67] This power is reaffirmed in the ECJ Rules of Procedure, which provide that where the Court considers that the conduct of counsel "is incompatible with the dignity of the Court or with the requirements of the proper administration of justice," it shall inform the person concerned and subsequently "decide to exclude" the counsel from the proceedings.[68] Similarly, the ECHR's Rules of Court provide that the President of the Chamber may exclude counsel for the applicant where the President "considers that the circumstances or the conduct of the advocate . . . so warrant," and direct "that the applicant should seek alternative representation."[69] Thus, while a code of ethical or professional conduct is not outlined by either the ECJ or the ECHR, both courts have disciplinary power through which they may assess counsel conduct and impose sanctions against counsel, including excluding counsel from participation.

3.3 *International Centre for Settlement of Investment Disputes*

As with the governing documents of the ICJ, the ECJ, and the ECHR, there are no provisions addressing counsel conduct or challenges in the International Centre for Settlement of Investment Disputes ("ICSID") Convention, ICSID Arbitration Rules, or the ICSID Additional Facility Rules. Nor do they explicitly confer on tribunals the power to discipline counsel appearing before them.[70] The power to discipline counsel has nonetheless been read into the ICSID Convention and Arbitration Rules by tribunals as an "inherent right" of

66 European Court of Human Rights, Rules of Court, Rule 4(2) (July 1, 2014) [hereinafter ECHR Rules of Court], *available at* http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf.

67 ECJ Statute, *supra* note 57, art. 19.

68 ECJ Rules of Procedure, *supra* note 57, arts. 46(1)–(2). Though it possesses disciplinary powers concerning counsel, the ECJ has not exercised this right to exclude counsel. Sarvarian, *supra* note 5, at 141.

69 ECHR Rules of Court, *supra* note 65, Rule 36(b).

70 *See* Carolyn B. Lamm, Chiara Giorgetti & Hansel T. Pham, *Has the Time Come for an ICSID Code of Ethics for Counsel?, in* Yearbook on Int'l Investment L. & Pol'y 2009–2010 277 (2010).

international tribunals, and as one authorized by Article 44 of the Convention.[71] Indeed, at least three ICSID tribunals have confirmed that they possess such inherent powers in the context of counsel challenges based on conflicts of interest.[72]

In *Hrvatska Elektroprivreda, d.d. v. Republic of Slovenia*,[73] the ICSID tribunal had occasion to address whether it had the power to order "that the Respondent refrain from using the services of Mr. Mildon QC," following claimant's objection to Mr. Mildon's participation in the dispute based on an alleged conflict of interest.[74] After noting that the "ICSID Convention and Rules do not . . . explicitly give the power to tribunals to exclude counsel,"[75] the tribunal rejected respondent's contention that the tribunal lacked inherent powers to take measures to preserve the integrity of the arbitral proceedings on the basis that Article 44 of the ICSID Convention authorizes the tribunal "to decide 'any question of procedure' not expressly dealt with in the Convention, the ICSID Arbitration Rules or 'any rule agreed by the parties.'"[76] The tribunal also noted that international courts possess an inherent power to deal with issues necessary for the conduct of matters falling within their jurisdiction, and that such inherent power exists independently of any statutory reference.[77]

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71 Article 44 of the ICSID Convention provides that arbitration proceedings

> "shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree in accordance with the Arbitration Rules . . . . If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question."

Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159, art. 44 [hereinafter ICSID Convention].

72 In addition to the cases discussed here, there also appears to have been a counsel challenge in *Highbury International AVV & Ramstein Trading Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/1. The tribunal's decision on the challenge has not been published, and press reports simply noted that the tribunal did not sustain the counsel challenge. The grounds on which the challenge was submitted to the arbitral tribunal are not known. *See* Sebastian Perry, *ICSID Panel Declines to Disqualify Counsel*, Global Arbitration Rev. (Aug. 15, 2011), http://globalarbitrationreview.com/news/article/29757/.

73 ICSID Case No. ARB/05/24, Tribunal's Ruling Regarding the Participation of David Mildon QC in Further Stages of the Proceedings (May 6, 2008).

74 *Id.* ¶ 12. In this case, the respondent was to be represented by Mr. David Mildon QC of Essex Court Chambers London, to which the president of the tribunal (Mr. David A.R. Williams QC) also belonged. *See id.* ¶ 3.

75 *Id.* ¶ 24.

76 *Id.* ¶ 33.

77 *Id.*

Having established its disciplinary power, the tribunal then turned to claimant's conflict of interest allegation which was based on the fact that, days before hearings on the merits of the case was to begin, the respondent informed the tribunal and the opposing party that it was to be represented by Mr. David Mildon QC of Essex Court Chambers London, to which the president of the tribunal belonged.[78] The tribunal noted that the claimant's objection to Mr. Mildon was not based on "any actual lack of independence or impartiality, but on apprehensions of the appearance of impropriety."[79] Nonetheless, the tribunal found that "[i]n the interest of the legitimacy of these proceedings," the claimant's objection was well founded and that either the arbitrator must resign or counsel must be excluded from participating.[80]

The tribunal explained that there is no

> hard-and-fast rule to the effect that barristers from the same Chambers are always precluded from being involved as, respectively, counsel and arbitrator in the same case. Equally, however, there is no absolute rule to opposite effect.[81]

The tribunal focused on the apprehensions regarding propriety of the arbitral proceeding, and indicated that the relevant factors must be taken into consideration to determine whether the apprehensions are justifiable.[82] In this case, decisive factors included: the respondent's decision not to inform the claimant or tribunal of Mr. Mildon's involvement in the case following his engagement; the tardiness of the respondent's announcement regarding Mr. Mildon's involvement; and the respondent's refusal to disclose the scope of Mr. Mildon's involvement.[83] These circumstances led the tribunal to conclude that there existed a "substantial risk of a justifiable apprehension of partiality," and therefore either the arbitrator must resign or counsel must be excluded from participating.[84]

78 *See id.* ¶ 3.
79 *Id.* ¶ 22.
80 *Id.* ¶ 32.
81 *Id.* ¶ 31.
82 *Id.* ¶¶ 31–32.
83 *Id.* ¶ 31.
84 *Id.* ¶ 32.

Furthermore, relying on the principle of immutability of properly constituted tribunals,[85] the tribunal found that while the respondent

> was free to select its legal team as it saw fit prior to the constitution of the Tribunal, it was not entitled [to] subsequently amend the composition of its legal team in such a fashion as to imperil the Tribunal's status or legitimacy.[86]

The tribunal thus confirmed its decision to exclude Mr. Mildon's participation in the dispute, rather than reconstitute the tribunal.[87]

The ICSID tribunal in *Rompetrol Group N.V. v. Romania* also dealt with counsel challenge.[88] Over two years after the tribunal held its first session, the claimant appointed Mr. Barton Legum as counsel, after one of the claimant's attorneys withdrew from the case.[89] Respondent objected to Mr. Legum's participation in the case on the basis that Mr. Legum and the claimant-appointed arbitrator on the tribunal had recently been members of the same law firm. The respondent did not seek to challenge the claimant-appointed arbitrator because the composition of the tribunal had already been established and uncontested.[90]

The tribunal first addressed whether it had the power to exclude counsel from participating in an ICSID arbitration. In this respect, the tribunal noted that the ICSID Convention and Arbitration Rules "contain no provision allowing in terms for a challenge to the appointment by a Party of counsel to represent it in an ICSID arbitration."[91] Although the tribunal ultimately concluded that it did possess the power to decide on the issue of counsel challenge, it emphasized that this power was limited.[92] The tribunal stated:

> A power on the part of a judicial tribunal of any kind to exercise a control over the representation of the parties in proceedings before it is by

85 This principle is encompassed in ICSID Convention, Article 56(1), which states that after "a Tribunal has been constituted and proceedings have begun, its composition shall remain unchanged."

86 *Hrvatska Elektroprivreda*, ICSID Case No. ARB/05/24, ¶¶ 25–28.

87 *Id.* ¶ 34.

88 *Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision of the Tribunal on the Participation of a Counsel (Jan. 14, 2010).

89 *Id.* ¶¶ 3–4.

90 *Id.* ¶ 12.

91 *Id.* ¶ 14.

92 *Id.* ¶¶ 16–17, 22.

> definition a weighty instrument, the more so if the proposition is that the control ought to be exercised by excluding or overriding a party's own choice. One would normally expect to see such a power specifically provided for in the legal texts governing the tribunal and its operation. Absent express provision, the only justification for the tribunal to award itself the power by extrapolation would be an overriding and undeniable need to safeguard the essential integrity of the entire arbitral process. It plainly follows that a control of that kind would fall to be exercised rarely, and then only in compelling circumstances.[93]

The tribunal then assessed whether Mr. Legum should be removed from the arbitral proceedings and ultimately concluded that Mr. Legum could continue to participate in the proceedings.[94] Relying on the standard pronounced in a decision of the United Kingdom House of Lords, the tribunal reasoned that there was no real possibility that the tribunal was biased due to Mr. Legum's past association with one of the arbitrators,[95] noting that the association between the two

> is in the past and raises no issue as to either person having a present or future financial or material interest in the other's professional activity.[96]

Additionally, the tribunal factored in that the claimant notified the tribunal and opposing party of Mr. Legum's appointment shortly after the fact, and well before the hearing took place or any other decisions needed to be made.[97]

Finally, counsel challenge was also raised in the ICSID annulment proceeding in *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*.[98] In its Application for Annulment, the claimant indicated that Mr. Eric Schwartz would act as counsel to the claimant.[99] The respondent objected to Mr. Schwartz's participation on the basis that he had previously represented the respondent in a related proceeding. The respondent thus

93 *Id.* ¶ 16.

94 *Id.* ¶ 27.

95 *Id.* ¶ 26; *see also Porter v. Magill*, [2002] 2 A.C. 357 (H.L.).

96 *Rompetrol Group N.V.*, ICSID Case No. ARB/06/3, ¶ 26.

97 *Id.*

98 *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on Application for Disqualification of Counsel (Sept. 18, 2008).

99 *Id.* ¶ 6.

sought to disqualify Mr. Schwartz from acting on behalf of the claimant in the arbitration.[100]

Like other ICSID tribunals, the *ad hoc* Committee also recognized that the ICSID "Convention and Arbitration Rules contain no specific rules as to the disqualification of counsel."[101] Nevertheless, it referenced Article 44 of the ICSID Convention and found that the Committee must decide the matter of counsel challenge in accordance with powers given to it under Article 44.[102] The Committee thus noted that

> it has the power and duty to conduct the process before it in such a way that the parties are treated fairly and with equality and that at any stage of the proceedings each party is given the opportunity to present its case,[103]

which

> necessarily includes the power and obligation to make sure that generally recognized principles relating to conflict of interest and the protection of the confidentiality of information imparted by clients to their lawyers are complied with.[104]

As such, the Committee referenced rules of ethical and professional conduct that are applicable in different national jurisdictions in order to ascertain "common general principles which may guide the Committee."[105] It thus referenced rules of American legal ethics, the Paris Bar Rules, and the CCBE Code of Conduct regarding conflict of interest that may arise where a former client objects to a lawyer acting against the party.[106]

Having considered the different ethical/professional rules, the Committee focused on whether client confidences would be breached if Mr. Schwartz were permitted to continue to serve as counsel. The Committee decided that the facts before it did not establish that Mr. Schwartz was in possession of confidential information from the respondent from his prior representation that

100 *Id.* ¶¶ 7, 10.
101 *Id.* ¶ 36.
102 *Id.*
103 *Id.* ¶ 37.
104 *Id.*
105 *Id.* ¶ 41.
106 *Id.* ¶¶ 42–44.

could be used against the respondent. The Committee thus decided against excluding Mr. Schwartz from the annulment proceedings.[107]

3.4 *International Chamber of Commerce Arbitration*

Like many other arbitral institutions, the International Chamber of Commerce ("ICC") Rules of Arbitration do not contain any specific provisions for the challenge or disqualification of party representatives. The most relevant rule is Article 22(2), which provides as follows:

> In order to ensure effective case management, the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties.[108]

While this article—combined with an arbitrator's inherent powers to manage the conduct of arbitral proceedings—would appear to give ICC tribunals significant latitude, the few examples in the public record indicate that ICC tribunals are reluctant to discipline or disqualify counsel.

In an unpublished ICC case, sanctions were requested against the claimant and its counsel because they included, within a bundle of documents provided to the tribunal, certain confidential documents from the opposing party that had been obtained from unknown sources.[109] In this case, the potentially applicable disciplinary rules emanated from the jurisdiction in which the accused counsel was registered, and the tribunal concluded that it could not enforce those rules or laws.[110] The tribunal did note that it had the obligation to protect the integrity of the arbitral proceedings in accordance with standards of fairness and due process provided under Article 15(2) of the ICC Arbitration Rules applicable at that time (now Article 22(4) of the ICC Rules of Arbitration).[111] The tribunal ultimately decided to exclude the evidence but did not impose any sanctions on the claimant or its counsel.[112]

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107 *Id.* ¶¶ 45–56.

108 Int'l Chamber of Commerce, ICC Rules of Arbitration (Jan. 1, 2012), *available at* http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/#top.

109 Horacio Grigera Naón, *What Duties Do Counsel Owe To The Tribunal and Why?, in* Dossier of the ICC Institute of World Business Law: Players' interaction in International Arbitration 4–5 (2012).

110 *Id.*

111 *Id.*

112 *Id.*

Additionally, in ICC Case No. 8879,[113] a law firm provided legal advice to the claimants relating to the subject matter of the arbitration concerning an investment in a Latin American country, which was the respondent in the ICC case. After the initiation of arbitral proceedings, the same law firm appeared as counsel for the respondent and made arguments contrary to its earlier advice to the claimants. The claimants then requested the exclusion of the law firm from representing respondent in the arbitral proceeding on the basis of the civil and criminal codes, as well as the code of ethics of the jurisdiction where respondent's counsel was registered.[114] The tribunal declined to exclude counsel on the basis that (1) such a claim did not fall within the scope of the arbitration clause and should rather be the subject of "domestic proceedings"; (2) any exclusion of respondent's counsel would be contrary to the fundamental right of parties to be represented by counsel of their choice; and (3) the dispute was non-arbitrable since it required adjudicating "the criminal consequences of alleged advocate misconduct."[115] The tribunal, furthermore, expressed doubts as to whether the domestic code of ethics was applicable in the context of an international arbitral proceeding.[116]

Thus, in the absence of any specific guidance in the rules on challenges to party representatives, ICC tribunals have come to different conclusions on their authority and ability to exclude or sanction counsel in certain circumstances.

3.5 *London Court of International Arbitration*

For many years, the Arbitration Rules of the London Court of International Arbitration ("LCIA") did not address counsel conduct or challenges in any substantial detail. In October 2014, however, the LCIA promulgated amended Arbitration Rules, which are novel in their treatment of conflicts of interest and counsel misconduct.

Unlike the Hague Principles or the IBA Guidelines, the LCIA Arbitration Rules do not expressly permit tribunals to exclude or disqualify counsel due to a potential conflict of interest. The LCIA Arbitration Rules instead reframe the issue as one of preapproval for new counsel rather than disqualification. In particular, Article 18.3 requires parties to request approval for any change in its party representatives after the composition of the tribunal. Article 18.4 then provides that a tribunal "may withhold approval of any intended change

113 Gary B. Born, International Arbitration: Cases and Materials 982–983 (2011).

114 *Id.* at 982.

115 *Id.* at 983.

116 *Id.*

or addition to a party's legal representatives where such change or addition could compromise the composition of the Arbitral Tribunal or the finality of the award."[117] In this way, the LCIA Arbitration Rules preemptively address the problem raised in the *Hrvatska* case by the possibility of a conflict of interest stemming from the appearance of new counsel at a late stage in the proceeding.

The amended LCIA Arbitration Rules are also innovative in their provisions relating to counsel conduct. As part of the 2014 amendment, the LCIA added an Annex dealing with "General Guidelines for the Parties' Legal Representatives." This Annex contains a number of restrictions for a party's legal representative, including prohibitions against (1) false statements and evidence, (2) obstructionist behavior, and (3) *ex parte* contacts. While these ethical requirements are commonplace, the LCIA Arbitration Rules are unprecedented in that Article 18.5 requires a party to ensure that its legal representatives have agreed to comply with the provisions of the Annex:

> Each party shall ensure that all its legal representatives appearing by name before the Arbitral Tribunal have agreed to comply with the general guidelines contained in the Annex to the LCIA Rules, as a condition of such representation. In permitting any legal representative so to appear, a party shall thereby represent that the legal representative has agreed to such compliance.[118]

The amended LCIA Arbitration Rules go a further step in Article 18.6 by setting forth a procedure for a tribunal to sanction a legal representative for breach of the general guidelines:

> In the event of a complaint by one party against another party's legal representative appearing by name before the Arbitral Tribunal (or of such complaint by the Arbitral Tribunal upon its own initiative), the Arbitral Tribunal may decide, after consulting the parties and granting that legal representative a reasonable opportunity to answer the complaint, whether or not the legal representative has violated the general guidelines. If such violation is found by the Arbitral Tribunal, the Arbitral Tribunal may order any or all of the following sanctions against the legal representative: (i) a written reprimand; (ii) a written caution as to future

117 London Court of Int'l Arbitration, LCIA Arbitration Rules, art. 18(4) (Oct. 1, 2014), *available at* http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx#Article%2018.

118 *Id.* art. 18(5).

> conduct in the arbitration; and (iii) any other measure necessary to fulfill within the arbitration the general duties required of the Arbitral Tribunal under Articles 14.4(i) and (ii).[119]

Thus, the amended LCIA Arbitration Rules break new ground in expressly setting forth a binding code of conduct for counsel appearing before arbitral tribunals under its rules and authorizing tribunals to enforce the code through sanctions, all as part of the procedural rules of the arbitration.

4 Conclusion

As is clear from the discussion above, there is currently no uniform code of ethics or code of professional conduct that governs the conduct of counsel appearing before international courts and tribunals. Although international organizations have started to develop codes of professional conduct for the international bar, these rules have not yet been fully developed. The different rules and guidelines adopted by different organizations are not always consistent. No given ethical or professional code of conduct is widely accepted by the international bar community. And, importantly, none of the rules and guidelines codified by international organizations is binding on the international bar.

In the absence of a single set of ethical and professional conduct rules for the international bar, counsel must rely on the rules and practice of the international court before which they appear. Yet, many public and private international courts and tribunals (as distinguished from criminal courts and tribunals) have not adopted specific ethical or professional rules to regulate the conduct of counsel appearing before them.

Still, based on the rules and practice of international courts and tribunals, as well as the developing codes of ethical and professional guidelines for the international bar, the following conclusions may be drawn. First, international courts and tribunals have inherent disciplinary powers—derived primarily from their powers to protect the integrity of judicial and arbitral proceedings—that permit them to address issues pertaining to ethical and professional conduct. Second, challenges to party representatives and counsel before international courts and tribunals may well succeed based on serious and substantiated allegations of conflict of interest rules. At least one arbitral tribunal has excluded counsel from participating in arbitral proceedings on the basis

119 *Id.* art 18(6).

of counsel's existing relationship with an arbitrator on the tribunal that had already been constituted.[120] This conflict of interest rule is also endorsed by the IBA Guidelines.[121] Conflict of interest may also stem from counsel's representation of a new client in proceedings involving a former client;[122] or counsel's own personal interests—such as professional or financial interest—which conflict with the best interests of the client.[123]

Furthermore, the absence of a uniform code of ethics or professional conduct for the international bar generally, or for counsel appearing before specific international courts and tribunals, has not stopped international institutions and organizations from developing sets of rules under which counsel conduct may be assessed and consequences may be imposed against counsel for alleged misconduct. Since international organizations such as the International Law Association and the International Bar Association have proposed ethical and professional guidelines, at least one international arbitral institution (the LCIA) has gone a step further by recently adopting certain mandatory rules to govern the conduct of counsel appearing before arbitral tribunals governed by its rules. Now, it remains to be seen whether other international institutions, courts and tribunals will follow suit by adopting their own sets of ethical or professional rules, or whether they will continue to leave it to the international courts and tribunals to flex their inherent disciplinary powers and address issues relating to counsel on a case-by-case basis.

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120 *See Hrvatska Elektroprivreda, d.d. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Tribunal's Ruling Regarding the Participation of David Mildon QC in Further Stages of the Proceedings, ¶¶ 25–28, 31–32, 34 (May 6, 2008).

121 IBA, Conduct for the Legal Profession, *supra* note 34, at Guideline 5.

122 *See Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on Application for Disqualification of Counsel, ¶¶ 6–7, 10. (Sept. 18, 2008); ILA, Hague Principles, *supra* note 11, art. 4.2; Bishop & Stevens, *supra* note 22, Rule 13.

123 *See* ILA, Hague Principles, *supra* note 11, art. 4.3; Bishop & Stevens, *supra* note 22, Rule 14.

CHAPTER 14

Challenges to Arbitrators in Asia: The Position Before the Singapore and Hong Kong Courts

Lucy Reed, John Choong and Chan Yong Wei

1 Introduction

Arbitration in Asia is on the rise. A growing number of countries in Asia have established arbitral institutions and implemented arbitration-friendly laws. Consequently, arbitral institutions based in Asia have reported a steady increase in caseload over the last few years.[1]

In Asia, Singapore and Hong Kong remain the preferred seats for international arbitration. Both Singapore and Hong Kong have adopted arbitration laws based closely on the UNCITRAL Model Law on International Commercial Arbitration ("Model Law"), and have courts that have earned a reputation for being pro-arbitration. These are not the only points of similarity: both jurisdictions are also former British colonies and they draw upon a similar body of case law, in the form of the common law. Accordingly, in considering challenges to arbitrators in Asia, it is natural to look to these two jurisdictions.

This chapter will first describe the approach that the Hong Kong and Singapore courts have adopted in dealing with applications to challenge arbitrators. Thereafter, it summarizes common features of the approach taken in both jurisdictions, before highlighting the key points to note, in conclusion.

2 Hong Kong

2.1 *Applicable Law*

Arbitrations in Hong Kong are regulated by the Arbitration Ordinance (Cap. 609) ("Arbitration Ordinance"), which incorporates and gives effect to most of the provisions of the 2006 Model Law.[2]

1 Kanishk Verghese, *Arbitration in Asia: the Next Generation?*, Asian Legal Business (July 1, 2014), http://www.legalbusinessonline.com/reports/arbitration-asia-next-generation.

2 The Arbitration Ordinance came into force on 1 June 2011. It replaced the former Arbitration Ordinance (Cap. 341). Under the former Arbitration Ordinance, challenges to arbitrators in

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In particular, section 25 of the Arbitration Ordinance gives effect to the provisions concerning an arbitrator's duty of disclosure and grounds for challenging an arbitrator under Article 12 of the Model Law, and section 26, which incorporates Article 13 of the Model Law, sets out the procedure for challenging an arbitrator.

To date, there have been no reported cases of challenges being brought under the present Arbitration Ordinance.[3] The two leading cases in Hong Kong concerning challenges to arbitrators arose under the previous Arbitration Ordinance (Cap. 341), which also incorporated and gave effect to, among other provisions, Article 12 of the 1985 Model Law:[4]

(1) In *Pacific China Holdings Limited v Grand Pacific Holdings Limited*,[5] the challenge was based on the alleged misconduct of the arbitrator.
(2) In *Jung Science Information Technology Co., Ltd v ZTE Corporation*,[6] the challenge was based on various grounds, including an alleged failure of the arbitrator to fulfil his disclosure obligations, and an alleged failure to act impartially and independently in the arbitration.

In the absence of cases decided under the present Arbitration Ordinance, and given that these two cases were decided under Article 12 of the Model Law

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international arbitrations were also governed by Articles 12 and 13 of the Model Law: section 34C(1) of the former Arbitration Ordinance. Hong Kong Arbitration Ordinance, (2011) Cap. 609, 10–11, §§ 25–26 (H.K.) [hereinafter 2011 Arbitration Ordinance].

3 Although, in 2014, in *Gong Ben Hai v. The Hong Kong International Arbitration Centre* HCMP 325 of 2014, the Hong Kong Court of First Instance dismissed a summons brought against the Hong Kong International Arbitration Centre ("HKIAC") regarding its decision to reject a summons to challenge two arbitrators in an arbitration governed by the HKIAC Rules, on the following grounds: (a) the HKIAC was not the proper defendant to the summons (it should have been the applicant's counter-party in the arbitration); (b) the challenge was found to be made out of time, pursuant to Article 13(3) of the Model Law; and (c) the burden of Article 12(2) of the Model Law to show that justifiable doubts exist as to the arbitrators' impartiality or independence was not satisfied, as the applicant had failed to indicate why the relevant decision of the tribunal was unfair or lacked independence. The case therefore lacks real precedential value and is not discussed further in this chapter. Gong Ben Hai v. Hong Kong Int'l Arbitration Ctr., [2014] Misc. Case No. 325, ¶¶ 14, 15 (C.F.I.).

4 Hong Kong Arbitration Ordinance, (1997) Cap. 341, § 34C(1) (H.K.) (repealed 2011).

5 Pac. China Holdings Ltd. v. Grand Pac. Holdings Ltd., [2007] 3 H.K.L.R.D. 741, 741 (C.F.I.) (H.K.). A summary of this case is set out in the Annex.

6 Jung Sci. Info. Tech. Co. Ltd. v. ZTE Corp., [2008] 4 H.K.L.R.D. 776, 776 (C.F.I.) (H.K.). Disclosure: Freshfields Bruckhaus Deringer acted for the successful party in this case. A summary of this case is set out in the Annex.

(which continues to have effect under section 25 of the Arbitration Ordinance), it is likely that the Hong Kong courts will have regard to these cases in deciding any future challenges to arbitrators under the present Arbitration Ordinance.

2.2 *Grounds for Challenge*

As stated above, section 25 of the Arbitration Ordinance gives effect to Article 12 of the Model Law, which provides, among other things, that an arbitrator may be challenged

> only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties.[7]

Hong Kong case law provides limited direct guidance on how the term 'justifiable doubts' is to be interpreted, or the circumstances under which such doubts would arise. However, it is clear that the fact that a party has repeatedly lost his arguments, without more, would not of itself call into question an arbitrator's impartiality or independence.[8]

The Hong Kong courts appear to accept that one of the situations where there are 'justifiable doubts' as to the impartiality or independence of an arbitrator is where there is 'apparent bias' on the part of an arbitrator. In *Jung Science*, the court proceeded to apply the same test in determining an issue of 'apparent bias' on the part of arbitrators as it did to judges. This connection is significant, because the 'apparent bias' test is a well-established one under common law, with considerable case law interpreting how this test is applied.[9]

From the *Jung Science* case, it is clear that the test focuses on whether an objective fair-minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the arbitrator was biased.[10] The test is not whether a particular litigant thinks or feels that the arbitrator has been or may have been biased.[11]

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7 2011 Arbitration Ordinance, § 25; UNCITRAL Model Law on International Commercial Arbitration, art. 12(2) (as adopted in 2006) [hereinafter UNCITRAL Model Law].

8 *Jung Science*, 3 H.K.L.R.D., ¶ 74.

9 *Jung Science*, 3 H.K.L.R.D., ¶ 50. *See also* the discussion of the test for apparent bias by the Hong Kong Court of Final Appeal in *Deacons v. White & Case*. Deacons v. White & Case Ltd. Liab. P'ships, [2003] 6 H.K.C.F.A.R. 322, 329–32 (C.F.A.) (H.K.).

10 *Jung Science*, 3 H.K.L.R.D., ¶ 50.

11 *Id.* ¶ 51.

As to the attributes of such an observer, in both *Pacific China* and in *Jung Science*, the Hong Kong court endorsed the description given by Kirby J of the High Court of Australia:

> Such a person is not a lawyer. Yet neither is he or she a person wholly uninformed and uninstructed about the law in general or the issue to be decided. . . . Acting reasonably, the fictitious bystander would not reach a hasty conclusion based on the appearance evoked by an isolated episode of temper or remarks to the parties or their representatives, which was taken out of context. Finally, a reasonable member of the public is neither complacent nor unduly sensitive or suspicious.[12]

Where the objection arises from an association between the arbitrator and the legal representative of a party, there must be a cogent and rational link between the association and its capacity to influence the decision to be made in the particular case before it can be concluded that the adjudicator might not bring an impartial and unprejudiced mind to the resolution of the dispute. It is the capacity of the association to influence the decision rather than the association as such that is disqualifying.[13]

In evaluating whether such an association has the capacity to influence, the objective onlooker can be expected to be aware of the legal traditions and culture of Hong Kong which have played an important role in ensuring the high standards of integrity on the parts of both the judiciary and the profession, and accordingly the objective onlooker would be aware that in the ordinary way, contacts between the judiciary and the legal profession should not be regarded as giving rise to a possibility of bias; and this statement can be made of the wider dispute resolution circle, including arbitrators and arbitration advocates.[14]

In *Jung Science*, the applicant relied on, among other factors, the presiding arbitrator's social and professional relationship on arbitration-related matters with the respondent's solicitor, as a basis for challenging the arbitrator. However, the court held that this did not give rise to 'justifiable doubts' as to the arbitrator's independence or impartiality. The court reasoned as follows: the international arbitration circle in Hong Kong is small and frequent contacts between persons who are active in this area are to be expected; both

12 *Johnson v. Johnson* (2000) 201 CLR 488, ¶53 (Austl.).

13 *Id.* ¶ 54 (citing *Aussie Airlines Pty Ltd v Australian Airlines Pty Ltd.*, (1996) 135 ALR 753, 761, 763).

14 *Jung Science*, 3 H.K.L.R.D., ¶ 55.

individuals were well-respected practitioners in international arbitration who could be expected to observe high standards of integrity; their social and professional interactions were not out of the ordinary; their relationship was open as ascertainable from public sources; the handling solicitor's representation of the respondent had been open at all material times; the presiding arbitrator was appointed by the Hong Kong International Arbitration Centre ("HKIAC") and not by the respondent's counsel; the handling solicitor ceased acting for the respondent before the arbitration became procedurally contentious; and the tribunal had ruled against the respondent on certain issues.[15] The court held that it was 'unthinkable' that an objective and fair-minded observer, informed of these facts and circumstances as well as the relationship between the arbitrator and the respondent's solicitor, would even consider applying for the arbitrator's disqualification.[16]

2.3 *Obligation to Disclose*

Under Hong Kong law and practice—as is the case in many other jurisdictions—when a person is approached in connection with a possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. The obligation to disclose to the parties any such circumstances, without delay, continues from the time of the arbitrator's appointment and throughout the arbitral proceedings, unless the arbitrator has already informed the parties of them.[17]

A failure to disclose, of itself, could be one of the circumstances which, together with others, may give rise to a reasonable apprehension of bias, because this may leave a party or the public with the impression that there was intentional concealment or non-disclosure, or that something was "wrong about it all."[18]

The facts to be disclosed are not confined to those warranting or perceived to be warranting disqualification but those that might found or warrant a bona fide application for disqualification.[19] Whether particular facts might or might not found or warrant a bona fide application for disqualification must

15 *Id.* ¶ 56.

16 *Id.* ¶ 64.

17 2011 Arbitration Ordinance, § 25; UNCITRAL Model Law, art. 12(1).

18 *Jung Science*, 3 H.K.L.R.D., ¶ 57.

19 *Id.* ¶ 58.

be assessed with reference to how the fictitious fair-minded and informed observer would look at those facts.[20]

In this regard, arbitrators should be circumspect about declaring the existence of a relationship where there is no real possibility of it being regarded by a fair-minded and informed observer as raising a possibility of bias. If such a relationship was disclosed, it necessarily raises an implication that it could affect the judgment and approach of the arbitrator. If that was not the position, no purpose was served by mentioning the relationship.[21]

In the *Jung Science* case, the court rejected the applicant's complaint that the arbitrator had failed to disclose his relationship with the respondent's solicitor prior to accepting his appointment. The court held that an objective and fair-minded observer, informed of the relationship, would not consider it as a basis for seeking the arbitrator's disqualification. The court also rejected the complaint that the arbitrator had refused to answer the applicant's questions about the relationship during the course of the arbitration, especially since the questions put did not appear to have arisen from any proper basis. In any event, the court held that it was not necessary for the applicant to receive the answers to its questions because the applicant had already ascertained the nature of the relationship from public sources before it posed the questions to the arbitrator.[22]

3 Singapore

3.1 *Applicable Law*

Arbitration in Singapore is regulated primarily by two statutes: the International Arbitration Act ("IAA")[23] which governs international arbitrations seated in Singapore, and the Arbitration Act ("AA")[24] which governs what might be described as "non-international" arbitrations seated in Singapore.[25]

20 *Id.* ¶ 62.

21 *Id.* ¶ 63.

22 *Id.* ¶¶ 64–66.

23 International Arbitration Act, (1995) Cap. 143A (Sing.) (revised 2012) [hereinafter Singapore IAA].

24 Arbitration Act, (2002) Cap. 10 (Sing.) (revised 2012) [hereinafter Singapore AA].

25 A third statute, the Arbitration (International Investment Disputes) Act, implements the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 and governs the arbitration of investment disputes. Arbitration (International Investment Disputes) Act, (1968) Cap. 11 (Sing.) (revised 2012) .

Although parties to a non-international arbitration may agree in writing to opt into the IAA, and parties to an international arbitration with Singapore as the place of arbitration may agree that the AA will apply instead of the IAA,[26] in practice it is rare for parties to expressly opt out of or into another regime.

The IAA gives legislative effect to the 1985 Model Law and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and has been amended to reflect certain of the key changes made in the 2006 amendments to the 1985 Model Law. While many of the provisions of the AA are also based on the 1985 Model Law, the regime under the AA is designed to provide greater protection for parties to a domestic arbitration, as opposed to an international arbitration under the IAA.

3.2 *Grounds for Challenge*

Under both the IAA and the AA, an arbitrator may be challenged only if "circumstances exist that give rise to justifiable doubts as to his impartiality or independence";[27] or "he does not possess qualifications agreed to by the parties."[28] As in the case of Hong Kong, both tests are drawn directly from the Model Law.[29]

Prior to the Singapore High Court's decision in *PT Central Investindo v. Franciscus Wongso and others and another matter*[30] in 2014, there had been no reported cases of challenges to the appointment of an arbitrator under the present IAA or the AA.[31] There were, however, a number of cases decided under a previous edition of the AA, which provided, among other things, that a court could remove an arbitrator if he had "misconducted himself or the proceedings."[32]

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26 Singapore IAA, § 15(1).

27 In the Attorney-General Chamber's Review of Arbitration Laws published in 2001, the drafters of the AA explained that "[w]hile the 'lack of impartiality' has been universally accepted as sufficient to unseat an arbitrator, there has been an attempt to distinguish from it, the lack of 'independence.' As parties to the dispute may not readily appreciate the distinction and this may affect their confidence in the tribunal, we find it inappropriate to distinguish the two." Attorney-General Chamber's Review of Arbitration Laws, LRRD No. 3/2001 (2001) (Sing.) [hereinafter LRRD].

28 *Id.*

29 Singapore IAA, § 3(1); Singapore AA, § 14(3); UNCITRAL Model Law, art. 12(2).

30 *PT Central Investindo v. Wongso*, (2014) MSCLC 190 (S.G.H.C.) (Sing.). A summary of this case is set out in the Annex.

31 That is, the International Arbitration Act (Cap. 143A) (2002 Rev. Ed.) and the Arbitration Act (Cap. 10) (2002 Rev. Ed.).

32 The present AA provides that a party may request the removal of an arbitrator who, among other things, has refused or failed to "properly conduct the proceedings," and

The following principles can be drawn from those cases:

(1) 'Misconduct' means "such a mishandling of the arbitration as is likely to amount to some substantial miscarriage of justice."[33]

(2) The nature of such mishandling is a question of fact and of degree and depends on the circumstances of the case. However, making an erroneous finding of law or of fact or making procedural errors by themselves do not amount to misconduct.[34]

(3) Parties are entitled to expect from an arbitrator complete impartiality and indifference, both as between themselves and with regard to the matters left to the arbitrator to decide. Lack of impartiality or bias will be a ground on which objection may be taken against an arbitrator.[35]
The test for bias is whether a reasonable and fair-minded person sitting in court and knowing all the relevant facts would have a reasonable suspicion that a fair trial for the applicant was not possible.[36]

Some guidance on the test for apparent bias in the context of an arbitration was also available from decisions of the Singapore courts on applications to set aside arbitral awards for the breach of natural justice. In those decisions, the Singapore courts tended to apply the same test for apparent bias: whether the circumstances give rise to a reasonable suspicion or apprehension on the part of a fair-minded reasonable person with knowledge of the relevant facts that the arbitrator was biased.[37]

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where substantial injustice has been or will be caused to that party. Singapore AA, § 16(1). The drafters of the AA explained in the LRRD that this ground "is intended to cover only those rare cases where an arbitrator so conducts the proceedings in a manner that actually frustrates the object of the arbitration." LRRD (2001). Loss of confidence in an arbitrator's ability to come to a fair and balanced conclusion is itself not capable of being substantial injustice. Yee Hong Pte Ltd. v. Powen Elec. Eng'g Pte Ltd., (2005) 3 S.L.R. 512, ¶ 48 (Sing.). *See* Robert Merkin & Johanna Hjalmarsson, Singapore Arbitration Legislation Annotated 140 (2009) (observing that "[a]s is the case under the Model Law, a different regime exists for problems arising from lack of independence, lack of impartiality or lack of agreed qualifications: that is set out in AA, ss. 14 and 15, namely the Model Law challenge procedure").

33 *Anwar Siraj v Ting Kang Chung*, (2003) 2 S.L.R. 287, ¶ 40 (Sing.).

34 *Id.*

35 *Turner* (*East Asia*) *Pte Ltd. v. Builders Federal* (*Hong Kong*) *Ltd.*, (1988) S.L.R. 532 (Sing.).

36 *Id.* ¶ 72. *See also* Koh Bros. Bldg. & Civil Eng'g Contractor Pte Ltd. v. Scott's Dev. Pte Ltd., (2002) 2 S.L.R. 1063, ¶¶ 33–34 (Sing.).

37 *PT Prima Int'l Dev. v. Kempinski Hotels SA*, (2012) S.G.C.A. 35, ¶ 59 (Sing.); *TMM Div. Maritima SA de CV v. Pac. Richfield Marine Pte Ltd.*, (2013) S.L.R. 186 (S.G.H.C.), ¶ 122 (Sing.). *But see* Chen Siyuan & Kenny Lau Hui Ming, *The Test for Apparent Bias*, SLW

PT Central Investindo was the first reported challenge to an arbitrator under the IAA, and the case provided some clarity concerning the applicable test for apparent bias in an application to challenge an arbitrator. In that case, the applicant challenged an arbitrator on the basis that there were allegedly justifiable grounds to doubt the impartiality of the arbitrator. The court dismissed the challenge. It held that:

(1) The test under Article 12(2) of the Model Law is an objective one and the court must find that circumstances exist that justify one doubting an arbitrator's impartiality or independence.[38]
(2) The test for apparent bias is the "reasonable suspicion test". It is a two-stage inquiry: First, the applicant has to establish the factual circumstances that would have a bearing on the suggestion that the tribunal was or might be seen to be partial. The second inquiry is then to ask whether a hypothetical fair-minded and informed observer would view those circumstances as bearing on the tribunal's impartiality in the resolution of the dispute before it.
(3) The nature of the challenged arbitrator's conduct necessary to warrant a finding of justifiable doubt as to impartiality will be particular to each case. Hence, any associated level of disquiet about the conduct cannot rise or fall depending on the extent of the arbitration already undertaken and the extent of the disruption that would be caused if a removal of the arbitrator is ordered. These are matters that should not influence the objective test that is to be applied.
(4) The mere fact that a party had lost confidence in the arbitrator would not be justification for his or her removal.

The court also noted that, having regard to the overall objective of arbitral proceedings, the supervising court should accord a reasonable margin of appreciation to arbitrators in the discharge of their functions.

Commentary 1 (2014) (concluding that it remains unclear whether the formulation of the test should refer to "reasonable suspicion" or "reasonable likelihood," and whether there is a difference between these two formulations).

38 The court followed the application of the test set out in a leading UK case, *Laker Airway Inc. v FLS Aerospace Ltd.*, which provided that "an unjustifiable or perhaps unreasonable doubt is not sufficient: it is not enough honestly to say that one has lost confidence in the arbitrator's impartiality. On the other hand, doubts, if justifiable, are sufficient: it is not necessary to prove actual bias." *Laker Airways Inc. v. FLS Aerospace Ltd.*, [2000] 1 W.L.R. 113 (Q.B.) at 117 (Eng.).

This test is similar to that applied by the Singapore courts to determine whether there was apparent bias on the part of a judge,[39] a disciplinary tribunal,[40] and a disciplinary committee of a professional body.[41]

3.3 *Obligation to Disclose*

Under the IAA and the AA, arbitrators are required to disclose any circumstances "likely to give rise to justifiable doubts as to his impartiality or independence."[42]

To date, no Singapore cases have shed light on how this obligation is to be discharged, under either the current IAA or the AA.

4 A Summary of the Hong Kong and Singapore Positions

Despite some differences in the historical development of arbitrator challenges in Hong Kong and Singapore, there are broad similarities to the approach taken in both jurisdictions. In summary, both approaches:

(1) Apply the same grounds for challenge of an arbitrator as the standard used in assessing an arbitrator's obligation to disclose;[43]
(2) Recognise that one of the situations where there are 'justifiable doubts' as to the impartiality or independence of an arbitrator is where there is 'apparent bias' on the part of the arbitrator; and
(3) Apply an objective standard to the 'apparent bias' test, although Hong Kong appears to apply a 'real possibility' test while Singapore applies a 'reasonable suspicion' test.

5 Observations

It will be apparent that the Hong Kong and Singapore positions are broadly similar. That is not surprising, given the common law background of both jurisdictions, and the reciprocal influence of legislation and jurisprudence

39 *Jeyaretnam Joshua Benjamin v. Lee Kuan Yew*, (1992) S.L.R. 27 (S.G.C.A.), ¶¶ 79–83 (Sing.).
40 *Manjit Singh s/o Kirpal Singh and another v. Attorney-General*, (2013) S.L.R. 62 (S.G.H.C.), ¶ 33 (Sing.).
41 *Lim Mey Lee Susan v. Singapore Medical Council*, (2011) S.L.R. 133 (S.G.H.C.), ¶ 52 (Sing.).
42 Singapore IAA, § 3(1); UNCITRAL Model Law, art. 12(1); Singapore AA, § 14.
43 Although, as noted in the main text, there have been no Singapore cases which have considered the disclosure obligation in the specific context of the current IAA and AA.

emanating from each other in the course of their development as leading arbitral seats.

What is perhaps of more interest is the relatively undeveloped case law on arbitrator challenges in both Singapore and Hong Kong. This is the direct result of the low number of court cases dealing with arbitrator challenges in both jurisdictions. In the case of Hong Kong, the leading cases date from 2008. As for Singapore, the very first decision by the courts following an arbitrator challenge under the current IAA was issued in 2014.

The paucity of cases is in large part due to the similar regime for arbitrator challenges in both jurisdictions. Both Singapore and Hong Kong have adopted Article 13 of the Model Law and—as with many other jurisdictions—apply a two-stage approach to challenges to arbitrators.

First, challenges are usually brought before either the arbitral tribunal or the arbitral institution. Second, only if the challenge is unsuccessful, may the challenging party then request the court, within thirty days after having received notice of the decision rejecting the challenge, to decide the challenge.

Therefore, the first stage challenge filters cases where challenges have been successful so that court involvement is not required. Similarly, cases where arbitrators have withdrawn from the arbitration will not proceed to the court challenge stage. Even in the case of unsuccessful challenges, the challenging party may nonetheless decide not to proceed with a further challenge to the courts.

Another point of interest is that, to date, there have been no reported decisions by the Hong Kong or Singapore courts which have made any definitive pronouncement on the status of the *IBA Guidelines on Conflicts of Interest in International Arbitration* ("IBA Guidelines"), whether the 2004 or the 2014 versions. Neither have there been decisions addressing the extent to which the IBA Guidelines might guide the court's determination of any challenge to an arbitrator's appointment.

In the 2014 Singapore case of *PT Central Investindo*, it is understandable that no reference to the IBA Guidelines was made, since this case did not involve a conflict of interest situation. However, in the *Jung Science* case in Hong Kong, the reason for the omission is less obvious. That case squarely involved a conflict of interest issue, and indeed, covered a situation which potentially fell within the "traffic light system" in the IBA Guidelines.

This omission is of some concern, given the frequency with which the IBA Guidelines are cited by parties in arbitrations, including those seated in Singapore and Hong Kong.[44]

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44 *See e.g.*, Mangan, Reed & Choong, A Guide to the SIAC Arbitration Rules 103 n. 60 (2014); Alvin Yeo & Lim Wei Lee, *International Bar Association Arbitration Guide—Singapore*, IBA

There are a variety of possible explanations for the courts' reluctance to rely on the IBA Guidelines. First, at the time the *Jung Science* case was decided in 2008, the IBA Guidelines were relatively less established. Second, despite the desire of the IBA Working Group that the IBA Guidelines would "help . . . the courts in their decision-making process," in practice some courts have been more wary about relying on the IBA Guidelines than arbitral institutions.[45] Third, given that the IBA Guidelines are not 'law,'[46] they are of uncertain legal status, and indeed are arguably not entirely consistent with Singapore and Hong Kong law on arbitrator challenges. For example, the IBA Guidelines appear to give more weight to the subjective views of the parties, in determining what matters should be disclosed by an arbitrator.[47]

Notwithstanding these reservations, it will be interesting to see if the Hong Kong and Singapore courts are more influenced by the IBA Guidelines in future cases, bearing in mind that in the ten years since the IBA Guidelines were introduced, they have increasingly been relied upon by parties, arbitral institutions and other courts.[48] In addition, given that the IBA Guidelines are widely used by arbitral institutions, including the Singapore International Arbitration

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Arbitration Committee (Nov. 2013) ("Arbitrators in Singapore frequently refer to the IBA Guidelines on Conflicts of Interest in International Arbitration for guidance").

45 *See e.g.*, IBA Conflicts of Interest Subcomm., *The IBA Guidelines on Conflicts of Interest in International Arbitration: The First Five Years 2004–2009*, 4 Dispute Res. Int'l No. 1 (May 2010) [hereinafter IBA Guidelines].

46 As one commentator has noted: "The IBA Guidelines are of uneasy status. They are not law. The IBA Guidelines are not a Convention, nor are they rules of an arbitral institute. Strictly, IBA is not in a position to prescribe solutions . . . [p]erhaps one way to treat the IBA Guidelines is to consider them as a legal opinion of a high order, enjoying the formal approval of a respected international organization." Chan Leng Sun, *Arbitrators' Conflicts of Interest: Bias By Any Name*, 19 Sing. Acad. L.J. 264 (2007); *cf.* IBA Guidelines, ¶ 6.

47 General Standard 3(a) of the IBA Guidelines 2004 states that a duty of disclosure by the arbitrator arises "[i]f facts or circumstances exist that may, *in the eyes of the parties*, give rise to doubts as to the arbitrator's impartiality or independence." [emphasis added]. It is clear from the Explanation to General Standard 3(a) that whether "facts or circumstances" arise which warrant disclosure is in part based on a subjective standard ("the Working Group in principle accepted, after much debate, a subjective approach for disclosure . . . [h]owever, the Working Group believes that this principle should not be applied without limitations.") The application of a test that is at least partially subjective in nature has not been met with universal approval: *See e.g.*, Laurence Shore & Emmanuelle Cabrol, Note & Comment, *A Comment on the IBA Guidelines on Conflicts of Interest: The Fragile Balance Between Principles and Illustrations, and the Mystery of the 'Subjective Test'"*, 15 Am. Rev. Int'l Arbitration 602 (2004).

48 *See e.g.*, Gary B. Born, International Commercial Arbitration 1840 (The Netherlands: Kluwer Law Int'l 2d ed. 2014).

Centre ("SIAC"),[49] this would have the added benefit of more closely aligning the tests applied at both the first stage of the challenge procedure, typically before an arbitral institution or the tribunal, and at the second stage before the courts. Conversely, it will be interesting to see if the Singapore and Hong Kong courts decide to develop their own unique approaches to arbitrator conflict of interest, to take into account less common features of arbitration in their respective jurisdictions—for example, the relatively small arbitration community in both jurisdictions,[50] and in Singapore's case, the fact that it has a fused profession with local lawyers acting as both advocates and solicitors.

Only time will tell how the case law develops in the future, although one thing is almost certain—given the increase in arbitration, we will likely see more arbitrator challenge cases come before the Singapore and Hong Kong courts in the next decade than we have seen in the previous one. This will add to the jurisprudence on arbitrator challenges in both jurisdictions, particularly as the courts grapple with what are likely to be increasingly complex conflict of interest questions.

Annex—Summary of Key Cases

Pacific China Holdings Limited v. Grand Pacific Holdings Limited[51]

In *Pacific China*, it was undisputed that *ex parte* communications had passed between a party-nominated arbitrator and the solicitors of the party that had nominated him. Such communications had taken place prior to the appointment of a third arbitrator.

The party-nominated arbitrator refused to disclose the contents and details of the *ex parte* communications to the other party, and stated that the communications were of a "non-substantive" nature and concerned possible candidates for the third arbitrator. The other party applied for the removal of the party-nominated arbitrator, arguing that the refusal to disclose the communications amounted to apparent bias.

The court rejected the challenge. It held that it was "not possible to make a blanket declaration or statement that, in all cases, either (a) once appointed all communica-

49 *See e.g.*, IBA Conflicts of Interest Subcomm., *The IBA Guidelines on Conflicts of Interest in International Arbitration: The First Five Years 2004–2009*, 4 Dispute Res. Int'l No. 1 (May 2010); Mangan, Reed & Choong, A guide to the SIAC Arbitration Rules 103 n. 60 (2014).

50 This feature of arbitration in Hong Kong is expressly acknowledged in the *Jung Science* case. *Jung Sci. Info. Tech. Co. Ltd. v. ZTE Corp.*, [2008] 4 H.K.L.R.D., ¶ 56 (C.F.I.) (H.K.).

51 *Pac. China Holdings Ltd. v. Grand Pac. Holdings Ltd.*, [2007] 3 H.K.L.R.D. 741 (C.F.I.) (H.K.).

tions shall be disclosed or on the other hand, (b) unilateral communications are permitted save concerning the issues in dispute."[52] It further held that:

> The test in *Porter v Magill* [2002] 1 AER 465 has to be applied to *this* arbitrator in *these* circumstances namely "whether the fair-minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the tribunal was biased."[53]

The court endorsed the following description by the High Court of Australia of such an informed observer as being "worth repeating in full":

> The attributes of the fictitious bystander to whom courts defer have therefore been variously stated. Such a person is not a lawyer. Yet neither is he or she a person wholly uninformed and uninstructed about the law in general or the issue to be decided. Being reasonable and fair-minded, the bystander, before making a decision important to the parties and the community, would ordinarily be taken to have sought to be informed on at least the most basic considerations relevant to arriving at a conclusion founded on a fair understanding of all the relevant circumstances. The bystander would be taken to know commonplace things, such as the fact that adjudicators sometimes say, or do, things that they might later wish they had not, without necessarily disqualifying themselves from continuing to exercise their powers. The bystander must also now be taken to have, at least in a very general way, some knowledge of the fact that an adjudicator may properly adopt reasonable efforts to confine proceedings within appropriate limits and to ensure that time is not wasted. The fictitious bystander will also be aware of the strong professional pressures on adjudicators (reinforced by the facilities of appeal and review) to uphold traditions of integrity and impartiality. Acting reasonably, the fictitious bystander would not reach a hasty conclusion based on the appearance evoked by an isolated episode of temper or remarks to the parties or their representatives, which was taken out of context. Finally, a reasonable member of the public is neither complacent nor unduly sensitive or suspicious.[54]

Applying that test, the court found no apparent bias. In doing so, it appears that the court placed weight on the following factors:

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52 *Id.* ¶ 15(5).

53 *Id.*

54 *Johnson v. Johnson* (2000) 201 CLR 488, ¶ 53 (Austl.).

(1) The honesty and integrity of the challenged arbitrator, and the truthfulness of his description of the *ex parte* communications, was not in dispute. The applicant therefore knew, for a fact, that none of the communications concerned the merits of or the issues in the arbitration.[55]

(2) The initial reaction of both party-nominated arbitrators was to discuss the choice of the third arbitrator with the party who had, respectively, nominated them. In the absence of any written procedure for choosing the third arbitrator, the arbitrators had therefore, by conduct, agreed that confidential communications on the matter could take place.[56]

(3) The ICC had rejected a challenge on identical grounds to the challenged arbitrator's appointment. There was no criticism of the procedures followed in that challenge, and all parties had the opportunity to make written submissions.[57]

(4) The challenged arbitrator had referred to the Code of Ethics of the American Arbitration Association to justify the *ex parte* communications. The Code of Ethics provided, among other things, that "a party-appointed arbitrator may consult with the party who appointed the arbitrator concerning the choice of the third arbitrator."[58]

(5) Much of the law relied on by the applicant relates to the duty of arbitrators to have no private communications with the parties once the arbitration has commenced and in relation to the issues in dispute and not to the preliminary question of the selection of arbitrators who might be suitable to hear a particular case.[59]

(6) The applicant's solicitor did not immediately object to the communications when he was first aware of them. Instead, he "took a few days to mull it over" and "[seemed] to have embarked on his objection out of an excess of caution." The court took the view that "[such] a scenario goes against the prospect of even apparent bias in the mind of the informed bystander. . . . Such a bystander would know, inter alia, that both arbitrators instinctively did the same thing, both arbitrators agreed to cease when requested to do so (out of an excess of caution) and the ICC made no criticism of [the challenged arbitrator] and confirmed his appointment."[60]

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55 *Pacific* China, 3 H.K.L.R.D., ¶¶ 7, 15(2).

56 *Id.* ¶¶ 8, 15(1).

57 *Id.* ¶ 15(3).

58 *Id.* ¶ 15(5).

59 *Id.* ¶ 15(6).

60 *Id.* ¶ 15(7).

Jung Science Information Technology Co., Ltd v. ZTE Corporation[61]

In *Jung Science*, the claimant in an arbitration formed the view that the presiding arbitrator was biased against it. This view was formed following a number of interlocutory applications that were decided by the arbitral tribunal in the respondent's favor.[62]

Having formed this view, the claimant conducted a preliminary investigation into the relationship between the presiding arbitrator and the respondent's solicitors. It found that the presiding arbitrator had, allegedly, "a very close relationship in social and/or professional aspects" with the partner of the respondent's solicitors who was in charge of handling the arbitration.[63]

The claimant then wrote to the presiding arbitrator, accusing him of, among other things, "actual bias, partiality and lack of independence." In its letter, the claimant asserted that "the relationship between [the presiding arbitrator] and [the partner of the respondent's solicitors in charge of the arbitration] was likely to give rise to justifiable doubts as to [the presiding arbitrator's] impartiality or independence."

The claimant requested a response to the matters raised in its letter from the arbitral tribunal, and in particular the presiding arbitrator. It also requested that the presiding arbitrator state his opinion on whether it was appropriate for him to serve as the presiding arbitrator.[64]

In response, the presiding arbitrator noted that the respondent had refused to consent to the presiding arbitrator's withdrawal, and that the other two members of the tribunal had decided to abstain from making any decision on the claimant's challenge.[65]

The presiding arbitrator rejected the applicant's challenge.[66]

The claimant then wrote to the presiding arbitrator with a list of questions which the claimant purportedly required the answers to "for the purpose of considering and, if necessary, preparing the application [to challenge the presiding arbitrator's appointment]" before the Hong Kong courts.[67] The claimant also asked for written reasons for the rejection of the applicant's challenge.[68] The presiding arbitrator declined to answer the questions.[69]

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61 *Jung Sci. Info. Tech. Co. Ltd. v. ZTE Corp.*, [2008] 4 H.K.L.R.D. 776 (C.F.I.) (H.K.).
62 *Id.* ¶ 22.
63 *Id.* ¶ 23.
64 *Id.* ¶¶ 24–27.
65 *Id.* ¶ 34.
66 *Id.* ¶ 34.
67 *Id.* ¶ 35.
68 *Id.* ¶ 37.
69 *Id.* ¶ 38.

The applicant then applied to the Hong Kong courts to challenge the appointment of the presiding arbitrator.[70] In summary, the applicant alleged that the presiding arbitrator's alleged failure to disclose his relationship with the respondent's solicitors and his conduct in relation to the arbitration and the challenge gave rise to justifiable doubts as to his impartiality or independence.[71]

The court rejected the challenge. It held that:

(1) The test for apparent bias on the part of an arbitrator was whether an objective fair-minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the arbitrator was biased.[72] The test was not whether a particular litigant thought or felt that the arbitrator had been or may have been biased.[73]

(2) Where the objection arises from an association between the arbitrator and the legal representative of a party, there must be a cogent and rational link between the association and its capacity to influence the decision to be made in the particular case before it can be concluded that the adjudicator might not bring an impartial and unprejudiced mind to the resolution of the dispute. It is the capacity of the association to influence the decision rather than the association as such that is disqualifying.[74]

(3) In evaluating whether such an association has the capacity to influence, the objective onlooker can be expected to be aware of the legal traditions and culture of Hong Kong which have played an important role in ensuring the high standards of integrity on the parts of both the judiciary and the profession, and accordingly the objective onlooker would be aware that in the ordinary way contacts between the judiciary and the legal profession should not be regarded as giving rise to a possibility of bias; and this statement can be made of the wider dispute resolution circle, including arbitrators and arbitration advocates.[75]

(4) A failure to disclose, of itself, could be one of the circumstances which together with others may give rise to a reasonable apprehension of bias as a party or the public may well be left with the impression that there was intentional concealment or non-disclosure, or that something was "wrong about it all."[76]

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70 *Id.* ¶ 39.

71 *Id.* ¶¶ 3–5.

72 *Id.* ¶ 50.

73 *Id.* ¶ 50.

74 *Id.* ¶ 54 (citing *Aussie Airlines Pty Ltd v Australian Airlines Pty Ltd*, (1996) 135 ALR 753, 761, 763 (Austl.)).

75 *Jung Science*, 4 H.K.L.R.D., ¶ 55.

76 *Id.* ¶ 57.

(5) The facts to be disclosed are not confined to those warranting or perceived to be warranting disqualification but those that might found or warrant a bona fide application for disqualification.[77]

(6) Whether particular facts might or might not found or warrant a bona fide application for disqualification must be assessed with reference to how the fictitious fair-minded and informed observer would look at those facts.[78]

(7) Adjudicators should be circumspect about declaring the existence of a relationship where there is no real possibility of it being regarded by a fair-minded and informed observer as raising a possibility of bias. If such a relationship was disclosed, it necessarily raised an implication that it could affect the judgment and approach of the arbitrator. If that was not the position, no purpose was served by mentioning the relationship.[79]

Applying these principles, the court held that:

(1) The presiding arbitrator was not obliged to disclose his relationship with the respondent's solicitors, nor was he obliged to respond to the applicant's questions concerning that relationship.[80] It was unthinkable that an objective and fair-minded observer, informed as to the relationship between the presiding arbitrator and the respondent's solicitors, would even consider applying for the presiding arbitrator's disqualification.[81]

(2) The fact that the arbitral tribunal had made no order against the respondent for the discovery of documents, where the existence of such documents was disputed, would not lead the objective fair-minded and informed observer to conclude that there was a real possibility that the presiding arbitrator was biased against the claimant.[82] The fact that a party has repeatedly lost his arguments, without more, does not of itself call into question the arbitrator's impartiality or independence.[83]

(3) An objective, fair-minded, and informed observer who had reviewed the correspondence between the presiding arbitrator and the parties concerning the claimant's challenge would not conclude that there was any real possibility that the presiding arbitrator was or might be biased against the claimant.[84]

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77 *Id.* ¶ 58.
78 *Id.* ¶ 62.
79 *Id.* ¶ 63.
80 *Id.* ¶¶ 64–65.
81 *Id.* ¶ 64.
82 *Id.* ¶ 73.
83 *Id.* ¶ 74.
84 *Id.* ¶ 87.

PT Central Investindo v. Franciscus Wongso and Others and Another Matter[85]

In *PT Central Investindo*, the respondent in the arbitration argued that the directions issued by the arbitrator showed the sole arbitrator to be guilty of partiality.

The claimants in the arbitration had written to the arbitrator on 1 April 2013 giving notice of a possible "fresh" claim in the arbitration, about two years after the filing of the post-hearing reply memorial. On the same day, the arbitrator directed the respondent to respond by 3 April 2013 to the claimants' factual assertions and prayer that such facts, if true, would constitute a fundamental breach by the respondent of one of the contracts relevant to the dispute ("1 April direction"). As the respondent did not reply by the stipulated date, the arbitrator directed on 5 April 2013 that the respondent respond by 8 April 2013, failing which adverse inference may be drawn on the facts asserted by the claimants ("5 April direction").[86]

On 12 April 2013, the respondent wrote to the arbitrator stating that the directions issued by the arbitrator evidenced "an intent and actual action on [the arbitrator's] part to enter the arena and actively assist the [c]laimant in the claims that they have made and intend to make," and invited the arbitrator to withdraw from the arbitration. On 15 April 2013, the respondent applied to the Singapore International Arbitration Centre to challenge the arbitrator's appointment. The challenge was dismissed on 9 May 2013.

The respondent then applied to the Singapore High Court challenging the appointment of the arbitrator. The respondent alleged that there were justifiable doubts as to the arbitrator's impartiality as the arbitrator's 1 April direction had given the respondent an unreasonable timeline of one day for it to respond to the "fresh" claim the claimants sought to admit and the direction was issued without giving the respondent a reasonable opportunity to be heard. In addition, the arbitrator had threatened to draw adverse inferences on the facts asserted by the claimants in the "fresh" claim by way of the 5 April direction.[87]

The Court dismissed the respondent's application (and a summons filed by the respondent for a consequential order to set aside the award on the basis that the arbitrator's apparent bias was in breach of natural justice). The court held as follows:

(1) The test in Article 12(2) of the Model Law is an objective one and "[t]he court must find that circumstances exist that justify one doubting the Arbitrator's impartiality."[88]

85 *PT Central Investindo v. Wongso*, (2014) S.G.H.C. 190 (Sing.).

86 *Id.* ¶¶ 34–38.

87 *Id.* ¶ 61(c)–(d).

88 *Id.* ¶ 14.

(2) "Doubts, if justifiable, are sufficient: it is not necessary to prove actual bias."[89] One form of bias is apparent bias,[90] the test for which is the 'reasonable suspicion test,'[91] for which a two-stage inquiry is undertaken:

> First, the applicant has to establish the factual circumstances that would have a bearing on the suggestion that the tribunal was or might be seen to be partial. The second inquiry is to then ask whether a hypothetical fair-minded and informed observer would view those circumstances as bearing on the tribunal's impartiality in the resolution of the dispute before it.[92]

(3) The mere fact that a party had lost confidence in the arbitrator would not be justification for his removal.[93]
(4) The analysis of whether there are justifiable doubts as to whether an arbitrator's impartiality or independence is not influenced by the stage of the arbitral proceedings.[94]

Applying these principles, the court held that justifiable doubts were not made out as to the arbitrator's impartiality or independence for the following reasons:

(1) The arbitrator's directions related to and fell within the realm of the case management powers of the tribunal and as such was within the discretion of the arbitrator to make.[95] As case management directions, they were fair and reasonable.[96]
(2) Having regard to the overall objective of arbitral proceedings, the supervising court should accord a reasonable margin of appreciation to arbitrators in the discharge of their functions. That said, this instant case was plainly not a case where the arbitrator had gone wrong in his conduct of the arbitration such that he should be removed.[97]

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89 *Id.* ¶ 14 (citing *Laker Airways Inc. v. FLS Aerospace Ltd.*, [2000] 1 W.L.R. 113 (Q.B.) at 117 (Eng.).)
90 *Id.* ¶ 15.
91 *Id.* ¶ 16.
92 *Id.* ¶ 19.
93 *Id.* ¶ 18 (citing *Yee Hong Pte Ltd. v. Powen Elec. Eng'g Pte Ltd.*, (2005) 3 S.L.R. 512, 548 (Sing.)).
94 *Id.* ¶ 59.
95 *Id.* ¶ 69.
96 *Id.* ¶ 70.
97 *Id.* ¶ 71.

(3) The arbitrator's directions did not give rise to any semblance of biasness or manifest any objective lack of impartiality in the conduct of the arbitral proceedings and were, in reality, nothing more than the arbitrator's attempt to seek information.[98] The directions did not manifest the arbitrator's intention to admit the "fresh" claim.[99] The 1 April direction was intended to allow the respondent to respond to the claimants' assertion of a "fresh" claim[100] and reading the direction objectively, no impression could be conveyed that the arbitrator had prejudged any questions of jurisdiction or made any determinations.[101] Similarly, the 5 April direction was an attempt by the arbitrator to continue to give the respondent an opportunity to be heard. It was well within the arbitrator's case management powers to draw adverse inferences when faced with a party that ignored his case management decisions and the arbitrator only stated that he "may" draw adverse inferences.[102]

(4) Contrary to the respondent's assertion that it was given an unreasonable timeline of one day to respond to the 1 April direction, the respondent was given seven days (until 8 April) to comply with the 1 April direction.[103] In the overall circumstances, the amount of time given to the respondent to comply with the arbitrator's direction, in the present case, could not be said to have led a reasonable observer to doubt his impartiality.[104]

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98 *Id.* ¶ 71.
99 *Id.* ¶ 90.
100 *Id.* ¶ 73.
101 *Id.* ¶ 74.
102 *Id.* ¶¶ 75–76.
103 *Id.* ¶ 79.
104 *Id.* ¶ 80.

CHAPTER 15

Arbitrator Challenges in Latin America

Jonathan C. Hamilton, Francisco X. Jijon, and Ernesto E. Corzo

1 Introduction

In recent years, dispute resolution has experienced a sustained transformation, fueled by the way international business and trade are conducted in a multipolar world. Multilingual proceedings, multi-jurisdictional issues of law, and increasing reliance on different arbitral rules shape the growth of arbitration. As more individuals fill the ranks of arbitration to deal with an ever-expanding docket of cases, the potential for conflicts of interest invariably increases. This complexity has led to an overlap of rules aimed at regulating those individuals involved in the process such as arbitrators, counsel, and parties to disputes. In the United States, for example, specific states have distinct sets of rules regarding professional responsibility and conflicts of interest. At the international level, various guidelines apply to conflict of interest situations, which may result in divergent practices.

Against this background, this chapter focuses on arbitrator challenges that arise in arbitration proceedings in Latin America. Part I summarizes the context for arbitration in Latin America. Part II discusses standards used by local or international arbitral institutions when dealing with the issue of impartiality and independence of arbitrators in the region. Part III discusses selected case studies from the region relevant to the use of arbitrator challenges in both investment and commercial arbitration.

2 Latin American Arbitration and Arbitrators

Arbitration is booming in Latin America, due in large part to the development of a comprehensive supporting legal framework and infrastructure. During the

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past three decades, most states in the region overhauled their domestic arbitration laws, entered into various treaties providing for arbitration, and ratified a treaty framework for the recognition of arbitral awards.[1] Notwithstanding the skepticism of certain states,[2] arbitration remains the preferred dispute resolution mechanism under bilateral investment treaties,[3] as well as new multilateral agreements such as the Pacific Alliance, the region's largest economic and trade bloc.[4]

Latin America now accounts for a significant proportion of the world's arbitrations. In 2014, cases involving Latin American states made up more than 33% of the cases registered at the International Centre for Settlement of Investment Disputes ("ICSID"), more than any region in the world.[5] Meanwhile, private parties have embraced commercial arbitration,[6] and cases involving parties from Latin America regularly account for 10% of all cases registered at the International Chamber of Commerce ("ICC").[7] This is in addition to the arbitration proceedings handled by over 165 arbitral institutions in Latin America, 70% of which were established no more than two decades ago.[8] These local and regional centers administer increasingly complex matters, with more than 10% of the cases involving foreign entities and up to 22% of these arbitrations involving more than two parties.[9]

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1 *See* Jonathan C. Hamilton, *Three Decades of Latin American Commercial Arbitration*, 30 U. Pa. J. Int'l L., 1099 (2009).

2 Bolivia denounced the ICSID Convention in May 2007, while Ecuador did it in July 2009, and Venezuela in January 2012.

3 *See Compendium of Latin American Arbitration Law*, White & Case LLP Int'l Disp. Q. (2009), *available at* http://www.whitecase.com/files/Uploads/Documents/latincompendium.pdf.

4 Angeles Villareal, Congressional Research Service, The Pacific Alliance: A Trade Integration Initiative in Latin America 2 (Oct. 2, 2014), http://fas.org/sgp/crs/row/R43748.pdf ("The economies of the four [Pacific Alliance countries] are among the most liberalized in the world.").

5 Int'l Ctr. for Settlement and Investment Disp., The ICSID Caseload Statistics, Issue 2015–1 11 (2015), https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202015–1%20(English)%20(2)_ Redacted.pdf.

6 Jonathan C. Hamilton & Michael Roche, *Survey of Trends in Latin American Arbitration*, White & Case LLP Int'l Disp. Q. (2009), http://www.whitecase.com/idq/summer_2009_1a/.

7 *See* 25(1) ICC Int'l Ct. of Arb. Bull., ¶¶ 7–8 (2014). The total number of cases registered in 2013 was 2,120, with 221 cases involving parties from Latin American countries, see 24(1) ICC Int'l Ct. of Arb. Bull., ¶¶ 7–8, (2013). In 2012, out of 2,036 filed cases, 226 involved parties from Latin American countries.

8 For a cumulative list of arbitral institutions identified in Latin America, see Inst. for Transnat'l Arbitration, The Inaugural Survey of Latin American Arbitral Institutions 10 (2011), http://www.whitecase.com/files/upload/fileRepository/LAL-itasurvey.pdf [hereinafter Inaugural Survey].

9 *Id.* at 12–13.

In both international and local cases, party autonomy is generally encouraged in the selection of arbitrators, sometimes subject to limitations such as nationality, character, and/or competence. In ICSID, for example, a majority of the arbitrators on a tribunal must be nationals of states other than the state party to the dispute and the state whose national is a party to the dispute,[10] and arbitrators must be persons of high moral character with recognized competence in the fields of law, commerce, industry, or finance, who may be relied upon to exercise independent judgment.[11] A survey of local arbitral institutions found that 77% of institutions had one or no requirements for selecting arbitrators, 42% followed requirements that arbitrators be on a roster, 27% followed requirements that arbitrators be nationals, and 24% followed requirements that arbitrators be licensed.[12]

10 *See* World Bank, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Art. 39 [hereinafter ICSID Convention], *available at* https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc_en-archive/ICSID_English. pdf.

11 *See id*., Art. 14.

12 Inaugural Survey, *supra* note 8, at 15. For roster requirements, see, e.g., Rules of Arbitration, Conciliation and Amicable Resolution of the Chamber of Commerce of Cali, Art. 30.1 ("Para arbitrar procesos de mayor cuantía [es requisito s]er abogado titulado y con tarjeta profesional."); Arbitration and Conciliation Rules of Centro de Arbitraje y Conciliación de la Cámara de Comercio de Guatemala, Art. 28 ("Únicamente en arbitrajes de derecho, la designación de Árbitros deberá recaer en abogados"); Arbitral Rules of Tribunal de Arbitraje General de la Bolsa de Comercio de Buenos Aires, Art. 5 ("Los Árbitros deberán poseer título universitario reconocido por el Estado. Por lo menos dos de ellos deberán ser abogados con diez años de antigüedad en el ejercicio de la profesión; si el restante no lo fuere, deberá acreditar una vinculación profesional con empresas durante igual lapso."); Arbitration Rules of Câmara de Arbitragem do Mercado, Art. 3.4.1 ("O terceiro árbitro deverá ter formação jurídica, e ser escolhido dentre os membros integrantes do Corpo de Árbitros da Câmara de Arbitragem."); Rules of the Arbitration Center of the Bar Association of Lima, Arts. 32.2–32.3 ("Los requisitos para aceptar el cargo de Árbitro en los procesos arbitrales seguidos ante el Centro, son aquellos establecidos por la Ley, el presente Reglamento y el acuerdo de las partes, de ser el caso. En especial se deberá cumplir con los siguientes requisitos: 2.Si se trata de árbitro de derecho, tener título de abogado1. 3. Si se trata de árbitro de derecho, tener el título de abogado, y una antigüedad de no menos de seis (06) años en el ejercicio de la profesión."); Rules of Arbitration, Centro de Conciliación y Arbitraje Nacional e Internacional de la Cámara de Comercio de Lima, Arts. 25.3–25.4 ("3. En el arbitraje nacional que deba decidirse en derecho, se requiere ser abogado, salvo acuerdo en contrario. De ser el caso, no se requerirá ser abogado en ejercicio ni pertenecer o estar inscrito o habilitado por ninguna asociación o gremio de abogados nacional o extranjera. 4. En el arbitraje internacional, en ningún caso se requiere ser abogado para ejercer el cargo.").

For requirements on nationality, see, e.g., Arbitration Rules of Centro de Conciliación y Arbitraje de la Corte de Arbitraje Internacional para el MERCOSUR de la Bolsa de Comercio de Uruguay, Art. 12.2 ("En el caso de arbitrajes derivados de litigios internacionales, el Consejo del Centro procurará designar a personas de nacionalidad diferente a la de las partes en conflicto."); Arbitration Rules of Cámara Nacional de Comercio de la Ciudad de México, Art. 8.3 ("La Comisión tomará las medidas necesarias para garantizar el nombramiento de un árbitro independiente e imparcial; y, cuando el arbitraje sea internacional, tendrá en cuenta la conveniencia de nombrar a un árbitro de nacionalidad distinta al de la nacionalidad de las partes."); Rules of International Commercial Arbitration of the Santiago Arbitration and Mediation Center, Santiago Chamber of Commerce, Art. 9.4 ("If the litigation is resolved by one single arbitrator, the nationality thereof shall be different from that of the litigating parties, unless CAM Santiago deems otherwise after consulting the parties, who may oppose this for good reason. The same shall apply to the president of a three-member tribunal."). Other institutions do not have a preference on nationality, for example Rules of Arbitration, Centro de Conciliacion y Arbitraje Nacional e Internacional de la Camara de Comercio de Lima, Art. 25.2 ("Salvo acuerdo en contrario de las partes, la nacionalidad de una persona no será obstáculo para que actúe como árbitro."); Arbitration Rules of the Amcham Arbitration and Mediation Center Brazil, Art. 6.2 ("Any individual with legal capacity and trusted by the Parties, without restrictions as to his/her nationality, may act as arbitrator."); Arbitral Rules of Centro de Mediación y Arbitraje de la Cámara de Comercio de Nicaragua, Art. 8 ("Salvo acuerdo en contrario de las partes, la nacionalidad de una persona no será obstáculo para que actúe como árbitro.").

For licensing requirements, see, e.g., Arbitration Rules of Câmara de Arbitragem do Mercado, Art. 3.4.1 ("O terceiro árbitro deverá ter formação jurídica, e ser escolhido dentre os membros integrantes do Corpo de Árbitros da Câmara de Arbitragem."); Rules of Arbitration and Conciliation, Centro de Conciliação e Arbitragem da Câmara de Comércio Argentino–Brasileira de São Paulo, Art. 3.2.1 ("Nos casos em que as partes não tiverem nomeado árbitros, ou que não exista acordo entre as mesmas neste aspecto, seguir-se-á o seguinte procedimento: O Secretário Geral requererá às partes que cada uma nomeie um árbitro membro do Corpo Arbitral do Centro de Conciliação e Arbitragem da Câmara."); Rules of Arbitration, Câmara Mineira de Mediação e Arbitragem (CAMINAS), Art. 3.1 ("Deverão as Partes, preferencialmente, indicar Árbitros dentre os profissionais integrantes do Quadro de Especialistas da CAMINAS.").

For other requirements, see, e.g., Rules of the Arbitration and Mediation Center of the Chamber of Commerce of Quito, Art. 74.1 ("Para ser autorizado como árbitro de este Centro se requiere: [t]ener al menos 35 años."); Rules of the Arbitration Center of the Bar Association of Lima, Art. 32.1 ("Los requisitos para aceptar el cargo de Árbitro en los procesos arbitrales seguidos ante el Centro, son aquellos establecidos por la Ley, el presente Reglamento y el acuerdo de las partes, de ser el caso. En especial se deberá cumplir con los siguientes requisitos: [s]er mayor de edad."); Rules of Arbitration, Conciliation and Amicable Resolution of the Chamber of Commerce of Cali, Art. 30.2 ("Requisitos para integrar las listas de árbitros: Para arbitrar procesos de mayor cuantía: 1. Ser abogado titulado y con tarjeta profesional; 2. Tener experiencia mínima de diez (10) años en ejercicio de la profesión de abogado o el desempeño como profesor en alguna disciplina jurídica.").

Gone are the days when arbitrators were primarily heads of state.[13] Today, arbitrators are often sophisticated practitioners and jurists with years of experience in the region. At ICSID, approximately 170 arbitrators have been appointed in cases involving a Latin American state, of which over 60% are Spanish speakers.[14] Moreover, eleven arbitrators have been appointed at least ten times, and the top 10% of arbitrators account for almost 40% of the appointments.[15] Although similar data are not available for other institutions, anecdotal evidence suggests that many arbitrators repeatedly are appointed in matters before local institutions as well.

3 Standards for Disqualification of Arbitrators

Together with the growth of arbitration in the region, the potential for, and limits of, arbitrator disqualification in Latin America are issues of particular interest. Although some have opined that absolute independence and impartiality of the arbitrator may not be possible,[16] a balance must be struck to guarantee the integrity of the arbitration and due process and to avoid the use of *ad hoc* challenges as a guerilla tactic.

In the context of Latin American arbitration, the most common standard for disqualification is the existence of "*justifiable doubts as to the arbitrator's impartiality or independence*." This test has been adopted by international arbitration rules that are commonly applied in arbitration relating to Latin

13 For example, Mexico and France agreed to arbitrate the ownership of the Clipperton Island in 1909, appointing the King of Italy to settle the dispute; Peru and Chile agreed to settle issues of territorial boundaries in the area of Tacna and Arica through arbitration, appointing U.S. President Calvin Coolidge in 1925; Costa Rica and Nicaragua agreed in the Cañas-Jerez Treaty of 1858 to arbitrate a boundary dispute along the San Juan River, appointing U.S. President Grover Cleveland as sole arbitrator; Colombia and Venezuela agreed in the Arosemena-Guzman Treaty of September 14, 1881 to settle their boundary dispute through arbitration, appointing the King of Spain as sole arbitrator; and Argentina and Paraguay agreed to arbitrate a boundary dispute in the Chaco region, appointing as arbitrator U.S. President Rutherford Hayes in 1878.

14 *See Latin American Investment Arbitrator Survey*, Latin Arb. L., http://latinarbitrationlaw.com/latin-arbitration-law-arbitrators (last visited Apr. 15, 2015).

15 *Id.*

16 *Urbaser S.A. & Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Claimant's Proposal to Disqualify Professor Campbell McLachlan, Arbitrator, ¶ 40 (Aug. 12, 2010) ("No arbitrator and, more generally, no human being of a certain age is, in absolute terms, independent and impartial. Simply put, every individual is conveying ideas and opinions based on its moral, cultural, and professional education and experience.").

America, including, for example, the Arbitration Rules of the United Nations Commission On International Trade Law (the "UNCITRAL Arbitration Rules"),[17] and the Rules of Procedure of the Inter-American Arbitration Commission (the "IACAC Arbitration Rules"),[18] as well as the rules of other international centers that sometimes are involved in Latin American arbitration matters.[19]

For arbitrations before ICSID, the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the "ICSID Convention") provides that arbitrators may be disqualified for a "manifest" lack of high moral character, competence, or independence.[20] Although the "manifest" requirement has been considered less subjective than the "justifiable doubts" standard, some recent cases involving Latin American states may have blurred the line by considering how a third party would perceive the arbitrator's conduct. For example, in *Blue Bank v. Venezuela*, a challenge was accepted on the grounds "that a third party would find an evident or obvious appearance of lack of impartiality on a reasonable evaluation of the facts in this case."[21] Similarly in *Burlington Resources v. Ecuador*, a challenge was accepted where there was manifest evidence of "an appearance of lack of impartiality."[22]

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17 UNCITRAL Arbitration Rules, A/65/465, Art. 12(1) (Dec. 6, 2010), http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf [hereinafter 2010 UNCITRAL Rules] ("Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.").

18 Inter-American Commercial Arbitration Commission Rules, Art. 7.1 (Apr. 1, 2002), *available at* https://www.adr.org/cs/groups/international/documents/document/dgdf/mday/~edisp/adrstg_002003~1.pdf ("Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.").

19 *See, e.g.*, London Court of International Arbitration Rules, Art. 10(3) (Oct. 2014); Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, Art. 15(1) (Jan. 2007).

20 ICSID Convention, *supra* note 10, Art. 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."); *id.*, Art 57 ("A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14. A party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV.").

21 *Blue Bank Int'l & Trust* (*Barbados*) *Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/24, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, ¶ 69 (Nov. 12, 2013).

22 *Burlington Resources, Inc. v Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, ¶ 80 (Dec. 13, 2013).

At the local level, many arbitral institutions across Latin America follow the "justifiable doubts" test.[23] In other jurisdictions, institutions have preferred to incorporate by reference the local rules for disqualification of judges where the jurisdiction of that specific institution is located. For instance, according to Article 7(1) of the Rules of Procedure of the Center for Arbitration and Conciliation of Bogota's Chamber of Commerce, arbitrators can be disqualified for the same reasons specified in the Code of Civil Procedure for judges.[24]

The following infographic illustrates various standards and strategies established across Latin America.

Institution	Standard of Disqualification
Arbitration and Mediation Center of the National Chamber of Commerce of Mexico City	Article 8.3. The Commission shall take the necessary measures to secure the appointment of an independent and impartial arbitrator.[25] Article 15.1. Either party may initiate the disqualification of an arbitrator within fifteen days following the notification of the appointment of the arbitrator or within fifteen days of the date it becomes aware of the circumstances described in Articles 8 to 12 of these Rules.[26]
Center for Arbitration and Mediation of the Chamber of Commerce Brazil—Canada	Article 5.1. Members of the List of Arbitrators and/or others designated by the parties can be appointed as arbitrators, with the provisions of article 4.4.1 of these Rules, the CAM/CCBC Code of Ethics and the requirements of independence, impartiality and availability always being observed.[27]

23 *See, e.g.*, Centro de Conciliación y Arbitraje Nacional e Internacional de la Cámara de Comercio de Lima, Arbitration Rules, Art. 30; Centro de Arbitraje y Mediación de la Cámara de Comercio de Quito, Arbitration Rules, Art. 9; Consejo de Conciliación y Arbitraje de la Cámara de Comercio de Santo Domingo, República Dominicana, Arbitration Rules, Art. 17; Centro Internacional de Conciliación y Arbitraje (CICA) de la Cámara Costarricense Norteamericana de Comercio (AMCHAM), Arbitration Rules, Art. 17; Centro de Mediación y Arbitraje de la Cámara de Comercio e Industria de El Salvador, Arbitration Rules, Art. 26.

24 Rules of Procedure of Centro de Arbitraje y Conciliación de la Cámara de Comercio de Bogotá para los Arbitramentos que Surtan ante el Mismo, Art. 7.1.

25 Arbitration Rules of Cámara Nacional de Comercio de la Ciudad de México, Art. 8.3.

26 *Id.*, Art. 15.1.

27 Arbitration Rules of the Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada, Art. 5.1.

TABLE (cont.)

Institution	Standard of Disqualification
Arbitration and Conciliation Center of the Bogota Chamber of Commerce	Article 7.1. The arbitrators are prevented and can be disqualified for the same reasons specified in the Code of Civil Procedure for judges. Also they can be disqualified in the event that they do not fulfill the requirements agreed to by the parties to the arbitration agreement.[28]
Arbitration and Mediation Center of the Santiago Chamber of Commerce	Article 12.1. An arbitrator may be recused only if: (a) There are circumstances that justifiably put his independence and impartiality in doubt. . . .[29]
Mediation and Commercial Arbitration of the Argentine Chamber of Commerce	Article 11.1. The parties may object to any of the arbitrators when there are justified doubts regarding his impartiality or Independence or if he/she does not possess the qualifications agreed to by the parties.[30]
International Center for Conciliation and Arbitration of the Costa Rican-AMCHAM Chamber of Commerce of Costa Rica	Article 17. The arbitrator may be challenged for the same reasons established in the Civil Procedural Code in regards to the judges, as well as for the presence of circumstances that give rise to justifiable doubts about their impartiality or independence.[31]
Arbitration and Mediation Center of the Quito Chamber of Commerce	Article 75. The duties and obligations of the arbitrator, in addition to those identified in the Arbitration and Mediation Act and the Arbitration and Mediation Rules, are the following: (a) to act with absolute impartiality and neutrality. . . .[32]
Center for Conciliation and National and International Arbitration of the Lima Chamber of Commerce	Article 30. The arbitrators may be challenged only on the following grounds: . . . (b) When circumstances exist that give rise to justifiable doubt as to his/her impartiality or independence.[33]

28 Rules of Procedure of Centro de Arbitraje y Conciliación de la Cámara de Comercio de Bogotá para los Arbitramentos que Surtan ante el Mismo, Art. 7(1).

29 Rules of International Commercial Arbitration of the Santiago Arbitration and Mediation Center, Santiago Chamber of Commerce, Art. 12.1(a).

30 Arbitration Rules of Centro de Mediación y Arbitraje Comercial de la Cámara Argentina de Comercio, Art. 11(1).

31 Arbitration Rules of Centro Internacional de Conciliación y Arbitraje (CICA) de la Cámara Costarricense Norteamericana de Comercio (AMCHAM), Art. 17.

32 Rules of the Arbitration and Mediation Center of the Chamber of Commerce of Quito, Art. 75(a).

33 Rules of Arbitration, Centro de Conciliacion y Arbitraje Nacional e Internacional de la Camara de Comercio de Lima, Art. 30.b.

Some local institutions have attempted to provide definitions of independence, thus establishing a test that can be applied to the facts of each particular challenge. For instance, Article 8 of the Code of Ethics of the Arbitration and Mediation Center of the Chamber of Commerce of Quito lists the different situations where bias or lack of independence occurs:

[When the arbitrator]: has economic or personal interest in the outcome of the dispute; maintains an ongoing business relationship, directly or indirectly, with any of the parties; has maintained professional business relationship directly on the subject matter of the dispute; keeps substantial social or kinship relationship with any of the parties.[34]

Where such definitions are unavailable, decision-makers may look to the International Bar Association's Guidelines on Conflict of Interest in International Arbitration (IBA Guidelines), which include the well-known green, yellow, and red lists which provide examples of potential conflicts of interest.[35] Although the IBA Guidelines "are not legal provisions and do not override any applicable national law or arbitral rules chosen by the parties," as they themselves recognize,[36] multiple tribunals in Latin America have recognized their persuasive authority and have "frequently been guided by them."[37] As recognized in *Universal v. Venezuela*, the IBA Guidelines are "the preeminent set of guidelines for assessing arbitrator conflicts, [but they] are indicative only."[38]

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34 Code of Ethics for Arbitrators, Mediators, Secretariat y Experts of the Arbitration and Mediation Center of the Chamber of Commerce of Quito, Art. 8.

35 Int'l Bar Ass'n., Guidelines on Conflict of Interest in International Arbitration (Nov. 28, 2014), http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx [hereinafter 2014 IBA Conflict Guidelines] (last visited Apr. 15, 2014); Int'l Bar Ass'n., Guidelines on Conflict of Interest in International Arbitration (May 22, 2004).

36 2014 IBA Conflict Guidelines, *supra* note 35, ¶ 3.

37 *Tidewater Inc. & Others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Claimant's Proposal to Disqualify Professor Brigitte Stern, Arbitrator, ¶ 41 (Dec. 23 2010); *see also ICS Inspection & Control Servs. Ltd.* (*United Kingdom*) *v. Republic of Argentina*, PCA Case No. 2010–9, Decision on Challenge to Arbitrator, ¶ 22.2 (Dec. 17, 2009) ("Although the IBA Guidelines have no binding status in the present proceedings, they reflect international best practices and offer examples of situations that may give rise to objectively justifiable doubts as to an arbitrator's impartiality or independence."); *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Annulment, ¶ 263 (Sept. 1, 2009); EDF Int'l S.A., *SAUR Int'l S.A. & León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB 03/23, Decision on Disqualification, ¶¶ 25, 34, 50, 60 (June 25, 2008).

38 *Universal Compression Int'l Holdings, S.L.U. v. Bolivian Republic of Venezuela*, ICSID Case No. ARB/10/9, Decision on the Proposal to Disqualify Professor Brigitte Stern and Professor Guido Santiago Tawil, Arbitrators, ¶ 74 (May 20, 2011).

Finally, parties have tried to raise an arbitrator's alleged lack of independence or impartiality in legal proceedings outside the arbitration or institution. In one private arbitration in Peru, arbitrator Fernando Cantuarias Salaverry was challenged by one of the parties based primarily on his previous representation of another mining company related to the dispute. After the tribunal rejected the challenge, the challenger pursued criminal charges against Dr. Cantuarias for an alleged general misrepresentation and for procedural fraud in connection with his functions as arbitrator. In the course of considering a writ of habeas corpus filed by Dr. Cantuarias, the Peruvian Constitutional Court determined that criminal proceedings should not be used as an excuse to examine the underlying claim submitted to arbitration, over which the arbitral tribunal had jurisdiction.[39]

4 Arbitrator Challenges in Practice

Because questions of independence and impartiality may be fact-specific in nature, it is instructive to consider how institutions and tribunals in Latin America have decided particular arbitrator challenges. Although a comprehensive analysis is impossible given that the circumstances and outcome—and in some instances even the occurrence—of challenges are confidential, this section illustrates how arbitrator challenges have been resolved by drawing from publicly available decisions and the authors' recent experience.

4.1 *Experience as Arbitrator in Other Proceedings*

Arbitrators are sometimes appointed by the same party or counsel in multiple cases, and may occasionally be privy to pleadings and evidence that are unavailable to the other members of the tribunal.[40] In some cases, arbitrators

39 *Fernando Cantuarias Salaverry*, Decision of the Peruvian Constitutional Court, EXP No. 6167-2005-PHC/TC, Part IV §1 (Feb. 28, 2006). In connection to impartiality, Magistrate Gonzales Ojeda's remarked:

> "[I]n certain cases, each party choose an arbitrator, and these, in turn, a President of the Arbitral Tribunal. So if the necessity of his impartiality can be predicated upon the latter, this is not necessarily the case with respect to the arbitrators designated by the parties."

Id.

40 One tribunal has opined that an arbitrator

> "cannot reasonably be asked to maintain a 'Chinese wall' in his own mind: his understanding of the situation may well be affected by information acquired in the other arbitration."

Encana Corp. v. Republic of Ecuador, UNCITRAL, Partial Award on Jurisdiction, ¶ 45 (Feb. 27, 2004).

have been challenged for participation in other proceedings on the basis of a perceived lack of independence or impartiality.

(a) In *Blue Bank* v. *Venezuela*, an investment arbitration before ICSID, the claimant challenged an arbitrator based on (i) repeat appointments by the respondent in investment arbitrations and (ii) alleged systematic findings in favor of states. Following the challenge, the arbitrator resigned after making a note of his independence.[41]

(b) In *Tidewater Inc*. v. *Venezuela*, an investment arbitration before ICSID, the claimant challenged an arbitrator who had been appointed multiple times by Venezuela and Venezuela's counsel, including in ongoing arbitrations. The challenge was rejected.[42]

(c) A party to an international commercial arbitration challenged an arbitrator who was also sitting on a tribunal in a parallel investment arbitration involving the same factual circumstances. The challenger argued that because the parallel proceeding was further advanced, the arbitrator could have had to give an opinion on issues germane to the commercial matter. Following the challenge, the arbitrator tendered his resignation, which was accepted by the other members of the arbitral tribunal.

(d) A party to an international commercial arbitration challenged an arbitrator who was also sitting on a tribunal in another arbitration involving similar factual circumstances. The challenger argued that the arbitrator had access to information and evidence to which neither the other members of the arbitral tribunal nor the party in the case had access. The opposing party argued that most of the information at issue was publicly available and that the challenger was in any case a shareholder of a party involved in the parallel case. Following the challenge, the arbitrator tendered his resignation, which was accepted by the other members of the arbitral tribunal.

(e) A party to an international commercial arbitration submitted a request for disqualification of an arbitrator who was also sitting on a tribunal in a parallel arbitration involving the same factual circumstances, which had not been disclosed. The opposing party argued that the arbitrator did not need to disclose something that could already have been known to the parties, and that insistence on disclosure was absurd and artificial. Following the challenge, the arbitrator resigned.

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41 *Blue Bank Int'l & Trust* (*Barbados*) *Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/24), Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, ¶ 70 (Nov. 12, 2013).

42 Tidewater Inc., ICSID Case No. ARB/10/5.

(f) A party to an international commercial arbitration challenged the appointment of a presiding arbitrator who was appointed by the opposing party and was sitting on a tribunal in an unrelated investment arbitration. The challenger expressed discomfort with the possibility of the arbitrator hearing evidence on the opposing party's conduct, which the challenger would not be able to know or confront. The arbitral institution decided not to confirm the arbitrator's appointment.

4.2 *Experience as Counsel*

Many arbitrators in Latin America have been or are engaged in practice as counsel. Although a party's appointment of its own counsel is uncommon, arbitrators have been challenged for previously having represented the challenging party or for acting as counsel for third parties.

(a) In *Blue Bank* v. *Venezuela*, Venezuela challenged an arbitrator who was a partner in an international law firm, another office of which represented other claimants against Venezuela in separate ICSID cases. Taking into account the extent of the connection and coordination within the arbitrator's law firm, the Chairman found that "a third party would find an evident or obvious appearance of lack of impartiality on a reasonable evaluation of the facts in this case."[43] The challenge was accepted and the arbitrator was disqualified.[44]
(b) A party to an international commercial arbitration challenged an arbitrator who had counseled a third party in an unrelated, unresolved matter against the challenger. The arbitrator resigned, denying any direct connection between the two cases, and professing to have formed part of the counsel team in that other case for a short time.
(c) A party to an international commercial arbitration moved to disqualify an arbitrator who previously had acted as its legal counsel. The challenger argued that the previous representation could raise questions as to independence and impartiality due to an apparent conflict of interest. The opposing party argued that the prior relationship between the arbitrator and the challenger benefitted the challenger and did not constitute a conflict of interest affecting the arbitrator's independence or impartiality. The challenge was accepted and the arbitrator was disqualified.

43 *Blue Bank Int'l*, ICSID Case No. ARB/12/24, ¶ 69.
44 *Id.*, ¶ 71.

4.3 *Statements Regarding Parties and Counsel*

Collegiality between arbitrators and counsel is the norm in Latin American arbitration. The arbitration community is growing internationally and locally, but it remains common for practitioners to work together or know each other well. In some cases, arbitrators have been challenged on the basis of relationships with a party's counsel allegedly calling into question the arbitrator's impartiality and independence as well as statements made about party's counsel.

(a) In *Burlington Resources* v. *Ecuador*, an investment arbitration before ICSID, Ecuador challenged an arbitrator who (i) had allegedly been appointed by the claimant's counsel in an "unacceptably high number of cases,"[45] (ii) had not disclosed prior and contemporaneous appointments by the claimant's counsel in other proceedings, and (iii) had submitted an explanation letter in response to the challenge in which he criticized the ethics of Ecuador's counsel. Although the Chairman did not consider the first two grounds sufficient for disqualification, he considered that a third party might reasonably conclude that the arbitrator's statements "manifestly evidence[] an appearance of lack of impartiality with respect to the Republic of Ecuador and its counsel."[46] The challenge was accepted and the arbitrator was disqualified.[47]

(b) In *Perenco* v. *Ecuador*, an investment arbitration before ICSID, Ecuador challenged an arbitrator that had said in an interview that "recalcitrant host countries" were one of the most pressing issues in international arbitration. The other members of the tribunal concluded that the context of the challenged arbitrator's statements had the overall effect of painting an unfavourable view of Ecuador in such a way as to give a reasonable and informed third party justifiable doubts as to [his] impartiality.[48] The challenge was accepted and the arbitrator was disqualified from serving on the tribunal.[49]

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45 *Burlington Resources, Inc. v Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, ¶ 20 (Dec. 13, 2013) (citation omitted).

46 *Id.*, ¶ 80.

47 *Id.*, ¶ 81.

48 *Perenco Ecuador Ltd. v. Republic of Ecuador & Empresa Estatal Petroleos del Ecuador*, ICSID Case No. ARB/08/6, Decision on Challenge to Arbitrator (PCA Case No.IR-2009/1), ¶ 48 (Dec. 8, 2009).

49 *Id.* at 11.

(c) A party to an international commercial arbitration submitted a request for disqualification alleging that the challenged arbitrator (i) had active participation in ongoing and pending cases against one of the parties' counsels, and (ii) had a direct interest in the dispute as a shareholder of one of the parties. The challenge was accepted and the arbitrator was disqualified from serving on the tribunal.
(d) A party to an international commercial arbitration challenged the appointment of a presiding arbitrator who had publicly questioned the ethics of the party's counsel during a conference. The challenger alleged personal animosity and hostility that called into question the arbitrator's impartiality. The challenge was accepted and the arbitrator was not appointed to the tribunal.
(e) A party to an international commercial arbitration challenged the appointment of a presiding arbitrator who had publicly praised the opposing party's counsel. The challenger alleged that the effusive tenor of the arbitrator's statements reflected more than a collegial relationship, and raised justifiable concerns as to the arbitrator's impartiality. The arbitrator acknowledged the statements and denied having a close personal friendship with the opposing party's counsel. The challenge was accepted and the arbitrator was not appointed to the tribunal.

5 Conclusion

In summary, Latin America has become a stronghold in global arbitral practice. Burgeoning arbitration in the region is indicative of the trust that many states and private parties have placed in this mechanism as a way of resolving disputes. Latin America now has hundreds of institutions and rules governing arbitration, many of which establish standards of independence and impartiality. In practice, these standards have been applied in various commercial and investor-state cases with varying outcomes. As the region's caseload continues to increase, so will opportunities for the application and analysis of arbitrator challenges.

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